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January 26, 2021

Via Electronic Filing

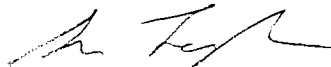
Rosemary Chiavetta, Secretary
PA Public Utility Commission
PO Box 3265
Harrisburg, PA 17105-3265

Re: Conyngham Township v. Sanitary Sewer Authority of the Borough of
Shickshinny
Docket No. C-2021-3023624

Dear Secretary Chiavetta:

Enclosed for electronic filing please find the Sanitary Sewer Authority of the Borough of Shickshinny's Preliminary Objections to the Formal Complaint filed in the above-referenced matter. Copies to be served in accordance with the attached Certificate of Service.

Very Truly Yours,



Sean W. Logsdon, Esquire

SWL:

Cc: Sanitary Sewer Authority of the Borough of Shickshinny
Vito J. DeLuca, Esquire (Via Electronic means)

**COMMONWEALTH OF PENNSYLVANIA
BEFORE THE PENNSYLVANIA PUBLIC UTILITY COMMISSION**

In the Matter of:

CONYNGHAM TOWNSHIP,	:	
	:	
Complainant	:	
	:	
v.	:	COMPLAINT DOCKET
	:	NO. C-2021-3023624
SANITARY SEWER AUTHORITY	:	
OF THE BOROUGH OF	:	
SHICKSHINNY,	:	
	:	
Respondent	:	
	:	

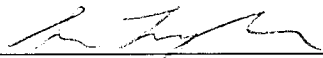
CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that this day I served a copy of the foregoing Preliminary Objections upon the persons listed below in the manner indicated in accordance with the requirements of 52 Pa. Code Section 1.54.

Via Email Only to:

Vito J. DeLuca, Esquire
DeLuca Law Offices
26 Pierce Street
Kingston, PA 18704
vjd@delucalawoffices.com

Date: January 26, 2021



Sean W. Logsdon, Esquire
Attorney for Sanitary Sewer Authority of the
Borough of Shickshinny

**COMMONWEALTH OF PENNSYLVANIA
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SANITARY SEWER AUTHORITY OF THE BOROUGH OF SHICKSHINNY,	:	
	:	
Respondent	:	
	:	

NOTICE TO PLEAD

To: Vito J. DeLuca, Esquire
DeLuca Law Offices
26 Pierce Street
Kingston, PA 18704
vjd@delucalawoffices.com

Pursuant to 52 Pa. Code § 5.101, you are hereby notified that an answer to the enclosed **Preliminary Objections** of the Sanitary Sewer Authority of the Borough of Shickshinny (SSABS) must be filed within 10 days of the date of service of the Preliminary Objections.

All pleadings, such as a Reply to Preliminary Objections, must be filed with the Secretary of the Pennsylvania Public Utility Commission with a copy served to counsel for SSABS and the Office of Administrative Law Judge.

File with:

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
PO Box 3265
Harrisburg, PA 17105-3265

With a copy to:

Sean W. Logsdon, Esquire
Sanitary Sewer Authority of the Borough of
Shickshinny
85 Drasher Road
Drums, PA 18222
sean@karpowichlaw.com

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SHICKSHINNY,	:	
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Respondent	:	
	:	

**THE SANITARY SEWER AUTHORITY OF THE BOROUGH OF SHICKSHINNY'S
PRELIMINARY OBJECTIONS**

Pursuant to 52 Pa. Code § 5.101, the Sanitary Sewer Authority of the Borough of Shickshinny (“SSABS” or “Authority” or “Respondent”) submits these Preliminary Objections to the Formal Complaint of Conyngham Township (“Complainant”). In support of these Preliminary Objections, the SSABS avers as follows:

PRELIMINARY OBJECTIONS

1. Contemporaneously with the filing of these Preliminary Objections, SSABS has filed an Answer and New Matter to the Complaint, which is incorporated herein by reference. SSABS Answer denies that the Complainant is entitled to the requested relief, which includes the award of a return of all monies collected by the SSABS from rate payers in Conyngham Township.
2. Paragraph 4 of the Complaint alleges that SSBS is operating in Conyngham Township without a Certificate of Public Convenience.

3. Paragraph 5 seeks on Order directing SSABS to immediately stop billing residents of Conyngham Township and return all monies collected until after a valid Certificate of Public Convenience is obtained.

A. Applicable Legal Standards

4. The Commission's Rules of Administrative Practice and Procedure permit the filing of preliminary objections.¹ The Commission's procedures regarding the disposition of preliminary objections is similar to that utilized in Pennsylvania civil practice. *Id.*

5. Under Section 5.101(a) of the Commission's regulations, preliminary objections must specifically state 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; and
- (7) Standing of a party to participate in the proceeding.

6. The moving party may not rely on its own factual assertions, but must accept for the purposes of disposition of the preliminary objection, all well-pleaded, material facts of the

¹ 52 Pa. Code § 5.101(a)(1)-(7). *Equitable Small Transportation Interveners v. Equitable Gas Company*, 1994 Pa. P.U.C. LEXIS 69, Docket No. C-00935435 (July 18, 1994).

other party, as well as every inference fairly deducible from those facts.² However, the Commission need not accept as true conclusions of law, unwarranted inferences from facts, argumentative allegations or expressions of opinion.³

7. In deciding the preliminary objections, the Commission must determine whether, based on the well-pleaded factual averments of the party, recovery or relief is possible.⁴

8. SSABS submits these preliminary objections pursuant to 52 Pa. Code § 5.101(a)(7), 52 Pa. Code § 5.101(a)(4), and 52 Pa. Code § 5.101(a)(1), based on the lack of standing of Conyngham Township and based in the lack of Commission jurisdiction over specific issues presented. The Township lacks standing to bring this action on behalf of the residents of the Township. The Commission lacks jurisdiction to grant any monetary compensation to the Complainant in the form of refunds, and therefore such issues and claims must be dismissed.

B. Preliminary Objection – Standing to seek Relief on behalf of others

9. Conyngham Township lacks standing to seek relief on behalf of others. It is well-settled that class actions are not permitted under the Public Utility Code. Section 701 of the Public Utility Code provides that any person may complain in writing to the Commission regarding the acts or omissions of a public utility.⁵ 66 Pa.C.S. § 701. However, nothing in Section 701 or any other section of the Public Utility Code allows for the filing of class action complaints or allows a customer to file a complaint on behalf of other similarly situated customers. *See Painter v. Aqua PA, Inc.*, Docket No. C-2011-2239556 (Order entered May 22,

² *County of Allegheny v. Cmwlth. of Pa.*, 490 A.2d 402 (Pa. 1985).

³ *Stanton-Negley Drug Co. v. Dep't of Pub. Welfare*, 927 A.2d 671, 673 (Pa. Cmwlth. 2007).

⁴ *Department of Auditor General, et al. v. SERS, et al.*, 836 A.2d 1053, 1064 (Pa. Cmwlth. 2003); *P.J.S. v. Pa. State Ethics Commission*, 669 A.2d 1105 (Pa. Cmwlth. 1996).

⁵ SSABS is a Municipal Authority created pursuant to the Municipality Authorities Act.

2014); *Pettko v. Pennsylvania American Water Company*, Docket No. C-2011-2226096 (Interim Order dated October 5, 2011).

10. Therefore, Conyngham Township may not seek relief on behalf of a larger class of customers and the Commission lacks jurisdiction to direct SSABS to provide relief to any customer other than Conyngham Township in this proceeding.

11. Accordingly, such issues and claims must be dismissed from this proceeding.

C. Preliminary Objection – Legal Insufficiency

12. SSABS submits, pursuant to 52 Pa. Code § 5.101(a)(4), that the claim that SSABS is operating in Conyngham Township without a Certificate of Public Convenience.

13. Section 1102(a)(5) of the Public Utility Code, 66 Pa.C.S. § 1102(a)(5), requires a certificate of public convenience for “any municipal corporation to acquire ... or begin to operate, any plant, equipment, or other facilities for the rendering or furnishing to the public of any public utility service beyond its corporate limits....”.

14. Nowhere in the Complaint is the Township alleging that SSABS is acquiring or beginning to operate any plant, equipment, or other facility, as the sewage plant is and has been operating in the Township for several decades.

15. The Department of Environmental Resources ordered Conyngham Township to join with the Borough of Shickshinny to undergo the project of preservation and improvement of the purity of the waters of the Commonwealth pursuant to the provisions of the Clean Streams Law.

16. Conyngham Township employed an engineering firm and incorporated the Conyngham Township Sewer Authority to undertake the project.

17. The site of the current processing plant was selected by and approved unanimously by the Conyngham Township Supervisors as the site for the erection of the processing plant.

18. The Conyngham Township sewer lines are located in, owned by, and maintained by the Township's sewer authority, and those lines convey sewage to the SSSBS's processing plant located on property owned by SSABS located in Conyngham Township.

19. Conyngham Township was a bulk customer of SSABS until the service contract was terminated in November of 2020.

20. SSABS began invoicing the rate payers in Conyngham Township directly in January of 2021 for the processing of the sewage at the plant.

21. The rights asserted by Conyngham Township derive from a private contract, and the PUC lacks jurisdiction over private contractual disputes. *Allport Water Authority v. Winburne Water Company*, 258 Pa.Super. 555, 393 A.2d 673 (1978).

22. Therefore, Conyngham Township's complaint is legally insufficient and the Commission lacks jurisdiction to grant relief in relation to a contract dispute.

D. Preliminary Objection – Lack of Jurisdiction to award the Relief Requested

23. SSABS submits, pursuant to 52 Pa. Code § 5.101(a)(1),⁶ that the claims and issues related to monetary compensation must be dismissed because the Commission lacks jurisdiction over those issues.

⁶ The regulation at 52 Pa. Code § 5.101(a)(1) permits the filing of a preliminary objection to dismiss a pleading for lack of Commission jurisdiction. The provision at 52 Pa. Code § 5.101(a)(1) serves judicial economy by avoiding a hearing where no factual dispute exists. If no factual issue pertinent to the resolution of a case exists, a hearing is unnecessary. 66 Pa. C.S. § 703(a); *Lehigh Valley Power Committee v. PUC*, 563 A.2d 557 (Pa. Cmwlth. 1989); *S.M.E. Bessemer Cement, Inc. v. PUC*, 540 A.2d 1006 (Pa. Cmwlth. 1988); *White Oak Borough Authority v. PUC*, 103 A.2d 502 (Pa. Super. 1954).

24. The Commission's jurisdiction does not include actions that sound in either contract or tort. The powers of the Commission do not include the power to award monetary damages⁷. It is well settled that the courts of common pleas have jurisdiction over suits for damages, including claims against public utilities.

25. The Commission lacks jurisdiction to grant any monetary compensation in the form of refunds to the Complainant, and such issues and claims must be dismissed.

26. SSABS submits this preliminary objection, pursuant to 52 Pa. Code § 5.101(a)(1), based on the lack of Commission jurisdiction over the issue presented.


WHEREFORE, SSABS respectfully requests that this Commission (a) grant SSABS's preliminary objections; (b) dismiss the Complaint in its entirety; and (c) grant any other relief to SSABS that is deemed to be reasonable and appropriate.

DATE: 1/26/2020

Respectfully submitted,

Donald G. Karpowich, Attorney-at-Law, P.C.

By:


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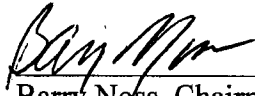
⁷ 3 See, e.g., *DeFrancesco v. W. Pa. Water Co.*, 453 A.2d 595 (Pa. 1982); *Elkin v. Bell of Pa.*, 491 Pa. 123, 420 A.2d 371 (1980); *Feingold v. Bell Telephone Co. of Pa.*, 383 A.2d 791 (Pa. 1977).

VERIFICATION

I, Barry Noss, am the Chairman of the Board of Directors of the Sanitary Sewer Authority of the Borough of Shickshinny, and I do hereby verify that the facts set forth in the foregoing are true and correct to the best of my knowledge, information and belief. I understand that false statements herein are made subject to the penalties of 18 Pa. C.S.A. Section 4904 relating to unsworn falsification to authorities.

Sanitary Sewer Authority of the Borough of
Shickshinny

DATE: 1-25-2021



Barry Noss, Chairman
Board of Directors of the Sanitary Sewer
Authority of the Borough of Shickshinny