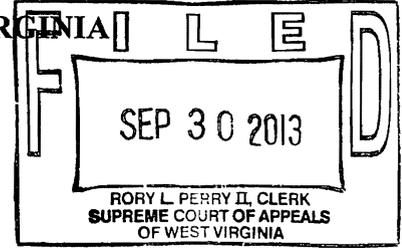


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



**The Sanitary Board of the
City of Charleston,**

Petitioner,

v.

Docket No. 13-0727

**The Public Service Commission of
West Virginia, Mary Lou Newberger,
and James McCormick,**

Respondents.

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

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I. SUPPLEMENTAL STATEMENT OF THE CASE

The Sanitary Board of the City of Charleston, West Virginia (the “Sanitary Board” or the “Board”) appeals from a June 24, 2013 Order of the Public Service Commission of the State of West Virginia (the “Commission”) determining that a shared sewer line constructed and owned by a group of property owners pursuant to a 1906 agreement is a main line of the Sanitary Board “for regulatory purposes,” directing the Sanitary Board to repair an existing break in the shared sewer line, and imposing on the Sanitary Board the obligation to repair and forever maintain the private sewer line in question, including replacing and/or relocating the line if necessary in the future.

In accordance with Rules 10(g) and (d) of the West Virginia Rules of Appellate Procedure, the Sanitary Board relies on its Statement of the Case in Petitioner’s Brief. (Petitioner’s Brief at 2-10.) However, the Sanitary Board emphasizes, in response to Respondent, Mary Lou Newberger’s, Summary Response (hereinafter, “Summary Response”), that this Appeal is not rendered moot due to the Sanitary Board’s completion of the sewer line repair mandated by the Commission.¹ Further, the Sanitary Board emphasizes, in response to the Statement of the Respondent Public Service Commission of West Virginia of its Reasons for the Entry of its Order of June 24, 2013 (hereinafter, “Statement of Reasons”), that the Commission has downplayed the impact of the Order by claiming that all the Order requires is a repair of the sewer line in question. At the very least, the Order requires the Sanitary Board to repair any further problems on the shared sewer line which any of the sixteen customers may face, including acquiring ownership of the line and replacing the line if necessary. Moreover, the

¹ The sewer line repair was completed by the Sanitary Board not due to a belief that the sewer line is the responsibility of the Sanitary Board, but in order to comply with the Order.

Commission's June 24, 2013 Order has far reaching implications beyond the mandated repair of the sewer line that will adversely affect the Sanitary Board and its rate payers for years to come.

II. ARGUMENT

A. The shared sewer line at issue in this case is subject to a private easement, and the Commission lacks jurisdiction to interpret or discard said easement.

At the heart of this case is a 1906 Agreement, an easement, on record with the Kanawha County Clerk since 1906, that governs the responsibilities related to the shared sewer line and binds the present and future owners of the lots for which it benefitted (Appendix Record (hereinafter "App'x"), at 131, 289-90.)

This Agreement, and the duties and responsibilities set forth therein concerning the shared sewer line at issue, are matters of real property, and the interpretation of, and remedy for breach of, those duties and responsibilities are solely within the province of a circuit court. The question in this case is whether the Commission may usurp that authority of a circuit court and decide private disputes arising from a private easement concerning private property. The answer is that the Commission has no such authority, express or implied.

The Sanitary Board has not taken issue with 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.

The only way the Commission's 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 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 Order 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).² 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. In its June 24, 2013 Order (App'x, at 1282-1300) the Commission did not explain why it chose to depart from this long-standing principle. The Commission failed to discuss or address its prior decisions in this regard.

² All Commission orders or recommended decisions referenced herein are available at the Commission's website.

Despite Petitioner's first Assignment of Error set forth in its Brief filed in this Appeal stating that the Commission exceeded its jurisdiction by resolving a real property dispute, the Commission in its Statement of Reasons did not fully address the real property issue, but rather simply concluded that the Commission did not exceed its jurisdiction because it has regulatory jurisdiction to order the Sanitary Board to repair the shared sewer line. The line of cases cited by the Commission was anticipated, and rebutted and distinguished by the Sanitary Board in its Brief filed July 24, 2013.

The Commission continues to gloss over the fact that the core of this case is an easement agreement under which the property owners served by the sewer line have responsibilities related to the sewer line. The Commission has skirted the issue of its lack of jurisdiction over real property issues and has not directly refuted the Sanitary Board's arguments that the Commission had no jurisdiction to decide this case involving a real property issue. Instead, the Commission ignores the issue and simply proclaims that its regulatory authority over the Sanitary Board allows utility law to trump real property law and usurp the jurisdiction and authority of the Kanawha County Circuit Court.

The Commission has overstepped its jurisdiction to reach its desired result, and its failure to dismiss the Complaints below at the outset was reversible error.

B. The Commission Order creates a great deal of potential liability for sewer utilities and their customers.

The Commission's argument in its Statement of Reasons that the Sanitary Board has overstated the impact of the Commission decision in this case is uninformed at best. As the Sanitary Board argued in its Brief in this matter, the Order is of significant impact because the Commission has in error ignored the 1906 Agreement and determined that this case does not involve a real property matter over which it has no jurisdiction; has incorrectly applied to this

case a line of cases that are all clearly distinguishable from the facts of this case, simply stating that “the underlying public policy is the same” (App’x, at 1293); has created the fictional doctrine of “regulatory control”; and has erroneously determined that it did not need to make a finding of fault or assessment of blame or utility complicity regarding the private shared sewer line in order to find the Sanitary Board responsible to repair the sewer line. There is nothing in the Order that restrains the Commission from applying these unsupported determinations to future cases, and doing so will clearly negatively impact utilities. Further, while the Commission in its Statement of Reasons argues that the Order is “limited to the specific circumstances presented by these two cases,” the Commission has not supported this argument with a cite to language in the Order that defines the “specific circumstances” that limit the decision. (Statement of Reasons, at 15.) Although the Commission in its Statement of Reasons tries to imply that the Order is limited to the circumstance where there is a recorded instrument, this is simply not accurate. What about the parents who have divided their land and allow their children to build houses and connect their sewer customer service lines to the parents’ sewer customer service line? What about the individual who has turned his house into a duplex (or apartments) and thereby created multiple customer service lines connecting into the original customer service line? What about the “developer” such as Mr. Schwabe in the present case, who constructed four or five houses on a street in Charleston in the early twentieth century and constructed a joint customer service line to connect to the main located in the street? According to the Commission the Sanitary Board has assumed “regulatory control” over those lines. There are literally hundreds of these kinds of customer service line situations throughout Charleston and other cities in West Virginia, and this decision hands financial responsibility for these lines to the municipalities who had no part in or knowledge of their creation or existence. The

Sanitary Board filed an affidavit of Mr. Tim Haapala in this case in which he stated that after the Commission 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. (App’x, at 1212-73.) The Municipal Water Quality Association, Inc. (“MWQA”), comprised of water and sewer utilities statewide, representing approximately 90% of the sewer population in the state, moved to join the case as an *amicus curiae*. (*Id.*, at 544-50.) MWQA filed a Motion for Leave to file the affidavit of David C. Sago, its President. (*Id.*, at 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.*, at 1280.)

Moreover, the Commission is disingenuous in its argument in its Statement of Reasons: the Commission argues that the June 24, 2013 Order “only directs the Sanitary Board to repair the sewer line and sinkhole . . . the Sanitary Board does not have to take ownership of the line . . . does not need to obtain easements . . . and does not have to replace the entire sewer line.” (Statement of Reasons, at 14-15.) However, the fact is that the Order also concludes that ownership of the line is not 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 (sic) and Quarrier Streets” (App’x, at 1298 (emphasis added).) The line is already over 100 years old. The line will break down at some point in the future and need repaired or replaced. Thus, the Order clearly demonstrates the Commission’s intent to hold the Sanitary Board responsible to own and repair this line at some

point in the future. For all of these reasons, the Sanitary Board is gravely concerned about the impact of the Order on the Sanitary Board and on sewer utilities and sewer customers statewide for years to come.

C. **The shared sewer line is not a sewer main and subject to the Sanitary Board's responsibility.**

The Commission has incorrectly characterized the privately owned shared sewer line as a main line, thus placing the line under the responsibility of the Sanitary Board. In doing so the Commission has ignored the definition of a "sewer main" in its own Rules for the Government of Sewer Utilities 150 C.S.R. § 150-5-1, et seq. (the "Sewer Rules") and has also incorrectly transferred the customer's duty to maintain his/her service line in a manner compliant with the Sewer Rules to the Sanitary Board.

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. 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.

Sewer Rule 5.3.i. provides:

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.

These Rules are 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.

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, at 289-90). In other words, this line was constructed by the predecessors of the Complainants for their own use and accommodation. It is readily apparent that the Board did not construct this line. It was and is the Complainants' responsibility. There is no basis for the Commission to transfer the customer's responsibility to have a service line compliant with the Sewer Rules to the utility as it has done in this case. The Commission has promoted an arbitrary construction of Rule 5.3.i by taking clear language that prohibits a customer from having a customer service line that passes through or across property other than that to be served, and now requiring the Sanitary Board to fix the customer's non-compliance, at the cost of other ratepayers. (See Statement of Reasons, at 23.) There is absolutely no merit in such a construction of this Rule.

In further meritless support of its argument that the shared sewer line is a sewer main, the Commission argues that the customers served by the shared sewer line have "paid the same rate as other customers connected to sewer mains operated and maintained by the Sanitary Board." (Statement of Reasons, at 21-22.) This argument has no bearing on the character of the sewer line. Under the Sewer Rules every customer is responsible for the proper construction and operation of a customer service line. No matter the age or length of a customer's service line, every customer pays the same rates for sewer service. The customer service line has no bearing on the rates he/she pays.

The customers served by the shared sewer line have had their sewage transported away from their homes by the Quarrier Street main line and treated by the Sanitary Board's treatment plant just as every other customer has their sewage transported and treated. In fact, capital (or debt) cost and operational cost of this sewer line is not included in the Sanitary Board's rates, and Ms. Newberger and Mr. McCormick (and the others who share this customer service line) have not been paying anything to move their sewage through the sewer line – just like no other customer pays for sewage movement through his/her customer service line.

The subject customers have gotten away with not having to maintain a Rules-compliant customer service line. The fact that they pay the same rates for sewer service as every other customer does not entitle them to have the Sanitary Board's other customers pay the cost of the Sanitary Board now taking over repairs and responsibility of the non-compliant line. Once it became apparent that the shared sewer line was not in compliance with the Sewer Rules, the Commission should have ordered the affected customers to bring the shared line into compliance, just as would be the case if the shared line were being built today. The only difference between the existing shared sewer line and one being constructed today is the passage of time. These customers should now be required to become compliant with the Sewer Rules like the rest of the Sanitary Board's paying customers.

The appropriate result would have been for the Commission to order the customers/property owners to make their service lines compliant with the Sewer Rules (or permit the Sanitary Board to require the customers/property owners to make their service lines compliant). Instead, the June 24, 2013 Order requires the repair, maintenance and eventual replacement of a private line to be made with public funds.

D. The Commission can fulfill its “statutory mandate” to regulate the service provided by a public utility without foisting the cost and responsibility of the private sewer line at issue upon the Sanitary Board.

The Commission claims that “to allow a private party to stand between a public utility and its customers thwarts the Commission’s jurisdiction.” (Statement of Reasons, at 18.) The Commission also claims that in order for the Commission to fulfill its “statutory mandate to regulate the service provided by a public utility” a private party cannot be interposed between a public utility and its customers. (Statement of Reasons, at 19.) The answer to this perceived problem is not to require the Sanitary Board to shoulder the blame and cost of the customers’ failure to have customer service lines that are compliant with the Sewer Rules. The Sanitary Board had no involvement, knowledge, or complicity in the construction or operation of the shared sewer line. The correct remedy to the instant situation is for the Commission to permit the Sanitary Board to require the customers/property owners to fix their customer service lines and make them compliant with the Sewer Rules. Doing so will remove the so-called private party and place the responsibility and cost squarely where it belongs – with the non-compliant customer – instead of on the shoulders of the compliant customers of the Sanitary Board.

E. The fact that the Sanitary Board repaired the existing break in the sewer line as ordered by the Commission does not render this Appeal moot.

Respondent Newberger, in her Summary Response, states her belief that this Appeal is moot since the Sanitary Board has made the Commission-ordered repair to the sewer line. (Summary Response, at 1.) The Commission in its June 24, 2013 Order (App’x, at 1282-1300) made numerous conclusions of law, and also ordered, among other things, the Board to repair the sewer line at issue in this case. A break has existed in the sewer line for over 18 months, and although the sewer line is located on Newberger’s property and serves her residence, Newberger has made no effort to fix the break. Upon the Commission’s ordering the Board to make the

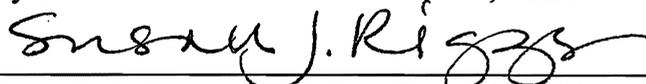
sewer line repair, the Board did so in order to comply with the Commission's Order. However, the Sanitary Board has raised numerous Assignments of Error in this Appeal, and the Board's repair of the line in no way represents acquiescence to the Commission's Order. Newberger's immediate problem has been remedied, thus she is ready to be finished with this matter. Newberger's self-concerned view does not recognize the adverse impact of the Order on the Board and its ratepayers, and thus her opinion that this Appeal is now moot is erroneous. At the very least, the Order requires the Sanitary Board to repair any further problems on the shared sewer line which any of the sixteen customers may face, including acquiring ownership of the line and replacing the line if necessary.

III. 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 lack of jurisdiction, or, in the alternative, determine that the Commission erred in requiring the Sanitary Board to repair this line.

THE SANITARY BOARD OF THE CITY OF CHARLESTON, WEST VIRGINIA

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CERTIFICATE OF SERVICE

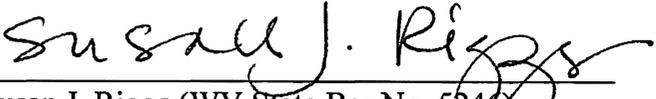
I, Susan J. Riggs, counsel for The Sanitary Board of the City of Charleston, West Virginia, hereby certify that service of the foregoing **Petitioner, The Sanitary Board of the City of Charleston, West Virginia's Reply Brief** has been made upon the parties of record by United States Mail, postage prepaid, on this 30th day of September, 2013, addressed as follows:

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