

BEFORE THE PENNSYLVANIA
PUBLIC UTILITIES COMMISSION

BARON E. MATTHEWS,
Complainant,

versus

SHREWSBURY BOROUGH,
Respondent.

No. C-2011-2250687

NOTICE TO PLEAD

You are hereby notified that, pursuant to the rules governing proceedings before the Public Utilities Commission, 52 Pa. Code § 5.101(f)(1), you must file a written response to respondent Shrewsbury Borough's Preliminary Objections within ten (10) days from service hereof or a judgment may be entered against you.

CGA LAW FIRM, P.C.

/s/ Eric Suter, Esq.

Jeffrey L. Rehmeyer (No. 80210)

Eric Suter (No. 202017)

135 N. George Street

York, PA 17401

P: 717.848.4900

F: 717.843.9039

e: esuter@cgalaw.com

Counsel for Shrewsbury

Borough Municipal Authority

**BEFORE THE PENNSYLVANIA
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No. C-2011-2250687

PRELIMINARY OBJECTIONS TO COMPLAINT

Comes now respondent Shrewsbury Borough (“Borough”) and, in answer to the complaint of Baron E. Matthews, pleads as follows:

1. On information and belief, the Borough admits that Matthews maintains an address at 306 East Main Street, New Freedom, PA 17349
2. The Borough is a municipality located in York County. The Borough provides sewer service only to properties within its geographical boundaries.
3. In his complaint against the Borough, Matthews, like other recent complainants, asserts that property owners served by Shrewsbury Borough can buy sewer capacity for less than property owners who are not served by Shrewsbury Borough. Matthews further alleges that “[t]he cost of service (sewer connection fees) and the availability of sewer in the service area are not equitable among the different municipalities in the service area.” Matthews also alleges Shrewsbury Municipal Borough Authority (“SBMA”) “isn’t meeting on a regular basis and customers outside Shrewsbury Borough’s municipal limits have no one protecting their interest;” and SBMA “is merely a front.” See Complaint at ¶ 4B. Many of Matthews’s allegations are word-for-word identical to those set forth in other recent complaints against SBMA and Shrewsbury Borough.
4. Shrewsbury Borough does not provide sewer service in Shrewsbury Township.
5. SBMA does not provide sewer service within Shrewsbury Borough.
6. Matthews is not a sewer customer of Shrewsbury Borough.

7. Matthews is a sewer customer of SBMA.

I. Preliminary Objections

A. Absence of Regulatory Jurisdiction

8. Pennsylvania law confers upon the Public Utilities Commission (“PUC”) jurisdiction to entertain written complaints alleging violations of law “by any public utility.” 66 P.S. § 701 (emphasis added).

9. As a threshold matter, the Borough, as a duly constituted municipal corporation, is not a “public utility.”

10. Because the Borough is not a “public utility,” PUC lacks jurisdiction to regulate or otherwise conduct inquiry into the cost, availability, or administrative delivery of the services the Borough provides within its lawful service area.

11. In a recent Initial Decision issued in *Robinson v. Shrewsbury Borough Municipal Authority*, C-2011-2238127, a closely-related action raising complaints virtually identical to those Matthews raises here, PUC determined it did “not have jurisdiction to entertain the complaint.” *Robinson v. Shrewsbury Borough Municipal Authority*, C-2011-2238127, Initial Decision at 1 (July 6, 2011) (Exhibit 1).

12. In her decision, Administrative Law Judge Long concluded that, “[t]he Commission does not have jurisdiction to determine whether [SBMA] is operating in accordance with the Municipal Authorities Act, its enabling ordinances, or articles of incorporation.” *Id.* at 6 (citing *Langeloth Townsite Co. v. Pennsylvania-American Water Co.*, PUC Docket No. C-2009-2117744 (Order dated Oct. 16, 2009)).

13. The same is true with regard to Shrewsbury Borough. Although Matthews presents a legal conclusion to the effect that the Borough is providing sewer “services beyond the corporate limits of the Borough without a certificate of public convenience,” Matthews pleads no facts in support of that legal conclusion. Complaint at ¶ 4.B. Indeed, Matthews contradicts that conclusion by alleging that the property for which he wishes to

acquire sewer capacity is located in Shrewsbury Township, not Shrewsbury Borough. *Id.* The allegation that persons who own property within, and receive sewer from, Shrewsbury Borough may be able to obtain or reserve sewer capacity less expensively than persons who own property outside, and do not receive sewer from, Shrewsbury Borough simply does not raise an issue for the PUC. Absent factual allegations showing conduct bringing Shrewsbury Borough within the scope of PUC jurisdiction, the complaint must be dismissed. There are no such factual allegations here, merely naked legal conclusions.

B. Lack of Standing/Capacity to Sue

14. The threshold absence of PUC jurisdiction aside, Matthews’s complaint is insufficient in other respects.

15. Pennsylvania law provides that only those “person[s] . . . having an interest in the subject matter . . . may complain in writing, *setting forth any act or thing done or omitted to be done by any public utility in violation, or claimed violation, of any law which the commission has jurisdiction to administer, or of any regulation or order of the commission.*” 66 P.S. § 701 (emphasis added).

16. Matthews fails to identify any law whatsoever that the Borough has allegedly violated.

17. Because Matthews does not identify any specific “act or thing done or omitted to be done,” as section 701 plainly requires, his complaint fails, on its face, to state a violation of law and should be dismissed as legally insufficient. *See* 52 Pa. Code § 5.101(a)4.

18. Alternatively, the complaint should be dismissed on the basis of insufficient factual specificity. *See* 52 Pa. Code § 5.101(a)3. The Borough is entitled to know the factual basis underlying Matthews’s allegation that the Borough “has been providing illegal services.” The only allegation approaching one of fact is that the “Borough sets the rates and determines the service.” Complaint at ¶ 4.B. But Matthews does not explain how it is that the Borough’s provision of administrative support to SBMA is in any way unlawful. As filed,

Matthews's complaint consists almost exclusively of unsubstantiated assertions and pejorative characterization (*e.g.*, SBMA "is merely a front so that the Borough can act as it pleases"). Indeed, Matthews alleges no facts pertaining to past dealings between himself, SMBA, and/or Shrewsbury Borough on the specific issues raised in his complaint despite verifying under penalty of perjury that he has "spoken to a utility company representative about this complaint." Had Matthews actually done so, it is not unreasonable for the Borough to expect that Matthews plead the facts pertaining to those contacts.

C. Failure to Conform to Code

19. The Pennsylvania Code specifies that formal complaints "must set forth [a] clear and concise statement of the act or omission being complained of[.]" 52 Pa. Code § 5.22(a).

20. As noted in Section B, *supra*, Matthews's complaint fails to set forth any facts describing a specific "act or omission being complaint of" and, for that reason, fails to conform to the requirements of 52 Pa. Code §§ 5.1, *et seq.* The complaint must be dismissed for this reason as well.

II. Conclusion

21. For all the foregoing reasons, the Borough respectfully requests that PUC dismiss Matthews's complaint. The Borough further requests dismissal with prejudice on the basis that a hearing on the complaint is not necessary in the public interest. *See* 52 Pa. Code § 5.21(d).

Date: August 1, 2011

CGA LAW FIRM, P.C.

/s/ Eric Suter, Esq.

Jeffrey L. Rehmeyer (No. 80210)

Eric Suter (No. 202017)

135 N. George Street

York, PA 17401

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VERIFICATION

I, Eric Suter, hereby state that the facts above set forth are true and correct (or are true and correct to the best of my knowledge, information and belief) and that I expect to be able to prove the same at a hearing held in this matter. I understand that the statements herein are made subject to the penalties of 18 Pa.C.S. § 4904 (relating to unsworn falsification to authorities).

Date: August 1, 2011

/s/ Eric Suter, Esq.

Jeffrey L. Rehmeyer (No. 80210)

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135 N. George Street

York, PA 17401

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e: esuter@cgalaw.com

Counsel for

Shrewsbury Borough

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Phillip N. Robinson

v.

Shrewsbury Borough Municipal Authority

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C-2011-2238127

INITIAL DECISION

Before
Mary D. Long
Administrative Law Judge

This decision sustains the preliminary objection of Shrewsbury Borough Municipal Authority and dismisses the complaint of Philip N. Robinson because the Pennsylvania Public Utility Commission does not have jurisdiction to entertain the complainant.

HISTORY OF THE PROCEEDINGS

On April 26, 2011, Phillip N. Robinson (Complainant) filed a formal complaint against the Shrewsbury Borough Municipal Authority (Authority), alleging that the Authority's rates were "not equitable among the different municipalities in the service area . . ." and is not meeting regularly and is not fairly serving customers outside of Shrewsbury Borough. On May 19, 2011, the Authority filed Preliminary Objections and Notice to Plead which sought dismissal of the Complainant's complaint on the basis of lack of jurisdiction, lack of standing, legal insufficiency, lack of factual specificity and failure to conform to the Public Utility Code. To date, no answer to the complaint has been filed. The Complainant filed a response to the Preliminary Objections on May 26, 2011.

This matter was assigned to me by Motion Judge Assignment Notice dated June 20, 2011, and is now ready for ruling. As I am granting the preliminary objections and dismissing the complaint, I am issuing the ruling as an Initial Decision subject to exceptions.¹

FINDINGS OF FACT

1. The Complainant is Philip N. Robinson, an individual with a mailing address of 18147 Amanda Lane, New Freedom, Pennsylvania, York County.
2. The Shrewsbury Borough Municipal Authority is a municipal authority.
3. On April 26, 2011, the Complainant filed a formal complaint against the Shrewsbury Borough Municipal Authority (Authority), alleging that the Authority's rates were "not equitable among the different municipalities in the service area . . ." and is not meeting regularly and is not fairly serving customers outside of Shrewsbury Borough.
4. As relief, the Complainant wants the Commission to regulate the Shrewsbury Borough Municipal Authority to ensure all customers in the service area are treated equally.

DISCUSSION

Preliminary objections are permitted under Commission regulations.² Preliminary objection practice before the Commission is similar to Pennsylvania civil practice respecting preliminary objections.³

¹ 52 Pa. Code § 5.103(d)(3); *Langeloth Townsite Company v. Pennsylvania-American Water Company*, PUC Docket No. C-2009-2117744 (Initial Decision dated October 16, 2009).

² 52 Pa. Code § 5.101.

³ *Equitable Small Transportation Intervenors v. Equitable Gas Company*, 1994 Pa. PUC LEXIS 69, Docket No. C-00935435 (July 18, 1994).

Commission regulations⁴ provide:

§ 5.101. Preliminary objections.

(a) Grounds. Preliminary objections are available to parties and may be filed in response to a pleading except motions and prior preliminary objections. Preliminary objections must be accompanied by a notice to plead, must state specifically the legal and factual grounds relied upon and be limited to the following:

(1) Lack of Commission jurisdiction or improper service of the pleading initiating the proceeding.

(2) Failure of a pleading to conform to this chapter or the inclusion of scandalous or impertinent matter.

(3) Insufficient specificity of a pleading.

(4) Legal insufficiency of a pleading.

(5) Lack of capacity to sue, nonjoinder of a necessary party or misjoinder of a cause of action.

(6) Pendency of a prior proceeding or agreement for alternative dispute resolution.

In deciding the preliminary objections, the Commission must determine whether, based on well-pleaded factual averments of the petitioners, recovery or relief is possible.⁵ Any doubt must be resolved in favor of the non-moving party by refusing to sustain the preliminary objections.⁶ All of the non-moving party's averments in the complaint must be viewed as true for purposes of deciding the preliminary objections, and only those facts specifically admitted may be considered against the non-moving party.⁷

The Authority contends that as a "duly constituted municipal corporation" it is not a "public utility" and the Commission lacks the jurisdiction to regulate or otherwise conduct inquiry into the cost, availability or administrative delivery of services. The Complainant

⁴ 52 Pa. Code § 5.101(a).

⁵ *Dept. of Auditor General, et al. v. SERS, et al.*, 836 A.2d 1053, 1064 (Pa. Cmwlth. 2003); *P.J.S. v. Pa. State Ethics Comm'n*, 669 A.2d 1105 (Pa. Cmwlth. 1996).

⁶ *Boyd v. Ward*, 802 A.2d 705 (Pa. Cmwlth. 2002).

⁷ *Ridge v. State Employees' Retirement Board*, 690 A.2d 1312 (Pa. Cmwlth. 1997).

concedes that the Authority is incorporated by Shrewsbury Borough, but contends that it is not meeting or organizing in accordance with the Pennsylvania Municipal Authorities Act. He further contends that it is actually Shrewsbury Borough that is controlling the sanitary sewer service and not the Authority which is, according to the Complainant, a violation of the Municipal Authorities Act, the Public Utility Code and various intermunicipal agreements. As I explain more fully below, I find that the Commission lacks jurisdiction to resolve this dispute.

In every case coming before it, the Commission must decide initially whether it has jurisdiction over the parties and the subject matter of this dispute. As a creature of legislation, the Commission possesses only the powers expressly conferred or necessarily implied by its enabling statute.⁸ The Commission must act within and cannot exceed its jurisdiction.⁹ Jurisdiction may not be conferred by the parties where none exists.¹⁰ Indeed, subject matter jurisdiction is a prerequisite to the exercise of the power to decide a controversy.¹¹

Municipal authorities, too, are creatures of legislation. Authorities are independent and sovereign agencies of the Commonwealth.¹² They are created under the auspices of the Municipal Authorities Act which confers certain powers and duties upon authorities.¹³ Thus municipal authorities are independent of the municipalities that have created them.¹⁴ Further, municipal authorities are not “public utilities” within the meaning of the Public

⁸ *Feingold v. Bell of Pa.*, 383 A.2d 791 (Pa. 1977); *Allegheny County Port Authority v. Pa. P.U.C.*, 237 A.2d 602 (Pa. 1967). See also *Department of Environmental Resources v. Butler County Mushroom Farm*, 454 A.2d 1, 4 (Pa. 1982), and *Pequea Township v. Department of Environmental Protection*, 716 A.2d 678, 686 (Pa. Cmwlth. 1998).

⁹ *City of Pittsburgh v. Pa. P.U.C.*, 43 A.2d 348 (Pa. Cmwlth. Ct. 1945).

¹⁰ *Roberts v. Matorano*, 235 A.2d 602 (Pa. 1967).

¹¹ *Hughes v. Pa. State Police*, 619 A.2d 390 (Pa. Cmwlth. Ct. 1992), *alloc. den.*, 637 A.2d 293 (1993).

¹² *Simon Appeal*, 184 A.2d 695 (Pa. 1962); *White Rock Sewage Corporation v. Pa. P.U.C.*, 578 A.2d 984 (Pa. Cmwlth. Ct. 1990).

¹³ 53 Pa. C.S. § 5607.

¹⁴ *E.g.*, *88 Transit Lines, Inc. v. Mid Mon Valley Transit Authority*, PUC Docket No. C-2009-2116699 (Commission order entered February 25, 2011).

Utility Code.¹⁵ Therefore, the Complainant's challenge to the Authority's organization and operation, compliance with enabling ordinances or articles of incorporation, rests outside the jurisdiction of the Commission.¹⁶

Further, the Commission also lacks jurisdiction to entertain the Complainant's challenge to the rates charged by the Authority. The Municipal Authorities Act explicitly vests the courts of common pleas with exclusive jurisdiction over disputes regarding rates and service provided by a municipal authority:

Any person questioning the reasonableness or uniformity of a rate fixed by an authority or the adequacy, safety and reasonableness of the authority's services, including extensions thereof, may bring suit against the authority in the court of common pleas of the county where the project is located or, if the project is located in more than one county, in the court of common pleas of the county where the principal office of the project is located. The court of common pleas shall have exclusive jurisdiction to determine questions involving rates or service.¹⁷

Indeed, the Commonwealth Court on several occasions has upheld the Commission's decisions holding that a municipal authority is not a public utility as defined by the Public Utility Code and that the Municipal Authorities Act vests exclusive jurisdiction involving rates and service in the courts of common pleas.¹⁸

In sum, the Commission is not the proper forum to resolve the Complainant's objections to actions of the Shrewsbury Borough Municipal Authority. Accordingly, the

¹⁵ *Langeloth Townsite Company v. Pennsylvania-American Water Company*, PUC Docket No. C-2009-2117744 (Order dated October 16, 2009).

¹⁶ *Id.*

¹⁷ 53 Pa. C.S. § 5607(d)(9).

¹⁸ *White Rock Sewage Corporation; Graver v. Pa. P.U.C.*, 469 A.2d 1154 (Pa. Cmwlth. 1984). The statutory interpretation of the salient sections of the Act and the Public Utility Code in these decisions involves prior versions of the Municipal Authorities Act and Public Utility Code which have been recodified in the present versions of the Act and the Code.

Authority's preliminary objections on the basis that the Commission lacks jurisdiction are granted and the complaint must be dismissed.¹⁹

CONCLUSIONS OF LAW

1. Commission regulations provide for the filing of preliminary objections based upon the lack of Commission jurisdiction. 52 Pa. Code § 5.101.

2. As a creature of legislation, the Commission possesses only the powers expressly conferred or necessarily implied by its enabling statute. *Feingold v. Bell of Pa.*, 383 A.2d 791 (Pa. 1977); *Allegheny County Port Authority v. Pa. P.U.C.*, 237 A.2d 602 (Pa. 1967). See also *Department of Environmental Resources v. Butler County Mushroom Farm*, 454 A.2d 1, 4 (Pa. 1982), and *Pequea Township v. Department of Environmental Protection*, 716 A.2d 678, 686 (Pa. Cmwlth. 1998).

3. The Commission does not have jurisdiction to determine whether the Shrewsbury Borough Municipal Authority is operating in accordance with the Municipal Authorities Act, its enabling ordinances, or articles of incorporation. *Langeloth Townsite Company v. Pennsylvania-American Water Company*, PUC Docket No. C-2009-2117744 (Order dated October 16, 2009).

4. The Commission does not have jurisdiction over the rates or service of a municipal authority. 53 Pa. C.S. § 5607(d)(9).

¹⁹ Having decided that the Commission lacks jurisdiction, I need not reach the Authority's other bases for preliminary objection.

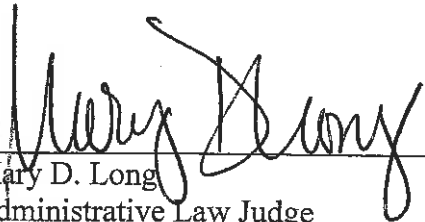
ORDER

THEREFORE,

IT IS ORDERED:

1. That the Preliminary Objection filed by the Shrewsbury Borough Municipal Authority to the Complaint of Philip N. Robinson at Docket No. C-2011-2238127 based upon lack of jurisdiction is granted.
2. That the complaint of Philip N. Robinson at Docket No. C-2011-2238127 is dismissed.
3. That the record at Docket No. C-2011-2238127 be marked closed.

Date: July 6, 2011



Mary D. Long
Administrative Law Judge

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versus

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Respondent.

No. C-2011-2250687

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of August 2011 respondent's Preliminary Objections to Complaint have been served via first-class mail, postage prepaid, upon the following:

Baron E. Matthews
306 East Main Street
New Freedom, PA 17349

/s/ Eric Suter, Esq.

Jeffrey L. Rehmeyer (No. 80210)

Eric Suter (No. 202017)

135 N. George Street

York, PA 17401

P: 717.848.4900

F: 717.843.9039

e: esuter@cgalaw.com

Counsel for

ShrewsburyBorough