

STATE OF WEST VIRGINIA

**West Virginia Infrastructure
and
Jobs Development Council**

SPECIAL REPORT

The Council does not adequately document that the statutory selection process for funding state infrastructure projects is applied in a correct and consistent manner

Infrastructure Council designees have non-public work sessions which appear to violate the open meetings law

There is no expeditious process for using unspent balances when remaining balances are beneficial and serve the Council's mandate

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August 2000

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August 2000

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August 20, 2000

The Honorable Edwin J. Bowman
State Senate
129 West Circle Drive
Weirton, West Virginia 26062

The Honorable Vicki V. Douglas
House of Delegates
Building 1, Room E-213
1900 Kanawha Boulevard, East
Charleston, West Virginia 25305-0470

Dear Chairs:

Pursuant to the West Virginia Sunset Law, we are transmitting a **Special Report on the West Virginia Infrastructure Council**, which will be presented to the Joint Committee on Government Operations on Sunday, August 20, 2000. The issues covered herein are *"The Council does not adequately document that the statutory selection process for funding state infrastructure projects is applied in a correct and consistent manner; Infrastructure Council designees have non-public work sessions which appear to violate the open meetings law; and There is no expeditious process for using unspent balances when remaining balances are beneficial and serve the Council's mandate."*

We conducted an exit conference with the West Virginia Infrastructure Council on August 9, 2000. We received the agency response on August 14, 2000.

Let me know if you have any questions.

Sincerely,

A handwritten signature in cursive script that reads "John Sylvia".

John Sylvia
Acting Director

JS/wsc

Joint Committee on Government and Finance

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Executive Summary

The West Virginia Infrastructure Council was created by the Legislature in 1994. The Council consists of 11 voting members, seven of whom are appointed by virtue of their position in other West Virginia State Agencies and four members from the general public. The Council also has eight nonvoting advisory members. This Special Report identifies three issues, which are briefly described below.

Issue Area 1: The Council does not adequately document that the statutory selection process for funding state infrastructure projects is applied in a correct and consistent manner.

In 1994 the Legislature created the Infrastructure and Jobs Development Act (Chapter 31, Article 15A). This act also created the eleven member Infrastructure and Jobs Development Council (IJDC) which provides funding for water supply and sewage treatment systems as well as other economic development projects.

Funding for projects can come from several sources other than the Council therefore one main function of the council is the coordination and assistance it provides to agencies or groups which are attempting to develop a project. The Council is required by the West Virginia Code and it's own rules to choose projects for funding based upon the criteria set forth in section 4 of article 15A. A PERD review of files found that there is inadequate documentation regarding whether the Council applies the mandated criteria in a correct and consistent manner.

PERD reviewed 10% of the projects funded by the Council to determine how those projects were chosen and 10% of the overall pending projects. Project files reviewed which were requesting funding from the IJDC, contained a score sheet which rated the project according to the criteria in the code/rules that specify how projects are to be selected. These score/evaluation sheets however, had no indication how they were used in the process of choosing a project from the lengthy list of pending projects.

According to the Executive Secretary, "*the Funding Committee staff uses these project worksheets which address the criteria outlined in the legislation as an internal working tool to assist in evaluating each project*". PERD also asked about these sheets and how they were completed. The response was "*Funding Committee staff have non- public work sessions in order to fill out these project work sheets*". These staff members are also the same individuals which are the designee for the statutory members and vote as members. We were unable to obtain any reports or attendance records of these meetings that indicated files were reviewed or how and when they were scored. During these work sessions recommendations are developed and given to the Funding Committee. No report is made regarding how the projects were prioritized or how each was scored. PERD has made the following recommendations:

- Recommendation 1:** **The Infrastructure and Jobs Development Council should begin advertising when work sessions are held so that project sponsors and the public are able to attend and witness the process of selection in progress.**
- Recommendations 2:** **Recommendations for funding projects and any actions taken by Funding Staff during work sessions should be published in a report and available for public review.**
- Recommendation 3:** **A priority list of projects should be developed and maintained from the pending list of projects indicating when the project was reviewed and the score of the project.**
- Recommendation 4:** **The project work sheet for scoring/evaluating each project should be signed off on by the staff members which reviewed the project documenting the score and notes explaining how the score was obtained.**
- Issue Area 2:** **The Infrastructure Council has non-public work sessions which appear to violate the open meetings law.**

§31-15A-3 of the West Virginia Code appoints certain council members by virtue of their position as the head of a regulatory agency and allows for the use of a designee to represent the agency during council meetings. Section 3 goes further mandating that member agencies shall provide staff support for the council in the manner determined by the council. It appears that the Councils utilization of these Code sections may cause potential conflicts.

As discussed in Issue Area 1, in order to evaluate the list of pending infrastructure projects the Funding Committee staff have non-public work sessions. According to the Executive Secretary these staff members are also the designees for the statutory members. We were unable to obtain any reports or attendance records of these work sessions indicating who attended or what occurred during the work session.

These staff members make up nearly half of the council. A total of eleven members are on the council and seven on the Funding Committee. In fact only the Regulatory agencies are on the Funding Committee. In other words five members of the seven member Funding Committee meet as staff to review project files representing a quorum of the Funding Committee members. These designees also vote and represent their agencies during most public meetings of the Council. Although this majority of the Funding Committee is meeting as staff, they still are making decisions through a group consensus, regarding projects which could constitute a violation of the open meetings act.

If this practice of having non-public work sessions with designees also representing the staff

does not violate the open meetings law it certainly gives the impression of being a violation.

Recommendation 5:

The Legislature may consider requesting an opinion from the Ethics Commission concerning the Council work sessions. In addition, it should be determine whether member agency staff can play a dual as designee and Council staff.

Issue Area 3: There are no rules for using unspent balances by applicants when the use of remaining balances is beneficial and serves the Council Mandate.

As discussed in Issue 1 all Public Service Districts (PSD) and Municipalities requesting State infrastructure funding from any agency must first apply with the Infrastructure and Jobs Development Council (IJDC). If the IJDC loans or grants funding to one of these organizations the Council assists in developing a strict schedule and budget for the entity to follow. However, there is no expedited process in which relatively large unused remaining balances can be used by the applicant for other important projects or expand the existing project. If the applicant has projects for which large unused balances can be used, the applicant must go through the process all over again, which could take months. Furthermore, an expedited process for using large remaining balances could act as an incentive to keep projects within budget.

Use of Remaining Balances

PERD’s research indicates that the use of relatively large remaining balances could be expedited if rules were developed to assist the Council. In order to use large remaining balances a project sponsor must essentially go back through the process of submitting a request in order for the Council to review the changes through the technical committees and again through the Funding Committee and full Council. In order to further explore the use of remaining balances PERD requested detailed information from the Council. The agency merely responded verbally, that the information was not easily accessible. The Executive Secretary stated that it would require all of her staff and several weeks to obtain the information. The agency’s rules do not address the use of remaining balances so nothing dictates when agencies are allowed to utilize them.

Recommendation 6: Rules should be developed regarding the process of using remaining balances when it is beneficial and serves the Council’s mandate.

Recommendations 7: The IJDC should begin keeping more detailed data to assist in assessment of the agency from within and from external audits. There is no detailed data base from which to draw information. A proper data base would also assist in providing information to the administration on the activities of the agency.

Review Objective, Scope and Methodology

This special review of the West Virginia Infrastructure and Jobs Development Council was conducted in accordance with Article 2, Chapter 4 West Virginia Code as amended. This review was to determine the answers to two questions. The First being if the Infrastructure and Jobs Development Council uses the criteria mandated in Article 15a, Chapter 31 to determine which water and sewer projects to fund. The second question concerned whether there are any incentives for Public Service Districts and Municipalities to manage projects well and complete these projects under the established budget. There are none provided for in the code and no such practice by the Council, however, PERD believes that the Council could develop rules for using unspent balances by applicants when the use of remaining balances is beneficial and serves the Council mandate, which would also be an incentive to keep projects within budget.

In order to answer these important questions the Performance Evaluation and Research Division first tried to gain an understanding of the process and then reviewed a sample of agency files. Both funded projects and non-funded projects were reviewed. Agency personnel provided answers to questions and Council member designees were interviewed. In addition, a survey of Public Service districts and Municipalities was conducted to gain knowledge of their understanding of the process and satisfaction. During the evaluation an additional area of concern was noted with the Councils practice of having non-public work sessions in order to apply the codes criteria.

Issue Area 1: The Council does not adequately document that the statutory selection process for funding state infrastructure projects is applied in a correct and consistent manner.

In 1994 the Legislature created the Infrastructure and Jobs Development Act (Chapter 31, Article 15). This act also created the eleven member Infrastructure and Jobs Development Council (IJDC) which provides funding for water supply and sewage treatment systems as well as other economic development projects. The Council consists of eleven members including:

- Executive Director of the Housing Development Fund
- Director of the Division of Environmental Protection
- Director of the Economic Development Authority
- Director of the Water Development Authority
- Executive Director of the WV Development Office
- Director of the Division of Health
- Chairman of the Public Service Commission
- Four members representing the General Public

Nonvoting advisory members are also appointed from the Division of Highways, State Rail Authority, House of Delegates, State Senate, West Virginia University Board of Trustees, Board of Directors of the State College system.

Funding for projects can come from several sources other than the Council therefore one main function of the council is the coordination and assistance it provides to agencies or groups which are attempting to develop a project. The Council is required by the West Virginia Code and it's own rules to choose projects for funding based upon;

- The public health benefits of the project or infrastructure project
- The economic development benefits of the project or infrastructure project
- The degree to which the project or infrastructure project will correct deficiencies in the compliance of water supply or sewage treatment facilities with state or federal law, regulations or standards.
- The degree to which the projects or infrastructure project encourages effective and efficient consolidation of water or sewage treatment systems.....
- The cost effectiveness of the project or infrastructure project as compared with alternatives which achieve substantially the same public health or economic development benefits.....
- The applicants ability to operate and maintain the system if the project or infrastructure project is approved
- The degree to which the project or infrastructure project achieves other state or regional planning goals.
- The estimated date upon which the project or infrastructure project could commence if funding were available and the estimated completion date of the project.....
- Such other considerations as the council may consider necessary or appropriate to accomplish the purpose and intent of this article.

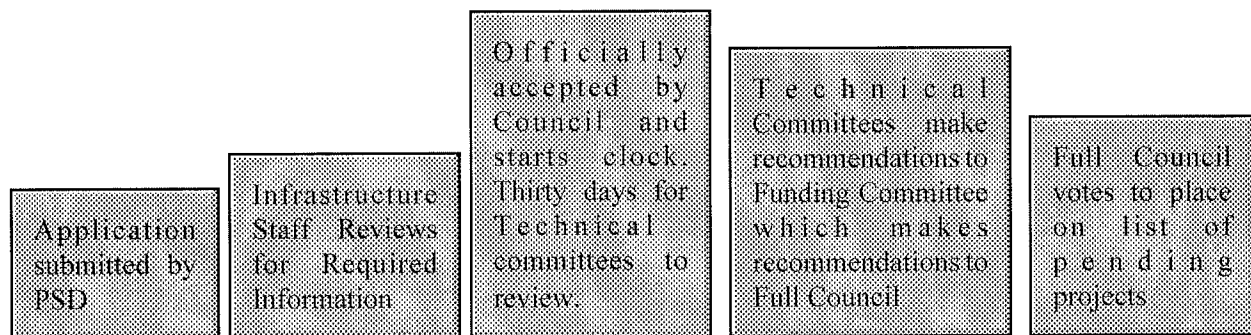
A PERD review of files found that there is inadequate documentation regarding whether the Council applies the criteria mandated by the West Virginia Code in a correct and consistent manner.

Application Process

All public service districts and municipalities requesting State funding for infrastructure projects from any source must first apply through the Council whether they are requesting IJDC funding or not. Public Service Districts fill out a pre-application describing the project, costs, benefit to the community, rates etc. Council staff review the application to ensure it is complete before being presented to the council. Once the application is officially accepted at a Council meeting, the Sub-Committees of the Council have thirty days to review the application. Technical/Sub-Committees which consists of the regulatory agency members first review the application and make a recommendation to the funding committee regarding the need, feasibility, and additional funding resources. It is interesting to note that the Technical Sub-Committees do not normally meet publicly according to the Executive Director. Each member receives a copy of the project file and sends in comments to the Chairman of the Committee and a report is issued to the Funding Committee. The Funding Committee then reviews the project and makes a recommendation to the full Council.

If the full Council agrees with the Subcommittees recommendations, the project is put on the pending list for funding. A letter of recommendation is given to the local Public Service District (PSD) with the Infrastructure Councils comments which in turn is submitted to other funding sources such as the West Virginia Development Fund. The Council maintains the status of the project and whether alternate funding is approved. Below are the basic steps of the application process.

Chart 1
Application Flow Chart



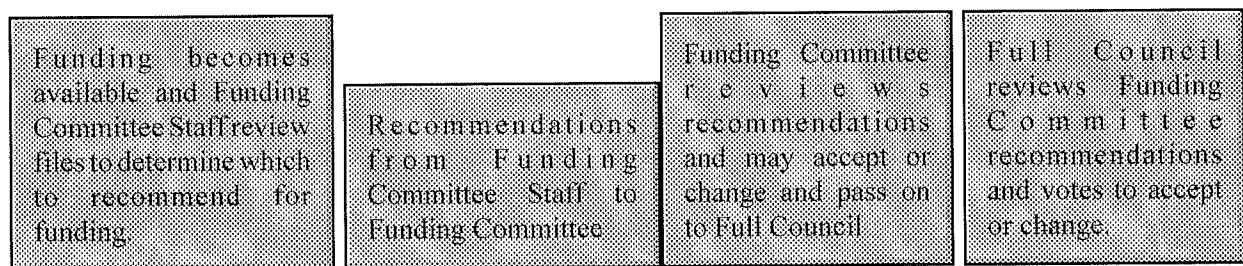
Funding of the Projects

When Infrastructure funding becomes available through the IJDC, projects on the pending list requesting Infrastructure Funds are reviewed internally by Funding Committee staff which make recommendations to the Funding Committee. The Committee reviews the recommended projects and

makes recommendations to the full Council. According to the Executive Secretary, Funding Committee staff are the engineering, financial and technical staff members of the regulatory agencies comprising the Council as required by §31-15A-5(d). In the last 20 meetings only 2 of the statutory members attended on a regular basis. In most instances the Statutory members are represented by a designee who is a staff member from their agency at meetings. These staff members make up a large portion of the council. The chart in Appendix A demonstrates that the majority of meetings are attended by the designees of the regulatory agencies. These agencies represent seven of the eleven members.

According to the Executive Secretary, projects are chosen for funding according to the criteria listed in title 167 of the rules. **Projects are not prioritized on any list nor are they chosen according to the date they applied. It is possible for a newer project to be chosen over one that has been on the pending list for years.** Project sponsors can request the Council to issue a letter of Binding Commitment which basically states the Council will fund the project when funding is available. Chart 2 below shows the basic flow of the funding process.

**Chart 2.
Fund Process Flow Chart**



Funding for the Council is provided by the sale of General Obligation Bonds for wastewater, water and economic development projects. The act dedicates 80 percent of the funds generated by the sale of bonds to be spent on wastewater and water needs. These funds have been used to assist in funding over 95 water and sewer projects and 15 to 20 design projects. In addition, the Council has participated in 40 economic development projects such as the additions to the Benedum Airport and site development for the Toyota plant. To date the council has **participated in funding and assisting over 1.8 billion dollars worth of water, sewer and economic development projects in the State.**

Review of Agency Files

PERD reviewed 10% of the projects funded by the Council to determine how those projects were chosen and 10% of the overall pending projects. Within the files were sub-committee reports which discussed the projects and provided recommendations to the Funding Committee and full Council. Project files reviewed which were requesting funding from the IJDC, also contained a score sheet which rated the project according to the criteria in the code/rules that specify how projects are to be selected. These score/evaluation sheets however, had no indication how they were used in the process of choosing a project from the lengthy list of pending projects. The sheets are not signed so there is nothing to indicate who completed them. With one exception, scores for funded projects in the sample are higher than the unfunded projects.

According to the Executive Secretary, *“the Funding Committee staff uses these project worksheets which address the criteria outlined in the legislation as an internal working tool to assist in evaluating each project. These are Council work papers there is no requirement that they be signed.”* The review found only one to two of these internal evaluation sheets within the files indicating that a meeting was held in order to fill these out. PERD asked the Executive Secretary about these sheets and how they were completed. The response was *“Funding Committee staff have non-public work sessions in order to fill out these project work sheets”*. These were also the same staff members which are the designees for the statutory members. We were unable to obtain any reports or attendance records of these meetings that indicated files were reviewed or how and when they were scored. One of the Designees that was interviewed indicated that the project work sheet score was a “big chunk” of the overall evaluation. Some Designees interviewed also felt the work sessions were open to the public however, they are not on the published list of scheduled Council meetings. Responses also vary among the Executive Director and the Designees regarding the public Funding Committee meetings. Some indicated that mainly the recommendations are discussed and others indicate that all files are discussed. The Funding Committee report does not indicate that all projects were discussed. Full Committee meeting minutes also do not give a review of all projects, do not mention scores of projects and mainly discuss the recommended projects.

Funding Committee reports contained in project files do occasionally list a priority number for some projects or a need for funding rating indicating that some sort of prioritization has been conducted. PERD requested copies of any prioritization list from the Council which would indicate that committees reviewed all pending cases and chose the ones which best fit the required criteria. The Executive Secretary responded **“The Council does not maintain a project priority list”**. In order to choose among a lengthy list of projects it would stand to reason that some sort of list would be developed, when funding becomes available, to indicate that the Committee reviewed all pending projects and utilized the criteria in making its recommendations.

The Councils has adequate information from which to evaluate and may in fact make decisions in accordance with the Code/rules criteria. Projects should be ranked and a list developed. Project sponsors should also be informed as to where their projects rank among the others pending funding.

Process of Selection Unclear to Some Municipalities and PSD's

In order to obtain the perspective of the Council's customers, PERD surveyed both funded and non-funded projects. Two of three respondents from the non-funded list of pending projects were dissatisfied with the process. One respondent from the sample of non-funded projects and three from the sample of funded projects were satisfied with the process. A total of seven non-funded and eight funded projects were surveyed. Despite having had other projects funded one respondent made the following statements:

In general, the information and reports required in the application are very comprehensive and expensive to generate. The council accepts a wide range of "completeness" in the applications.

The Council's Selection Process for selection of projects to be funded is a mystery. Chapter 31 of the West Virginia Code outlines certain criteria for selection; however the District does not know if, or how, the criteria affects selection. The selection process appears to be a "closed door" process that applicants are not involved with or privy to.

we have not been notified of how our pending projects ranked among others. The Council does this "in-house" and applicants are not involved. It is our understanding that the Council is currently selecting projects to receive funding from the next series of bonds to be sold in the next couple of months.

It is my understanding that the selection process is rooted in the criteria established in Chapter 31 of the West Virginia Code. The pending projects are ranked as per the Congressional District they are in, therefore there are three rankings. While there is some objective reasoning in the ranking method, I get the sense that the subjective thoughts and opinions of the individual Council members greatly influence the final projects rankings.

Although these statements could simply be written off as "sour grapes" another respondent made similar statements. Respondent two stated;

The application process has been fairly straight forward with respect to the Council's technical review and eligibility for funding review. Being elusive on the actual commitment of funding from the Council has been a major problem.

The selection process of who actually gets funded is some what of a mystery and appears to be greatly influenced by politics.....

To the best of our knowledge, there is no actual ranking of the pending projects and as a result we do not know where we stand on a large number of projects.

Reasons have not been given with regard to the length of time projects have been pending the availability of funding.

It would appear that the selection process ranking method is mostly subjective with special interest groups having the greatest influence. These special interest groups have reaped the greatest benefits. The application and selection process for many smaller utility systems with lesser influence has been an effort in futility.

Questioning the selection process has also been noted in the meeting minutes of November 5, 1997. During this meeting binding commitments were announced for 18 projects. **An official of Kanawha County asked the Council to clarify the criteria used for the projects being recommended because it was his opinion that some of the projects did not meet the criteria.** The Chairman of the Council stated that *“the Funding Committee makes recommendations based on a sound evaluation process, that the process is fair and completed in a public setting.”* However, if the Funding Committee and the Council do not evaluate all projects in a public setting and mainly look at the staff recommendations during the meeting then the process is not totally completed in an open forum since a major portion of the evaluation process i.e. the application of the statutory criteria, is conducted in non-public work sessions.

Conclusion

The Council has had a great impact in the State by providing funding and leveraging other funding for infrastructure projects throughout the state however, due to the lack of available data PERD is unable to determine if this was done in accordance with the code criteria. In order to assure that projects were evaluated fairly and that State funds are spent to benefit the citizens in the best possible way the Code mandates the criteria by which to chose projects. Each project also undergoes a Technical review thus providing the Council adequate information on each project to utilize in the decision making process. In order to be fair with each municipality or PSD the Council should provide a rating regarding how each project ranks among the others awaiting funding. In addition, information regarding how the required criteria was utilized to choose among pending projects should also be provided. There are many projects requiring funding from which to choose but never enough money. However, the process of ranking/choosing among projects needs to be accomplished in public so that all parties can see where they rank on the pending list and why one was chosen over another. A process of purging the pending list could also be developed so that projects do not sit on the list for years wondering wether they will be funded each time funding becomes available.

If the Council does not adequately document this process and the project sponsors are not allowed to witness how the Code criteria is applied it causes confusion and suspicion. Although not all Public Service Districts and Municipalities may be dissatisfied with the process, without documentation and an open process, the image of the Infrastructure Council could appear purely political and not judged fairly. The Performance Evaluation and Research Division recommends the following:

Recommendation 1:

The Infrastructure and Jobs Development Council should begin advertising when work sessions are held so that project sponsors and the public are able to attend and witness the process of applying the code criteria.

Recommendations 2:

Recommendations for funding projects and any actions taken by Funding Staff during work sessions should be published in a report and available for public review.

Recommendation 3:

A priority list of projects should be developed and maintained from the pending list of projects indicating when the project was reviewed and the score of the project.

Recommendation 4:

The project work sheet for scoring/evaluating each project should be signed off on by the staff members which reviewed the project documenting the score and notes explaining how the score was obtained.

Issue Area 2: Infrastructure Council designees have non-public work sessions which appear to violate the open meetings law.

§31-15A-3 of the West Virginia Code appoints certain council members by virtue of their position as the head of a regulatory agency and allows for the use of a designee to represent the agency during council meetings. Section 3 goes further mandating that member agencies shall provide staff support for the council in the manner determined by the council. It appears that the Councils' utilization of these Code sections may cause potential conflicts.

As discussed in Issue Area 1, in order to evaluate the list of pending infrastructure projects the Funding Committee staff have non-public work sessions. According to the Executive Secretary these staff members are also the designees for the statutory members. Interviews with the Designee/staff members indicate that several attend the non-public work session meetings. PERD was unable to obtain any reports or attendance records of these work sessions indicating who attended or what occurred during the session.

A review of full Council meeting attendance indicates that in the last 20 regular Council meetings only 2 of the statutory members attended on a regular basis. In most instances the Statutory members are represented by a designee. **These staff members make up nearly half of the council.** A total of eleven members are on the Council and seven on the Funding Committee. Only the Regulatory agencies are on the Funding Committee. In other words five members of the seven member funding Committee meet as staff to review project files representing a quorum of the Funding Committee members. The chart in Appendix A demonstrates that the majority of Full Council meetings have also been attended by the designees. These designees also vote and represent their agencies during most public meetings of the Council. Although this majority of the Funding Committee is meeting as staff they still are making decisions through a group consensus regarding projects which could constitute a violation of the open meetings act. Also mentioned in issue one is the fact that these same members make up the technical/sub-committees. Although they do not meet physically as a committee according to the Executive Secretary, the technical sub-committees apparently still render decisions through some sort of consensus and issue a report to the Funding Committee. This too could be a violation of the act.

The Statute allows the Council members from agencies to have a designee and the Council to utilize staff from the representative agencies but it is silent regarding whether the designee can have a dual role. As a Council and Subcommittee member the designees are not exactly an independent voice in the process thus adding to the image of the non-public work sessions and no doubt adding to the attitudes of those PSD's and Municipalities which have waited for years to get their projects funded.

Recommendation 5:

The Infrastructure and Jobs Development Council should request an opinion from the Ethics Commission concerning the Council work sessions. In addition, it should be determine whether member agency staff can play a dual role as designee and Council staff.

Issue Area 3: There are no rules for using unspent balances by applicants when the use of remaining balances is beneficial and serves the Council Mandate.

As discussed in Issue 1 all Public Service Districts (PSD) and Municipalities requesting State infrastructure funding from any agency must first apply with the Infrastructure and Jobs Development Council (IJDC). If the IJDC loans or grants funding to one of these organizations the Council assists in developing a strict schedule and budget for the entity to follow. However, there is no expedited process in which relatively large unused remaining balances can be used by the applicant for other important projects or expand the existing project. If the applicant has projects for which large unused balances can be used, the applicant must go through the process all over again, which could take months. Furthermore, an expedited process for using large remaining balances could act as an incentive to keep projects within budget.

Loan and Grant Development

In working with project developers the IJDC assists in coordinating a detailed budget. Each budget is set on a schedule B with a line item for each area of the budget. Built into every loan is a 5 to 6 percent contingency line to ensure the project can be completed if unforeseen events occur and cause the project to run over budget. This contingency may be provided by Council funds or other funding sources. If a project is well managed and no unexpected costs arise, money can be left over.

An example would be if a Public Service District or Municipality is approved for a loan of \$10 million dollars and finishes the project for \$9 million dollars the balance of the loan and the contingency would remain. The agency would not simply get to keep the balance and use it in any manner even though they had been approved for the original amount of \$10 million dollars. In order to use these funds to expand the project to several customers the agency would have to go to the IJDC and request to use the remaining funds.

The scenarios could vary regarding what could occur. In this example a significant amount of funds are involved and the addition of customers so the Council would go through the technical review process, Funding Committee and the full Council once again to determine if the agency would be allowed to utilize the funds. If a small amount of funds were left over the PSD or Municipality could simply be allowed to complete a change order requesting to expend the remaining funds. The IJDC reviews the requests and can approve or deny the use of the funds. The PSD or Municipality must make its case for the use of the money and the costs must be reasonable. A partial grant of funds could also be made and the balance redistributed to another project in need of funding or running over budget. **There no is set rule regarding the use of left over funding and what the Council decides.**

Use of Remaining Balance

PERD’s research indicates that the use of relatively large remaining balances could be expedited if rules were developed to assist the Council. In order to use large remaining balances a project sponsor must essentially go back through the process of submitting a request in order for the

Council to review the changes through the technical committees and again through the Funding Committee and full Council. In order to further explore the use of remaining balances PERD requested detailed information from the Council. The agency responded verbally, that the information was not easily accessible. The Executive Secretary stated that it would require all of her staff and several weeks to obtain the information. The agency's rules do not address the use of remaining balances so nothing dictates when agencies are allowed to utilize them.

Conclusion

The Infrastructure and Jobs Development Council should develop rules which would establish a process for the possibility of using large remaining balances of loans to PSD's and municipalities when the need is beneficial and serves the Council's mandate. This process would also serve as an incentive to keep projects within budget. The future use of those funds would of course still have to be reviewed by the IJDC and if done correctly would avoid the padding of budgets. All methods to speed the building of the states infrastructure should be explored in order to assist in the development of a strong economy. Although each situation is different, rules would help guide the Council and give municipalities and PSD's some indication of what would allow them to keep left over funding.

Recommendation 6: Rules should be developed regarding the process of using remaining balances when it is beneficial and serves the Council's mandate. The Legislature should determine whether these rules need to be legislative or procedural.

Recommendations 7: The IJDC should begin keeping more detailed data to assist in assessment of the agency from within and from external audits. There is no detailed data base from which to draw information. A proper data base would also assist in providing information to the administration on the activities of the agency.

Appendix A
Council Meeting Attendance

Appendix A Council Meeting Attendance

Meeting Date	Housing Development Fund	DEP	Economic Development Authority	Water Development Authority	WV Development Office	Public Health	Public Service Commission
May 98	Designee	Designee	Designee	Member	Designee	Designee	Designee
June 98	Member	Designee	Member	Member	Designee	Designee	Member
October 98	Designee	Designee	Designee	Member	Designee	Designee	Member
November 98	Designee	Designee	Member	Member	Designee	Designee	Member
December98	Designee	Designee	Member	Member	Designee	Designee	Designee
January 99	Designee	Designee	Member	Designee	Designee	Designee	Designee
February 99	Designee	Designee	Member	Member	Designee	Designee	Designee
March 99	Designee	Designee	Designee	Member	Designee	Designee	Designee
April 99	Designee	Designee	Member	Member	Designee	Designee	Designee
May 99	Designee	Designee	NA	Member	Designee	Designee	Member
June 99	Member	Designee	Member	Designee	Designee	Designee	Designee
July 99	Designee	Designee	Member	Member	Designee	Designee	Designee
August 99	Designee	Designee	Member	Member	Designee	Designee	Member
September 99	Designee	Designee	Designee	Member	Designee	Designee	Designee
October 99	Designee	Designee	Member	Member	Designee	Designee	Designee
February 00	Designee	Designee	Member	Member	Designee	Designee	Designee
March 00	Designee	Designee	Member	Member	Designee	Designee	Member
April 00	Designee	Designee	NA	Member	Designee	Designee	Member
May 00	Designee	Designee	Member	Member	Designee	Designee	Member
June 00	Designee	Designee	Member	Member	Designee	Designee	Member

Appendix B
Agency Response

West Virginia Infrastructure & Jobs Development Council

Public Members:

James D. Williams, Chairman
St. Albans
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August 14, 2000

Via facsimile (347-4939)
and regular mail

Harvey R. Burke, Research Manager
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Performance Evaluation and Research Division
Building One, Room W-134
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Charleston, WV 25305

Re: Draft Special Report on the West Virginia
Infrastructure and Jobs Development Council

Dear Mr. Burke:

The West Virginia Infrastructure & Jobs Development Council (the "Council") has received a copy of the draft special report prepared by your office (the "Report"). The Report identifies three specific concerns:

1. The Council does not adequately document that the statutory selection process for funding state infrastructure projects is applied in a correct and consistent manner;
2. Infrastructure Council designees have non-public work sessions which appear to violate the open meetings law; and
3. There are no incentives for projects which are completed under the projected budget.

The Council is concerned that the Report's conclusions and recommendations in these areas evidence a misunderstanding of the Council's goals and operations. The Council offers the following clarifications so that your office may make any revisions to the Report that it believes are necessary.

1. THE COUNCIL DOES ADEQUATELY DOCUMENT THE STATUTORY SELECTION PROCESS.

As noted in the Report, the Council was created in 1994 pursuant to the West Virginia Infrastructure and Jobs Development Act, Chapter 31, Article 15A of the Code of West Virginia, 1931, as amended (the "Council Act"). While the Council was created by statute in 1994, the first actual funding was provided by the General Obligation Bonds issued in June of 1996.

The Council review process has evolved since the Council's creation, as the Council gains more and more experience dealing with comprehensive projects and as it hones its procedures for determining whether projects meet the criteria set forth in Section 4 of the Council Act. The Report fails to explain the actual procedure used by the technical staff to compile the information from the project applications for presentation to the Funding Committee. A keen understanding of the selection process is critical to any informed analysis of the Council's documentation process.

Each time that the Council has funding available, the technical staff completes a Project Work Sheet for each project requesting Infrastructure Fund money or projects which have requested funding that was unavailable (such as Safe Drinking Water Treatment Revolving Loan funds). Since 1998, the technical staff has prepared a Project Work Sheet for all projects in the Council's funding pipeline. Some project files may include one or more revised Project Work Sheets, since this process is done each time Council has funding available. An individual project's ranking may change each time due to changing circumstances; for example, the ranking may improve if a newly-developed economic development project is announced or if the project sponsor is cited for regulatory violations. Project sponsors file applications on a monthly basis and the pending list of projects changes from month to month due to the filing of new applications, the receipt of new non-state funding commitments or other technical reasons.

During a series of work sessions, technical staff uses information from the Project Work Sheets and its independent investigations to develop a master work sheet of projects for each Congressional District. Technical staff work with each project sponsor to

ascertain if the other funding components will be available, to verify actual rates and to collect additional information. In order to present the most up-to-date information to the Funding Committee, this review process can occur over the course of many technical staff work sessions, each of which may involve two or more technical staff members. We note that the "flow chart" on page 10 of the draft report does not reflect that the technical staff's review of pending projects is an ongoing effort that does not occur during one limited period in the funding process.

When Council funding becomes available, the Council announces a cut-off date for review of pending projects to be funded. As required by the Council Act and as described above, technical staff from the various agencies making up the Council do the preliminary work in preparing the information for each project. This procedure is consistent with the procedure used to develop priority lists by the Bureau of Public Health for the State Drinking Water Treatment Revolving Fund and by the Division of Environmental Protection for the Clean Water State Revolving Fund.

The Report offers four recommendations on this issue. Recommendation one states that "[t]he Infrastructure & Jobs Development Council should begin advertising when work sessions are held so that project sponsors and the public are able to attend and witness the process of selection in progress." This recommendation misunderstands the nature and purpose of these work sessions. No selections or decisions are made in the work sessions; their purpose is solely to collect pertinent information on the status of pending projects and to put that information in a format that can be reviewed by the Funding Committee. In other words, this activity is akin to the daily work activities of any other public agency. No other state government agency has its daily work activities held in a public session. Like the staff in any other state agency, the technical staff members working on behalf of the Council would be hampered in their ongoing efforts if the Council were constantly required to post notices for activities that are not "official action."

Recommendation two provides that "[r]ecommendations for funding projects and any action taken by the funding staff during work sessions should be published in a report and available for the public review." The Funding Committee meets pursuant to the Open Meetings Act, Chapter 6, Article 9A of the Code of West Virginia, 1931, as amended ("Open Meetings Act"), and following its meetings provides a written report to the Council that is part of the package given to the Council for the Council meetings. This report is readily available for public review.

Recommendation three provides that “[a] priority list of projects should be developed and maintained from the pending list of projects indicating when the project was reviewed and the score of the project.” This recommendation does not appreciate the fact that any priority list is necessarily a “snapshot” at a given time. Because the pending list changes frequently and a variety of factors can affect the readiness of projects to be funded, developing and maintaining a single priority list on a monthly basis would be time consuming and of no value. Such a list would create the misimpression that the priority list is set in concrete. In reality, the only priority list that counts is the final one prepared when Council funding actually becomes available. Moreover, a locked-in priority list would not address the ongoing changes in demands and needs among the various Congressional Districts.

Recommendation four provides that “[t]he project worksheet for scoring/evaluating each project should be signed off on by the staff members which reviewed the project, documenting the score and notes explaining how the score was obtained.” The Council would be pleased to adopt this recommendation.

2. THE INFRASTRUCTURE COUNCIL DOES NOT VIOLATE THE OPEN MEETINGS LAW.

The creation of the Council resulted from a stalemate in the processing of projects through various state agencies and regulatory bodies due to a lack of a comprehensive review process. Before the Council was created, a project sponsor would apply agency-by-agency for funding; frequently projects were held up due to a lack of adequate financing and other factors. When the Council was created, the Legislature had the option of creating another bureaucracy, one composed of new staff working independently from other state infrastructure funding agencies. Instead, the Legislature wisely chose to use the technical staff from the various funding agencies to provide the Council with advice in reviewing projects. The framework has enhanced cooperation among the various funding agencies and enabled projects to move through the funding pipeline in a more efficient and timely way. This success is evidenced by the fact that over \$1.1 billion in infrastructure projects have been financed and constructed in West Virginia since the Council’s inception. Additionally, projects that are not technically or financially feasible do not take up extensive amounts of staff time as they did in the past.

The Report questions whether the work sessions and the preparation of materials to be provided for the Funding Committee are violations of the Open Meetings Act. The Report blurs the critical distinction between the functions of the technical staff members

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in the work sessions and the roles of the agency designees who attend and make recommendations in the Funding Committee meetings. The Report's apparent conclusion that the technical staff members make funding decisions in the context of these work sessions is absolutely incorrect. Strictly put, the technical staff members are not making or deliberating toward decisions on any matters that will result in or require an "official action" by a "governing body" – their activities consequently do not constitute a "meeting" under the Open Meetings Act.

It is also important to note that the work sessions do not always involve members of the agencies that have seats on the Funding Committee. The selection of the technical staff of the primary agencies – the Bureau of Public Health, the Division of Environmental Protection, the Housing Development Fund, the Water Development Authority and the Public Service Commission – varies with the type of project to be considered at any given work session and the areas of expertise required for that session. Moreover, the other agencies that are members of the Infrastructure Council do not have staff with the technical expertise to make technical evaluations of the variety of projects considered in the work sessions.

The Report's implication that the ongoing work of the technical staff members constitutes "official action" is simply without foundation, especially when one considers that the recommendations of the Funding Committee and the ultimate funding decisions of the Council are made in meetings that comply fully with the Open Meetings Act. There is nothing in the Council Act that suggests that the Council's technical staff is a decision-making "governing body" that should be subject to the Open Meetings Act. The Council believes that any recommendation that would lead to this result is misplaced.

3. THE COUNCIL ACT DOES NOT AUTHORIZE AN INCENTIVE "BONUS" PROGRAM FOR UNSPENT CONTINGENCY FUNDS.

The Council is at loss to understand recommendation six, which advises that the Council use contingency funds available at the conclusion of construction as "some sort of incentive to reward well-managed projects."

First, the Council Act neither contemplates nor authorizes the granting of incentive "bonuses" for projects that are completed under budget. Second, the purpose of the Council is to fund as many projects as possible from the available dollars. Giving bonuses would reduce the number of projects funded and thwart this purpose. Third, the

Report assumes that projects are completed under budget due to good management, and that projects come in over budget due to bad management. This is a false premise. Generally, luck has more to do with the project coming in under budget than any management practice, since a project construction budget is set at the beginning of a project based on actual bids, contracts and other established documentation. The inclusion of a contingency line item is a well-established convention in the construction industry that acknowledges that unforeseen events, such as bad weather and terrain problems, routinely occur that cause a project's final construction cost to exceed the as-bid amount. No responsible engineer would ever allow a project to be bid without an acceptable contingency, and no sensible project sponsor would, either. The contingency should not be used to encourage a project sponsor to accelerate the construction of a project or to deter it from making necessary change orders for the benefit of the project. The Report's premise that there are always expenditures for which unspent contingency amounts could be used is also misplaced.

Recognizing that on certain projects the entire construction contingency amount will not be needed, the Council has established a procedure for unspent contingency funds. Council may direct unneeded contingency funds to leverage more construction dollars for other needed projects. Because the majority of Council projects are multi-agency funded, frequently the contingency is funded by another funding agency, meaning that the Council is not the only agency with a say in how any unused amounts should be applied.

The Report fails to recognize that if a project comes in under budget, the project sponsor only repays the amount actually advanced by the Council. A reduction in the final loan amount and the associated debt service payments benefits the project sponsor, since the customer user rates are established based on a forecasted debt service amount that includes the contingency amount. Lower debt service equals lower customer rates or additional funds for the project sponsor to use to improve its system. In summary, the Council adamantly disagrees with the recommendation that the remaining funds should be used as an incentive to award "well-managed projects." This recommendation contravenes the Council Act, ignores the fact that "good management" has very little to do with unused contingency, takes away funding from additional projects and does not acknowledge the benefit of lower customer rates.

Recommendation seven suggests "that the Council should keep more detailed data to assist in the assessment of the agency from within and from external audits." The Council does not understand what additional data the Report is requesting and the value that it would have with respect to the Council's ongoing operations. The Council does not

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operate in a vacuum. As noted above, the majority of Council projects are multi-funded projects, the ongoing management of which is done in cooperation with the other agencies.

GENERAL OVERVIEW RESPONSE

The Report is critical of the procedures and funding decisions of the Council while ignoring the various statutory requirements that the Council must follow in deciding which projects to fund. Again, the Council Act provides that technical assistance must be provided by the technical staffs of the agencies. As described above, the work product generated from the combined efforts of many skilled professionals is provided to the Funding Committee, which then meets in open session to discuss those reviews and make its recommendations. Project sponsors frequently attend Funding Committee meetings and are encouraged to participate in open discussions of their projects.

While appearing critical after review of 10% of the projects funded by the Council and 10% of the overall pending projects, the Report notes that "with one exception, scores for funded projects in the sample are higher than the unfunded projects." While the Report seems to take issue with the scoring procedure, the Report itself admits that with one exception the funded projects had the higher scores. Additionally, if the Report had been candid, it would have noted that this unfunded project was in a congressional district which had already reached its funding limit. The Report does not even address the fact that funds must be divided equally among the three congressional districts and further divided between loans and grants.

SUMMARY

Like all other agencies, the Council has learned from its experience in providing funding for as many projects as possible with the limited funds available. The Council feels that if the Report had focused on material from the last two years, an increasingly well-documented procedure would have been apparent.

The Report ignores the many factors that can result in a delay in project funding. Each Funding Committee report includes a caveat on the necessity of "other available funding and readiness to proceed." The Report never considers the result when a particular project designated as number one faces environmental problems, litigation, rate protests at the Public Service Commission and appeals through the Supreme Court, and a variety of other problems that stand in the way of a project reaching construction in a timely

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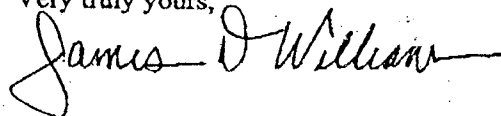
manner. The Council attempts to fund the highest priority projects that are ready to proceed with all funding sources in place. When deciding how to spend tax-exempt bond proceeds, the Council must ensure that the bond proceeds are expended within the three-year period required by the U.S. Internal Revenue Code.

Furthermore, the Report does not recognize the vast knowledge and experience of the technical staff in working through projects and in recognizing the pitfalls that can prevent projects from reaching construction in a timely fashion. Also, the Report's insistence on an immutable priority list ignores the complicated, constantly-changing factors affecting the readiness for projects to receive Council funding. The Council's goals -- to fund as many projects and, over time, to fund all viable projects -- would be defeated by pitting one project sponsor against another on the basis of an ever-changing priority list.

Most importantly, the Report fails to recognize the Council's significant record of achievement. During no other comparable period in this state's history has a greater investment in water, sewer and economic development projects been made. Without the concerted efforts of the Council and its member agencies, it is certain that many of these projects would not have been funded or built. The Council encourages your office to define performance with reference to measurable indicators, including the amount of funds (including federal monies) leveraged for projects and the numbers of new customers served, environmental issues resolved and new jobs created. Viewed in this perspective, we think you will find that the Council has fulfilled its statutory mission in an open, professional and highly effective manner.

Thank you for your interest in the Council and its operations. While the Council takes issue with some of the Report's conclusions, it expects that the information in this letter will help make the final version of the Report a more reasoned analysis of the Council's performance. With your help and insight, we hope to make the Council an even more effective agency for positive change in West Virginia.

Very truly yours,



James D. Williams, Chairman

bcc: Katy Mallory, P.E.
Samme L. Gee
Christopher L. Callas