



PSC Holds that Shared Lateral in Kenova is not a Public Utility Service Line, April 2017

In early February, the PSC issued a favorable order in *Crow v. City of Kenova* (Case No. 15-1831-S-C), holding that a shared lateral was a private sewer line. In short, the Commission held that the private line at issue, a non-conforming sewer lateral constructed in the 1960s which now serves 17 units in a mobile home park, is a private sewer lateral and not a public service line that would be the City's responsibility.

This holding is significant in three respects. First, the Commission's holding implicitly recognizes that there are exceptions to its general policy that a third party cannot be "interposed" between a utility and its customers. This completely reverses the recommended decision in this case as well as Staff's arguments before the Commission. Second, the Commission made clear that in cases where the line at issue was constructed prior to the Sewer Rule's formation, those Rules are not binding. Here, this meant that the Rules, which were modified in 2003 to address mobile home parks, did not preclude the master meter configuration at issue. Third, the Commission identified key "distinguishing features" (summarized below) that tipped the scale in favor of determining that this was a private sewer line.

Overall, we see this order as a beneficial policy change by the Commission and the first useful precedent for MWQA members facing PSC efforts to force them to take over private shared laterals.

Background. The *Kenova* dispute started when the land owner, Mr. Crow, sought to have the City reimburse him for a \$700 bill for flushing his line (a sewer line running down the middle of his property underneath (and serving) 17 or so mobile homes). The City, which had flushed Mr. Crow's line occasionally over the years, refused to reimburse Mr. Crow for the cost to clean his private line. Mr. Crow took the matter to the PSC, where the ALJ's Recommended Decision held that the City must obtain Mr. Crow's line because it was a utility service main. Essentially, the Administrative Law Judge held that a utility must be on one side of a meter and a customer on the other in all cases – here, Mr. Crow, a third-party, could not have his sewer line interposed between the utility and its customers.

With the MWQA's support, the City sought reconsideration of the PSC's order and requested oral argument. The Commission granted the City's petition and required the parties to enter additional information into the record. During oral argument before the Commission in late September 2016, the City argued that the PSC had exceeded its statutory authority by ordering the City to obtain Mr. Crow's line. The City asserted that, assuming for the sake of argument that



the PSC can order the public taking of private property, it can only do so when there is both a public necessity and the public utility can financially afford to do so. Moreover, such a justification for a public taking of private property must be a case-by-case evaluation and not imposed through a blanket PSC position that there can be no shared private laterals.

Holding. The Commission held that the line was a private sewer line and that Mr. Crow has maintenance responsibility for it, overturning the ALJ's determination. In reaching this conclusion, the Commission noted that Mr. Crow's service line was "similar to sewer service provided by many public utilities through a single master-meter for apartment buildings and older mobile home parks." Additionally, the Commission stated that the definitions of "point of service" and "utility service pipe" in the Commission's Sewer Rules "do not preclude a decision that the line through the center of the lots is a private line." This holding emphasizes that there are gray areas within the Sewer Rules and that, rather than trying to fit a round peg into a square hole as the ALJ attempted to do, the Commission will consider distinguishing arguments on a case-by-case basis.

The Commission pointed to a few distinguishing facts that made clear that the line was a private sewer line. First, the mobile homes were placed so that access and easement for a sewer main would have required a permanent removal of the mobile homes, "completely frustrating Mr. Crow's current use of the land as a mobile home park." Second, this case dealt with a Complainant who took ownership of multiple lots at a time when those lots received utility service through a master-meter. Third, because the line ran beneath the center of the mobile homes, the City could not access the line to replace or to repair it.

Going Forward. While the Commission emphasized "case-by-case" review going forward, we see this as a positive ruling for MWQA Members. As many will likely recall, another similar case wound its way up to the West Virginia Supreme Court of Appeals in 2013 (*Sanitary Board of the City of Charleston v. PSC*). There, the Court never reached the merits of the case with three of the five Justices finding the case to be moot because CSB had already repaired the line. However, two Justices strongly dissented and stated that they do not believe public utilities have any responsibility to maintain, repair, or take ownership of shared private laterals. The Commission's holding in *Crow v. City of Kenova* finally addresses this issue and reaches the same conclusion as the two dissenting Justices. While the Commission reached this conclusion without addressing many of the larger policy issues raised by the City, this case should serve as a useful reference going forward for Members who are dealing with attempts by private sewer owners and/or the PSC to force them to take ownership of private sewer laterals.

It is clear that the PSC Commissioners did not want to issue a decision holding that Kenova had to acquire and maintain the private service line. They knew we would appeal that to the WV



Supreme Court and that the facts here were not favorable (landowner can afford to maintain his line – no necessity to order condemnation; utility condemnation would frustrate use of property; etc.). Overall, this is an excellent result.