

**PUBLIC SERVICE COMMISSION
OF WEST VIRGINIA
CHARLESTON**

At a session of the PUBLIC SERVICE COMMISSION OF WEST VIRGINIA in the City of Charleston on the 6th day of September 2019.

CASE NO. 18-1232-S-C

REBECCA LYNN FLORCZAK,
Kenova, Wayne County,

Complainant,

v.

CITY OF KENOVA,
a municipal utility,

Defendant.

COMMISSION ORDER

The Commission grants exceptions filed by the Complainant, does not adopt the February 13, 2019 Recommended Decision, and requires a leak adjustment.

BACKGROUND

On August 31, 2018, Rebecca Lynn Florczak (Complainant) filed a complaint against the City of Kenova (Kenova), alleging that Kenova wrongfully denied her request for a leak adjustment for a leaky commode that was not obvious and detectable. The Complainant seeks a leak adjustment of her sewer bill.

On September 11, 2018, Kenova filed an answer stating that a leaking toilet does not qualify for a leak adjustment and the complaint should be dismissed.

On November 29, 2018, Staff filed a Final Memorandum recommending that the Commission require Kenova to (i) refund the Complainant \$233.12 and (ii) modify its leak adjustment policy to comply with Rule 4.4.c of the Commission Rules for the Government of Water Utilities, 150 C.S.R. 7 (Water Rules) and General Order No. 188.12, and file the revised policy as a closed case filing within thirty days of a Commission final order in this case.

Hearing

On December 21, 2018, the Administrative Law Judge (ALJ) convened a hearing in this case.

The Complainant testified that her husband died after being in the hospital from June 12, 2018 to June 27, 2018. After the Complainant received the disputed August bill for \$424.55 from Kenova, she and her daughter checked the master bathroom, found that the toilet was leaking or running, and immediately corrected the problem. (Tr. 11-12).

The Complainant testified that access to the leaking commode required entering the master bedroom, passing through a door into the vanity area, and through another door into the master bathroom. (Tr. 18; ALJ Exhibit 1). The Complainant slept in the master bedroom but did not use the master bathroom and did not hear the commode running. Her husband treated his bladder cancer with strong chemicals in the master bathroom and it was closed to everyone but him. (Tr. 22). The Complainant was at home approximately ten percent of the time that her husband was in the hospital. (Tr. 20). She does not believe anyone used the master bathroom during July 2018. The Complainant is not hearing impaired. (Tr. 29-30).

The Complainant's daughter Glenna Shepherd testified that having to go through the master bedroom to the vanity area and through another door into the master bath made it difficult to hear the commode. Sounds in the master bathroom cannot be heard in the kitchen. (Tr. 42, 45).

Cameron Underwood, a Kenova meter utility technician, testified that Kenova uses a special radio read system with a software program that accepts radio reads before bills are generated and a program that alerts for a high meter read. A customer can be notified of a potential leak prior to issuance of a bill but Kenova did not activate the alert system. (Tr. 56-59).

Sylvie Steranka, a technical analyst for the Commission's Engineering Division, testified that she is aware that Sewer Rule 4.4.c.1 disallows a leak adjustment for leaking commodes, dripping faucets, malfunctioning appliances and similar situations. (Tr. 82). Although she acknowledged that there is no exception in the rule she asserted that the Commission has authority to investigate utility practices. (Tr. 81-89).

Ms. Steranka testified that Kenova never alerted the Complainant of the leak although it has the technology to do so. The leak was hidden because it was not obvious to the Complainant or to Kenova. No one was aware of the leak until the Complainant received her bill. (Tr. 101-106).

Ms. Steranka related that the Commission has granted a leak adjustment to a Complainant with a hearing problem on the grounds that the leak was hidden due to her disability. Another Complainant left a spigot running behind her house and was unable to access the area because of a difficulty maneuvering down steps. In that case, the Commission held that the leak was hidden because it was not visible or audible to the

Complainant. (Tr. 107-109). Ms. Steranka believes that this case is similar because the Complainant did not hear or see any evidence of a leak.

Recommended Decision

On February 13, 2019, the ALJ issued a Recommended Decision denying the leak adjustment on the grounds that a leaking commode is not a leak for which a customer is entitled to a recalculated bill. Rule 4.4.c.1 of the Commission Rules for the Government of Sewer Utilities 150 C.S.R. 7 (Sewer Rules) provides, in part, that “leaking commodes, dripping faucets, malfunctioning appliances and similar situations shall not constitute leaks which entitle the customer to a recalculated bill.”

The ALJ stated that the rule is clear and does not require interpretation or revision. Any interpretation or revision of Sewer Rule 4.4.c.1 would be tantamount to the creation of an exception, which would be a violation of longstanding legal precedent. In Consumer Advocate Div. of Pub. Serv. Comm’n of West Virginia, 182 W.Va. 152, 156, 386 S.E.2d 650, 654 (1989), the Supreme Court of Appeals of West Virginia, citing Crockett v. Andrews, 153 W.Va. 714, 172 S.E.2d 384 (1970), stated “[i]nterpretation of statutes or rules and regulations is proper only when an ambiguity exists.” (*Id.*)

Exceptions

On February 26, 2019, the Complainant filed exceptions to the Recommended Decision.

The Complainant argued that Kenova is just as responsible as she is, if not more, for failing to detect the leak because Kenova has a radio read meter system with capability to alert on a high meter read, but Kenova did not activate the alert system.

The Complainant also argued that there are exceptions to every rule. She noted that in a previous case the Commission approved a leak adjustment for a customer who could not access the upper level of the home. The Complainant reiterated that she did not hear the leak.

Staff response

On March 8, 2019, Staff filed a response to the Complainant’s exceptions, citing a series of cases establishing that the Commission reviews leak circumstances, even toilet leaks, on a case-by-case basis to determine if a leak is detectable. Staff argued that the Complainant had good reason for restricting access to the master bathroom and the layout of the house made hearing the leak difficult because the toilet was behind two doors. Staff argued that under these circumstances the Commission should grant the exceptions to the Recommended Decision and allow a leak adjustment.

DISCUSSION

Sewer Rule 4.4.c.1 requires each utility to develop and implement a written policy for the adjustment of customer bills based upon metered water consumption or metered sewer lines when the bill reflects unusual water usage attributed to leakage on the customer's side of the point of service. "Leaking commodes, dripping faucets, malfunctioning appliances and similar situations shall not constitute leaks that entitle the customer to a recalculated bill."

Sewer Rule 4.4.c.1 makes the customer responsible for readily discernible leaks but the Commission has allowed leak adjustments for hidden leaks. John McDowell v. Jefferson Utilities, Inc. and Jefferson County Public Service District, Case No. 09-0769-W-PSD-C (Commission Final Order, January 11, 2011) at 5. See also, Vickie Jenkins v. Berkeley County Public Service District, Case No. 17-0663-PSD-C (Commission Order October 1, 2018). In McDowell, the Complainant requested a leak adjustment because of a leak that originated from a faulty spigot at the rear of his residence that was only observable by going completely around the house. The Complainant was confined to entering the house at a side level during his recovery from hip replacement surgery. Based on these facts the Commission granted water and sewer leak adjustments because the Complainant demonstrated that the leak was in a non-detectable location for him.

In McDowell, the Commission cited other cases in which it approved a leak adjustment because the leak was not detectable to the Complainant. See Collins v. Corporation of Shepherdstown, Case No. 01-1430-WS-C (Commission Order, July 23, 2002) (leak not noticeable because it originated in broken pipe in wall and water did not run into house); Solenberger v. Martinsburg Municipal Water and Sewer Departments, Case No. 05-0645-WS-C (Recommended Decision, August 18, 2005, Final Commission Order, September 7, 2005) (utility agreed to leak adjustment because leak due to faulty bathtub faucet located in vacant house owned by customer); Mayfield, Inc. v. Berkeley County Public Service Water District, Case No. 02-1416-PWD-C (Recommended Decision, June 5, 2003, Final Commission Order June 25, 2003) (leak in crawl space undetected for a period of time); and Watkins v. City of Grafton, Case No. 97-1545-S-C (Commission Order, February 11, 1998) (leak adjustment made to customer based on hardship waiver because the customer had hearing problems and difficulty discerning the sound of running water). Id. at 5-6.

The ALJ denied the Complainant a Staff-recommended sewer leak adjustment solely because Sewer Rule 4.4.c.1 lists a leaking commode as a type of leak for which a customer should not be entitled to a recalculated bill. Based on the facts of this case and Commission precedent, we do not agree that the Rule prohibits a leak adjustment in this case. The record indicates that the Complainant's leaking toilet was not obvious or detectable to her. (Tr. 11-12, 18, 20, 22, 27-30, 42, 45).

Neither Kenova nor the ALJ refuted the Complainant's testimony that the leak was in a non-detectable location. It is therefore reasonable for the Commission to grant the exceptions to the Recommended Decision and require the leak adjustment.

FINDINGS OF FACT

1. Access to the master bathroom where the toilet leaked was restricted.
2. The location of the master bathroom in the house made hearing the leak difficult to hear.

CONCLUSIONS OF LAW

1. The Commission has discretion to allow an adjustment for hidden leaks. John McDowell v. Jefferson Utilities, Inc. and Jefferson County Public Service District, Case No. 09-0769-W-PSD-C; Collins v. Corporation of Shepherdstown, Case No. 01-1430-WS-C, (Commission Order, July 23, 2002); Solenberger v. Martinsburg Municipal Water and Sewer Departments, Case No. 05-0645-WS-C (Recommended Decision, August 18, 2005, Final Commission Order, September 7, 2005); Mayfield, Inc. v. Berkeley County Public Service Water District, Case No. 02-1416-PWD-C (Recommended Decision, June 5, 2003, Final Commission Order June 25, 2003); and Watkins v. City of Grafton, Case No. 97-1545-S-C (Commission Order, February 11, 1998).

2. The Complainant's leak was a hidden leak that justifies a sewer leak adjustment credit of \$233.12.

ORDER

IT IS THEREFORE ORDERED that the exceptions filed by Rebecca Lynn Florczak are granted and the February 13, 2019 Recommended Decision is not adopted.

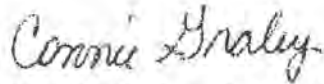
IT IS FURTHER ORDERED that Kenova shall make a leak adjustment in the amount of \$233.12 to the Complainant's account and refund that amount to the Complainant within twenty days of the date of this Order.

IT IS FURTHER ORDERED that the City of Kenova file a closed entry letter in this case verifying that the leak adjustment refund has been made.

IT IS FURTHER ORDERED that upon entry of this Order this case shall be removed from the Commission docket of open cases.

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

A True Copy, Teste,

A handwritten signature in cursive script, reading "Connie Graley".

Connie Graley, Executive Secretary

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