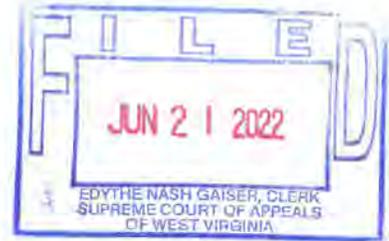


BEFORE THE
SUPREME COURT OF APPEALS
OF WEST VIRGINIA



MASON COUNTY PUBLIC
SERVICE DISTRICT,

Petitioner,

vs.

PUBLIC SERVICE COMMISSION
OF WEST VIRGINIA and RALPH
AND CARLA HUFF,

No. 22-0351

Respondents.

**BRIEF OF THE WEST VIRGINIA RURAL WATER ASSOCIATION
AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER**

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STATEMENT OF INTEREST OF THE *AMICUS CURIAE*¹

The West Virginia Rural Water Association (WVRWA) is a non-profit association created in 1985 to provide technical assistance and training to the small water and wastewater systems of West Virginia. WVRWA's members include public water and wastewater systems throughout the state. Membership is comprised of several categories: Voting Members (public service districts, municipalities, and not for profit water and sewer associations); Affiliate Members (private companies); Individual Members (individuals who support the goals of WVRWA); and three levels of Associate Members (companies who support WVRWA at various financial levels).

In addition to the technical assistance and training which it provides to its members, WVRWA also publishes a quarterly magazine, "Mountain State Water Line," that contains timely and helpful technical information for systems throughout the state and represents the membership on matters involving water and wastewater systems before the West Virginia Legislature. WVRWA often appears before committees of the Legislature and the Public Service Commission of West Virginia (PSC) in matters regarding the passage and implementation of legislation that affects its members.

In 2014, WVRWA, along with the Municipal Water Quality Association, the West Virginia Section of the American Water Works Association, and the West Virginia Water Environment Association, sponsored a study of the extent to which publicly owned

¹ Pursuant to West Virginia Rule of Appellate Procedure 30(e)(5), the Amicus Curiae, by counsel, represents that no counsel for a party to this action authored this Brief in whole or in part. Moreover, no such counsel or party made a monetary contribution specifically intended to fund the preparation or submission of this Brief. Finally, no other person who would need to be identified under Rule 30(e)(5) made a monetary contribution towards this Brief. It is noted that the Mason County Public Service District is a member of the West Virginia Rural Water Association.

water and sewer utilities are regulated by state government in states other than West Virginia. That fifty-state study was published in September 2014 and presented to the West Virginia Legislature in October 2014.² Based upon the results of the study, WVRWA and others sponsored and supported the passage of Senate Bill 234 (SB 234) during the 2015 Session of the West Virginia Legislature.

One of the key provisions of SB 234, *West Virginia Code* §24-1-1(j), limits the jurisdiction of the PSC and provides that water and sewer utilities that meet certain criteria (locally rate regulated utilities or LRRs) are most fairly and effectively regulated at the local level:

(j) The Legislature further finds that **water and sewer utilities that are political subdivisions of the state providing separate or combined services and having at least four thousand five hundred customers and annual gross revenues of \$3 million or more are most fairly and effectively regulated by the local governing body with respect to rates, borrowing and capital projects.** Therefore, notwithstanding any contrary provisions of this section, the jurisdiction of the Public Service Commission over water and sewer utilities that are political subdivisions of the state is limited to that granted specifically in this code. (Emphasis added)

The Petitioner in this matter, Mason County Public Service District (Mason PSD), is one of the 259 voting members of WVRWA and provides water and sewer service to customers located in Mason County, West Virginia.

² See, Kay Casto & Chaney PLLC, *Regulation of Publicly-Owned Water and Sewer Utilities*, September, 2014 ("2014 Study").

West Virginia Code §24-2-1(b) delineates the extent of authority that the PSC retains in regard to locally rate regulated utilities, with the following two sections being pertinent to this proceeding:

(b) The jurisdiction of the commission over political subdivisions of this state providing separate or combined water and/or sewer services and having at least 4,500 customers and annual combined gross revenues of \$3 million or more that are political subdivisions of this state is limited to:

* * *

(2) Regulation of measurements, practices, acts, or services, as granted and described in §24-2-7 of this code;

* * *

(7) Customers of water and sewer utilities operated by a political subdivision of the state may bring formal or informal complaints regarding the commission's exercise of the powers enumerated in this section and the commission shall resolve those complaints: Provided, That any formal complaint filed under this section that is based on the act or omission of the political subdivision shall be filed within 30 days of the act or omission complained of and the commission shall resolve the complaint within 180 days of filing. . . . Provided, further, That if the matter complained of would affect the rates, fees, and charges so fixed by the political subdivision providing separate or combined water and/or sewer services, the rates, fees, or charges shall remain in full force and effect until set aside, altered or amended by the commission in an order to be followed in the future.

West Virginia Code §24-2-7 provides, in pertinent part, as follows:

(a) Whenever, under the provisions of this chapter, the commission shall find any regulations, measurements, practices, act or service to be unjust, unreasonable, insufficient or unjustly discriminatory, or otherwise in violation of any provisions of this chapter, . . . the commission shall determine and declare, and by order fix reasonable measurement, regulations, acts, practices or services, to be furnished, imposed, observed and followed in the state in lieu of those found to be unjust, unreasonable, insufficient, or unjustly discriminatory, inadequate or otherwise in violation of this chapter, and shall make such other order respecting the same as shall be just and reasonable.

West Virginia Code §16-13A-9(a) sets forth the new process for the public service district (PSD) board and county commission to establish rates, fees, and charges, in pertinent part, as follows:

(1) The board shall make, enact, and enforce all needful rules in connection with the acquisition, construction, improvement, extension, management, maintenance, operation, care, protection, and the use of any public service properties owned or controlled by the district. The board shall establish, in accordance with this article, rates, fees, and charges for the services and facilities it furnishes, which shall be sufficient at all times, notwithstanding the provisions of any other law or laws, to pay the cost of maintenance, operation, and depreciation of the public service properties and principal of and interest on all bonds issued, other obligations incurred under the provisions of this article, and all reserve or other payments provided for in the proceedings which authorized the issuance of any bonds under this article. The schedule of the rates, fees, and charges may be based upon:

* * *

(E) Any other basis or classification which the board may determine to be fair and reasonable, taking into consideration the location of the premises served and the nature and extent of the services and facilities furnished. . .

(2) The board of a public service district with at least 4, 500 customers and annual combined gross revenue of \$3 million or more from its separate or combined water and sewer services may make, enact, and enforce all needful rules in connection with the enactment or amendment of rates, fees, and charges of the district . . .

* * *

(E) Rates, fees, and charges approved by resolution of the board shall be forwarded in writing to the county commission with the authority to appoint the members of the board. The county commission shall publish notice of the proposed revised rates, fees, and charges . . . Within 45 days of receipt of the proposed rates, fees, and charges, the county commission shall take action to approve, modify, or reject the proposed rates, fees, and changes, in its sole discretion.

The subject matter of this appeal involves the question of whether the PSC has jurisdiction to prohibit a locally rate regulated utility from imposing a disconnection fee that was properly adopted by the PSD and county commission and is a matter of interest to all WVRWA members. Accordingly, WVRWA, on behalf of its voting members, seeks leave pursuant to Rule 30(c) of the West Virginia Rules of Appellate Procedure, to present the Court with its support for the position of Mason PSD. The Petition for Appeal of Mason PSD is in keeping with (i) the basis for, and the legislative intent behind, the passage of SB 234, (ii) the limitations on the authority of the PSC as set forth in *West Virginia Code* §24-1-1(j) and other related provisions of the *Code*, and (iii) the delegation of authority to the PSD and county commission to establish rates, charges and fees of LRR water and sewer utilities that meet the criteria set forth in *West Virginia Code* §24-1-1(j).

INTRODUCTION AND SUMMARY OF ARGUMENT

The fifty-state study performed for WVRWA in 2014 found that no other state in the nation regulated publicly-owned water and sewer utilities as completely as West Virginia. The West Virginia Legislature, through the passage of SB 234 in 2015, exempted certain public service districts and municipalities from rate and construction jurisdiction by the PSC. The method of such exemption chosen by the Legislature is determined by a combination of annual revenues and the number of customers served by the utility. Under the method chosen by the Legislature, a publicly owned water or sewer utility having at least 4,500 customers with combined annual revenues of \$3

million or more is exempt from PSC jurisdiction and is properly subject to the jurisdiction of the local governing body for the regulation of rates and construction projects.

Mason PSD's appeal represents a challenge to the PSC decision issued on April 4, 2022, that *West Virginia Code* §24-2-7 provides authority for the PSC to set aside a rate, fee or charge adopted by the local governing body for an LRR. WVRWA urges this Honorable Court to hold that (i) the Legislature clearly and deliberately shifted the authority to establish rates, fees, and charges for LRR Mason PSD to the Mason County PSD board and Mason County Commission and (ii) the general authority granted to the Commission to review unreasonable practices or acts of a utility does not override the specific limitations on the PSC jurisdiction that the Legislature recently enacted regarding rates, fees and charges for LRR utilities.

In March 2021, Mason PSD disconnected water service for customers Ralph and Carla Huff for non-payment. On October 6, 2021, about six months after their water service was terminated, the Huffs filed a formal complaint with the PSC, alleging that Mason PSD improperly disconnected their water service.

On March 18, 2021, the Mason PSD board and Mason County Commission established rates, pursuant to the authority delegated in *West Virginia Code* §16-13A-9(a), that include a disconnect fee.³ This fee allows Mason PSD to recover part of the \$116.10 that it costs Mason PSD to terminate service when a customer has failed to pay the water bill. Commission Staff asserts that the entire \$116.10 cost to disconnect service should instead be paid by all customers of Mason PSD through Mason PSD's base rates. The Commission adoption of Staff's position supplants the authority and

³ This is not a new fee. The disconnect fee has been in the Mason PSD tariff since at least 2015.

judgment of the Mason PSD board and the Mason County Commission to establish rates, fees and charges for Mason PSD, pursuant to *West Virginia Code* §16-13A-9(a)(2)(E), that recover a portion of the termination costs directly from the “cost-causer” via the disconnection fee.

The Huffs did not appear at a hearing on December 30, 2021, to prosecute their formal complaint. Rather than dismissing the formal complaint for failure to prosecute as Mason PSD requested, the PSC proceedings continued, and the Administrative Law Judge accepted the Staff position in a Recommended Decision entered on January 28, 2022. Exceptions were filed by Mason PSD on February 11, 2022. In an Order entered on April 4, 2022, the Commission also accepted the Staff position that the PSC retains authority, pursuant to *West Virginia Code* §24-2-7, whenever the PSC finds an act or practice of a utility to be unreasonable and the issue that was determined was whether the imposition of a disconnect fee to be paid by the cost-causer was unreasonable. The PSC’s Order asserted that it did not review the calculation of the disconnect fee, but scrutinized whether “the imposition of the fee itself” was an unreasonable utility practice, and concluded that it properly exercised its authority to regulate an unjust or unreasonable practice. *Huff v. Mason PSD*, Case No. 21-0730-LRR-C, Comm’n Order at 7 (Apr. 4, 2022).

ARGUMENT

THE GENERAL AUTHORITY GRANTED TO THE COMMISSION TO REVIEW PRACTICES OR ACTS OF A UTILITY DOES NOT OVERRIDE THE SPECIFIC LIMITATIONS ON PSC JURISDICTION THAT THE LEGISLATURE ENACTED REGARDING RATES, FEES AND CHARGES.

Fundamental to the position of Mason PSD and WVRWA is the statutory scheme that (i) carved out a category of utilities, LRRs, that are exempt from PSC jurisdiction regarding rates, fees and charges and (ii) delegated authority to adopt rates, fees and charges for LRRs to the local governing body. As indicated in the Statement of Interest section of this brief, WVRWA, at the request of its members, sponsored a study of the extent to which publicly owned water and sewer utilities were regulated in the states outside of West Virginia.⁴ The 2014 Study showed that only seven (7) states outside of West Virginia regulated the rates of municipalities and publicly owned utilities similar to West Virginia's public service districts. With regard to the regulation of construction projects, only six (6) states other than West Virginia regulate municipal projects at the state level and only eight (8) states regulate the projects of public service district-type utilities. In the states that do not regulate the rates and construction projects of municipalities and public service district-like utilities, any regulation of rates or construction projects that may exist is at the local level. The findings set out in the 2014 Study were supported by a report produced by Moody's Investors Services which was

⁴ The membership of WVRWA had for many years been critical of the delay and extent of regulation to which they were exposed in dealing with the PSC. Delays in rate relief complained of by WVRWA and others led to the passage by the Legislature of House Bill 4601 in 2014. That bill amended *Code* §§24-2-4a and 24-2-4b to permit publicly-owned water and sewer utilities to place rate increases of less than 25% into effect subject to refund; thus giving such utilities immediate rate relief.

attached to the 2014 Study. The Moody's report concluded that rate regulation of publicly-owned utilities in West Virginia imposes the highest obstacles to rate increases of all of the states that regulate publicly-owned utility rates, making it "difficult for such utilities to increase revenues, upgrade infrastructure to comply with federal and state environmental regulations, engage in long-term financial planning and meet rate covenants."⁵

In response to the results of the 2014 Study and the observations of the Moody's report included therein, the West Virginia Legislature, in 2015, passed SB 234. That legislation established a new paradigm for the adoption of rates by publicly-owned utilities. One of the major thrusts of SB 234 was to accelerate the timing of rate relief . Effective June 12, 2015, water and sewer utilities with at least 4,500 customers and annual revenues of the water or sewer utility or the combined water and sewer revenues of a utility providing both water and sewer service are no longer subject to the PSC's jurisdiction for the establishment of rates. Instead, as stated in *Code* §24-1-1(j), the rates for such utilities would be determined at the local level by the local governing body of the municipality or, in the case of public service districts, the applicable county commission.

Public service districts that meet the new statutory criteria are subject to a number of new statutory provisions applicable to the ratemaking process. In order to both speed up the regulatory process and provide local governments with control over needed rate relief, SB 234 amended both *Code* §§16-13A-9(a)(2) and 24-2-4a. In the

⁵ See, Seymour, *Most US Municipal Utilities Enjoy Unlimited Authority Over Rates*, Moody's Investors Service, Special Comment, August 19, 2014, page 3 of Exhibit 6 attached to the 2014 Study.

process, the Legislature established new notice and hearing provisions to permit both the utilities and their customers to participate in the process at the local level.

The question in this case is whether the authority that the PSC retains to investigate whether a utility act or practice is unreasonable, pursuant to *West Virginia Code* §§24-2-1(b), 24-2-2(c)(2) and 24-2-7, guts the new authority that the Legislature delegated to the local governing body for Mason PSD pursuant to *West Virginia Code* §§24-1-1(j) and 16-13A-9(a) to establish rates, fees and charges for an LRR.

In the case of *Berkeley County Public Service Sewer District v. West Virginia Public Service Commission*, 204 W. Va. 279, 287, 512 S.E.2d 201, 209 (1998), this court addressed the matter of statutory construction in a case involving public utilities as follows:

"Interpreting a statute ... presents a purely legal question...." Syl. pt. 1, *Appalachian Power Co. v. State Tax Dept. of West Virginia*, 195 W.Va. 573, 466 S.E.2d 424 (1995). We explained recently in Syllabus Point 11 of *Cox v. Amick*, 195 W.Va. 608, 466 S.E.2d 459 (1995), that " '[t]he primary object in construing a statute is to ascertain and give effect to the intent of the Legislature.' Syllabus Point 1, *Smith v. State Workmen's Compensation Commissioner*, 159 W.Va. 108, 219 S.E.2d 361 (1975)." Syl. pt. 2, *Farley v. Buckalew*, 186 W.Va. 693, 414 S.E.2d 454 (1992). "Syl. pt. 2, *State ex rel. Water Development Authority v. Northern Wayne County Public Service District*, 195 W.Va. 135, 464 S.E.2d 777 (1995)." "[A] common maxim of statutory construction is that statutes are to be construed so as to give meaning to every word in them." *Keatley v. Mercer County Bd. Of Educ.*, 200 W.Va. 487, 493, 490 S.E.2d 306, 312 (1997) (quoting *Bullman v. D & R Lumber Co.*, 195 W.Va. 129, 133, 464 S.E.2d 771, 775 (1995)). Similarly, this Court has previously recognized the "traditional rule of statutory construction that 'the Legislature is presumed to intend that every word used in a statute has a specific purpose and meaning.'" *Keatley*, 200 W.Va. at 495, 490 S.E.2d at 314.

The transfer of authority to the local governing body to enact rates, fees and charges for LRRs is specific and intentional. To the extent that there is any conflict between the general authority of the Commission to investigate unreasonable acts or practices by a utility, pursuant to *Code* §24-2-7, and the specific delegation of authority to the local governing body via *West Virginia Code* §§24-1-1(j) and 16-13A-9(a) to enact rates, fees and charges, the specific grant of authority prevails. *Syl. Pt. 8, Vest v. Cobb*, 138 W. Va. 660, 76 S.E.2d 885 (1953) (“The general rule of statutory construction requires that a specific statute be given precedence over a general statute relating to the same subject matter.”)

The PSC attempts to justify its position by arguing that its concern is not with the amount of the disconnect fee, but with Mason PSD’s authority to impose the disconnect fee. The Legislature’s deliberate and intentional delegation of authority to the local governing body to enact rates, fees and charges would have no effect if, by characterizing the “imposition of a fee” as an unreasonable utility act or practice, the PSC is permitted to prevent an LRR from implementing a properly adopted rate, fee or charge. *West Virginia Code* §16-13A-9(a)(1) provides that “[t]he schedule of the rates, fees, and charges may be based” upon five criteria – four specific items plus a fifth broad-based criteria that authorizes the local governing body to use

(E) Any other basis or classification which the board may determine to be fair and reasonable, taking into consideration the location of the premises served and the nature and extent of the services and facilities furnished. . .

There is no dispute that the Mason PSD decision to implement a disconnect fee is different than the position that Commission Staff has routinely recommended for several years. The new regulatory approach set forth in West Virginia Code §16-13A-9(a)(1) authorizes the local governing body to enact rates, fees and charges in a manner "which the board may determine to be fair and reasonable." It does not require a local governing body to act in lockstep with the Commission. In fact, if the local governing body is required to act exactly as the PSC would act for each and every rate, fee, or charge, there would be no effect to the Legislature's finding in West Virginia Code §24-1-1(j) that LRRs "are most fairly and effectively regulated" at the local level with regard to rates.

The Commission routinely allows a utility to impose a reconnect fee upon a cost-causer but requires that the costs to perform a service termination be paid by all utility customers through base rates. In this case, Mason PSD and the Mason County Commission took a different approach than the PSC and established a disconnect fee to shift the burden of a portion of Mason PSD's costs to terminate service directly to the cost-causer and relieve customers who timely pay their bills from those costs. This is a reasonable approach, consistent with the authority delegated to the local governing body in *Code* §16-13A-9(a)(1)(E) to enact rates, fees and charges in a manner "which the board may determine to be fair and reasonable." The PSC position is contrary to the new regulatory scheme that the Legislature adopted after careful study.

THE PSC HAS JURISDICTION UNDER WEST VIRGINIA CODE §24-2-1(b)(7) TO RESOLVE THE COMPLAINT OF AN LRR CUSTOMER ONLY WHEN THE COMPLAINT IS FILED WITHIN 30 DAYS OF THE ACT OR OMISSION OF THE POLITICAL SUBDIVISION.

Under *West Virginia Code* §24-2-1(b)(7), the Commission is granted jurisdiction to review a complaint filed by a customer of an LRR utility only when the complaint is filed within 30 days of the political subdivision's act or omission. In this case, the Mason PSD board and Mason County Commission concluded the process to approve revised rates, including the disconnect fee, on March 18, 2021. The Huff formal complaint was not filed, however, until October 6, 2021, well outside of the 30-day window. Rather than recognizing the limitations set forth in the revised regulatory scheme, the Commission acted *sua sponte* and without jurisdiction to review the Huff complaint. The PSC's Order issued on April 2, 2022, therefore, should be set aside.

WVRWA agrees with the other arguments made by Mason PSD in the Petition for Appeal and chooses for brevity and simplicity not to address those arguments in this Amicus Brief.

CONCLUSION

The Public Service Commission erroneously held that the PSC has jurisdiction under *West Virginia Code* §24-2-7 to prevent, as an unreasonable utility practice of act, the imposition of a disconnect fee that was adopted by the PSD board and county commission for an LRR pursuant to *West Virginia Code* §§24-1-1(j) and 16-13A-9(a). The April 4, 2022 Order should be set aside.

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CERTIFICATE OF SERVICE

I, John R. McGhee, counsel for West Virginia Rural Water Association, do hereby certify that copies of the foregoing West Virginia Rural Water Association's Amicus Curiae Brief In Support of Petitioner have been served upon the following parties via First Class U.S. Mail, postage prepaid, and by e-mail if addresses are available as noted below, on this 21st day of June, 2022:

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