

BEFORE THE PENNSYLVANIA
PUBLIC UTILITIES COMMISSION

STEPHEN ANDERSON, GENERAL
PARTNER IN PRESIDENTIAL HEIGHTS
ASSOCIATES,

Complainant,

versus

SHREWSBURY BOROUGH
MUNICIPAL AUTHORITY,

Respondent.

No. C-2011-2251347

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 Municipal Authority'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.

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**BEFORE THE PENNSYLVANIA
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PRELIMINARY OBJECTIONS TO COMPLAINT

Comes now respondent Shrewsbury Borough Municipal Authority (“SBMA”) and, in answer to the complaint of Stephen Anderson, General Partner in Presidential Heights Associates, pleads as follows:

1. On information and belief, SBMA admits that Anderson maintains an address at 335 Winterstown Road, Red Lion, Pennsylvania 17356.
2. SBMA denies that the property located at 335 Winterstown Road, Red Lion, Pennsylvania 17356 is the property at issue in this action.
3. The property at issue in this action is described as “Presidential Heights Associates, Mount Airy Road, Shrewsbury, PA 17361. See Complaint at ¶ 1. Anderson does not provide a street address for the property at issue.
4. SBMA is a duly-constituted municipal authority that, pursuant to a series of inter-municipal agreements, provides sewer service to a closed and well-defined group of properties otherwise situated within the geographical jurisdiction of Shrewsbury Township.
5. Anderson’s complaint regarding service to Presidential Heights Associates does not concern property Anderson owns in his individual capacity.
6. Presumably, Presidential Heights Associates is the owner of the property described as being located at an undisclosed address on Mount Airy Road in Shrewsbury.

7. The caption of Anderson's complaint indicates that Anderson brings this action in his capacity as "General Partner" of Presidential Heights Associates.
8. Anderson thus purports to represent in this proceeding the legal interests of the general partnership Presidential Heights Associates.
9. On information and belief, Mr. Anderson is not an attorney licensed to practice law in the Commonwealth of Pennsylvania.
10. Accordingly, Presidential Heights Associates brings this action *pro se* through the agency of its general partner, Anderson.
11. Shrewsbury Borough does not provide sewer service outside the geographical boundaries of Shrewsbury Borough.
12. SBMA does not provide sewer service within Shrewsbury Borough.
13. Presidential Heights Associates is not a sewer customer of Shrewsbury Borough.
14. On information and belief, Presidential Heights Associates is a sewer customer of SBMA. SBMA reserves the right to deny that Presidential Heights Associates is a sewer customer of SBMA until such time as Presidential Heights Associates provides the street address associated with the property in question.
15. In his complaint against SBMA, most of which is a word-for-word recapitulation of other complaints filed against SBMA, Anderson alleges that
 - a. "[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;"
 - b. SMBA "refuses to make [certain] capacity available to Township property owners;"
 - c. Property owners who receive sewer service from other entities are not required to pay certain costs associated with reservation of future sewer capacity that property;
 - d. SBMA "isn't meeting on a regular basis;"

- e. Customers outside Shrewsbury Borough’s municipal limits have no one protecting their interest;” and
- f. SBMA “is merely a front.”

See Complaint at ¶ 4B.

16. Anderson also complains about existing sewer capacity. Simplifying the argument, Anderson complains that, because an EDU entitles a property owner to 375 gallons-per-day of sewer capacity and because, on a metered flow basis, property owned by Presidential Heights Associates utilizes less than 375 gallons per day, Presidential Heights Associates is entitled to re-assign the unused portion of a single EDU to different properties and, through that mechanism, is entitled to additional sewer connections at no charge. Sewer capacity in the system in question is sold on a flat-rate EDU basis, not on a metered flow basis. The law is clear that Presidential Heights Associates has no right to purchase capacity on a metered flow basis.¹ In any event, no one is “denying” Presidential Heights Associates “the use of the gallons of treatment capacity” it acquired. The entity has an absolute right to send 375 gallons-per-day into the system from each property for which an EDU was acquired. The entity does not, however, have a right unilaterally to re-assign portions of EDUs that were acquired for and assigned to one property to any other property and, more fundamentally, the law plainly does not require that SBMA (or Shrewsbury Borough) to permit him to do so. In the end, even if there were some colorable argument that Presidential Heights Associates is entitled to acquire sewer capacity on terms different from those set forth in the relevant ordinances and/or re-assign portions of EDUs among different properties (and there is not), PUC is not the proper forum litigating the issue.

¹ Pennsylvania courts readily permit authorities to impose uniform non-metered flat rates for sewage and/or water services upon dwellings regardless of their type. *See, e.g., Glen Riddle Park*, 314 A.2d 524 (1974) (affirming imposition flat fee on apartment units); *The Carlyle Group Inc. v. Warwick Township*, 28 Pa. D. & C. 4th 542 (1993) (affirming flat fee imposed on units with a mobile home park).

I. Preliminary Objections

A. Absence of Regulatory Jurisdiction

17. 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).

18. As a threshold matter, SBMA, as a duly constituted municipal corporation, is not a “public utility.”

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

20. 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 Anderson/Presidential Heights Associates 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).

21. 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)).

22. The conclusion is equally applicable here and the complaint should be dismissed as to SBMA on that basis.

23. The same is true with regard to Shrewsbury Borough.² Although the Anderson/Presidential Heights Associates complaint presents a legal conclusion to the effect

² Although paragraph 2 of the complaint identifies Shrewsbury Borough as a “respondent” in this matter, the complaint caption identifies only SBMA as a respondent and the complaint was not served on Shrewsbury Borough. Out of an abundance of caution, Shrewsbury Borough joins in the preliminary objections of SBMA but reserves the right to contest effective service.

that the Borough is providing sewer “services beyond the corporate limits of the Borough without a certificate of public convenience,” the complaint pleads no facts in support of that legal conclusion. Complaint at ¶ 4.B. Indeed, Anderson/Presidential Heights Associates contradicts that conclusion by alleging that the “property [in question] is located within the Shrewsbury Borough Municipal Authority Sanitary Sewer Service Area.” *Id.* Shrewsbury Borough simply does not provide sewer service in Shrewsbury Township. As the Anderson/Presidential Heights Associates correctly alleges, its service is through SBMA. Accordingly, to the extent it is a party to these proceedings, the complaint should be dismissed as to Shrewsbury Borough.

B. Lack of Standing/Capacity to Sue

24. The threshold absence of PUC jurisdiction aside, the Anderson/Presidential Heights Associates complaint is insufficient in other respects.

25. 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.

26. This suit does not concern property that Anderson himself owns but apparently concerns property owned by Presidential Heights Associates.

27. Because Anderson does not own the property in question, he has no interest in the subject matter sufficient to support standing to file a complaint.

28. To the extent Anderson attempts to represent the interest of the Presidential Heights Associates, the complaint must be dismissed because Anderson is not an attorney.

29. Business entities are not permitted to appear *pro se* in legal proceedings; they must be represented by an attorney. *See Walacavage v. Excell 2000, Inc.*, 480 A.2d 281, 284 (Pa. Super. Ct. 1984).

30. Thus, the complaint must be dismissed either because Anderson, not being a property owner, lacks standing, or because Presidential Heights Associates is attempting to appear in these proceedings on an impermissible *pro se* basis.

31. Apart from the threshold issues of standing, just as with the numerous other complaints filed in the present campaign to alter public policy by means of an abusive litigation campaign, the Anderson/Presidential Heights Associates fails to identify any law, regulation, or other restriction that SBMA has violated.

32. Because Anderson/Presidential Heights Associates 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.

33. Alternatively, the complaint should be dismissed on the basis of insufficient factual specificity. *See* 52 Pa. Code § 5.101(a)3. SBMA is entitled to know the factual basis underlying Anderson/Presidential Heights Associates complaint, which, by definition, constitutes an assertion that SMBA has acted *illegally* (as opposed merely to having acted in a manner different than have other regional providers. Indeed, the bulk of the Anderson/Presidential Heights Associates complaint appears concerned with the actions of Shrewsbury Borough, who neither provides service to Anderson/Presidential Heights Associates nor is a named party to this action.

34. As filed, Anderson/Presidential Heights Associates complaint does not allege concrete facts, just unsubstantiated general assertions. For example, despite verifying under penalty of perjury that he has “spoken to a utility company representative about this complaint,” Anderson/Presidential Heights Associates alleges no facts pertaining to past dealings between himself, SMBA, and/or Shrewsbury Borough on the specific issues raised in the complaint. It is not unreasonable for SBMA to expect that Anderson/Presidential Heights Associates plead the facts pertaining to those contacts.

C. Failure to Conform to Code

35. 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).

36. As noted in Section B, *supra*, the Anderson/Presidential Heights Associates 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

37. For all the foregoing reasons, SBMA respectfully requests that PUC dismiss the Anderson/Presidential Heights Associates complaint. SBMA 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 2, 2011

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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 2, 2011

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Borough Municipal Authority

**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.

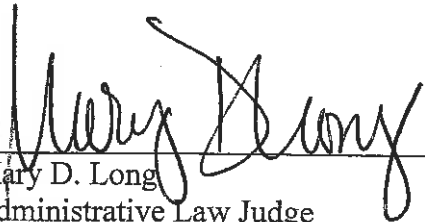
ORDER

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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Respondent.

No. C-2011-2251347

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of August 2011 respondent's Preliminary Objections to Complaint have been served via first-class mail, postage prepaid, upon the following:

Stephen Anderson
335 Winterstown Road
Red Lion, PA 17356

and

Presidential Heights Associates
Mount Airy Road
Shrewsbury, PA 17361

/s/ Eric Suter, Esq.

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