

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

THE SANITARY BOARD OF THE
CITY OF CHARLESTON, WEST VIRGINIA,

Petitioner,

v.

DOCKET NO. 13-0727

THE PUBLIC SERVICE COMMISSION
OF WEST VIRGINIA,

Respondent.

PETITIONER, THE SANITARY BOARD OF
THE CITY OF CHARLESTON, WEST VIRGINIA'S BRIEF

ON APPEAL FROM THE PUBLIC SERVICE COMMISSION
OF WEST VIRGINIA'S JUNE 24, 2013 ORDER IN
CASE NO. 11-1572-S-C, AND CASE NO. 11-1601-S-C

Grant P. H. Shuman (WV Bar No. 8856)
Spilman Thomas & Battle, PLLC
300 Kanawha Boulevard, East (25301)
Post Office Box 273
Charleston, West Virginia 25321-0273
304.340.3800 (*phone*)
304.340.3801 (*facsimile*)
gshuman@spilmanlaw.com

*Counsel for Petitioner, The Sanitary Board
of the City of Charleston, West Virginia*

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COMES NOW the Sanitary Board of the City of Charleston, West Virginia (the “Sanitary Board” or the “Board”), and pursuant to Rules 10 and 14 of the West Virginia Rules of Appellate Procedure, hereby submit the following appeal from a June 24, 2013 Order entered by the Public Service Commission of the State of West Virginia (the “Commission”).

The case involves a break in a private sewer line serving several homes on wholly private property. The line in question is the subject of a recorded maintenance easement among the homeowners to maintain the line. The maintenance agreement has been on record for over a hundred years. The Commission made three compounding errors below. First, it determined that the dispute about the broken private line is within its jurisdiction. Second, it applied a doctrine of “regulatory control,” and found that the Sanitary Board has regulatory control over the broken line despite the fact that it is privately owned and on private property. Finally, having applied the fiction of “regulatory control” (in reality “ownership”), the Commission then bootstrapped that fiction to impose on the Sanitary Board the obligation to repair and forever maintain the private line in question. The Commission expanded its jurisdiction in this case well beyond its legislative imprimatur, this Court’s prior decisions and the Commission’s own precedent for the benefit of one Complainant, who now, unlike every other customer of the Sanitary Board, is not required to repair her own customer service line on her property.

The instant appeal is the culmination of nearly two years of litigation, two hearings, countless briefs and mediation. But, after all that, there is no doubt that the Commission’s June 24, 2013 Order in which the Commission required the Sanitary Board to repair the line at question, is fraught with legal error. Moreover, it represents bad public policy that will negatively affect sewer utilities and sewer customers statewide. The Sanitary Board recognizes that the Commission, in part, must balance the interests of utilities and customers. In this case,

however, the Commission's balance is askew. This Court should overturn the Commission's June 24, 2013 Order. Pursuant to Rule 10 of the West Virginia Rules of Appellate Procedure, the Sanitary Board will set forth the matters required therein *in seriatim*.

I. ASSIGNMENTS OF ERROR

1. The Commission erred by taking jurisdiction in a consumer complaint case that, at bottom, involves the interpretation and attendant responsibilities of an easement entered into by private parties concerning private lands and rights that has been of record with the Kanawha County Clerk since 1906. In effect, the Commission exceeded its jurisdiction by resolving a real property dispute that properly belongs in a court of competent jurisdiction.

2. The Commission erred in finding that the shared sewer line at issue is within the "regulatory control" of the Board despite the undisputed fact that the Sanitary Board does not own the shared sewer line in question or the real estate through which it was constructed.

3. The Commission erred in requiring that the Sanitary Board repair aspects of the shared sewer line, when such line is a customer service line within the meaning of the Commission's regulations, and, as such, is the responsibility of the customer(s) to both maintain and ensure conformity with the Commission's rules.

4. The Commission erred in finding that it could compel the Sanitary Board to take "regulatory" ownership of a private, shared sewer line on private property of which the Board had no knowledge, and, moreover, no complicity in, or knowledge of, the creation of the same.

II. STATEMENT OF THE CASE

On October 26, 2011, Complainant, Mary Lou Newberger, filed a Formal Complaint with the Commission against the Sanitary Board, alleging that a sewer pipe on her property in front of her home located at 1410 Quarrier Street, Charleston, West Virginia, was broken and

had caused a ground collapse, and requesting that the Sanitary Board repair the sewer pipe, among other things. (Appendix (“App’x”), 6-10) The Sanitary Board filed an Answer to Newberger’s Complaint on November 7, 2011, denying that the customer service line on Newberger’s property is a main line of the Sanitary Board, and asserting that the customer is responsible for the construction and operation of the customer service line in compliance with the Commission’s Rules for the Government of Sewer Utilities, 150 C.S.R. § 150-5-1, et seq. (the “Sewer Rules”), and moved to dismiss the Complaint. (Id., 16-18).

On November 1, 2011, James McCormick filed a Formal Complaint with the Commission against the Sanitary Board, which contained the same basic allegations, although the line break was neither located upon his property nor affected his sewer service. (Id., 1-4).¹ It should be noted that McCormick filed his Complaint as a result of pressure or duress from Newberger. (Id., 90-113). The Sanitary Board filed a similar Answer in response. (Id., 37-41).

Administrative Law Judge (“ALJ”) Keith A. George entered a Procedural Order on February 3, 2012, consolidating the McCormick Complaint with the Newberger Complaint. (Id., 60-61). The hearing before the ALJ was held as scheduled on June 12, 2012. The pertinent evidence adduced therein is as follows. Ms. Newberger lives at 1410 Quarrier Street and is a customer of the Board. (App’x, 6-10).² In approximately June 2011, Newberger discovered a hole in her yard and determined that it was caused by a leak in the underlying sewer line. (Id., 77). The hole in her yard worsened in October 2011. (Id., 76-77). Newberger contacted the City of Charleston, and, subsequently, the Sanitary Board became involved. (Id., 118). At that point, the Sanitary Board conducted dye testing and camera

¹ McCormick and Newberger will be referred to collectively from time to time as “Complainants.”

² The Sanitary Board respectfully directs the Court to the map contained in the Appendix that depicts an overlay of the sewer line, the property boundaries, lot numbers and so forth. (App’x, 658). This graphic depiction will, in the opinion of the Sanitary Board, aid the Court in analyzing the facts.

work to determine the nature of the line. (Id.). The Sanitary Board placed plywood over the sinkhole as a safety measure. (Id., 119). At the time, the Sanitary Board determined that McCormick, Newberger and at least one other home were using a shared private sewer line to access the Sanitary Board's main. (Id., 123). However, the Sanitary Board did not conduct further testing at that time to determine the entirety of the line in order to focus on the issue at hand. (Id., 125). The Sanitary Board concluded that the line at issue was a shared customer service line, inasmuch as multiple dwellings were connected to a common line. (Id., 128). In essence, the Sanitary Board then began to consider how to remedy the issue, while, at the same time, conducting a record search to see if the Sanitary Board had ownership of the line. (Id., 130-31). The purpose of such a search is to determine whether the Sanitary Board had the right to work on the line. (Id.).

In conducting this research, the Sanitary Board discovered an easement between the predecessors-in-interest to McCormick and Newberger, among others, that stated as follows:

This AGREEMENT made and entered into this 8th day of October, 1906, between Isadore Schwabe, Murray Briggs, J. B. Garvin, John D. Price and Willard F. Comstock,

WITNESSETH, Whereas the said parties have constructed a sewer extending from and connecting with the Quarrier Street Sewer, through the lots of the said Schwabe, Briggs, Garvin, John D. Price and into the lot of said Comstock, for the joint use and accommodation of the several properties through which the same passes, the said sewer running through lots one, two, three, four and five of Block "G" of the "First Ruffner Addition" in the City of Charleston, West Virginia,

NOW, THEREFORE, it is hereby agreed by and between the parties hereto, on behalf of themselves, their heirs, and assigns, that the said sewer shall be and remain a common sewer for the use and benefit of the several properties through which the same runs and for the use and benefit of the present and future owners of each of said lots for all time to come.

It is further agreed that the same shall be maintained at the common expense of the several properties through which the same runs,

It is further agreed that no stable shall be connected with said sewer.

It is further agreed that all the provisions of this agreement shall constitute and remain covenants running with the land, as to the several lots above mentioned and binding upon the present and all future owners thereof.

(Id., 131; 289-90). Neither the Sanitary Board—nor any other public entity—was a signatory to this document. (Id., 132). At that point, the Sanitary Board determined that the line was owned by the successors-in-interest to this 1906 Agreement.³ (Id., 130). As such, the Sanitary Board declined to repair the line, and the underlying complaints followed.

Ms. Newberger bought her home in October 2008. (Id., 76-78). Mr. McCormick lives at 1408 Quarrier Street and is a customer of the Sanitary Board. (Id., 6). The residences at 1408 Quarrier and 1410 Quarrier are one physical building. (Id., 79). Ms. Newberger bought her property at 1410 Quarrier Street from Mr. McCormick. (Id., 84). Mr. McCormick's deed for his purchase of the properties at 1408 and 1410 Quarrier Street includes recitals of reservations, restrictions and easements against the properties. (Id., 301-05). Mr. McCormick's deed specifically references the 1906 Agreement related to responsibility for sewer lines. (Id., 304). Ms. Newberger's deed for her purchase from Mr. McCormick of 1410 Quarrier Street states that the purchaser is subject to all the existing reservations, restrictions and easements set forth in Mr. McCormick's deed and in prior deeds in the chain of title. (Id., 85-86; 308). Ms. Newberger testified to her agreement that she is subject to the 1906 agreement, as it "run[s] with the land." (Id., 87). Ms. Newberger testified that when she purchased the property from Mr. McCormick he did not inform her that they shared a customer service line. (Id., 91). Ms. Newberger also testified that she did not obtain an inspection of the home prior to her purchase

³ The Sanitary Board will refer to this easement in this form hereafter, particularly because it was the term most often used to describe it in the proceedings below. It should be noted, however, that while the easement does contain certain covenants, the 1906 Agreement is, by its own terms, an easement running with the land.

of the property, nor did she herself check the chain of title of the property prior to purchase. (Id., 92; 96-97). Mr. McCormick also testified that he is subject to the 1906 Agreement. (Id., 112).

On July 24, 2012, the ALJ entered his Recommended Decision, which required the Sanitary Board to take over and maintain the line because it serves multiple customers. The ALJ determined that the Commission had jurisdiction to hear the Complaints, and that the Sanitary Board should be required to obtain the “private sewer line” at issue through negotiation and/or eminent domain. (App’x, 541). As a consequence, the ALJ ordered, in pertinent part, that the Sanitary Board obtain legal ownership of the shared sewer line that is the subject of the Complaints, obtain the line and proper rights-of-way by negotiation with its current owners and the owners of any real property through which the line may cross. (Id.) The ALJ further ordered that if negotiations were not successful, the Sanitary Board should obtain the lines and rights-of-way through eminent domain. (Id.). The ALJ did, however, note that the “customer service laterals [to the shared main of which the Sanitary Board must acquire ownership] . . . are not the Sanitary Board’s responsibility, but that of the various customers serviced by the 1906 eight-inch line.” (Id., 541).

On August 8, 2012, the Sanitary Board filed its exceptions to the Recommended Decision. (App’x, 1286). The Sanitary Board reiterated its position that the Commission lacks subject matter jurisdiction over the instant dispute as a result of the 1906 Agreement, and the Commission’s lack of jurisdiction to adjudicate real estate disputes. The Sanitary Board further argued that the policy concerning the provision of service through a third party line is inapplicable in this case because (1) the line at issue was built by several individuals to transport their sewage; (2) the intent of the original signatories to the 1906 Agreement leaves

no doubt that the line at issue is a customer service line under modern sewer practice; and (3) the authority cited by the ALJ, The Staff of the Public Service Commission (the “Staff”) and the Complainants do not compel the conclusion that the line is the Sanitary Board’s responsibility. (Id.). The Sanitary Board further stated that the Recommended Decision represents poor public policy and bad precedent, inasmuch as it would give certain customers (with non-conforming sewer laterals) a financial advantage over the vast majority of customers (with conforming sewer laterals). (Id.).

The West Virginia Municipal Water Quality Association, Inc. (“MWQA”) moved to join the case as an *amicus curiae*. (App’x, 544-50). The MWQA is comprised of water and sewer utilities statewide, representing approximately 90% of the sewer population in the state. (Id., 545). The MWQA asserted that the Recommended Decision is a significant concern to the MWQA’s members because, if it is upheld, it could impose substantial new liabilities on sewer utilities statewide relating to shared private sewer laterals. (Id.).

The Commission entered an order on January 8, 2013, in which the Commission noted the filing of a tax map and stated that a question remained whether the properties or structures connected to the line are the same properties that were the subject of the 1906 Agreement. (Id., 555-57). On March 14, 2013, the Commission convened a hearing on the exceptions.

The evidence adduced at the hearing indicated that the sewer line at issue runs through Lots 1 through 5, and not Lot 6 that is depicted on the map submitted by the Sanitary Board. (Id., 601). While there are structures located on Lot 6 of the block at issue, there are no sewer lines or laterals on that lot. (Id.). The Sanitary Board’s witness, Mr. Tim Haapala (a registered professional engineer), testified that in his opinion, all of the shared eight-inch sewer line was constructed in 1906 under the terms of the 1906 Agreement, but he could not be sure that all of

the structures and laterals currently connected to the eight-inch line were also built in 1906. (Id., 610). Mr. Haapala testified that he did not believe that any additional structures are served from the eight-inch line apart from those depicted on the map submitted to the Commission. (Id., 620). It should be noted that the shared customer service line is connected at the property line to the Sanitary Board's main on Quarrier Street, which was public in 1906 just as it is today. (Id., 603).

Mr. Haapala testified that the Sanitary Board regularly discovers shared sewer lines of similar vintage in residential areas. (Id., 612). In this instance, Mr. Haapala indicated that the Sanitary Board did not take action due to the existence of the 1906 Agreement. (Id., 615). Mr. Haapala also explained that in order to bring the shared sewer line into compliance with modern sewer practice, the process would be very expensive and problematic, due to the configuration of the homes. (Id., 616). Mr. Jay Goldman also testified for the Sanitary Board. (Id., 641). Mr. Goldman sponsored exhibits showing summaries of the chains of title for the lots and structures that are connected to the shared sewer line. (Id., 642). Based on Mr. Goldman's review of the deeds to Lots 1 through 6, he is of the opinion that the current owners of the lots depicted on the map are successors of interest to those who executed the 1906 Agreement. (Id., 645). The Sanitary Board also filed a master compilation of the titles for the entire city block G. (Id., 646).

After the hearing, the Sanitary Board filed a response to a question posed by the Commission at the hearing which directed the Sanitary Board to review the video footage shot inside the eight-inch diameter vitreous clay pipe ("VCP") shared customer service lateral. (App'x, 1289). Mr. Haapala observed several defects, but noted that the video used was low

resolution because it was not recorded for the purpose of line evaluation, but rather to determine line location and connectivity. (Id.).

In addition, the MWQA filed a Motion for Leave to file the affidavit of David C. Sago, its President. (Id., 1274-81). After canvassing his membership, Mr. Sago averred that the members of the MWQA are aware of hundreds of similar sewer arrays, and that this was merely the tip of the iceberg. (Id., 1280). Subsequently, the Sanitary Board filed an affidavit of Mr. Haapala in which he stated that after the hearing, he double-checked the number of shared sewer lines that the Sanitary Board had located and identified to date and found 57 known lines discovered since 2003, and included supporting documentation depicting each of the shared sewer line arrangements. (Id., 1212-73).

In its Order dated June 14, 2013, the Commission denied the Sanitary Board's exceptions, and modified the ALJ's Recommended Decision. (App'x, 1282). The Commission concluded that this complaint is not a real property dispute, but, rather, a question of whether a sewer utility should be required for public health and safety to repair sewer facilities which provide utility service. (Id., 1291). The Commission stated that it has 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 service. (Id.).

The Commission referenced prior decisions that have affirmed that private parties should not be interposed between a public utility and its customers. (Id., 1292). The Commission further found that provisions of contracts between utilities and private parties are unenforceable if the provisions are contrary to the public interest and the Commission's jurisdiction. (Id.). In effect, the Commission determined that the Sanitary Board was the

“regulatory” (but not legal) owner of the sewer line, and that the 1906 Agreement has no effect as between the Commission and the performance of its statutory duties. (Id.).

The Commission further determined that the line at issue does not fall within the definition of a “customer service pipe” in the Sewer Rules. (Id., 1292-93). Furthermore, the Commission determined that it is not necessary to order the Sanitary Board to assume ownership of the line in order to be required to repair it. (Id., 1293). The Commission stated that ownership of the line is not relevant unless the Sanitary Board determines that the line is no longer capable of providing service to the customers attached to it. (Id.). At that point, the Commission concluded, the Sanitary Board 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 pursuant to the Commission’s regulations. (Id.).

The Commission concluded that it was not necessary for the Commission to make a finding of fault, assessment of blame or utility complicity regarding the shared line to require the repair of the same. (Id., 1293-94). Finally, the Commission declined to consider the MWQA’s affidavit. (Id., 1294). In sum and substance, the Commission ordered that within 30 days of the Order, the Sanitary Board must repair the sewer line and sinkhole in front of Newberger’s home. (Id., 1299).⁴

III. SUMMARY OF ARGUMENT

This case presents several issues for this Court’s consideration. As an initial matter, the Sanitary Board has consistently asserted throughout this case that the Commission lacks

⁴ On June 28, 2013, the Sanitary Board filed a Motion to Stay this remedy, which was opposed by Newberger and denied by the Commission on July 8, 2013. On July 11, 2013, the Sanitary Board filed a duly verified Petition to Reconsider, raising due process concerns, among others. Newberger again opposed the Petition, and it was denied by the Commission on July 19, 2013.

jurisdiction over these Complaints. The reason is simple. This case involves the interpretation and application of an easement that was executed and recorded some 106 years ago. The Sanitary Board does not contest that the Commission has jurisdiction to regulate public utilities. However, the Sanitary Board does not believe that this jurisdiction extends to a private easement between private parties that deals entirely with private property. In its own cases, the Commission has recognized this principle. Yet, in this case, the Commission essentially dismissed this argument out-of-hand. The bottom line is that the duties and responsibilities relating to the shared line at issue are matters of real property, which must be decided in a court of competent jurisdiction. Thus, these Complaints should have been dismissed at the outset.

Nevertheless, the Commission asserted its jurisdiction. In so doing, the Sanitary Board asserts that the Commission committed a series of errors in its June 24, 2013 Order. To begin, the Commission concluded that the Sanitary Board has “regulatory control” (but not actual ownership) of the shared line. The Commission based this conclusion, in large part, upon cases decided before the Commission involving contracts or arrangements between a utility and a private party. That is not the case here. The Sanitary Board had no involvement in the construction, maintenance or regulation of this shared line. It did not provide any taps, mains or other sewer appurtenances for these customers. It was not until Newberger contacted the City of Charleston that the Sanitary Board even knew of the existence of this line. Yet, despite these uncontroverted facts, the Sanitary Board has been charged with repairing and maintaining a wholly private line with public funds.

Next, the Commission erred in determining that the shared sewer line is not a “customer service line” within the meaning of the Sewer Rules. The 1906 Agreement makes it clear that a group of individuals constructed the shared sewer line for their mutual benefit and to serve only

those lots subject to its terms. While it is true that there are individual customer laterals connected to the line, it is also true that the only purpose of this line is to serve a very small group of customers who agreed, for themselves and their successors, to maintain the line. If, as the Commission concedes, modern sewer practice controls this line, then the only logical conclusion under the Sewer Rules is that the shared line is a customer service line, not a “main.” Instead, both the Commission and the ALJ decided to compel the Sanitary Board to repair this line. In essence, therefore, the Sanitary Board must expend public funds for the benefit of a private landowner who (whether by the terms of the 1906 Agreement or the Sewer Rules) has the obligation to repair the problem. Meanwhile, other compliant customers of the Sanitary Board pay for remedying the issues of non-complaint customers through the payment of their rates. This is not only bad public policy, it is bad precedent.

Most (if not all) of the cases relied upon by the Commission involve some knowledge, involvement and/or complicity between a utility and a third party that places a barrier between the utility and its customers. The Commission has now held that such complicity is not required to compel a utility to take “regulatory control” over a sewer line. Yet, it is implicit in the Commission’s precedent. Without such complicity, utilities (like the Sanitary Board) that are strangers to a shared sewer line, will be left with untold liabilities lying beneath the ground that cannot be easily found. This is an untenable burden for sewer utilities, which, ultimately, will lead to rate increases on complying customers to subsidize non-compliant customers. Moreover, this is, again, simply bad public policy. In sum, the Commission’s Order is untenable, unwieldy, and creates a great deal of potential liability for the sake of a non-compliant customer.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Pursuant to Rule 18(a) of the West Virginia Rules of Appellate Procedure, the Sanitary Board asserts that oral argument is appropriate in this case, inasmuch as it does not waive oral argument, the appeal is not frivolous, there is no authoritative decision regarding the matter at bar, and the Sanitary Board believes that the decisional process will be aided by such argument.

Further, the Sanitary Board considers this case appropriate for oral argument pursuant to Rule 20 of the West Virginia Rules of Appellate Procedure because this is a case of first impression by this Court and this case presents issues of fundamental public importance. By way of further explanation, this Court has never ruled on the interplay between the Commission's jurisdiction and the law of real property as it relates to wholly private easements. Additionally, this case is of fundamental public importance because the Commission's ruling will almost certainly have an impact on the rates of customers of myriad sewer utilities, not to mention the effect on the duties and responsibilities of both utilities and customers.

V. ARGUMENT

A. The standard of review.

This Court has established the standard of review of final orders of the Commission as follows:

“In reviewing a Public Service Commission order, we will first determine whether the Commission's order, viewed in light of the relevant facts and of the Commission's broad regulatory duties, abused or exceeded its authority. We will examine the manner in which the Commission has employed the methods of regulation which it has itself selected, and must decide whether each of the order's essential elements is supported by substantial evidence. Finally, we will determine whether the order may reasonably be expected to maintain financial integrity, attract necessary capital, and fairly compensate investors for the risks they have assumed, and yet provide appropriate protection to the relevant public interests, both existing and foreseeable. The court's responsibility

is not to supplant the Commission's balance of these interests with one more nearly to its liking, but instead to assure itself that the Commission has given reasoned consideration to each of the pertinent factors.” Syl. pt. 2, Monongahela Power Co. v. Public Service Comm'n, 166 W.Va. 423, 276 S.E.2d 179 (1981).

Syl. pt. 1, Berkeley County Public Service Sewer District v. West Virginia Public Service Commission of W. Va., 204 W.Va. 279, 512 S.E.2d 201 (1998). In particular this Court refined the foregoing in the following statement:

The detailed standard for our review of an order of the Public Service Commission contained in Syllabus Point 2 of *Monongahela Power Co. v. Public Service Commission*, 166 W.Va. 423, 276 S.E.2d 179 (1981), may be summarized as follows: (1) whether the Commission exceeded its statutory jurisdiction and powers; (2) whether there is adequate evidence to support the Commission's findings; and, (3) whether the substantive result of the Commission's order is proper.

Syl. pt. 1, Central West Virginia Refuse, Inc. v. Public Service Commission of W. Va., 190 W.Va. 416, 438 S.E.2d 596 (1993). Thus, this Court has held that:

“[a]n order of the public service commission based upon its finding of facts will not be disturbed unless such finding is contrary to the evidence, or is without evidence to support it, or is arbitrary, or results from a misapplication of legal principles.” *United Fuel Gas Company v. The Public Service Commission*, 143 W.Va. 33, 99 S.E.2d 1 (1957). Syllabus Point 5, in part, *Boggs v. Public Service Comm'n*, 154 W.Va. 146, 174 S.E.2d 331 (1970). Syllabus Point 1, *Broadmoor/Timberline Apartments v. Public Service Commission*, 180 W.Va. 387, 376 S.E.2d 593 (1988).

Syl. pt. 1, Sexton v. Public Service Commission, 188 W.Va. 305, 423 S.E.2d 914 (1992).

In this case, the Commission exceeded its power and jurisdiction by placing itself in the position of an arbiter of a properly recorded easement and usurping the jurisdiction of our circuit courts. The evidence in this case does not support the conclusion that the shared sewer line is a utility “main,” or that the Sanitary Board has “regulatory control” of the same. Finally,

the result of the Commission's Order is substantively improper because it represents an inappropriate application of the Sewer Rules and Commission precedent to compel a result that is, in the end, the path of least resistance as opposed to a reasoned decision on the merits.

B. The Commission lacked jurisdiction in this case because the shared sewer line at issue is subject to a private easement that the Commission has no authority to interpret or discard.

The Commission's jurisdiction is narrowly drawn, and it does not include the authority to disregard or negate properly recorded easements, as in this case. It should be noted at the outset that the Sanitary Board does not come before this Court to argue against the general principle that the Commission has jurisdiction to supervise and regulate the Sanitary Board's sewer system. See Syl. pts. 5 & 6, State ex rel. City of Wheeling v. Renick, 145 W. Va. 640, 116 S.E.2d 763 (1960). Yet, it is equally true that "[t]he Public Service Commission of West Virginia has no inherent jurisdiction, power or authority and can exercise only such jurisdiction power or authority as is authorized by statute." Syl. pt. 1, Eureka Pipe Line Co. v. Public Service Comm'n of W. Va., 148 W. Va. 674, 137 S.E.2d 200 (1964). Furthermore, "[t]he jurisdiction, power and authority of the Public Service Commission of West Virginia are confined to the regulation of public utilities." Id. at syl. pt. 2. In this regard, this Court has stated that

The Public Service Commission was created by the Legislature for the purpose of exercising regulatory authority over public utilities. Its function is to require such entities to perform in a manner designed to safeguard the interests of the public and the utilities. Its primary purpose is to serve the interest of the public.

Boggs v. Public Service Comm'n of W. Va., 154 W. Va. 146, 154, 174 S.E.2d 331, 336 (1970)

(emphasis added; citations omitted).⁵ The question in this case is whether the Commission's jurisdiction encompasses private disputes arising from a private easement concerning private

⁵ Thus, the "public interest" includes both the interests of the public and the interests of utilities.

property. The answer is that the Commission has no such authority, express or implied. The Commission's decision does not safeguard the interests of all the customers of this utility, those of all other utilities in the State, or the utilities themselves; it only safeguards the interests of the Complainants herein.

In this instance, the Commission has grounded its jurisdiction in two statutes: West Virginia Code § 24-1-1 and West Virginia Code § 24-2-7. (App'x, 1291). These statutes do not even provide the thinnest of reeds upon which to balance jurisdiction in this case, and the Commission's Order does little more than cite them for broad propositions. To begin, West Virginia Code § 24-1-1 is simply the basic legislative purpose of the Commission, and it essentially echoes the point set forth above in Renick that the Commission has the authority to regulate and supervise utilities. See W. Va. Code § 24-1-1(a)(1)-(2). There is absolutely no inkling in this code provision that the Commission has the power to determine the rights of private parties to a private easement involving private property. Likewise, West Virginia Code § 24-2-7 provides, in pertinent part, that the Commission has the authority to find services inadequate, discriminatory or insufficient, and it may order a utility to remedy the same. W. Va. Code § 24-2-7(a). Again, this section is directed towards utilities, not private easements concerning private property and private parties. These distinctions are notable and critical.

The Commission has no inherent jurisdiction, and the only way its jurisdiction can be expanded is through "necessary implication," and its power, even then, is limited to regulating public utilities. See Syl. pt. 2, Wilhite v. Public Service Comm'n of W. Va., 150 W.Va. 747, 149 S.E.2d 273 (1966). If the Legislature had seen fit to give the Commission the authority to dissolve, ignore or interpret private easements, it certainly could have done so. But, it did not, and the Commission has provided no case or statute stating otherwise. In point of fact, the

Commission has long held that it has no jurisdiction over real property disputes. See Forsythe v. Monongahela Power Co., Case No. 99-1358-E-C (Comm'n Oder Feb. 4, 2000); see also Genesis Partners, Limited Partnership v. Monongahela Power Co., Case No. 04-1431-E-C (Procedural Order Nov. 8, 2004) (collecting cases for the same proposition). In fact, the Commission's lack of authority in this regard extends; for example, to determining whether a public utility has a valid easement or right-of-way. See Cady v. Monongahela Power Co., Case No. 83-291-E-C (Comm'n Order Sept. 7, 1983).⁶ In the words of the Commission:

[I]nasmuch as Genesis Partners' complaint raises real property law issues involving a dominant and servient owner of the rights-of-way and easements in question, Genesis Partners' complaint is more properly for the Circuit Court of Harrison County to consider and decide, not the Public Service Commission, which does not possess the jurisdiction necessary to decide questions involving the title to real estate and/or rights-of-way and easements.

Genesis Partners, at 7. (citations omitted). Thus, the Commission itself has repeatedly and consistently held that it has no jurisdiction over real property matters. This case obviously presents such an issue. The Commission did not explain why it chose to depart from this long-standing principle in the above-referenced matters because the Commission failed to discuss or address its prior decisions in this regard. And, in several cases before this Court, such a failure has been found to be error.

The Sanitary Board observes that the doctrine of *stare decisis* does not normally apply to decisions by administrative bodies such as the Commission. See Syl. pt. 5, Chesapeake and Potomac Telephone Co. of W. Va. v. Public Service Comm'n of West Virginia, 171 W. Va. 494, 300 S.E.2d 607 (1982). It is also true that "when an administrative agency reverses course from its precedents, it must give reasonable notice and supporting rationale before it changes its

⁶ All Commission orders or recommended decisions referenced herein are available at the Commission's website.

standards, or its actions appear arbitrary and capricious.” C & P Telephone Co. of W. Va. v. Public Service Comm’n of W. Va., 171 W. Va. 708, 715, 301 S.E.2d 798, 804 (1983). Here, the Commission has not provided any basis as to why it has departed from its time tested rule that it lacks jurisdiction to adjudicate real property disputes, and, to be sure, this case presents a real property dispute.

The shared sewer line at issue was and is subject to an easement that has been on record since 1906. That easement, which contains covenants directed solely to the use and maintenance of the shared sewer line, explicitly states as follows:

This AGREEMENT made and entered into this 8th day of October, 1906, between Isadore Schwabe, Murray Briggs, J. B. Garvin, John D. Price and Willard F. Comstock,

WITNESSETH, Whereas the said parties have constructed a sewer extending from and connecting with the Quarrier Street Sewer, through the lots of the said Schwabe, Briggs, Garvin, John D. Price and into the lot of said Comstock, for the joint use and accommodation of the several properties through which the same passes, the said sewer running through lots one, two, three, four and five of Block “G” of the “First Ruffner Addition” in the City of Charleston, West Virginia,

NOW, THEREFORE, it is hereby agreed by and between the parties hereto, on behalf of themselves, their heirs, and assigns, that the said sewer shall be and remain a common sewer for the use and benefit of the several properties through which the same runs and for the use and benefit of the present and future owners of each of said lots for all time to come.

It is further agreed that the same shall be maintained at the common expense of the several properties through which the same runs.

It is further agreed that no stable shall be connected with said sewer.

It is further agreed that all the provisions of this agreement shall constitute and remain covenants running with the land, as to the several lots above mentioned and binding upon the present and all future owners thereof.

(App’x, 289-90) (emphasis added). “An easement is a right that one person has to use the land of another person, for a specific purpose.” Cobb v. Daugherty, 225 W.Va. 435, 441, 693

S.E.2d 800, 806 (2010). In turn, “[a] covenant is simply an agreement between the grantor and grantee which requires the performance or the nonperformance of some specified duty with regard to *real property*, including an agreement to do or not to do a particular act.” Whispering Valley Lakes Improvement Ass’n v. Franklin County Mercantile Bank, 879 S.W.2d 572, 574 (Mo. Ct. App. 1994) (emphasis added). As this Court has stated:

The fundamental rule in construing covenants and restrictive agreements is that the intention of the parties governs. That intention is gathered from the entire instrument by which the restriction is created, the surrounding circumstances and the objects which the covenant is designed to accomplish.

Wallace v. St. Clair, 147 W.Va. 377, 390, 127 S.E.2d 742, 751 (1962). Thus, there is no question that the 1906 Agreement is a proper easement running with the land.

Based upon the foregoing, therefore, it is beyond cavil that this case requires a determination of the duties and responsibilities arising from the 1906 Agreement. In actuality, the duties and responsibilities under the 1906 Agreement are quite clear. Specifically, the landowners and their successors-in-interest are required to maintain the shared sewer line at issue. It is that simple. The Commission has no authority to pass on the validity of this easement, or to simply circumvent the same under the guise of its regulatory authority. The Complainants below are not public utilities; they are private landowners. The sewer line is on private property, and, the sewer line itself is private property owned by the Complainants. First and foremost, this case presents a real property dispute. The Commission cannot slip that noose merely by glossing over its jurisdiction and essentially acting as if the 1906 Agreement does not exist.

Furthermore, the Commission cannot assert that it is able to declare the 1906 Agreement unenforceable as contrary to the public interest or the Commission’s jurisdiction as

it claims because the 1906 Agreement does not include a utility as a party. (App'x, 1292). The Commission has such authority with respect to agreements between a utility and a private individual. See Preston County Light & Power Co. v. Renick, 145 W. Va. 115, 113 S.E.2d 378 (1960). Without providing any precedent to support its position, the Commission contends that the same public policy applies in this situation despite the fact that the Sanitary Board is not a signatory to the 1906 Agreement. (Final Order, at 11). This is a remarkable leap of logic, given that the Commission is limited to the regulation of public utilities. The Commission cannot simply expand its jurisdiction in such a broad and offhanded manner without some legislative imperative.

In sum, the Commission has overstepped its jurisdiction to reach its desired result. Thus, the Commission's ruling in this case that it has jurisdiction exceeds its legitimate powers, constitutes an abuse of discretion, and, pursuant to C & P Telephone, is arbitrary and capricious. Put another way, the Commission never had jurisdiction in this case, and these Complaints should have been dismissed at the outset. To do otherwise was reversible error.

C. **The Commission erred in determining that the Sanitary Board has “regulatory control” over the shared sewer line because there is no third party standing between the Sanitary Board and the customers served by the line.**

By now, the parties, the Staff, the ALJ and the Commission have each had a chance to research West Virginia law and Commission precedent to find a case that addresses a fact pattern substantially similar to the one at bar. To date, no such authority has been found. The Commission has relied upon a number of cases to suggest that the shared sewer line at issue is subject to the “regulatory control” of the Sanitary Board, despite the fact that there is no wholly private contract or agreement involved in any of these cases, and despite the fact that each of the customers served by this line own the line and have done so since at least 1906.

Additionally, while the Commission does not have jurisdiction over customers as a general rule, it obtains that jurisdiction if a customer, as in this case, files a formal complaint. At that point, the Commission could order the customer to obey the Sewer Rules, and repair the shared sewer line, which, as discussed further below, is the proper remedy in this case, if, in fact, it has the jurisdiction to act in this case at all. Nevertheless, the Commission has used inapt precedent in an effort to hammer a regulatory round peg into a factual square hole.

In its Order, the Commission held that “[t]he long-established policy and precedent that a utility in this state is prohibited from providing utility service through a third-party line remains sound.” (App’x, 1293) (citations omitted). The Commission has also stated that “[t]he 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., 292) (citation omitted). In essence, the Commission has dovetailed these concepts to create a new liability for the Sanitary Board. The problem, however, is that the Commission’s precedent is not so bold, nor do the cases cited by the Commission bolster its conclusion; rather, these cases relate to easily distinguishable factual scenarios that are inapplicable to the subject shared sewer line and the regulation thereof.

The Commission placed substantial reliance upon the case of Hurst v. West Virginia Water Company to support the notion that the Sanitary Board has “regulatory” (but not legal) control over this line even though the Commission concedes that the “facts in the Hurst case differ somewhat from those presented here.” (App’x, 1291-93). Hurst involved a case in which the owner and developer of a shopping center entered into an agreement with a water utility for the utility to provide service to the center. Hurst v. West Virginia Water Co., Case

No. 8850, at 1 (Comm'n Order June 10, 1980).⁷ Under the agreement, the utility agreed to construct, and the developer agreed to pay for, a pipeline for the delivery of water service. Id. As it happens, the pipeline crossed beyond the developer's property and partly through a public right-of-way. A customer requested service from the line, but said service was denied due to the terms of the agreement. Id. at 1-2. The customer filed a formal complaint alleging that the utility was acting in a discriminatory manner and protested the necessity of obtaining any agreement from the developer to receive service. Id. at 2. The Commission held that the utility was required to provide service despite the agreement, to cease its discriminatory practices, and that the contract between the developer and the utility was void, and, in any event, the water line was part of the utility's system for regulatory purposes. Id. This Court affirmed and held that the Commission has the authority to abrogate contracts between utilities and private individuals or corporations that impede a utility's ability to discharge its public duties. Id. at 3. Further, this Court held that a private party who contracts with a public utility does so in contemplation of this power, and cannot complain when the Commission elects to exercise the same. Id.⁸

The categorical difference between Hurst and the instant case is stark. First, the contract in Hurst was between a utility and a private party. In the case *sub judice*, the Sanitary Board is neither a party nor a signatory to any agreement. Next, the Sanitary Board has never been asked to add service to the shared sewer line, and it has not expended any of its own resources in constructing, operating or maintaining the line. Indeed, the shared line was totally unknown until the time of Newberger's calls regarding the same. While the Commission may

⁷ This citation is a slight misnomer. In fact, this Order actually contains the ruling by this Court on appeal. However, it does not appear that Hurst was a published decision by the Court, and, as such, this citation is really a simplified way of referring to this Court's ultimate holdings.

⁸ The Commission also reasoned that had the utility complied with the Sewer Rules, title in the line would have vested in the utility.

have authority over contracts entered into by utilities and private parties, it has no such authority over wholly private contracts, such as the 1906 Agreement. Finally, unlike Hurst, there is no third-party standing between the Sanitary Board and its customers. The line is privately owned by the successors-in-interest to the 1906 Agreement. As such, they all have equal ownership rights, and none of the customers is superior in this regard to any other. Put simply, Hurst does not control under these facts.

Next, the Commission cites Prutilpac v. City of Westover Sanitary Board and Morgantown Mall Assocs., L.P. This case is similarly unavailing. In that case, the Morgantown Mall built a sewer line in 1990. Prutilpac v. City of Westover Sanitary Board and Morgantown Mall Associates, L.P., Case No. 10-1390-S-C, at 2 (Recommended Decision April 29, 2011). By the time of the hearing, the evidence demonstrated that the line built by the Mall (which had apparently tried to convey the same to the utility without success for various reasons) served 22 or 23 customers who were located within the Mall, together with 66 additional utility customers of which 62 were located in the Pleasant Hills subdivision. Id. at 4. All of these customers were billed full tariff rates by the utility. Moreover, the utility had actual notice of the line, and, in fact, had performed maintenance on the line for which it attempted—and failed—to bill the Mall. Id. at 3. Finally, this case was originally brought by a potential customer who was denied service from the line. Id. at 1.

Of course, one major difference between the instant case and Prutilpac is that the Board has been serving customers from the “shared customer service line” to only customers who own the line. Put another way, Complainants own the line, and they are responsible for its maintenance. Thus, this case is not a situation where there is an intermediary between the utility and the customer; the Board is serving Complainants—and other successors in interest to

the 1906 Agreement—through a line they own. As a consequence, there is no “third party” in this case. Moreover, the argument that revenues somehow result in ownership is similarly flawed. This is not, for example, a case where a customer has been billed for service he or she did not receive. Complainants admit that the Board has transported and treated their sewage through Complainants’ own line, just as the Sanitary Board has transported and treated sewage from all of its customers in their own customer service lines. Consequently, the rubric under which cases like Prutilpac were decided is inapplicable here.

Likewise, the case of Broadmoor/Timberline Apts. v. Public Service Comm’n of W. Va., 180 W. Va. 387, 376 S.E.2d 593 (1988) is also inapplicable. In Broadmoor, the owner of an apartment complex was holding a landowner hostage by not allowing that landowner to connect to a sewer system constructed to serve said complex. Moreover, the owner of the complex had apparently allowed other third-parties to connect to the system, but not the landowner at issue who brought the complaint. Several facts are very informative to the case at bar. First, neither the Sanitary Board nor the Complainants have provided service to anyone outside of those contemplated by the 1906 Agreement through the line contemplated therein, and there is no evidence to the contrary. Another condition of obtaining ownership of such a line is that the utility participated in the case and raised no objection. Id. at syl. pt. 3. Each of the conditions in Syllabus Point 3 must be met in order for the Commission to order a utility to take over the line. Id. In this case, the Board has raised an objection. Additionally, in Broadmoor the utility was maintaining the lines, albeit at the expense of the apartment owner. Broadmoor does not control this dispute because of these factual and legal distinctions.

The same analytical fallacies also guide any analysis of Taylor v. Fort Gay Municipal Water Dept. Taylor basically involved two customers who sought water service from a utility,

and filed a formal complaint with the Commission to receive the same. Taylor v. Fort Gay Municipal Water Dept., Case No. 10-1088, at 1 (Comm'n Order May 31, 2011). The line at issue was originally built by a single landowner to which other homeowners connected over time. The construction of the line was based on an arrangement with the utility. The same landowner also maintained the line (until he moved from the premises) at his expense. Id. At that point, the other landowners paid for the maintenance of the line, including a lift station. Id. Nevertheless, the utility collected fees from the complainants for twenty years, but provided no maintenance or other services apart from the provision of water. Id. at 3. The Commission concluded that the line was subject to the utility's "regulatory control" even though it was a private line. Id. at 8. The Commission further bolstered its decision by the now predictable notion that a utility may not serve a customer when there is an intermediate third-party.

Taylor, once more, is not instructive. The agreement in Taylor was between the utility and a customer. The customers were required to maintain the line. Thus, the customers not only paid for service, but also maintenance. Furthermore, the non-compliance of the line was well known to the utility because the line did, in fact, violate Sewer Rule 5.3.i., and the complainants in Taylor were also well aware that they had a shared line. It appears, therefore, that this case was cited by the Commission for a premise that is, by now, well-travelled ground.

Union Williams Public Service District, upon which the Commission relies, disproves the very premise that the Commission purports not to take in such cases. In Union Williams, a utility, county commission and county economic development authority filed an application for a certificate of convenience and necessity to construct a water project. Union Williams Public Service District, et al., Case No. 09-0781, at 1 (Recommended Decision September 30, 2009). The development authority would own the facilities and lease the same to the utility until the

utility repaid its loan to the authority. Id. at 3. In the meantime, the utility would operate and maintain the project. The Commission referenced the old saw that utility services cannot be provided through facilities the utility did not own. Id. But, the Commission saw fit to ignore or waive this “long-established” precedent and grant the certificate. This case is buried in a long string cite in the Commission’s Order herein that contains a number of other cases with similarly distinguishable facts for a single legal proposition that the Commission ignored in Union Williams.

The case of Garry L. and Ronald Irons v. Kingmill Valley Public Service District is also off the mark. The facts of Irons are that the utility was installing its 8-inch sewer line and cut into an old 4-inch line that the utility realized was a private line serving several residences. Garry L. and Ronald Irons v. Kingmill Valley Public Service District, Case No. 07-1601-PSD-C, at 2 (Recommended Decision May 27, 2008). Although the utility understood that the line was “an illegal hookup originally,” nevertheless, it connected its 8-inch line into the 4-inch line and served the residences through that line. Id. Thus, in Irons, a utility created a problematic situation by affirmatively accepting a non-compliant line and beginning to bill customers using the line. In the instant case the Sanitary Board did not create the issue, and, indeed, was unaware of the situation until this line break arose. Further, the Sanitary Board had no reason to know about the shared customer service line because it was in use and part of a larger network of public collection lines being utilized before the Sanitary Board was even created.

The case of Town of Athens is also very far afield from this case. In Athens, the utility sought a moratorium on new water connections in a particular development, and the developer intervened. Town of Athens, Case No. 91-727, at 1 (Recommended Decision April 10, 1992). The water system at issue was constructed and maintained by the developer, and the utility

supplied the water for sale at its usual rate. Id. at 1-2. The mayor of the Town of Athens testified that the relationship between the developer and the Town was “unorthodox, and perhaps illegal.” Id. at 2. And, indeed, the line serving the development in Athens was constructed as an adjunct through another development. Id. at 3. The developer averred that his arrangement with the utility was verbal because the utility did not know the rules. Id. at 3-4. The Commission held that once the utility began treating orphan lines as part of its own system for fourteen years, it could not avoid its responsibilities, and, as such, it should take ownership of the lines. Id. at 6. This case shares nothing in common with the matter before the Court, inasmuch as it involved an admittedly illegal line within the express knowledge of the utility. Further, there was, again, an agreement between the utility and a third-party, which is, of course, not the case here. Athens has no relevance here.

Myers v. Town of Cedar Grove is barely worth discussing. Myers involved a customer who was receiving sewer service for twelve years from the Town of Glasgow, which, in turn, billed the customer. Myers v. Town of Cedar Grove, Case No. 95-0978, at 5 (Recommended Decision May 5, 1998). In essence, the Commission held that the Town of Glasgow must obtain ownership of the lines serving the customer through which the Town of Glasgow provided the service, even if said lines were located in the Town of Cedar Grove. Id. at 6. There is no “agreement” of any kind in this case. The only possible relevance is that the Commission believes that a utility must own the lines through which it provides service. By now, this idea is nothing new and the facts in Myers bear no similarity to this appeal.

Finally, the Commission cites the decision of Craig v. City of McMechen. In Craig, a customer complained that the utility failed to repair her sewer line that served her residence despite paying for service for fourteen years. Craig v. City of McMechen, Case No. 95-0978,

at 1 (Recommended Decision June 28, 2006). The utility contended that the problem was that the customer had an illegal customer service line passing across the property of other customers without an easement, and, moreover, that the other customer(s) wanted the line removed. Id. Although the utility originally denied knowing about the line, the evidence at hearing adduced that the customer repeatedly asked the utility to repair the line, the utility was aware of the problem due to problems downstream of the complainant, there was an impermissible third-party between the utility and the line, and that the utility received revenues for 30 years. Id. at 5-8. The result was, again, that the utility was ordered to take ownership and repair the line. Nevertheless, there was no agreement of any kind in Craig, and in the instant case the line is owned entirely by the customers via the 1906 Agreement. Craig has little to no precedential value here.⁹

The Sanitary Board has set forth these cases in detail for a significant reason; namely, none of them have anything other than superficial similarities to the present case. None of these cases involve a private recorded easement. None of these cases involve a line of which the utility was unaware. None of these cases involve a situation where there is no third-party, but, rather, several co-owners of a line that was built solely to serve them by their predecessors-in-interest. In other words, these cases are inapposite to the case at bar. The only reason they were cited by the Commission is to bolster its variably applied rule regarding service through lines owned by third parties. But, crucially, the Complainants' shared sewer line is owned by

⁹ Interestingly, the Staff stated its belief that the utility would have no responsibility, but for the following mitigating factors: (1) the customer received 30 years of service and paid accordingly; (2) the utility was aware of the service through billing; and (3) a new residence was connected to this non-compliant line two years before the complaint without protest from the utility. Id. at 3. In other words, in the view of the Staff, this was basically the customer's problem, except for these mitigating factors. The first two seem to pale in comparison to the latter, insofar as the utility was aware of the situation and allowed it to continue, which is a common denominator in the precedent relied upon by the Commission.

them and them alone. Furthermore, where there were agreements in the cases cited by the Commission, each and every one of them was between a utility and a private party, without exception. Consequently, the rule allowing the Commission to regulate contracts that have a utility as a party is inapplicable here. To be sure, this case presents somewhat novel facts as it relates to the easement. That is no license for the Commission to force this matter into a line of cases in which it does not fit by what amounts to a fiat. Instead, the Commission has utilized a regulatory framework to reach a desired result, which fails to account for disputes that have happened before and will happen again. Nothing could be more arbitrary or capricious.

D. The shared sewer line in this case leads is a customer service line under the Commission's Sewer Rules.

The Sanitary Board agrees with the Commission on at least one thing. In its Order, the Commission stated “although the sewer line was constructed prior to the existence of [the Commission], control of the sewer line can only be determined with reference to the rules of the Commission.” (App’x, 1291) (citation omitted). Although this notion is well-expressed by the Commission, it did not provide any substantive analysis of the Sewer Rules in this case. The Sanitary Board has expressed its concern several times in this litigation that there is a fundamental disconnect between Commission “precedent” and the Sewer Rules. Such a disparity is on full display in this case, wherein the Commission ignores its own regulations. This is problematic for several reasons.

First, the Commission’s Order pays little heed to the 1906 Agreement because the Commission determined that other authority controlled the resolution. However, the single best piece of evidence as to the intention of the parties is to be found in the 1906 Agreement. In any event, however, this Court has long held that “[a] valid written instrument which expresses the intent of the parties in plain and unambiguous language is not subject to judicial construction or

interpretation but will be applied and enforced subject to such intent.” Syl. pt. 1, Cotiga Development Co. v. United Fuel Gas Co., 147 W. Va. 484, 128 S.E.2d 626 (1963). That intention should be gathered from the entire instrument creating the restriction, including the surrounding circumstances and the object the covenant is designed to accomplish. See Armstrong v. Stribling, 192 W. Va. 280, 284, 452 S.E.2d 83, 87 (1994) (*per curiam*). The same rule applies to the construction of easements. See Farley v. Farley, 215 W. Va. 465, 468, 600 S.E.2d 177, 180 (2004).

The 1906 Agreement is plain on its face. The 1906 Agreement is, in fact, an easement between several landowners (predecessors-in-interest to the Complainants) who agreed to build and maintain a sewer line to benefit their properties and the current and future owners thereof.

¹⁰ The 1906 Agreement states as follows:

This AGREEMENT made and entered into this 8th day of October, 1906, between Isadore Schwabe, Murray Briggs, J. B. Garvin, John D. Price and Willard F. Comstock,

WITNESSETH, Whereas the said parties have constructed a sewer extending from and connecting with the Quarrier Street Sewer, through the lots of the said Schwabe, Briggs, Garvin, John D. Price and into the lot of said Comstock, for the joint use and accommodation of the several properties through which the same passes, the said sewer running through lots one, two, three, four and five of Block “G” of the “First Ruffner Addition” in the City of Charleston, West Virginia,

NOW, THEREFORE, it is hereby agreed by and between the parties hereto, on behalf of themselves, their heirs, and assigns, that the said sewer shall be and remain a common sewer for the use and benefit of the several properties through which the same runs and for the use and benefit of the present and future owners of each of said lots for all time to come.

¹⁰ Based upon the 1906 Agreement, Complainants had record notice of the shared customer service line. See Syl. pt. 4, Cole v. Seamonds, 87 W. Va. 19, 104 S.E. 747 (1920) (actual notice of such restrictive covenants is not essential. Such constructive notice is afforded by a duly recorded instrument in the vendee's chain of title is sufficient.). Moreover, Mr. McCormick had actual notice as the 1906 Agreement was set forth expressly in his deed. Neither Complainant can argue that they did not know (or should not have known) about this issue.

It is further agreed that the same shall be maintained at the common expense of the several properties through which the same runs,

It is further agreed that no stable shall be connected with said sewer.

It is further agreed that all the provisions of this agreement shall constitute and remain covenants running with the land, as to the several lots above mentioned and binding upon the present and all future owners thereof.

(App'x, 289-90).

In this case, the intent of the instant line is clear: it is a customer service line serving multiple dwellings. Based on the 1906 Agreement, we can say unequivocally that the parties to the 1906 Agreement intended to do the following: (1) construct a "sewer" to accommodate several properties that connected to the Quarrier Street Sewer; (2) jointly maintain the sewer among the signatories and all future owners; and (3) agree that the covenant to do the foregoing be binding on all future owners of the lots in question. Thus, in modern sewer practice, this line amounts to a customer service line, albeit one that is non-conforming under the current Sewer Rules. As such, it is the Complainants' responsibility. See Sewer Rule 5.3.g. ("A customer must maintain his service pipe in good condition and free from all leaks and defects, at the customer's cost and expense. A customer's failure to comply with this rule may result in termination of water or sewer service pursuant to these rules."). There is no other reasonable interpretation of Complainants' line. The Commission did not choose to even acknowledge the intent of the 1906 Agreement. The reason is that to do so would have compelled the Commission to declare that it has no jurisdiction, and, as a consequence, no authority in this case. So, to avoid that jurisdictional barrier, the Commission circumvented this easement by applying a jurisdictional rubric that allowed it to act in this case. In doing so, the Commission

ignored the best evidence concerning what this line is and who it was intended to serve. This is plain error.

Second, one of the stated purposes of the Sewer Rules is to “establish the rights and responsibilities of both utilities and customers.” Sewer Rule 1.5.b. (emphasis added). Under the Sewer Rules, therefore, the question is whether the line is properly considered a customer service line or a sewer main. A “sewer main” is defined as:

[S]ewer pipe owned, operated, or maintained by the utility located in a public right-of-way, street, alley, or private right-of-way, used for the purpose of collecting sewage and from which service connections for customers are taken. Any sewer pipe extending through a utility right-of-way across private property shall be a sewer main. Costs to install a sewer main across private property are subject to the cost-sharing provisions of subsection 5.5.

Sewer Rule 1.7.n. (emphasis added). It is undisputed that the Sanitary Board does not own, operate or maintain the line at issue. Indeed, this much is apparent from the 1906 Agreement. The line at issue was constructed by Complainants’ predecessors-in-interest over 100 years ago. (Utility Exhibit 1, at Tab 5). Thus, this line does not meet the definition of a sewer main under the first sentence of Rule 1.7.n. It is further undisputed that the Sanitary Board does not have a right-of-way or easement concerning this line across private property, so this line does not meet the requirements of the second sentence of Rule 1.7.n. As a consequence, by definition, the line at issue cannot be a sewer main.

Therefore, the next question is whether the line at issue constitutes a customer service line. Under the Sewer Rules a customer service line, and its attendant delineation of responsibilities, is defined as follows:

Sewer Rule 5.3.b. provides:

Once an application for service has been granted, the customer shall install and maintain the customer service pipe.

Sewer Rule 5.3.e. provides:

The customer service pipe shall be installed in a workmanlike manner, shall conform to all reasonable rules and regulations of the utility, and shall be maintained by the customer at his own expense.

Sewer Rule 5.3.g. provides:

A customer must maintain his service pipe in good condition and free from all leaks and defects, at the customer's cost and expense. A customer's failure to comply with this rule may result in termination of water or sewer service pursuant to these rules.

Thus, it is without doubt that the customer is responsible for the customer service line.

To continue through the Sewer Rules,

Sewer Rule 5.3.i. provides:

5.3.i. A customer's service pipe shall not pass through or across any premises or property other than that to be served nor cross any portion of the property that could practicably be sold separately from the immediate premises served and no pipes or plumbing in any premises shall be extended therefrom to adjacent or other premises.

This Rule is clearly directed to the customer, instructing the customer, the person who is responsible for the customer service line, that there are requirements and prohibitions with regard to the installation of the customer service pipe. See Sewer Rule 5.3.e.

In this case, there is no doubt that the line is a customer service pipe, albeit an incompliant variation. Indeed, the 1906 Agreement is again instructive. That document states that:

WITNESSETH, Whereas the said parties have constructed a sewer extending from and connecting with the Quarrier Street Sewer, through the lots of the said Schwabe, Briggs, Garvin,

John D. Price and into the lot of said Comstock, for the joint use and accommodation of the several properties through which the same passes, the said sewer running through lots one, two, three, four and five of Block "G" of the "First Ruffner Addition" in the City of Charleston, West Virginia

(App'x, 289-90). In other words, this line was constructed by the predecessors of the Complainants for their own use and accommodation. Unquestionably, the 1906 Agreement precedes the formation of the Sanitary Board, and, more importantly, predates the first sewer regulations to require that customer service lines be separated. (Id., 155-59). But, nevertheless, it is readily apparent that the Board did not construct this line. It was and is the Complainants' responsibility.

Finally, it is virtually impossible for the Sanitary Board to understand its rights and responsibilities under the Sewer Rules if the Commission's position is inconsistent and result driven. As an example, the Sanitary Board was a Defendant in a prior Commission case styled Edward L. and Carrie W. Erby v. Charleston Sanitary Board, et al., Case No. 08-1236-S-C. In that case, the Commission was presented with a factually similar scenario; namely, shared customer service lines. In analyzing the facts of that case, the same Technical Staff assigned to this matter asserted that despite the fact that the lines at issue were shared customer service lines, the Sanitary Board was responsible for the same. (Id., 206-07; 217). The Commission did not adopt that position, although, in fairness, the Commission did not decide the point. Nevertheless, Technical Staff agrees that the present situation and that presented in Erby are "similar in the sense that there [is] more than one customer attached to a service line." (Id., 217).

Deviating from her previous analysis, Technical Staff changed tack twice in this case. Instead of shared customer service lines, Technical Staff first argued in this case that the

customer lines at issue constituted an “alternate mainline.” (Id., 211-12). That argument is both legally and factually untenable, because there clearly is no alternate mainline extension agreement in place by Technical Staff’s own admission. (Id.). At hearing, Technical Staff changed her position once more. Now the line is a “main line for the utility company.” (Id., 218). As discussed above, the shared sewer line is clearly not a “main.” This testimony is merely further evidence of the arbitrary nature of the process and ultimate decision in this case.

It is also important to point out that the Sanitary Board was not formed until 1952, and the first iteration of its treatment plant was not completed until 1956. (Id., 155). Thus, the shared sewer line predates both the Sanitary Board and the Commission. The Commission itself did not promulgate any rule addressing customer service lines until 1977. This begs a question that the Commission would not answer; namely, what should the Sanitary Board have done in 1977? Should it have sent out a notice to all customers telling them that if they have an improper service line, they must repair it or face termination of sewer service? The larger question is what should the Sanitary Board do now? Send out the same notice? Under the Commission’s Order, if one of these situations crops up again in the future, the Sanitary Board and the Commission will be back to where they started. Additionally, the Sanitary Board now has little choice, it would appear, but to actively search out improper shared customer service lines and either repair the same or tell the owner to repair the same. Otherwise, protracted litigation is sure to follow. As a non-profit, the Board can only ameliorate this increase in responsibility by raising rates to hire new staff and purchase more equipment to operate, maintain and replace all customer service lines. Like it or not, this is what the Commission has wrought.

And, to be sure, this is a matter of statewide concern. The Sanitary Board is not alone in asserting the substantial problems that would result from the Recommended Decision, and, by extension, the Commission's Order. The MWQA has thirty-three members (or 90% of the State's municipal utilities' customers) throughout the State of West Virginia, and it has advanced—on behalf of its constituents—the same overall concerns. The truth is that the Sanitary Board is an easy target because its system is amongst the largest sewer systems in the State. Smaller, more rural utilities are also subject to the same scrutiny. Somewhat tellingly, the MWQA filed an affidavit from its president, Mr. Sago, who canvassed its members to determine their experience with this issue. The members of MWQA reported that they are aware of hundreds of these situations, and that even that number was merely the tip of the iceberg. Notably, the Commission disregarded and did not address this evidence explicitly. Based on the foregoing, therefore, the Commission's failure to even remotely analyze the line at issue under the Sewer Rules leads to the inexorable conclusion that the Order was an “easy fix,” but not a proper, sustainable solution. Moreover, it represents bad public policy that favors the non-compliant customer to the compliant customer. Accordingly, the Commission erred in determining that the shared line in this case was not a customer service line within the meaning of its own regulations.

E. The Commission's conclusion that there need not be a finding of blame on the part of the utility in compelling a utility to take over a given line is not supported by the Commission's precedent, nor is it good public policy.

It appears that Commission precedent is geared towards situations involving substantial sewer works built by another that a utility declined to accept into its system for various reasons. Usually, these cases involve many customers and peculiar arrangements with utilities. More importantly, in virtually all of these cases, the utility knew about the situation and was either

recalcitrant or simply went along with the arrangement. Even the Commission acknowledges “that in some cases, the Commission has applied the policy and required utilities to make repair or replacements based, at least in part, on a finding that the utility knowingly billed a customer and provided service through non-compliant lines.” (App’x, 1294). This is a mild understatement. Literally every case cited by the Commission in addressing this issue contained a decision based on revenues and/or knowledge of or complicity in the continuation of a non-compliant line.

In Hurst, there was an actual agreement between a private party and a utility preventing a customer from obtaining service. Hurst, at 1. In Taylor, the utility agreed to allow a private individual to construct line through which the utility then sold water. Taylor, at 2-3. In Union Williams, the Commission approved a project that had lines owned by a third party. Union Williams, at 3; 7. In Irons, there was both a finding of revenues for a twenty-year span and an arrangement that the mayor of the town described as “an illegal hookup originally.” Irons, 2-3. In Prutilpac, the utility was on actual notice of the line and apparently refused to accept it for reasons that the ALJ determined were basically rooted in recalcitrance, despite repeated attempts to convey the same to the utility by the Mall. Further, the line in Prutilpac served close to one hundred customers that the utility billed regularly. In Broadmoor, the sole and only new syllabus point that was decided related to a landlord tenant issue, and expressly required that the “utility participated in the case and did not object.” Broadmoor, at syl. pt. 3. Needless to say, the Sanitary Board objects. In Athens, the utility admitted that its arrangement with the developer was “unorthodox, and perhaps illegal.” Athens, at 2. In Myers, the result was dictated by the billing and collection of revenues for twelve years, and the fact that the utility had long-standing knowledge of the issue. Myers, 4-5. In Craig, the most germane

issues were the utility's awareness of the non-compliant line, and that a new residence connected to the line two years prior to the complaint, even though the utility knew about the non-compliant situation. Craig, 3; 5-6.

All of these cases involve some complicity by the utility in allowing a non-compliant line to serve customers. Many also point out that the utility obtained revenues from customers. Several involved "unorthodox" and "illegal" arrangements with private parties. Thus, Commission precedent has long indicated, at least tacitly, that there must be an element of complicity to pass on certain responsibilities to a utility. However, none of these cases involved a private easement executed by private individuals relating to private property. In addition, the Sanitary Board had no knowledge of the Complainants' sewer array until it developed a defect. Accordingly, as discussed further below, foisting this responsibility upon innocent actors, such as the Sanitary Board and its compliant customers, is simply bad public policy.

The following represent a few examples of how such a precedent will create an immeasurable financial burden on utilities and their customers.¹¹ When one considers all of the

¹¹ A utility bills its customers in the form of approved rates, which are established at levels necessary for the utility to receive revenues sufficient to pay its debt and operating costs. In the case of a municipal or other non-private public utility, there are no shareholders to pay any of the costs, and there is no revenue coming in for line items (such as investor return) which could be used for operational expenses if necessary. For a municipal or other non-private public utility, the revenues fairly closely meet expenses with very few "extra" dollars to use for unnecessary line replacement or construction. Further, as a customer pays his bills for sewer service such revenues are not booked or saved to an individual customer "bank" as a reserve to pay for future problems that particular customer may have with his/her service line. The Complainants' payment of their sewer bills covers the cost of transporting and treating their sewage and the cost of the debt of the sewer system. The Complainants have received services in exchange for their sewer bill payments. The Sanitary Board's only benefit from receiving the Complainants' bill payments is a benefit equal to the cost of serving the Complainants. The Sanitary Board has not reaped benefits in excess of the services it has provided. Further, the Sanitary Board continually makes investments in the transportation and treatment system which has benefitted the Complainants. It is not equitable to shift the responsibility of the customer service line to the Sanitary Board simply because the Sanitary Board has received sewer bill payments from the Complainants.

streets and neighborhoods in Charleston and surrounding areas served by the Sanitary Board where residential, commercial and industrial structures were constructed, there is an overwhelming likelihood that customer service lines were not constructed as envisioned by today's Sewer Rules. Other individuals will have no incentive to properly construct and connect customer service lines if they know that the utility will be required to replace any line that is non-compliant. The use of substandard materials and substandard building practices in order to cut costs will be abundant. Developers will have no incentive to properly lay out and construct customer service lines if they know that the utility will be required to replace any line that is non-compliant.

The homeowners (customers) in this case served by these substandard lines benefited from their lower installation cost, and under the Commission's reasoning, will benefit again from the repair of such lines at the Sanitary Board's other customers' detriment. If the Sanitary Board is required to correct all of these situations, as the Commission's Order seems to require, the cost to the Sanitary Board's customers would easily be millions of dollars. There is no basis in the Sewer Rules to lay that responsibility at the feet of the Sanitary Board and its compliant customers.

Finally, the Commission Order disregards the fact that even if the Sanitary Board fixes the "shared" customer service line in this case and takes "regulatory control" thereof, the daisy-chain nature of the connections between the Complainants' properties will still violate the Sewer Rules as applied by the Commission because, under Rule 5.3.i, the lines will continue to "pass through or across any premises or property other than that to be served" and will "cross any portion of the property that could practicably be sold separately from the immediate

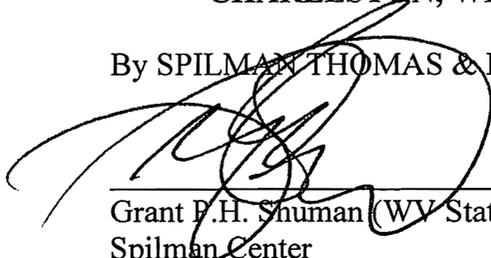
premises served”¹² Thus, the Commission’s Order invites a continuing violation of the Rules concerning customer service lines. It cannot possibly be the desire of the Commission to issue a decision that countenances “fixing” an issue via a method that directly contradicts the Commission’s own regulations. The proper result here is for the Complainants to perform under the 1906 Agreement, or sort out their obligations under the Agreement in circuit court, and bring this line into compliance with modern sewer practice. At that point, the Sanitary Board can make any new necessary connections, and this problem will be truly and completely dealt with. Band aids do not suffice here.

VI. CONCLUSION

For the reasons set forth herein and those reasons apparent to the Court, The Sanitary Board of the City of Charleston, West Virginia respectfully requests that this Honorable Court suspend the Commission’s Order of June 24, 2013, and remand this case to the Commission for dismissal for want of jurisdiction, or, in the alternative, determine that the Commission erred in requiring the Sanitary Board to repair this line, and compel Complainants to repair their own customer service line as provided by the Sewer Rules.

THE SANITARY BOARD OF THE CITY OF CHARLESTON, WEST VIRGINIA

By SPILMAN THOMAS & BATTLE, PLLC



Grant P.H. Shuman (WV State Bar #8856)
Spilman Center
300 Kanawha Boulevard, East
Charleston, WV 25301
Phone: 304-340-3800
Fax: 304-340-3801
gshuman@spilmanlaw.com

¹² See App’x, 148 (showing that the customer sewer line runs from Complainant McCormick’s home (under his foundation floor) into Complainant Newberger’s home (under her foundation floor).

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

THE CITY OF CHARLESTON SANITARY BOARD,

Petitioner,

v.

DOCKET NO. _____

THE PUBLIC SERVICE COMMISSION
OF WEST VIRGINIA,

Respondent.

CERTIFICATE OF SERVICE

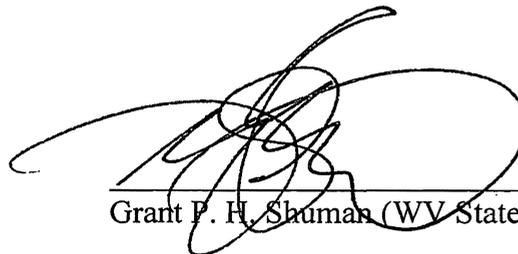
I, Grant P. H. Shuman, counsel for The Sanitary Board of the City of Charleston, West Virginia, hereby certify that service of the foregoing **Petitioner, The Sanitary Board of the City of Charleston, West Virginia's Brief** has been made upon the parties of record by United States Mail, postage prepaid, on this 24th day of July, 2013, addressed as follows:

Richard E. Hitt
c/o Ms. Sandra Squire
Executive Secretary
Public Service Commission
of West Virginia
201 Brooks Street
Charleston, West Virginia 25301

James McCormick
1408 Quarrier Street
Charleston, WV 25301

William S. Winfrey, II
1608 West Main Street
PO Box 1159
Princeton, WV 24740

F. Paul Calamita
Counsel, West Virginia Municipal
Water Quality Association
6 South 5th Street
Richmond, Virginia 23219



Grant P. H. Shuman (WV State Bar No. 8856)