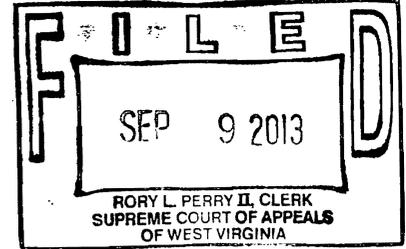


IN THE SUPREME COURT OF APPEALS  
OF WEST VIRGINIA  
CHARLESTON



THE SANITARY BOARD OF THE CITY OF CHARLESTON,

Petitioner,

v.

No. 13-0727

PUBLIC SERVICE COMMISSION OF WEST VIRGINIA;  
MARY LOU NEWBERGER AND JAMES MCCORMICK,

Respondents.

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STATEMENT OF THE RESPONDENT PUBLIC  
SERVICE COMMISSION OF WEST VIRGINIA  
OF ITS REASONS FOR THE ENTRY OF ITS ORDER  
OF JUNE 24, 2013, IN  
CASE NO. 11-1572-S-C AND CASE NO. 11-1601-S-C

---

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September 9, 2013

**TABLE OF CONTENTS**

TABLE OF AUTHORITIES ..... iii

STATEMENT OF THE CASE..... 1

    General Background ..... 1

    Procedural Background..... 5

    Commission Order ..... 7

SUMMARY OF ARGUMENT ..... 11

STATEMENT REGARDING ORAL ARGUMENT AND DECISION ..... 12

STANDARD OF REVIEW ..... 13

STATEMENT OF REASONS AND NOTE OF ARGUMENT ..... 14

    I.    THE CITY OF CHARLESTON SANITARY BOARD OVERSTATES  
          THE IMPACT OF THE PUBLIC SERVICE COMMISSION ORDER..... 14

    II.   THE COMMISSION’S STATUTORY MANDATE TO ENSURE THE  
          AVAILABILITY OF ADEQUATE, ECONOMICAL AND RELIABLE  
          UTILITY SERVICES THROUGHOUT THE STATE IMPLICITLY  
          INCLUDES THE AUTHORITY TO PROHIBIT THE FACILITIES OF A  
          PRIVATE PARTY FROM BEING INTERPOSED BETWEEN A  
          PUBLIC UTILITY AND ITS CUSTOMERS..... 177

    III.  THE PUBLIC SERVICE COMMISSION DID NOT EXCEED ITS  
          STATUTORY JURISDICTION BY DIRECTING THE CITY OF  
          CHARLESTON SANITARY BOARD TO REPAIR THE BROKEN  
          EIGHT-INCH SEWER MAIN SERVING SIXTEEN CUSTOMERS. .... 20

    IV.  THE EIGHT-INCH BROKEN SEWER MAIN IS A UTILITY FACILITY  
          USED TO TRANSPORT THE COMBINED SEWAGE FLOW OF  
          SIXTEEN CUSTOMERS OF THE CITY OF CHARLESTON  
          SANITARY BOARD. .... 21

    V.   THE PUBLIC HEALTH AND SAFETY DEMAND THE OPERATION  
          OF THE EIGHT-INCH SEWER MAIN IS NECESSARY TO PROVIDE  
          SEWER SERVICE TO SIXTEEN CUSTOMERS OF THE CITY OF  
          CHARLESTON SANITARY BOARD AND THAT LINE MUST BE

REPAIRED BY THE CITY OF CHARLESTON SANITARY BOARD.....25

CONCLUSION.....277

## TABLE OF AUTHORITIES

### CASES

#### UNITED STATES SUPREME COURT

Permian Basin Area Rate Cases,

390 U.S. 747 (1968) ----- 13

#### SUPREME COURT OF APPEALS OF WEST VIRGINIA

Benwood v. Public Service Commission,

75 W.Va. 127 pt. 5 syl., 83 S.E. 295 (1914) ----- 3, 21

Boggs v. Public Service Commission,

154 W. Va. 146, 174 S.E.2d 331 (1970)----- 20

Broadmoor/Timberline Apartments v. Public Service Commission,

180 W.Va. 387, 376 S.E.2d 593 -----8, 10, 17

C & P Telephone Co. v. City of Morgantown,

144 W.Va. 149, 107 S.E.2d 489, 469 (1959) ----- 2, 21

Central West Virginia Refuse, Inc. v. Public Service Commission,

190 W.Va. 416, 438 S.E.2d 596 (1993) ----- 13

Chesapeake and Potomac Telephone Company v. Public Service Commission,

171 W.Va. 494, 300 S.E.2d 607 (1982),----- 14

City of Mullens v. Power Co.,

122 W.Va. 179, 7 S.E. 2d 870 (1940)----- 2, 21

City of Wheeling v. Renick, 145 W. Va. 640, 116 S.E.2d 763 (1960)-----20, 25

Delardes v. Morgantown,

Syllabus Pt. No. 3 148 W.Va. 776, 137 S.E.2d 426, 433 (1964) ----- 2, 20

Ex Parte Dickey,

76 W.Va. 576, pt. 3 syl., 85 S.E. 781 (1915) ----- 2, 21

Lockard v. City of Salem,

127 W.Va. 237, 32 S.E.2d 568 (1944)----- 2, 21

Monongahela Power Company v. Public Service Commission,

166 W.Va. 423, 276 S.E.2d 179 (1981) -----13, 14

|  |                                 |
|--|---------------------------------|
| <u>Mountain State Water Co. v. Town of Kingwood,</u><br>122 W.Va. 374, 9 S.E. 2d 532 (1940)-----   | 2, 21                           |
| <u>Preston County Light &amp; Power Co. v. Renick,</u><br>145 W. Va. 115, 113 S.E.2d 378 (1960)-----   | 8, 17                           |
| <u>Sexton v. Public Service Commission,</u><br>188 W. Va. 305, 423 S.E.2d 914 (1992)-----  | 13                              |
| <u>United Fuel Gas Co. v. Battle,</u><br>153 W. Va. 222, 167 S.E.2d 890 -----  | 8, 17                           |
| <u>West Virginia Citizens Action Group v. Public Service Commission,</u><br>Syllabus Point 1,175 W. Va. 39, 330 S.E.2d 849 (1985) -----  | 20                              |
| <u>Wheeling v. Natural Gas Co.,</u> 74 W.Va. 372, pt. 6 syl., 82 S.E. 345 (1914)-----  | 3, 21                           |
| <b><u>PUBLIC SERVICE COMMISSION OF WEST VIRGINIA</u></b>   |                                 |
| <u>Burns v. The Sanitary Board of the City of Huntington,</u><br>Case No. 82-259-S-C, November 29, 1982, -----   | 8, 18                           |
| <u>Edward L. and Carrie W. Erby v. City of Charleston Sanitary Board</u><br>Case No. 08-1236-S-C -----   | 15                              |
| <u>Hurst v. West Virginia Water Co.,</u><br>Case No. 8850, 66 ARPSCWV 256, Commission Order May 4, 1979 at 10-13,<br>affirmed Supreme Court of Appeals of West Virginia, 67 ARPSCWV 163,<br>April 1, 1980----- | 8, 9, 10, 17, 18, 22            |
| <u>Mountaineer Heights Homeowners' Ass'n, Inc v. Pinch Public Service District,</u><br>Case No. 87-269-W-C, July 8, 1988 -----   | 8, 18                           |
| <u>Taylor v. Fort Gay Municipal Water Department, and Town of Fort Gay,</u><br>Case No. 10-1088-W-S-C, May 31, 2011 -----  | 8, 18                           |
| <u>Volk v. Broadmoor/Timberline Apartments,</u><br>Case No. 87-342-S-C April 15, 1988, -----   | 8, 9, 17, 18, 20                |
| <b><u>STATUTES</u></b>   |                                 |
| <u>West Virginia Code § 24-1-1 (1986)-----</u>   | 1, 2, 8, 12, 17, 18, 20, 25, 27 |
| <u>West Virginia Code § 24-1-1(a) -----</u>  | 17                              |
| <u>West Virginia Code § 24-1-1(a)(6)(b) (1986) -----</u>   | 24, 28                          |

West Virginia Code § 24-2-1 (1986)----- 2, 27  
West Virginia Code § 24-2-7 (1979)----- 2, 9, 13, 17, 25, 27  
West Virginia Code §24-5-1 (1979) -----12, 13

**RULES**

Rules for the Government of Sewer Utilities, 150 C.S.R. 5, et seq.----- 24  
Sewer Rule 1.7.g -----22, 23  
Sewer Rule 5.3.c ----- 10, 23, 28  
Sewer Rule 5.3.g -----10, 22  
Sewer Rule 5.3.i----- 10, 23, 28  
Rules of Appellate Procedure, West Virginia Supreme Court of Appeals, Rule 20 ----- 12

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STATEMENT OF THE RESPONDENT, PUBLIC  
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ITS REASONS FOR THE ENTRY OF ITS ORDER  
OF JUNE 24, 2013, IN CASE NO. 11-1572-S-C  
AND CASE NO. 11-1601-S-C

---

TO THE HONORABLE JUSTICES OF THE SUPREME COURT  
OF APPEALS OF WEST VIRGINIA:

The Respondent, Public Service Commission of West Virginia (hereinafter "Commission"), hereby tenders for filing with this Honorable Court this statement of its reasons for the entry of its Order of June 24, 2013, in Case No. 11-1572-S-C and Case No. 11-1601-S-C.

**STATEMENT OF THE CASE**

General Background

The Public Service Commission of West Virginia lawfully exercised its statutory jurisdiction pursuant to West Virginia Code § 24-1-1 et seq. when it directed the City of Charleston Sanitary Board ("Sanitary Board," "Board" or "CSB") to repair a sewer main line

that serves at least sixteen structures located on a city block between Quarrier and Lee Streets in Charleston, West Virginia. This sewer line has been functioning as a main line after its installation and after the creation of the Sanitary Board in 1952.<sup>1</sup> The Commission has the authority and a duty to ensure customers receive adequate, economical and reliable service from utilities. West Virginia Code § 24-1-1. The regulatory authority of the Commission extends to municipalities providing utility services. West Virginia Code §24-2-1. The Commission has broad authority to order that unjust, unreasonable, insufficient or unjustly discriminatory regulations, measurements, practices acts or services by a utility be fixed by reasonable measurements, regulations, acts, practices and services. West Virginia Code §24-2-7. The Commission has been granted authority by the West Virginia Legislature to control utility services and to supervise and control public utilities subject to its jurisdiction such that their practices and services are just and fair, just and reasonable, and just and proper. Delardes v. Morgantown, 148 W.Va. 776 at 781 and 784-5, 137 S.E.2d 426, 433 (1964) (the Commission exercises the predominant power of the State with respect to utility's practices, services and rates and that power is paramount to the rights given to a city by general statute to do so); C & P Telephone Co. v. City of Morgantown, 144 W.Va. 149 at 160, 107 S.E.2d 489, (1959) ("The paramount design of pertinent statutes to place regulation and control of public utilities exclusively with the Public Service Commission has been recognized by this Court." 144 W.Va. at 160) Lockard v. City of Salem, 127 W.Va. 237, 32 S.E.2d 568 (1944); City of Mullens v. Power Co., 122 W.Va. 179, 7 S.E. 2d 870 (1940); Mountain State Water Co. v. Town of Kingwood, 122 W.Va. 374, 9 S.E. 2d 532 (1940); Ex Parte Dickey, 76 W.Va. 576, pt. 3 syl., 85

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<sup>1</sup>The Commission entered an Order on October 31, 1952, in Case No. 3851, granting an application for a certificate of convenience and necessity to The City of Charleston to furnish sewage service in the City of Charleston and its environs, Kanawha County.

S.E. 781 (1915); Benwood v. Public Service Commission, 75 W.Va. 127 pt. 5 syl., 83 S.E. 295 (1914); Wheeling v. Natural Gas Co., 74 W.Va. 372, pt. 6 syl., 82 S.E. 345 (1914) .

The Administrative Law Judge (“ALJ”) assigned to these cases conducted a hearing on June 12, 2012.<sup>2</sup> The Commission thereafter required further investigation of the broken sewer main and conducted a further separate hearing before the full Commission on March 14, 2013.<sup>3</sup> A description of the properties served by the sewer main line and location of other sewer lines in the area is provided below.

The Sanitary Board presented Exhibit 1, at the March 14, 2013 Hearing, Tr. II at 32. The left side of Exhibit 1 depicts an aerial photograph of the site, with sewer lines superimposed in green. The center of that Exhibit 1 depicts a scale map of the structures in yellow with sewer lines drawn in green and is attached to this Statement of Reasons.

The city block being served by this sewer main is bounded on the south by Quarrier Street, on the east by Beauregard Street, on the north by Lee Street, and on the west by Shelton Avenue. The sewer main runs from Lee Street to Quarrier Street and serves sixteen customers and transports sewage generally in the direction of the Kanawha River. It connects into a twelve-inch main located in Quarrier Street. Exhibit 1, Tr. II at 32.

Ms. Newberger resides at 1410 Quarrier Street. Tr. I at 9. Her residence is a duplex with 1408 Quarrier Street where James McCormick resides. The two residences share a common wall and a sewer service lateral that runs from that home. Tr. I at 9. The shared service lateral serves the duplex and connects into the eight-inch sewer main along the east side of Ms. Newberger’s property, shown on Exhibit 1, toward Quarrier Street. Tr. II at 32. It is this significant eight-

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<sup>2</sup> The transcript for the Hearing conducted by the ALJ on June 12, 2012 will be referred to as “Tr. I.”

<sup>3</sup> The transcript for the Hearing conducted March 14, 2013 by the Commission will be referred to as “Tr. II.”

inch sewer main that suffered a break and remained unrepaired during the proceeding at the Commission. Tr. I at 9; Exhibit 1, Tr. II at 32.

Starting with the properties on Lee Street, the eight-inch line continues toward Quarrier Street, crosses the front of both Ms. Newberger's and Mr. McCormick's property and thereafter connects into a twelve-inch sewer main in Quarrier Street. Numerous other residences (at least 14 other customers) connect to the sewer main above where it is broken. The break is located in the small front yard on Ms. Newberger's side of the property. Tr. I at 9; Exhibit 1, Tr. II at 32.

The Sanitary Board has verified that at least sixteen customers<sup>4</sup> are connected to the eight-inch sewer main. Exhibit 1, Tr. II at 32. Some of these customers are owners of apartment building with multiple units. The broken eight-inch main resulted in sewage from sixteen creating a sinkhole located adjacent to the sidewalk near her front porch steps on Quarrier Street. Complaint, October 26, 2011; Tr. I at 10, 24. At the time Ms. Newberger purchased her home she stated she was not aware that the duplex shared a sewer line. Tr. I at 24. She did not have an inspection of the home completed; she did not personally research the title; and she stipulated to the existence of a 1906 agreement ("1906 Agreement") running with the property she purchased. Id. at 26-30.

On or about October 11, 2011, Mary Lou Newberger noticed a sinkhole in her front yard close to Quarrier Street. She estimated the hole was at least ten feet deep. Tr. I at 10, 24. At the bottom of the sinkhole, Ms. Newberger could see a "large broken pipe with water coming out of it into the ground." Ms. Newberger called the Sanitary Board who sent a representative to her residence on October 11, 2011. After a brief investigation, the Sanitary Board confirmed it was a

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<sup>4</sup> The Commission describes the number of customers hereinafter as a "minimum" because the witness for CSB could not state with certainty that the line was not serving customers in addition to the identified sixteen. Tr. II, at 55.

sewer line and initially informed Ms. Newberger repairs to the sewer line would be made by the Board. Complaint, October 26, 2011; Tr. I at 10-11.

On October 17, 2011, the Sanitary Board changed its position and informed Ms. Newberger that the Board would not repair the sewer line. The Sanitary Board explained that it had discovered a 1906 Agreement among the residents between Quarrier and Lee Streets to construct and maintain a sewer line. Tr. I at 15. This 1906 Agreement was executed by the parties and recorded as a covenant running with the five original parcels. Tr. I at 18-20. Because of the 1906 Agreement, the Sanitary Board told Ms. Newberger she would be responsible for repairing the broken sewer main. Ms. Newberger filed a complaint with the Commission against the Board requesting the broken sewer line be repaired by the Sanitary Board. Complaint, October 26, 2011; Id. at 16-19.

In response to the Complaint, the Sanitary Board asserted the eight-inch sewer line in Ms. Newberger's front yard was a customer service line, not a main line of the Sanitary Board, and argued that Ms. Newberger was responsible for the repair of the line. Answer to Formal Complaint and Motion to Dismiss, November 14, 2011. James McCormick filed a similar complaint against the Sanitary Board echoing the allegations in Ms. Newberger's Complaint on November 1, 2011.

#### Procedural Background

With the filing of the complaints, the Commission Staff conducted an investigation and made a recommendation about the complaints. Staff urged the Sanitary Board be required to repair the broken sewer line. Staff argued that the 1906 Agreement now contravenes regulatory authority of the Commission and thus should be declared of no moment as not in the public interest. The 1906 Agreement was executed prior to the Public Service Commission statutes and

long before the formation of the Sanitary Board. The Staff acknowledged that although the broken sewer main had been constructed as a private line, the broken main has long been used by the Board as a sewer main. The Sanitary Board has collected and continues to collect its full tariff rates from all of the customers served by the line. The line is necessary to continue service to the Board's customers and should be repaired by the Sanitary Board. Final Staff Memorandum, January 24, 2012. The Sanitary Board filed a response to the Final Joint Staff Memorandum disagreeing with nearly every point. Response to Final Joint Staff Memorandum, October 10, 2012.

In a Recommended Decision on July 24, 2012, the ALJ directed the Sanitary Board to (i) investigate the broken sewer line (ii) determine how many customers the line serves and its general condition, (iii) obtain ownership of the line, and (iv) make any necessary repairs to the broken sewer line. Recommended Decision, July 24, 2012.

The Sanitary Board filed exceptions to the Recommended Decision. Ms. Newberger and Staff responded to the Sanitary Board's exceptions agreeing with the ALJ decision. Complainant Response to Recommended Decision, August 22, 2012; Staff Response to the City of Charleston Sanitary Board, August 29, 2012.

The Commission, by Order on October 15, 2012, urged the Parties to resolve these cases through mediation and to repair the broken sewer line. The Commission directed the Board to provide the number of residences served by the broken shared sewer line and to provide a map showing the extent of the line and all connections, the names and addresses of the customers served by the broken shared sewer line, and any sewer mains located on Beauregard Street and Shelton Avenue. Commission Procedural Order, October 15, 2012. Mediation was unsuccessful,

and the case was set for hearing before the Commission. Commission Procedural Order, January 8, 2013.

On March 14, 2013, the full Commission conducted a further hearing. Tim Haapala, Operations Manager with the Charleston Sanitary Board, testified that this was the first time the Board encountered a recorded instrument between private parties regarding ownership and maintenance of a sewer line. Mr. Haapala also testified that the Sanitary Board halted repairs on the broken sewer line because of the 1906 Agreement. Tr. II at 50.

The Sanitary Board argued that, because of the 1906 Agreement, the Commission lacked jurisdiction to decide the case. The Sanitary Board also argued the repair of the broken shared sewer line was the responsibility of Ms. Newberger. The Sanitary Board asserted the broken sewer line is a shared customer service line. Initial Brief, Charleston Sanitary Board, April 15, 2013. Ms. Newberger urged the Commission to adopt the Recommended Decision. Letter, April 16, 2013. Staff also urged the Commission to adopt the ALJ's Recommended Decision. Initial Brief of Commission Staff, April 15, 2013.

#### Commission Order

The Commission issued a Final Order on June 24, 2013. That Order directed the Sanitary Board to repair the eight-inch broken and open sewer line. Commission Final Order, June 24, 2013, p. 18. In that Order, the Commission ruled that the Sanitary Board did not have to assume legal ownership of the line, obtain easements, or replace the entire line as required in the ALJ's Recommended Decision. It merely had to repair the public health concern created by the broken line. Id. at 17. The Order noted the high cost of replacing the entire eight-inch sewer main or repairing the broken portion of the sewer line. Id. at 12. Instead of directing the Sanitary Board to install new sewer main lines on Lee Street and/or Shelton Avenue, the Commission adopted the

most economical option of repairing the broken portion of the sewer main line. *Id.* at 12. The Commission also limited the impact of its Order to the specific circumstances of these consolidated cases. *Id.* at 18.

The Commission relied upon West Virginia Code § 24-1-1 et seq. and a long line of Commission precedent to support ordering the Sanitary Board to repair the broken sewer line. This statutory authority and case law prohibit the existence of facilities owned by a private party from implicating and controlling the service obligation of a public utility. The interjection of privately owned or controlled property of a third person, between the utility and its customers, hinders the public purpose of the Commission's ability to assure reasonable and adequate utility services and in this instance the health and welfare of persons in the area of the broken sewer line. The rulings of the Supreme Court of Appeals of West Virginia support the Commission's holdings. Broadmoor/Timberline Apartments v. Public Service Commission, 376 S.E.2d 593 (W.Va. 1988), citing United Fuel Gas Co. v. Battle, 153 W. Va. 222, 167 S.E.2d 890 (1969), Preston County Light & Power Co. v. Renick, 145 W. Va. 115, 113 S.E.2d 378 (1960). The Commission has consistently adhered to these principles in its administrative rulings. Taylor v. Fort Gay Municipal Water Department, and Town of Fort Gay, Case No. 10-1088-W-S-C, May 31, 2011, Volk v. Broadmoor/Timberline Apartments, Case No. 87-342-S-C April 15, 1988, Mountaineer Heights Homeowners' Ass'n, Inc v. Pinch Public Service District, Case No. 87-269-W-C, July 8, 1988, Burns v. The Sanitary Board of the City of Huntington, Case No. 82-259-S-C, November 29, 1982, Hurst v. West Virginia Water Co., Case No. 8850, 66 ARPSCWV 256, (Pub. Serv. Comm'n of W.Va., Comm'n Order, May 4, 1979 (final admin. review) at 10-13, affirmed by unpublished opinion Supreme Court of Appeals of West Virginia, 67 ARPSCWV 163, April 1, 1980.

The Commission has jurisdiction over the reasonableness of the practices and services of a public utility. West Virginia Code § 24-2-7. If the Commission finds practices or services of a public utility to be unreasonable, it can direct the utility to correct the practice or service. Id. In this case, the Commission found that the Sanitary Board's practice of providing service to as many as sixteen customers through a broken shared sewer main that is leaking raw sewage into the ground at the bottom of a sinkhole in downtown Charleston is unreasonable and contrary to the public health and safety. Commission Final Order, June 24, 2013, at 18.

The Commission also ruled that the line for all intents and purposes had no functional existence other than as part of the utility system of the CSB. Commission Final Order, June 24, 2013, at 10. After the formation of the Sanitary Board in 1952, customers receiving service from that line have paid the same sewer rate as every other customer on the Sanitary Board system. Those customers did not receive a discount for installing their sewer main. The installation of the sewer line, sometime around 1906, even predated the 1913 creation of the Commission. When the original parties to the 1906 Agreement installed the sewer line, there was no regulatory body charged with supervising sewer service. However, when the Sanitary Board was created in 1952, its role as a public utility, in exchange for a monopoly certificate area, is to assume the tasks, contemplated in the 1906 Agreement, in order to see that they are performed in a safe and reasonable manner consistent with public safety and welfare.

The determination that the Sanitary Board used the eight-inch sewer line as a main line to serve its customers is consistent with decisions of this Court. Hurst v. West Virginia Water Co., Case No. 8850, 66 ARPSCWV 256, (Pub. Serv. Comm'n of W.Va., Comm'n Order, May 4, 1979 (final admin. review) at 10-13, affirmed by unpublished opinion of Supreme Court of Appeals of West Virginia, 67 ARPSCWV 163, April 1, 1980. Volk v. Broadmoor/Timberline

Apartments, Case No. 87-342-S-C (1988), Broadmoor/Timberline Apartments v. Public Service Commission, 376 S.E.2d 593 (W.Va. 1988).

In this case, the Commission determined that the broken sewer line is not a “shared customer service pipe” under Sewer Rule 5.3.g. of the Rules for the Government of Sewer Utilities, 150 C.S.R. 5, but instead is necessary and essential infrastructure for the Sanitary Board to provide service to its customers. In fact, an application of the current rules results in a determination that a line necessary for the utility to accomplish service to multiple customers is functionally either a “utility service pipe” or a “utility main.” Sewer Rules 5.3.c. and 5.3.i. Under either function, it would be the obligation of the utility to repair the facility.

After the Commission issued its Final Order, the Sanitary Board filed with the Commission a Motion to Stay the Order in order to prosecute an appeal with the Supreme Court of Appeals of West Virginia during which time this open sewer would continued to operate. Ms. Newberger filed a response in opposition to the Motion to Stay. Response to Defendant’s Motion to Stay, July 2, 2013. The Motion to Stay was denied by the Commission. The Commission stated that granting the Motion would allow a public health hazard to continue to fester. Commission Final Order, July 8, 2013, at 2.

On July 11, 2013, the Sanitary Board filed a Petition for Reconsideration of the Commission’s July 8, 2013 Final Order. In this Petition, the Sanitary Board asserted that if the broken sewer line was repaired before the appeal was perfected, it could be dismissed as moot. Petition to Reconsider, July 11, 2013, at 3. Ms. Newberger and Staff filed responses in opposition to this Petition. The Commission denied the Sanitary Board’s Petition to Reconsider again stating the public health and safety require the broken sewer line to be repaired. Commission Final Order, July 19, 2013, at 2.

The Sanitary Board fixed the break in the eight-inch sewer main and repaired the sinkhole.

On July 25, 2013 the Sanitary Board filed the Petition for Appeal in these consolidated cases.

### **SUMMARY OF ARGUMENT**

The issue presented to the Court can be simply stated: should the sixteen customers of the Sanitary Board be bound by the terms of the 1906 Agreement that would require them to maintain the line and make the repairs, as argued by the Sanitary Board, or, as determined by the Commission, should the Sanitary Board, as the entity responsible for providing adequate and reliable utility service throughout the City of Charleston, be required to repair the line and provide future adequate service to its customers either by the existing line or other options. This issue has been confused by the disjointed and convoluted arguments contained within the Petition for Appeal of the Sanitary Board. The Commission incorporates the Discussion section of the Final Order for an explanation of the reasons for its decision. This Statement of Reasons will respond to the various arguments of the Sanitary Board contained in its Petition.

The Commission ordered the Sanitary Board to repair an eight-inch sewer main line that has been carrying the sewage of at least sixteen customers from whom the Board collects sewage charges. The Commission's Order is narrowly drawn to the specific facts in these two consolidated Commission Complaint cases. The Commission did not rule on the validity of the 1906 Agreement. The Commission focused, instead, on its own jurisdiction and on the orderly maintenance of facilities that provide utility sewage service and the authority of the Commission to regulate that activity for the public health and safety. The Commission order ensures that the Sanitary Board will provide adequate and reliable sewer service to its customers.

The Sanitary Board misstates the effect of what the Commission actually ordered and claims, contrary to its own witnesses' testimony, that there are numerous similar situations waiting to be found. According to its own witness, this is the first time the Sanitary Board has encountered a situation with a recorded instrument seeming to give control of a sewer line to private parties. The Court decisions dealing with similar situations all have a shared thread and a consistent result – that a private party cannot be interposed between as a basis to preclude or prevent a public utility from its monopoly obligation to serve its customers.

The Commission has the duty to ensure the availability of adequate, economical, reliable and safe utility services. West Virginia Code § 24-1-1. The utility cannot side step its statutory duty because of claims of a private party standing in the way. The Commission has the authority to direct a public utility to repair a utility sewer line serving as many as sixteen customers that is broken and spilling raw sewage into the ground. West Virginia Code § 24-2-7.

After the inception of the Sanitary Board in 1952, the sewer line in question has had no function other than to assure the safe and adequate transportation and disposal of the combined sewage of sixteen customers. The Commission properly determined the broken sewer line must be repaired by the Sanitary Board, because the public health and welfare demand that the broken sewer line be repaired.

#### **STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

According to West Virginia Code §24-5-1 and Rule 20, Rules of Appellate Procedure the Court by Order entered July 26, 2013, established oral argument on the appeal for January 14, 2014.

## STANDARD OF REVIEW

The authority for review of a Final Order of the Public Service Commission by the Supreme Court of Appeals of West Virginia is set forth in West Virginia Code § 24-5-1, which provides in part:

Any party feeling aggrieved by the entry of a final order by the commission, affecting him or it, may present a petition in writing to the supreme court of appeals, or to a judge thereof in vacation, within thirty days after the entry of such order, praying for the suspension of such final order.

In reviewing a Commission Order, this Court is guided by the established holdings in Sexton v. Public Service Commission, 188 W. Va. 305, 423 S.E.2d 914 (1992) and Monongahela Power Company v. Public Service Commission, 166 W.Va. 423, 276 S.E.2d 179 (1981). In Syllabus Point 1 of Sexton this Court reiterated previous holdings: “[A]n order of the public service commission based upon its findings 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.” (citations and quotation marks omitted). In Monongahela Power Company, this Court adopted the comprehensive standard of review applied by many states and set forth in Permian Basin Area Rate Cases, 390 U.S. 747 (1968):

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. . . . 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.

Monongahela Power Company, Syllabus Point 2 (in relevant part).

This Court summarized its three-pronged analysis in Monongahela Power Company in Syllabus Point 1 of Central West Virginia Refuse, Inc. v. Public Service Commission, 190 W.Va. 416, 438 S.E.2d 596 (1993) as follows:

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.

Similarly, in Chesapeake and Potomac Telephone Company v. Public Service Commission, 171 W.Va. 494, 300 S.E.2d 607 (1982), this Court repeated the three-pronged standard of review from Monongahela Power Company case, supra, and added that "[t]his Court will not substitute our judgment for that of the Public Service Commission on controverted evidence". Chesapeake, Syllabus Point 2. This Court further held that "[f]indings of fact made by the Public Service Commission will be overturned as clearly wrong when there is no substantial evidence to support them." Chesapeake, Syllabus Point 3.

### **STATEMENT OF REASONS AND NOTE OF ARGUMENT**

#### **I. THE CITY OF CHARLESTON SANITARY BOARD OVERSTATES THE IMPACT OF THE PUBLIC SERVICE COMMISSION ORDER.**

The Sanitary Board claims the Commission order directing it to repair the broken sewer line is "bad public policy that will negatively affect sewer utilities and sewer companies statewide." Petitioner's Brief, at 1. The Sanitary Board overstates the impact of this decision. The June 24, 2013 Commission Order only directs the Sanitary Board to repair the sewer line and sinkhole. Commission Final Order, June 24, 2013, at 18. Under the Order the Sanitary Board does not have to take ownership of the line (Id. at 17); does not need to obtain easements (Id.);

and does not have to replace the entire sewer line. Id. As stated at page 12, in the Commission's June 24, 2013 Order:

The shared sewer line has functioned relatively well for over one hundred years and when the CSB repairs the current defect, the line may continue to adequately serve the various customers attached to it for many additional years. Even in the event of future line deterioration, modern repair options such as the insertion of a pipe liner can further extend the life of the sewer line. Tr. II at 69. [Citing to the testimony of Sanitary Board Witness Haapala, Operations Manager, Charleston Sanitary Board.] Commission Final Order, June 24, 2013 at 12.

The Commission Order is limited to the specific circumstances presented by these two cases. The Sanitary Board confuses two separate concepts to avoid the simple expedient of repairing the broken sewer line. The situation in this case involves the 1906 Agreement regarding ownership and maintenance of a shared sewer main that was entered into prior to the creation of the Commission and the Sanitary Board. According to the Sanitary Board's Witness Tim Haapala, this is the first time where a recorded instrument between private parties regarding ownership and maintenance of a sewer line has been found. Tr. II at 50. The Sanitary Board confuses the issue in this case with situations where there are multiple connections to a single private sewer line but no recorded instrument<sup>5</sup>.

Using this single, and by its own admission, limited situation, the Sanitary Board argues that repairing a broken sewer pipe is bad public policy and has a chilling effect on public utilities statewide. This ignores what the Commission actually ordered and the testimony of the Sanitary Board's own witness. The Commission ordered the Board to repair the sewer line for now. The

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<sup>5</sup> Only one other Formal Complaint Case, involving the Sanitary Board, has been filed with the Commission in recent history concerning multiple structures connected to a single private sewer line. Case No. 08-1236-S-C, Edward L. and Carrie W. Erby v. City of Charleston Sanitary Board. That Complaint was dismissed by the Commission as moot because the situation had been remedied by the time the Complaint was filed. Commission Final Order, June 4, 2009. No funds to repair the sewer lines were expended by the Sanitary Board. The Erby Complaint also did not deal with any recorded instruments.

Sanitary Board's own witness testified this is the first time they have found a recorded instrument mentioning the ownership of a sewer line. Tr. II at 50. The Sanitary Board also acknowledges it has identified only fifty-seven structures that have shared sewer lines on its system of 24,000 customers – including the sixteen at the Quarrier Street location. Affidavit of Tim G. Haapala, March 27, 2013.

The Commission acknowledged there is a significant difference in the costs associated with repairing the break or replacing the entire sewer line. Commission Final Order, June 24, 2013, at 12. The Commission required only the repair of the break. The Commission noted it is aware that remedying the entire situation could be a “costly and extensive repair . . . for *both the CSB and the persons served by the line.*” *Id.* emphasis added. The Commission found 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 various options, including 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 Shelton Avenue and Quarrier Street pursuant to the rules of the Commission. The Commission chose the most economical option, the repair of the broken portion of the sewer line. *Id.*

To summarize, the Sanitary Board does not have to take ownership of the line, obtain easements for the properties the line crosses, or replace the entire line. It has to repair the broken portion of the sewer line serving these sixteen customers, the least costly option under the circumstances. The Sanitary Board has made the repairs. The Order is limited to the specific circumstances of these two cases and the distinct facts associated with this line and its use. This argument is in error and perplexing in light of the fact that the 1906 Agreement is the only recorded agreement the Board has found.

**II. THE COMMISSION'S STATUTORY MANDATE TO ENSURE THE AVAILABILITY OF ADEQUATE, ECONOMICAL AND RELIABLE UTILITY SERVICES THROUGHOUT THE STATE IMPLICITLY INCLUDES THE AUTHORITY TO PROHIBIT THE FACILITIES OF A PRIVATE PARTY FROM BEING INTERPOSED BETWEEN A PUBLIC UTILITY AND ITS CUSTOMERS.**

West Virginia Code § 24-1-1 and West Virginia Code § 24-2-7 both confer upon the Commission the authority and duty to enforce and regulate the practices, services and rates of public utilities. Specifically West Virginia Code § 24-1-1(a) provides the Public Service Commission has the authority and duty to enforce and regulate the practices, services and rates of public utilities in order to:

- (1) Ensure fair and prompt regulation of public utilities in the interest of the using and consuming public;
- (2) Provide the availability of adequate, economical and reliable utility services throughout the State;
- (3) Encourage the well-planned development of utility resources in a manner consistent with state needs and in ways consistent with the productive use of the State's energy resources, such as coal;
- (4) Ensure that rates and charges for utility services are just, reasonable, applied without unjust discrimination or preference, applied in a manner consistent with the purposes and policies set forth in article two-a [§§ 24-2A-1 et seq.] of this chapter, and based primarily on the costs of providing these services;

Allegations about the "compelling property rights" of a private party, whether established by written agreement or contract, cannot be interposed between a public utility and its monopolistic obligation to serve its customers. West Virginia Code § 24-1-1, United Fuel Gas Co. v. Battle, 153 W. Va. 222, 167 S.E.2d 890 (1960), Preston County Light & Power Co. v. Renick, 145 W. Va. 115, 113 S.E.2d 378 (1960), Hurst v. West Virginia Water Co., Case No. 8850, 66 ARPSCWV 256, Commission Order May 4, 1979 at 10-13, affirmed by unpublished opinion Supreme Court of Appeals of West Virginia, 67 ARPSCWV 163, April 1, 1980. Volk v. Broadmoor/Timberline Apartments, Case No. 87-342-S-C (1988), Broadmoor/Timberline Apartments v. Public Service Commission, 376 S.E.2d 593 (W.Va. 1988).

The Commission has applied this principle in its administrative decisions over several decades. Taylor v. Fort Gay Municipal Water Department, and Town of Fort Gay, Case No. 10-1088-W-S-C, May 31, 2011, Volk v. Broadmoor/Timberline Apartments, Case No. 87-342-S-C April 15, 1988, Mountaineer Heights Homeowners' Ass'n, Inc v. Pinch Public Service District, Case No. 87-269-W-C, July 8, 1988, Burns v. The Sanitary Board of the City of Huntington, Case No. 82-259-S-C, November 29, 1982, Hurst v. West Virginia Water Co., Case No. 8850, 66 APRSCWV 256, Commission Order May 4, 1979.

The Sanitary Board attempts to distinguish the line of cases cited by the Commission in its June 24, 2013 Final Order supporting its authority to require repair of this line. This effort by the Sanitary Board ignores the common thread of those cases – facilities or property owned by a private party cannot come between a public utility and its customers.

To allow a private party to stand between a public utility and its customers thwarts the Commission's jurisdiction. The Commission's jurisdiction is limited to public utilities and facilities identified in use by public utilities; it has no authority over private parties. West Virginia Code § 24-1-1. If the earlier 1906 Agreement controls this situation, as argued by the Sanitary Board, it effectively overrides the Commission's authority and thwarts legislative intent by preventing the Commission from regulating the delivery of sewer service by the Sanitary Board to the customers served by the broken sewer line. The original parties to the 1906 Agreement were five property owners but have now grown to sixteen customers served by the Sanitary Board. As private parties they are not subject to the jurisdiction of the Commission. For example, if in the future, there is a break or blockage in the line on one person's property that interferes with the service to other customers, if the property owner refuses to fix the problem, the Commission would not have jurisdiction to order the property owner to do anything. The result would be a direct interference with the Commission's jurisdiction to ensure reasonable and adequate sewer

service. This would frustrate the purpose of the Commission as conferred upon it by the Legislature to regulate the services of public utilities.

The Commission made no ruling on the 1906 Agreement. The Commission has determined only that the broken sewer pipe used to carry raw sewage of multiple customers of the Sanitary Board should be fixed by the entity receiving revenues for rendering that service. The line has now been repaired by the Sanitary Board, and no customer objected or complained. If the Sanitary Board believes it needs to have more defined ownership about that line, it can undertake a variety of approaches (quitclaim deeds, eminent domain or condemnation for a prescriptive easement). The Commission has not attempted to prescribe these actions.

Further, the Sanitary Board states in its Petition that Mr. McCormick's broken eight-inch sewer main is "neither located upon his property nor affected his sewer service." Petitioner's Brief, at 3. The break in the sewer line prevents sewage from efficiently flowing to the treatment plant and instead runs the risk of "public involvement" with that raw waste. Mr. McCormick and all other customers of the Sanitary Board are paying for the proper transportation of the sewage to the treatment plant and the treating of the sewage. The customers are not paying to have the sewage merely transported to a neighbor's property.

In order for the Commission to fulfill its statutory mandate to regulate the service provided by a public utility, a private contract cannot be construed to permit parties to contract away the Commission's authority and interpose a private party between a public utility and its customers.

### III. THE PUBLIC SERVICE COMMISSION DID NOT EXCEED ITS STATUTORY JURISDICTION BY DIRECTING THE CITY OF CHARLESTON SANITARY BOARD TO REPAIR THE BROKEN EIGHT-INCH SEWER MAIN SERVING SIXTEEN CUSTOMERS.

The Commission properly exercised its regulatory authority over public utilities and did not exceed its statutory jurisdiction by ordering the Sanitary Board to repair the broken sewer line. The Legislature confers upon the Public Service Commission “the authority and duty to enforce and regulate the practices, services and rates of public utilities . . .” West Virginia Code § 24-1-1. Interpreting the Legislature’s grant of authority to the Commission in West Virginia Code § 24-1-1, this Court held that the Legislature created the Public Service Commission to exercise regulatory authority over public utilities. Boggs v. Public Service Commission, 154 W. Va. 146, 174 S.E.2d 331 (1970), Syllabus Point 1, West Virginia Citizens Action Group v. Public Service Commission, 175 W. Va. 39, 330 S.E.2d 849 (1985). The practices and services of municipal utilities are subject to the jurisdiction of the Commission. West Virginia Code § 24-2-1. Further the City of Wheeling v. Renick, 145 W. Va. 640, 116 S.E.2d 763 (1960) provides and West Virginia Code § 24-2-7 gives the Commission authority to correct any practices, acts or services of a public utility that are inadequate or unreasonable.

In addition to the legislative grant of power establishing Commission authority over utility practices, services and rates, various orders of this Court have long recognized and held that the Commission has primary jurisdiction over matters involving public utilities. City of Wheeling v. Renick, Syllabus Pt. Nos. 5 and 6, 145 W.Va. 640, 116 S.E.2d 763 (1960) (The policy of this state is that all public utilities shall be subject to the supervision of the Commission, and that the Commission has the statutory power and authority to control the charges of all public utilities); Delardes v. Morgantown, 148 W.Va. 776 at 781 and 784-5, 137 S.E.2d 426, 433 (1964) (the Commission exercises the predominant power of the State with respect to utility’s practices,

services and rates and that power is paramount to the rights given to a city by general statute to do so, 148 W.Va. at 781 and 784); C & P Telephone Co. v. City of Morgantown, 144 W.Va. 149 at 160, 107 S.E.2d 489, (1959) (“The paramount design of pertinent statutes to place regulation and control of public utilities exclusively with the Public Service Commission has been recognized by this Court. Lockard v. City of Salem, 127 W.Va. 237, 32 S.E.2d 568 (1944); City of Mullens v. Power Co., 122 W.Va. 179, 7 S.E. 2d 870 (1940); Mountain State Water Co. v. Town of Kingwood, 122 W.Va. 374, 9 S.E. 2d 532 (1940); Ex Parte Dickey, 76 W.Va. 576, pt. 3 syl., 85 S.E. 781 (1915); Benwood v. Public Service Commission, 75 W.Va. 127 pt. 5 syl., 83 S.E. 295 (1914); Wheeling v. Natural Gas Co., 74 W.Va. 372, pt. 6 syl., 82 S.E. 345 (1914)”).

In its June 24, 2013 Order, the Commission found the Sanitary Board’s practice of providing service to as many as sixteen customers through a broken sewer line constitutes inadequate and unreasonable service and is contrary to the public health and safety. Commission Final Order, June 24, 2013, Conclusion of Law No. 5. The Commission ordered the Sanitary Board to repair the sewer line. Commission Final Order, June 24, 2013, at 18. Thus the Commission did not exceed its statutory jurisdiction.

**IV. THE EIGHT-INCH BROKEN SEWER MAIN IS A UTILITY FACILITY USED TO TRANSPORT THE COMBINED SEWAGE FLOW OF SIXTEEN CUSTOMERS OF THE CITY OF CHARLESTON SANITARY BOARD.**

The sewer line is a utility facility that transports the combined sewage flow of sixteen customers of the Sanitary Board. After the formation of the Sanitary Board, the sewer line “for all intents and purposes had no functional existence other than as part of the utility system of the Sanitary Board.” Commission Final Order June 24, 2013 at 10. The Sanitary Board has billed the various customers served by the sewer line after the creation of the Sanitary Board. These customers paid the same rate as other customers connected to sewer mains operated and

maintained by the Sanitary Board. Customers connected to the ruptured sewer line did not, and do not, receive a discount to reflect some obligation of the customers to maintain that line.

The installation of the sewer line, sometime around 1906, predates the 1913 creation of the Commission and the 1952 creation of the Sanitary Board. In 1906, it was not possible to submit an agreement related to sewer services to the Commission for review; likewise, it was not possible to obtain sewer service from the Sanitary Board. When the parties to the 1906 Agreement installed the sewer line, there was no regulatory body from which to seek approval or to which to complain about a lack of sewer service. The 1906 Agreement to share the costs of maintenance of the line was a reasonable approach at the time; however, with the formation of the Sanitary Board and the oversight of the Commission, all customers share in the total costs incurred to serve all other customers, including the cost of repairs to mains. It is the purpose of a public utility to take over these tasks from citizens and ensure that adequate, safe, reasonably priced and state of the art utility services are provided to all customers.

The Commission determination that the sewer line repair by the Board is required in order to continue reasonable service is consistent with the Commission's statutory charge and its rules today. Hurst v. West Virginia Water Co., Case No. 8850, 66 ARPSCWV 256, (Pub. Serv. Comm'n of W.Va., Comm'n Order, May 4, 1979 (final admin. review) at 10-13, affirmed by unpublished opinion Supreme Court of Appeals of West Virginia, 67 ARPSCWV 163, April 1, 1980. The Sanitary Board argues that the broken sewer line is a "shared customer service pipe" and that those customers are responsible for the repair, not the Sanitary Board. The Board bases this contention on Sewer Rule 5.3.g. of the Rules for the Government of Sewer Utilities, 150 C.S.R. 5 which states, in relevant part: : "[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 service pipe" is defined by Sewer Rule 1.7.g. as "that portion of the service pipe from the point of

service to the structure or premises, installed at the cost and expense of the customer.” The Commission rejected the Sanitary Board’s contention that the broken sewer line is a “shared customer service line” holding that for regulatory purposes, the broken sewer line is a main and part of the Board’s system. Commission Final Order June 24, 2013 at 17.

The Commission Sewer Rules include many provisions that safeguard against substandard and disorderly installation of facilities by both the utility and the customer for new installations. See, Sewer Rules 5.2 and 5.3. Those Sewer Rules were not in place at the time of the construction of the sewer facilities that both these customers and the Sanitary Board have relied upon since its creation in 1952. After reviewing the sewer lines in place and considering the functions and use of the eight-inch shared sewer line, the Commission, however, properly determined that the eight-inch shared sewer line is necessary for the Sanitary Board to provide service to sixteen customers. Specifically Sewer Rule 5.3.c. provides that:

The utility’s authorized employee shall inform the customer of the location of the point of service. The customer shall install the customer service pipe to the point of service after which the utility will install the utility service pipe from the main to the point of service.

Further Sewer Rule 5.3.i. provides that:

A customer’s service pipe shall not pass through or across any premises or property other than that to be served nor across 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.

The application of Commission rules supports a conclusion that the eight-inch shared sewer line is a main because a customer service line cannot serve another customer or pass over another property, and the utility is responsible for installing the utility service pipe from the main to the point of service. The duty to provide sewer service lies with the Sanitary Board, not the customers.

If the broken sewer line is a “shared customer service line,” the customers connected to the line would be responsible for their own sewer service and would have no recourse to the utility or the Commission in the event there is inadequate service. This is not the orderly maintenance of facilities the Legislature envisioned when it created the Commission. The Legislature created the Commission to regulate utilities, for the benefit of the State and current and future utility customers.

West Virginia Code § 24-1-1(a)(6)(b) provides:

The Legislature creates the Public Service Commission to exercise the legislative powers delegated to it. The Public Service commission is charged with the responsibility for appraising and balancing the interests of current and future utility service customers, the general interests of the State’s economy and the interests of the utilities subject to its jurisdiction in its deliberations and decisions.

The purpose of the Sanitary Board is to provide sewer service to customers. The Complainants, Ms. Newberger and Mr. McCormick, are those customers.

The broken sewer line is a necessary utility main facility, not a shared customer service line. Although the installation of the sewer line predates the creation of the Commission and the Sanitary Board, the Board has billed the customers connected to the broken sewer line at the same rate as all other customers of the Sanitary Board. The broken sewer line has had no purpose since the creation of the Sanitary Board other than to transport sewage from the residences connected to it to the Board’s facilities. The Sewer Rules do not support the Sanitary Board’s contention that the broken sewer line is a shared customer service line. The Legislature vested regulatory authority over utilities with the Commission. If the line is a shared customer service line, the Commission is without authority to ensure all the customers connected to the broken sewer line receive reliable, efficient and economical service. Again, that result would contradict the purpose of creating the Sanitary Board and impede the jurisdiction of the Commission.

**V. THE PUBLIC HEALTH AND SAFETY DEMAND THE OPERATION OF THE EIGHT-INCH SEWER MAIN IS NECESSARY TO PROVIDE SEWER SERVICE TO SIXTEEN CUSTOMERS OF THE CITY OF CHARLESTON SANITARY BOARD AND THAT LINE MUST BE REPAIRED BY THE CITY OF CHARLESTON SANITARY BOARD.**

The Commission has authority to find that providing service to sixteen customers through a broken sewer line is unreasonable and contrary to the public health and safety. West Virginia Code § 24-1-1, City of Wheeling v. Renick, 145 W. Va. 640 at 650-2, 116 S.E.2d 763 (1960), (in Renick, the Court stated that “the public service commission has power and authority to control the facilities . . . of all public utilities and to hear complaints of persons entitled to the services which such utilities afford”); West Virginia Code § 24-2-7. Because the service to sixteen customers through a broken sewer line is unreasonable and contrary to the public health and safety, the Commission has authority to order the Sanitary Board to repair the broken sewer line. West Virginia Code § 24-2-7.

West Virginia Code § 24-2-7 bestows upon the Commission the following powers:

- (a) Whenever, under the provisions of this chapter, the commission shall find any regulations, measurements, practices, acts or services to be unjust, unreasonable, insufficient or unjustly discriminatory, or otherwise in violation of any service which is demanded cannot be reasonably obtained, the commission shall determine and declare, and by order fix reasonable measurements, regulations, acts, practices or services, to be furnished, imposed observed and followed in the state in lieu of those found to be unjust, unreasonable, insufficient, or unjustly discriminatory, in adequate or otherwise in violation of this chapter, and shall make such other order respecting the same as shall be just and reasonable.

In this case, Ms. Newberger’s residence is located in the East End of Charleston on Quarrier Street. The broken sewer line is at the bottom of a sinkhole in Ms. Newberger’s front yard and is leaking sewage into the ground. Complaint, October 26, 2011. The combined sewage of sixteen residences, some with multiple occupants, flows through the broken sewer pipe.

Exhibit 1, Tr. II at 32. This the Commission found to be an unreasonable service and against the public health and safety. Commission Final Order, June 24, 2013, at 15.

The method by which rates are established for utilities supports the Commission's directive that the public health and welfare demand the Sanitary Board repair the broken eight-inch sewer main. Customers with similar types of usage and demands on a utility's facilities are charged similarly. For example, the residential class rate includes fixed costs based on metering, office costs, billing expenses, distribution lines, transmission lines and plant costs. Some of these customers may be within a quarter mile of a plant while other customers may be miles away – using much greater amounts of transmission lines to get their sewage to the plant – yet all customers in the same class pay the same rates. The point is all customers pay rates to support the repair and maintenance of utility facilities.

In further comparison, sometimes utility facilities last more than one hundred years while other utility facilities may need to be replaced much sooner. But the same types of customers share the costs of these facilities – original construction, maintenance and repair – equally. This eight-inch sewer main is in need of repair. It is a facility that has been used by the Sanitary Board to provide service to sixteen or more customers. The Commission's directive to repair the eight-inch sewer main line is reasonable, is the least costly option and supports the public health and welfare. The sixteen customers located above the eight-inch main break have long paid the rates of the Sanitary Board. Now it is proper, reasonable and fair for a small portion of those rates to be expended to fix the main line serving these customers.

The Commission Order requires the Sanitary Board to fix the broken sewer line. This Order states: "The public health and safety require that the repair be performed and there will be no irreparable harm resulting from repair of the line and sinkhole." Commission Final Order, July 19, 2013, at 2. This Order was in response to the Sanitary Board's request for the Commission to

reconsider its July 8, 2013 Order denying the Board's request for a stay of the Commission's June 24, 2013 Final Order. In that Order, the Commission stated:

It is reasonable to deny the motion to stay pending review by the West Virginia Supreme Court because granting a stay would allow a public health hazard to continue. The record of this case reflects that Complainant Newberger's front yard has an open sinkhole to a broken sewer line and that use of the yard is inhibited by unstable ground and odors rising from the sinkhole.

Commission Final Order, July 19, 2013, at 2.

The Sanitary Board requested the Commission stay its Order directing the broken sewer line be repaired after the time period for filing a petition with the Supreme Court of Appeals had expired. The Commission declined the request to delay those repairs, declaring the furnishing of sewer services through a broken sewer line unreasonable and contrary to the public health and safety. The Commission's directive to the Sanitary Board to repair the broken sewer line is within the Commission's jurisdiction and statutory charge. The CSB has repaired the line which it should have done long ago.

### CONCLUSION

The Public Service Commission's June 24, 2013 Final Order should be upheld. The Commission fulfilled the statutory duty delegated by the Legislature in directing the Charleston Sanitary Board to repair the broken sewer line. The Legislature has declared that the Public Service Commission has a duty to ensure customers receive reliable and efficient service from utilities. Allowing the Board to claim that this shared 1906 facility is outside the jurisdiction of the Commission serves to thwart the intent of the Legislature is "bold" – it is also patently wrong. In the interest of public policy, this Court should not construe the 1906 Agreement to divest the Commission of its regulatory powers. West Virginia Code §§ 24-1-1, 24-2-1 and 24-2-7.

The evidence shows the broken sewer line is an essential part of the Charleston Sanitary Board's sewer system. The sewer line serves at least sixteen customers. Since the inception of the

Charleston Sanitary Board in 1952, the sewer line has had no other function than to transport the combined sewage of the customers. Sewer Rules 5.3.c. and 5.3.i.

Finally, the Public Service Commission's order for the Charleston Sanitary Board to repair the sewer line is the best resolution. Replacing the whole sewer line or installing new sewer mains on Shelton Avenue or Lee Street would be very expensive to both the Sanitary Board and its customers. It is not necessary now. Repairing the broken sewer line that was leaking raw sewage in the ground in the East End of Charleston was the most timely and most economical remedy, protects the public health and welfare and is the proper result.

Therefore, the Public Service Commission's June 24, 2013 Final Order should be upheld and the City of Charleston Sanitary Board's Petition should be denied.

Respectfully submitted this 9<sup>th</sup> day of September 2013.

THE PUBLIC SERVICE COMMISSION  
OF WEST VIRGINIA

By Counsel,



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CERTIFICATE OF SERVICE

I, RICHARD E. HITT, Counsel for the Public Service Commission of West Virginia, do hereby certify that a copy of the foregoing "Statement of the Respondent, Public Service Commission, of its Reasons for the Entry of its Order of February 18, 2011, in Case No. 11-1572-S-C and Case No.11-1601-S-C" has been served upon the following parties of record by First Class United States Mail, postage prepaid this 9<sup>th</sup> day of September 2013.

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# Exhibits on File in Supreme Court Clerk's Office