

13-0727

PUBLIC SERVICE COMMISSION
OF WEST VIRGINIA
CHARLESTON

At a session of the PUBLIC SERVICE COMMISSION OF WEST VIRGINIA in the City of Charleston on the 24th day of June 2013.

CASE NO. 11-1572-S-C
MARY LOU NEWBERGER,
Charleston, Kanawha County,

Complainant,

v.

CHARLESTON SANITARY BOARD,
a municipal utility,

Defendant.

CASE NO. 11-1601-S-C
JAMES MCCORMICK,
Charleston, Kanawha County,

Complainant,

v.

CHARLESTON SANITARY BOARD,
a municipal utility,

Defendant.

COMMISSION ORDER

The Commission denies exceptions, modifies the Recommended Decision and orders the Charleston Sanitary Board (CSB) to repair a sewer line.

Introduction

The basis for these complaints is an allegation of customers of the CSB that they are receiving inadequate sewer service because of a broken sewer line notwithstanding the existence of a 1906 contract that appears to require those customers to repair the sewer line themselves. The Commission considered the argument of the CSB that the 1906 contract made these cases a real property dispute, but ultimately concluded that because the Commission has jurisdiction over the adequate, reliable and economical provision of utility service, that argument must fail. These cases are about the orderly maintenance of facilities that provide utility service and the authority of the Commission to regulate such activities.

Background

On October 26, 2011, Mary Lou Newberger filed a complaint against the CSB and on November 1, 2011, James McCormick filed a complaint against the CSB. Both complaints involve a “sink hole” resulting from a deteriorated sewer line near the residences. The cases were consolidated by February 3, 2012 Procedural Order.

The Administrative Law Judge conducted a hearing on June 12, 2012. Transcript references for the hearing before the ALJ are “Tr. I at ___”. The complainants, CSB and Commission Staff participated.

The ALJ summarized the evidence in the July 24, 2012 Recommended Decision. Ms. Newberger resides at 1410 Quarrier Street in Charleston and is a customer of CSB. In 2011, Ms. Newberger noticed a hole in her yard and discovered it was due to a leak in a sewer line. Tr. I. at 9. The hole appeared in about June 2012 but became much worse in October. The hole is deeper than ten feet and has a broken pipe at the bottom and other lines on top of it. Id. at 10, 24. Ms. Newberger hears water running in the pipes from time to time. She smells odors from the line. Ms. Newberger’s toilets continue to operate. Id. at 40.

Ms. Newberger bought her home in October of 2008 from Mr. McCormick. Tr. I. at 10, 17. Ms. Newberger’s home is a duplex shared with Mr. McCormick’s townhouse and the property line runs down a common wall. Id. at 12, 37. In addition to the hole, there is also a depression near her porch which is getting worse which she believes is connected to the leak. Id. at 10.

The CSB investigated. It conducted dye tests and ran a camera down the line. It discovered that Ms. Newberger was served by a common line that also served other customers. Sewage from 1412 Quarrier Street passes through both Ms. Newberger and Mr. McCormick’s property (1408 Quarrier Street). Tr. I. at 11, 14, 35.

The CSB initially told Ms. Newberger that it would take care of the problem. It later found in official County property records a 1906 contract entered into among neighbors in the community regarding the sewer line at issue. Tr. I at 15. The contract between the neighbors was to build “a common sewer” and connect it to the “Quarrier Street Sewer.” Utility Exh. 1 at exhibit 5; Tr. I at 16. The CSB concluded that based on that 1906 contract, it was not obligated to repair the line.

Ms. Newberger’s deed was subject to the same restrictions and covenants as Mr. McCormick’s deed. Tr. I at 18. Among those covenants was one contained in the 1906 contract among five parties concerning “a common sewer.” Id. at 19. Mr. McCormick did not inform Ms. Newberger that they had a shared sewer line before he sold her the residence. Id. at 24.

Ms. Newberger has asked CSB to repair the line and fix the hole. She wants the CSB to admit responsibility for the line. Tr. I. at 30. Ms. Newberger is not insisting that the lines be separated but merely that CSB maintain the common line. Id. at 33.

Mr. McCormick has no current problems with his sewer service other than those related to the hole in Ms. Newberger's yard. Tr. I. at 47. Mr. McCormick also prefers that CSB maintain the line as it currently exists as opposed to attempting to separate the various homes from the common line. Id. at 48.

Tim Haapala is the operations manager of CSB. Tr. I at. 50. The CSB conducted both camera and dye testing on the line. Id. at 51. The CSB uses Geographic Information System (GIS) mapping for its system. The mapping is an ongoing project. Id. at 53. In the last six years, the CSB spent over \$2 million on mapping. Most of the system is mapped, but some of the maps go back to the 1940s. Id. at 115.

The CSB did not investigate the line at issue beyond the Thornily (1412 Quarrier Street) property. Mr. Haapala and the CSB assumed that the line continues past the property line and serves other customers between Beauregard and Shelton Streets. Tr. I at 57, 78. The CSB investigation in advance of the June 12, 2012 hearing determined that at least three customers were served by the common line. Id. at 58. The CSB did not know exactly how many other homes in the area are served. Based on the 1906 contract, Mr. Haapala assumed that additional homes in the community are served by the common line. Id. at 59. The common line is an eight-inch line and was probably installed around the time of the 1906 contract. Id. at 60. A typical service line for a single structure using modern construction techniques would be a four to six-inch line. Id. at 120.

As indicated, the CSB was preparing to make the repairs until it discovered the 1906 contract. At that point, the CSB decided it would not go forward with the repairs. Tr. I at 63, 64. The CSB found the 1906 contract while it was looking in public records for easements entitling it to be on the property to make the repairs. Id. at 64. Mr. Haapala believes that the intent of the 1906 contract was that a group of customers was responsible for and owns the common sewer line for all time. The CSB maintains that it was not formed until 1952 and is not a signatory to the document. Id. at 65, 66. In his ten years working for the CSB, Mr. Haapala has never seen an agreement like the 1906 contract. Id. at 76.

The CSB presented evidence that it would be expensive for the CSB to separate the sewer lines. It would involve jackhammering basements, redirecting plumbing inside of structures, undertaking major excavation work in yards and obtaining easements. Tr. I at 69.

Larry L. Roller, the general manager of the CSB, is a civil engineer. Tr. I at 87. Although the CSB was formed in 1952, there was no treatment plant until 1956. Id. at 88. Prior to 1952 or 1956, Mr. Roller believes that sewer mains went directly to the Kanawha River. There were no charges for the transportation of sewage. The CSB now has three hundred miles of mains, eighty employees and 24,000 customers. Id. at 89, 90.

In the past, builders would simply hook onto the sewer system without any notice to the CSB. CSB would receive notice of the customer when the customer got public water service. Tr. I at 94, 95. Now, the CSB has the opportunity to comment on building permit applications filed with the municipality. Id. at 96. Mr. Roller believes that the line at issue is a shared customer service line, and he testified that the customers both own the line and have the responsibility to maintain it. Id. at 97.

When the CSB inspects facilities, it adds them to its mapping. Customer service lines are not always obvious from walking an area. Some lines have clean outs. Tr. I at 101. The Newberger situation would not exist or be permitted with modern construction. Id. at 105. If the line in question had been solely a line serving Ms. Newberger, there would be no question that the cost and the responsibility to repair the line would be on her. Id. at 105. On the other hand, if the CSB is required to repair lines in situations like the one at issue, it will be the CSB responsibility and will adversely impact customer rates. Id. at 106.

Lisa Bailey, an engineer for Commission Staff, stated that adequate mapping is critical for utilities. Tr. I at 129. Ms. Bailey recommends that the Commission treat the line constructed in 1906 that "serves multiple customers" as a utility main. Id. at 131. She believes that CSB has been serving customers through that line for decades and, therefore, has assumed responsibility for it. Id. at 132. Ms. Bailey believes that CSB should make the necessary repairs on the main by fixing the leak and filling the sinkhole. She testified that the CSB would need to obtain proper rights of ways. Id. at 133, 134, 135. Other than making repairs, Ms. Bailey did not recommend modifications to the line. Id. at 135.

Ms. Bailey testified that the number of customers served by a private line is relevant. A private line serving two customers is of less concern than a private line serving numerous customers. Private lines serving numerous customers are sometimes deemed to be utilities by the Commission. Tr. I at 141. Multiple customers served on a single line, not owned and operated by a utility, whether water or sewer, create all sorts of problems including the potential that private parties may shut off essential utility services to neighbors. Id. at 163, 164.

The Recommended Decision

By Recommended Decision issued July 24, 2012, the ALJ ordered CSB to obtain legal ownership of the shared eight-inch sewer line and obtain proper rights-of-way by negotiation with its current owners and the owners of any real property through which the line may cross. If negotiations were not successful, the ALJ ordered CSB to obtain the line and rights-of-way by use of eminent domain. In addition, the ALJ required CSB to investigate the shared eight-inch sewer line and determine the exact number of customers served by the line and its general condition. The ALJ ordered CSB to report the number of customers served. The ALJ also ordered CSB to make any necessary repairs to the line and maintain the line in the future.

The Exceptions

The CSB exceptions state that the ALJ erred by ordering the CSB to obtain ownership of and repair a broken customer service line owned by the complainants and others. The CSB argues 1) the Commission lacks jurisdiction because the complaint is a real property dispute; 2) if the Commission finds jurisdiction, then the intent of the 1906 contract indicates that the line in question is a customer service line; 3) Sewer Rule 5.3.g. assigns the cost to remedy a non-compliant, in this case shared, customer service line, to the customer(s); 4) the cited precedent does not compel the ALJ's conclusion that the line is the CSB's responsibility; and 5) the Recommended Decision represents and is poor public policy.

On August 27, 2012, the West Virginia Municipal Water Quality Association (MWQA) filed both a motion for leave to file an amicus curiae brief, and an amicus curiae brief in support of the CSB exceptions. The MWQA asked the Commission to initiate a rulemaking to acknowledge that shared customer service lines exist but that shared lines should not be deemed to be utility mains. Furthermore, the rules should grandfather non-complying customer service lines as long as they are functional but leave the responsibility for repair of such shared lines with the customers, and not the utility.

Staff filed a Response to Exceptions on August 29, 2012, and argued that the ALJ properly decided the case.

On September 5, 2012, the CSB filed a Reply to the Staff Response to the Exceptions.

In response to the Exceptions, by Order issued on October 15, 2012, the Commission stated its concerns regarding the legal obligation to repair the shared line, the potential cost to repair the line, and the state of disrepair and potential public health and safety risks presented by the line. The Commission asked the parties to attempt mediation of the dispute and referred the case to mediation. The Commission also

required the CSB to file answers to certain questions to assist the Commission in resolving the matter in the event mediation was not successful. Finally, the Commission granted the motion of the MWQA to file an amicus curiae brief in this matter.

On November 15, 2012, CSB filed a photographic map and a schematic map depicting the shared eight-inch sewer line and the sixteen street addresses that are connected to the sewer line. The map indicated that the CSB has a sewer main on Beauregard Street, but not on Shelton Avenue. The filing also gave the names of the owners for each address and, if applicable, tenants at the addresses to the extent the CSB was able to learn the names of tenants.

On November 27, 2012, the mediator filed a Report on Mediation stating that mediation was unsuccessful.

By Order issued January 8, 2013, the Commission noted the City's filing of a tax map and stated that a question remained whether the properties with structures connected to the line are the same properties that were the subject of the original contract of October 8, 1906. Utility Exh. 1 at exhibit 5. The Commission scheduled a hearing to take evidence on this question.

On Complainant Newberger's notification to the Commission that she was unavailable on the originally scheduled hearing date, by Order issued January 24, 2013, the Commission rescheduled the hearing. The Commission also stated that this case presented troubling facts and positions and that the Commission remained concerned that a decision in favor of either side could have expensive consequences. The Order stated that a settlement at this point would ameliorate those costs.

Hearing on Exceptions

The hearing was held as scheduled on March 14, 2013 with all parties in attendance. The CSB presented testimony by two witnesses and moved fifteen exhibits into evidence. No other party presented a witness or exhibits. Transcript references for the hearing on exceptions are "Tr. II at ___."

Mr. Haapala sponsored Charleston Exhibit 1 to show that the sewer line at issue runs through Lots One through Five and not Lot Six that are depicted on the map. There are no sewer lines on Lot Six. Tr. II at 36. The structures that are located on Lot Six are also partially located on Lot Five, and Lot Five is where the lateral connectors associated with the structures are located. Id. at 40. Charleston Exhibit 1 shows that the shared line serves sixteen addresses. The residents or owners of those addresses are CSB customers that pay full tariff rates to CSB. Tr. II at 38. There are no sewer lines on Lee Street or on Shelton Avenue near the shared line in question. Id. at 39. Mr. Haapala identified the current owners of each of the lots associated with the 1906 contract and confirmed that

the structures on those lots are connected to the shared sewer line. Id. at 41-44. All the customer laterals that the CSB located and depicted on the exhibit are on lots one through five that were subject to the 1906 contract. Id. at 63. Mr. Haapala testified that in his opinion all of the shared eight-inch sewer line was constructed in 1906 under the terms of the 1906 contract, but he could not be sure that all of the structures and laterals currently connected to the shared eight-inch line were also built in 1906. Id. at 45-46. When asked whether a home across Shelton Avenue on the north end of the map and on Lee Street was served by the shared line, Mr. Haapala said he did not think so, but could not be certain. He also stated that the CSB investigation revealed nothing that would indicate that additional structures, other than those depicted on Exhibit 1, are served from the shared eight-inch line. Id. at 55, 64, 74-75. Mr. Haapala stated that none of the shared eight-inch line runs beneath buildings. Id. at 62.

Mr. Haapala testified that the CSB, during repair work, regularly discovers shared sewer lines in residential areas of similar vintage to the homes on the shared line that is the subject of this case. Typically, the City "resolves" those problems when they arise and requests easements to take over the lines. This is first instance where the CSB found an agreement similar to the 1906 contract, which is what "put the halt" on repairs. Tr. II at 50, 61. He stated that taking over ownership of this shared line would be problematic and would require customers to jackhammer their basements, and work around large trees and attached decks in order to reroute customer plumbing and service lines to connect to utility-owned mains. The rerouting would be to mains either already existing on Beuregard and Quarrier Streets, or to a new main that could possibly be constructed on Shelton Avenue. Id. at 51, 65. It would be difficult to repair or replace the eight-inch line in its current location because it lies within a narrow space between structures and shares that space with large trees and decks, there is little room to dig and attempts to dig might disturb home foundations. Id. at 68. Mr. Haapala stated that one repair option could be to slip a liner pipe through the older clay pipe. Id. at 69.

Mr. Jay Goldman, a real estate professional, also testified for the CSB. He sponsored exhibits showing summaries of the chains of title for the lots with structures that are connected to the shared eight-inch sewer line. Charleston Exhs. 4-13. Based on Mr. Goldman's review of the deeds to Lots 1-6, he is of the opinion that the current owners of the lots depicted on Charleston Exh. 1 are successors in interest to those who executed the 1906 contract. Tr. II at 80. Charleston Exhibit 14 is a master compilation of the entire city Block G. Id. at 81. Exhibit 15 is the 1906 contract. Id. at 82. Mr. Goldman did not learn from his research exactly when the homes on Lots 1-6 were built, but he believes almost all were built in the early twentieth century. Apartments and garages were likely built later. Id. at 85.

Post-hearing filings

On March 25, 2013, the CSB filed a response to a question posed by the Commission at the hearing which directed the CSB to review the video footage shot inside the eight-inch diameter vitreous clay pipe (VCP) shared customer service lateral that is depicted in Charleston Exhibit 1 introduced at the March 14, 2013 hearing. The CSB response explained that the video is low resolution because it was not recorded for the purpose of line evaluation, but rather to determine line location and connectivity. After the hearing, Mr. Haapala viewed the DVD segments the CSB has on record, which amount to approximately forty-two percent of the eight-inch diameter VCP shared customer service lateral. Mr. Haapala observed the following defects consistently throughout the video log: pulled joints, deflected joints, hammer taps (some intrusion) and bellies. The response stated that if the CSB had recorded the line with an assessment camera (i.e., pan and tilt, zoom, better lighting), the CSB may have observed more defects. The response stated that the CSB filmed most of the remaining VCP in a similar fashion. That footage, however, could not be recovered.

On March 27, 2013, the CSB filed an affidavit of its witness, Tim Haapala, stating that during the course of his hearing testimony, he was asked several questions about the number of "shared customer service lines" that the CSB had discovered to date. In the affidavit, Mr. Haapala stated that after the hearing, he double-checked the number of shared sewer lines that the CSB had located and identified to date, and found fifty-seven known lines discovered since 2003. In 2003, CSB located one line. In 2007, it discovered two lines, two in 2008, eight in 2009, four in 2010, twelve in 2011, seventeen in 2012, and eight to date in 2013. CSB has located six others but is not certain of the date of the discoveries. Supporting documentation depicting each of the shared line arrangements was attached. Mr. Haapala further stated that during CSB regular maintenance work, it often discovers shared arrangements, and some are likely not properly documented. Accordingly, Mr. Haapala believes more of the shared arrangements exist and that the CSB will continue to discover them.

The post-hearing brief filed by the CSB argued that the Commission should dismiss the case for lack of jurisdiction because of the 1906 contract. CSB argued that this complaint belongs in a court of competent jurisdiction in an action among the successors in interest to the 1906 Contract.

The CSB also argued that if the Commission finds jurisdiction, then the Commission Rules for the Government of Sewer Utilities, 150 C.S.R. 5 (Sewer Rules) 5.3.b., 5.3.e., 5.3.g. and 5.3.i, provide that the CSB is not responsible to maintain a customer service line.

The CSB distinguishes the facts presented in the cases cited by the ALJ and argues that the decisions are inapplicable to resolve this complaint. The CSB argues that the

Commission should not require a sewer utility to take ownership of a non-compliant customer service line unless the utility was somehow complicit in the perpetuation of the non-compliant lines. The CSB cites Prutilpac v. City of Westover and Morgantown Mall Associates, Case No. 10-1390-S-C, Commission Order 2011 and Broadmoor/Timberline Apts. v. Public Service Comm'n of West Virginia, 180 W. Va. 387, 376 S.E.2d 593 (1988) as supporting this policy. The mere receipt of revenue should not indicate complicity when the CSB had no knowledge of how the line was configured.

The CSB also argues that the public interest would not be served if it were required to take ownership of the non-compliant service line. The CSB stated that as its system ages, the vintage and construction methods of many of the sewer lines will result in collapses, sinkholes and other problems similar to this case. Citing, Tr. II at 11, 47-50. If the CSB is required to take over antiquated customer service lines that happen to be shared by more than one customer, the CSB will, in effect, become an insurer for every similarly situated customer. Also, the decision would reward customers for not complying with the Sewer Rules, and penalize compliant customers.

The CSB also stated that this complaint presents a matter of statewide concern because it impacts many utilities. Citing Haapala, Hr. Tr. II at 66-67 and MWQA amicus brief. This problem is not going to get better over time; it will get worse. As it gets worse, municipal (and other) utilities will begin to feel the financial pressure of remediating customer service lines that have failed. In order to do so under the Sewer Rules, each of these non-compliant lines will have to be removed and reconfigured to comply with modern sewer practice. Otherwise, utilities will simply be placing band aids on non-compliant, aging customer service lines, which will only delay the inevitable. Such stop-gap measures cannot and will not remedy the underlying defects under the Sewer Rules and sound sewer operation practices. In turn, rates will need to increase to defray the added costs of repairing shared customer service lines. The CSB requested clarification of the interplay between Commission precedent and the Sewer Rules. Without that, the Staff, customers and utilities will be left guessing who will or must pay for what, leading to more litigation.

The Staff brief argued that the public interest demands that the CSB obtain legal ownership of the broken sewer line. If the line remains in private hands then Staff suggested that the Commission will be without authority to enforce the rules and regulations relating to sewer utilities and repair of the broken sewer line will be left to property owners. Any disagreement as to how to repair the broken sewer line, or who will pay and how much, would have to be resolved by the Kanawha County Circuit Court. Staff urged the Commission to adopt the Recommended Decision.

The complainants did not file substantive briefs. At hearing, the attorney for the complainants argued that if the Commission sides with the CSB, then it would be approving a situation in which one customer on the shared line could cut the line and

leave the others unconnected, but those customers would not be able to come before the Commission for relief.

On April 19, 2013, MWQA filed a motion for leave to file an Affidavit of David C. Sago, arguing that shared sewer laterals are common throughout the State.

The CSB filed a Reply brief on April 22, 2013.

DISCUSSION

This case brings into focus the authority of the Commission and the interplay of that authority with history on the one hand and the public health and safety on the other. The Commission agrees with the ALJ that this complaint is not a real property dispute.

This complaint is about whether a sewer utility should be required to repair sewer facilities which provide utility service. Although the shared sewer line was constructed prior to the existence of the CSB, from the time that the CSB came into being, the sewer line for all intents and purposes had no functional existence other than as a part of the utility system of the CSB. In addition, although the sewer line was constructed prior to the existence of the Public Service Commission, control of the sewer line can only be determined with reference to the rules of the Commission. Hurst v. West Virginia Water Co., Case No. 8850, 66 ARPSCWV 256, Commission Order May 4, 1979 at 10-13, affirmed Supreme Court of Appeals of West Virginia, 67 ARPSCWV 163, April 1, 1980.

The Commission has the statutory authority to enforce and regulate the practices and services of public utilities in order to ensure fair and prompt regulation in the interest of the using and consuming public and to provide adequate, economical and reliable utility services. W.Va. Code §24-1-1. The service and practices of municipal utilities are subject to Commission jurisdiction. W.Va. Code §24-2-1; City of Wheeling v. Renick, 116 S.E.2d 763 (W.Va. 1960). In Renick, the Court stated that “the public service commission has power and authority to control the facilities . . . of all public utilities and to hear complaints of persons entitled to the services which such utilities afford.” 116 S.E. 2d at 770. Furthermore, the Commission has jurisdiction to find that the provision of sewer service via a broken sewer line is inadequate, unreasonable and contrary to the public health and safety, and has the authority to order the CSB to remedy the situation. W.Va. Code §24-2-7. Accordingly, the CSB first assignment of error, that the Commission lacks jurisdiction because the complaint is a real property dispute, will be denied.

The CSB also argues that that the ALJ erred because the Recommended Decision conflicted with the intent of the 1906 contract that the line in question was a customer service line. The CSB position is that the 1906 contract makes the neighbors and not the CSB responsible to repair the shared sewer line. Numerous prior decisions of the

Commission have affirmed, however, that private parties should not be interposed between a public utility and its customers. The Commission and the Courts have found provisions of contracts between public utilities and private parties to be unenforceable if the provisions were contrary to the public interest and the Commission's jurisdiction. Hurst at 13-14; Preston County Light & Power Co. v. Renick, 145 W. Va. 115, 113 S.E.2d 378 (1960); United Fuel Gas Co. v. Battle, 153 W. Va. 222, 167 S.E.2d 890, appeal dismissed and cert. denied, 396 U.S. 116 (1969). Although the CSB is not a party to the 1906 contract at issue in this case, the same public policy is relevant and applicable. The Commission's jurisdiction would be seriously undermined if a group of private parties could, by contractual agreement, interpose themselves between a public utility and its customers and the Commission. Hurst, Commission Order at 12. The 1906 contract does not diminish the capacity of the Commission to effectively supervise the provision of utility service in the public interest. The residents may technically be the legal owners of the sewer line, but for regulatory purposes, the sewer line is a main of the CSB. Id. at 10-13. The 1906 contract is therefore of no effect as between the Commission, in the performance of its statutory duties to regulate sewer utilities in the interest of public health and welfare, and the CSB's obligation to provide reasonable service to its customers. The CSB attempt to use the provisions of the 1906 contract "to circumvent the regulatory authority of this Commission is contrary to law and violative of the public interest." Id. at Conclusion of Law 7.

In its third assignment of error the CSB also argues that the Recommended Decision conflicts with Sewer Rule 5.3.g., which assigns the cost to remedy a non-compliant customer service pipe to the customer. Because for regulatory purposes the shared sewer line is a main of the CSB, the line does not fall within the definition of a "customer service pipe" found in the Commission Sewer Rules.

The issue raised by the ALJ with reference to the Sewer Rules, specifically, whether the CSB should be required to assume ownership of the shared line, is less important, given the facts of this case, than the question of who makes the needed line repair and when. This line is a public health hazard and should have been repaired long ago. The Commission does not agree with the Staff position and the ALJ opinion that it is necessary to order the CSB to obtain ownership of the line in order to repair the line. The Commission Order in Hurst concluded that the water line at issue in that complaint case was a part of the public utility system regardless of who held title to the line,

Regardless in whom title to the extension now vests, the Commission obtained regulatory authority over the extension as soon as the extension became subject to [the Commission Water Rule governing extension of mains]. Therefore, notwithstanding any claim of title, when a private party permits water mains that he constructs to become a part of a public utility system, for regulatory purposes the Commission will treat that property as though it belonged to the public utility which operates that system.

Hurst, Commission Order at 12.

Although the facts in the Hurst case differ somewhat from those presented here, the underlying public policy is the same. This situation needs to be remedied, and for regulatory purposes and given all the facts and history of this case, the shared sewer line belongs to the CSB regardless of whether the CSB has legal ownership of the pipe or a utility easement on the land. In addition, based on the record in this complaint, there is no reason to believe that Ms. Newberger would deny the CSB permission to be on her property to make the repair; on the contrary, she has been pressing to have the repair made.

The Commission is aware that this could be a costly and extensive repair if this entire situation must be remedied, both for the CSB and the persons served by the line. We are charged as much with the responsibility of being sensitive to costs and rate implications as we are with the orderly development of utility systems. W.Va. Code §24-1-1(2), (3) and (4). In this particular instance, ownership of the line will not be relevant unless the CSB determines that the line is no longer capable of providing service to the customers attached to it. At that point, the CSB would have the obligation of acquiring ownership of the line and replacing it in its current location, constructing new mains to serve the customers, extending existing mains, or connecting customers to existing mains in Shrewsbury and Quarrier Streets pursuant to the Rules of the Commission. The shared sewer line has functioned relatively well for over one hundred years and when the CSB repairs the current defect, the line may continue to adequately serve the various customers attached to it for many additional years. Even in the event of future line deterioration, modern repair options such as the insertion of a pipe liner can further extend the life of the sewer line. Tr. II at 69. Accordingly, the most economical solution at the present time is to maintain the current line configuration and to repair the leak and sinkhole immediately. The CSB is the entity that can most economically repair the line in order to provide adequate service.

The Commission does not agree with the CSB that in order to hold it responsible for the repair, the Commission must make a finding of fault or assessment of blame or utility complicity regarding the shared line. None of the foregoing is necessary or appropriate to determine responsibility for making the needed line repair. The long-established Commission policy and precedent that a utility in this State is prohibited from providing utility service through a third-party line remains sound. Taylor v. Fort Gay Municipal Water Department, Case No. 10-1088-W-S-C (2011), Prutilpac v. City of Westover Sanitary Board and Morgantown Mall Associates, L.P., Case No. 10-1390-S-C (2011); Union Williams Public Service District, et al, Case No. 09-0781-PWD-W-PC-CN (2009); Irons v. Kingmill Valley Public Service District, Case No. 07-1601-PSD-C (2008), Volk v. Broadmoor/Timberline Apartments, Case No. 87-342-S-C (1988), Broadmoor/Timberline Apartments v. Public Service Commission, 376 S.E.2d 593

(W.Va. 1988), Town of Athens, Case No. 91-727-W-P (1992), Myers v. Town of Cedar Grove, Case No. 95-0978-S-C (1996), Craig vs. City of McMechen, Case No. 95-0978-S-C (1996). The Commission acknowledges that in some cases, the Commission has applied the policy and required utilities to make repairs or replacements based, at least in part, on a finding that the utility knowingly billed a customer and provided service through non-compliant lines. The Commission resolution of the instant matter, however, is based on the individual facts and circumstances presented and Commission authority to regulate the CSB in order to provide adequate and economical utility service. W.Va. Code §§24-1-1 and 24-2-7. It is reasonable to deny the CSB assignment of error that the precedent cited by the ALJ does not compel a conclusion that the line is the CSB's responsibility.

The requirement that the CSB repair the shared line does not extend to the various customer service lines. The various customers are responsible for any sewer lines within their structures and out to the point of the connection to the shared eight-inch sewer.

The Commission does not agree with the MWQA position that ordering it to repair the shared sewer line will represent bad precedent and poor public policy because the resolution ordered by the Commission is unique to the specific circumstances presented. As an amicus curiae for briefing purposes, the MWQA has no party status and the Commission will disregard the efforts to provide additional evidence through a survey that is separate and apart from the specific matter complained of in this case. For the same reason, the Commission will not address the MWQA position that the Commission should amend its Sewer Rules to assign responsibility for repair of shared sewer lines predating the rules to the customers served by those lines.

FINDINGS OF FACT

1. In 1906, five property owners in the East End of Charleston built a private eight-inch sewer line to serve their properties and connected the line to the "Quarrier Street Sewer." Utility Ex. 1; Tr. I at 15, 16, 60.
2. The CSB came into existence as a public utility in 1952 and served multiple customers connected to the shared sewer line, billing those customers individually for service.
3. The CSB was not a party to a 1906 contract among five property owners pertaining to the eight-inch shared sewer line.
4. The 1906 contract predates the 1913 creation of the Public Service Commission.

5. The 1906 contract predates the 1952 creation of the CSB, the 1956 completion of the CSB sewage treatment plant, and the 1977 promulgation of the Commission Sewer Rules.

6. In 2011, the shared eight-inch sewer developed a problem resulting in a sinkhole and a visible break in the line. Tr. I at 9, 10, 24. The current condition of the line and the ground is a public health hazard.

7. When CSB discovered in official County property records the 1906 contract among the five original property owners who constructed the shared eight-inch sewer, the CSB declined to repair the line concluding that the shared eight-inch sewer was privately owned and should be maintained by its private owners. Tr. I at 63, 64, 65, 66; Tr. II at 50, 61.

8. At the second hearing, CSB witness Haapala sponsored Charleston Exhibit 1 to show that the shared sewer line runs through lots one through five and not lot six that are depicted on the map. There are no sewer lines on lot six. Tr. II at 36. The structures that are located on lot six are also partially located on lot five and that is where the lateral sewer connectors associated with the structures are located. Id. at 40.

9. Charleston Exhibit 1 shows that the shared sewer line now serves sixteen addresses on lots one through five on Charleston Exhibit 1. The residents or owners of those addresses are CSB customers paying full tariff rates. Tr. II at 38.

10. There are no sewer lines on Lee Street or on Shelton Avenue near the shared line in question. Id. at 39.

11. The structures on each of the lots associated with the 1906 contract are connected to the shared sewer line. Id. at 41-44. All the customer laterals that the CSB located and depicted on the exhibit are on lots one through five that were subject to the 1906 contract. Id. at 63.

12. The CSB investigation revealed nothing that would indicate that additional structures, other than those depicted on Exhibit 1, are served from the shared eight-inch line but CSB could not be absolutely certain that no other structures were connected. Haapala, Id. at 55, 64, 74-75.

13. No portion of the shared eight-inch shared sewer line runs beneath buildings. Haapala, Id. at 62.

14. Rerouting of customer service lines to connect with existing or new sewer mains would involve jackhammering basements and working around large trees and

attached decks in order to reroute customer plumbing and service lines to connect to utility-owned mains Id. at 51, 65.

15. The shared sewer line is located in a narrow space between structures with trees and decks limiting access and ability to dig. Haapala, Id. at 68.

16. The most economical solution at the present time is to maintain the current line configuration and to repair the leak and sinkhole immediately.

17. One repair option for the shared sewer line could be insertion of a liner through the original clay pipe. Id. at 69.

CONCLUSIONS OF LAW

1. This case brings into focus the authority of the Commission and the interplay of that authority with history on the one hand and the public health and safety on the other.

2. The complaint is not a real property dispute. This complaint is about whether a sewer utility should be required for public health and safety to repair sewer facilities which provide utility service.

3. Although the shared sewer line was constructed prior to the existence of the CSB, from the time that the CSB came into being, the sewer line for all intents and purposes had no functional existence other than as a part of the utility system of the CSB. Furthermore, although the sewer line was constructed prior to the existence of the Public Service Commission, control of the sewer line can only be determined with reference to the rules of the Commission. Hurst v. West Virginia Water Co., Case No. 8850, 66 ARPSCWV 256, Commission Order May 4, 1979 at 10-13, affirmed Supreme Court of Appeals of West Virginia, 67 ARPSCWV 163, April 1, 1980.

4. The Commission has the statutory authority to enforce and regulate the practices and services of public utilities in order to ensure fair and prompt regulation in the interest of the using and consuming public and to provide adequate, economical and reliable utility services. W.Va. Code §24-1-1. The service and practices of municipal utilities are subject to Commission jurisdiction. W.Va. Code §24-2-1; City of Wheeling v. Renick, 116 S.E.2d 763 (W.Va. 1960).

5. The Commission has jurisdiction to find that the provision of sewer service via a broken sewer line is inadequate, unreasonable and contrary to the public health and safety, and has the authority to order the CSB to remedy the situation. W.Va. Code §24-2-7.

6. Numerous prior decisions of the Commission have affirmed that private parties should not be interposed between a public utility and its customers. Prutilpac v. City of Westover Sanitary Board and Morgantown Mall Associates, L.P., Case No. 10-1390-S-C, Recommended Decision April 29, 2011, final Commission Order December 15, 2011, citing Hurst; West Augusta Development Co., 67 ARPSCWV 163 (1980); Burns v. Sanitary Board of the City of Huntington, Case No. 82-259-S-C, 70 ARPSCWV 1571 (1982); Graley v. Lincoln PSD, Case No. 87-082-W-C; Leibert v. Lincoln PSD, Case No. 87-087-W-C (1987); Mountaineer Heights Homeowners Association v. Pinch, Case No. 87-269-W-C (1988); Cervo v. Shinnston Municipal Water Dept., Case No. 87-266-W-C (1990). . Taylor v. Fort Gay Municipal Water Department, Case No. 10-1088-W-S-C (2011), Irons v. Kingmill Valley Public Service District, Case No. 07-1601-PSD-C (2008), Volk v. Broadmoor/Timberline Apartments, Case No. 87-342-S-C (1988), Broadmoor/Timberline Apartments v. Public Service Commission, 376 S.E.2d 593 (W.Va. 1988), Town of Athens, Case No. 91-727-W-P (1992), Myers v. Town of Cedar Grove, Case No. 95-0978-S-C (1996), Craig vs. City of McMechen, Case No. 95-0978-S-C (1996), Union Williams Public Service District, et al, Case No. 09-0781-PWD-W-PC-CN (2009).

7. The Commission and the Courts have found provisions of contracts between public utilities and private parties to be unenforceable if the provisions were contrary to the public interest and the Commission's jurisdiction. Preston County Light & Power Co. v. Renick, 145 W. Va. 115, 113 S.E.2d 378 (1960); United Fuel Gas Co. v. Battle, 153 W. Va. 222, 167 S.E.2d 890, appeal dismissed and cert. denied, 396 U.S. 116 (1969).

8. Although the CSB is not a party to the 1906 contract at issue in this case, the same public policy regarding contracts is relevant and applicable because the Commission's jurisdiction would be seriously undermined if a group of private parties could, by contractual agreement, interpose themselves between a public utility and its customers and the Commission. Hurst, Commission Order at 12.

9. The 1906 contract does not diminish the capacity of the Commission to effectively supervise the provision of utility service in the public interest.

10. Although the residents may technically be the legal owners of the sewer line, for regulatory purposes the sewer line is a main of the CSB. Hurst, Commission Order at 10-13. The 1906 contract is therefore of no effect as between the Commission, in the performance of its statutory duties to regulate sewer utilities in the interest of public health and welfare, and the CSB's obligation to provide reasonable service to its customers.

11. The CSB attempt to use the provisions of the 1906 contract “to circumvent the regulatory authority of this Commission is contrary to law and violative of the public interest.” Id. at Conclusion of Law 7.

12. The shared sewer line at issue in this complaint does not fall within the definition of a “customer service pipe” in the Sewer Rules.

13. The issue of whether the CSB should be required to take over ownership of the shared line is less important, given the facts of this case, than the question of who makes the repair and when.

14. It is not necessary to order the CSB to assume ownership of the line in order to order it to repair the line. Hurst at 12.

15. The sewer line defect and public health hazard must be remedied.

16. The shared sewer line belongs to the CSB for regulatory purposes, given all of the facts and history of this case, regardless of whether the CSB has legal ownership of the pipe or a utility easement on the land. Id.

17. The Commission is charged as much with the responsibility of being sensitive to costs and rate implications as it is with the orderly development of utility systems. W.Va. Code §24-1-1(2), (3) and (4).

18. In this particular instance, ownership of the line will not be relevant unless the CSB determines that the line is no longer capable of providing service to the customers attached to it. At that point, the CSB would have the obligation of acquiring ownership of the line and replacing it in its current location, constructing new mains to serve the customers, extending existing mains, or connecting customers to existing mains in Shrewsbury and Quarrier Streets pursuant to the Rules of the Commission.

19. The most economical solution at the present time is to maintain the current line configuration and to repair the leak and sinkhole immediately. The CSB is the entity that can most economically repair the line and sinkhole in order to provide adequate service.

20. To hold the CSB responsible to repair the shared sewer line, it is not necessary that the Commission make a finding of fault, assessment of blame or utility complicity regarding the shared line.

21. The long-established Commission policy and precedent that a utility in this State is prohibited from providing utility service through a third-party line remains sound. Taylor v. Fort Gay Municipal Water Department, Case No. 10-1088-W-S-C (2011),

Prutilpac v. City of Westover Sanitary Board and Morgantown Mall Associates, L.P., Case No. 10-1390-S-C (2011); Union Williams Public Service District, et al, Case No. 09-0781-PWD-W-PC-CN (2009); Irons v. Kingmill Valley Public Service District, Case No. 07-1601-PSD-C (2008), Volk v. Broadmoor/Timberline Apartments, Case No. 87-342-S-C (1988), Broadmoor/Timberline Apartments v. Public Service Commission, 376 S.E.2d 593 (W.Va. 1988), Town of Athens, Case No. 91-727-W-P (1992), Myers v. Town of Cedar Grove, Case No. 95-0978-S-C (1996), Craig vs. City of McMechen, Case No. 95-0978-S-C (1996).

22. The Commission resolution of the instant matter is based on the individual facts and circumstances presented and on the authority of the Commission to regulate the CSB in order to provide adequate and economical utility service. W.Va. Code §§24-1-1 and 24-2-7.

23. It is reasonable to deny the CSB assignment of error that the precedent cited by the ALJ does not compel a conclusion that the line is the CSB's responsibility.

24. The requirement that the CSB repair the shared line does not extend to the various customer service lines. The various customers are responsible for any sewer lines within their structures and out to the point of the connection to the shared eight-inch sewer.

25. As an amicus curiae for briefing purposes, the MWQA has no party status and the Commission will disregard the efforts to provide additional evidence through a survey that is separate and apart from the specific matter complained of in this case.

26. It is not appropriate in this complaint case to address the MWQA position that the Commission should amend its Sewer Rules to assign responsibility for repair of shared sewer lines predating the rules to the customers served by those lines.

ORDER

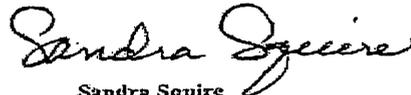
IT IS THEREFORE ORDERED that the Recommended Decision is modified as stated in this Order and the CSB exceptions are denied.

IT IS FURTHER ORDERED that within thirty days of the date of this Order, the CSB repair the sewer line and sinkhole in front of complainant Newberger's home.

IT IS FURTHER ORDERED that the MWQA post-hearing motion for leave to file an affidavit is denied.

IT IS FURTHER ORDERED that the Commission Executive Secretary serve a copy of this Order on all parties of record that have filed an e-service agreement, or by United States First Class Mail on parties that have not provided the Commission with an e-mail address, and on Staff by hand delivery.

A True Copy. Teste:


Sandra Squire
Executive Secretary

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