*Via electronic service only due to Emergency Order at M-2020-3019262*

**BEFORE THE**

**PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Conyngham Township :

:

 v. :C-2021-3023624

 :

Sanitary Sewer Authority :

of the Borough of Shickshinny :

**FIRST INTERIM ORDER**

**SUSTAINING INPART AND DENYING IN PART PRELIMINARY OBJECTIONS**

**AND DENYING RESPONDENT’S REQUEST FOR DISMISSAL OF THE COMPLAINT**

PROCEDURAL BACKGROUND

On January 6, 2021, Complainant Conyngham Township (the Township or Complainant) filed a Formal Complaint with the Pennsylvania Public Utility Commission (Commission) against the Sanitary Sewer Authority of the Borough of Shickshinny (SSABS, Authority or Respondent). The Township alleges the Sewer Authority is operating in the Township without a Certificate of Public Convenience. Complaint ¶4. For relief, the Township requests “that the Commission order Respondent to immediately stop billing residents of Conyngham Township and return all monies collected until after a valid Certificate of Public Convenience is obtained.” Complaint ¶5.

The SSABS filed an Answer and New Matter and Preliminary Objections (PO) on January 26, 2021. The SSABS maintained the allegations of Paragraph 4 of the Complaint were a conclusion of law. The SSABS asserted it “is not acquiring or beginning to operate any plant, equipment, or other facility, or doing any other activity which would trigger the need for a Certificate of Public Convenience.” Answer ¶4. The SSABS further alleged as follows:

The Department of Environmental Resources ordered Conyngham Township to join with the Borough of Shickshinny to undergo a project of preservation and improvement of the purity of the waters of the Commonwealth pursuant to the provisions of the Clean Streams Law. Conyngham Township employed an engineering firm and incorporated the Conyngham Township Sewer Authority to undertake the project. 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. SSABS cannot be said to be extending service outside of its municipal boundaries. The Conygham Township sewer lines are located in, owned by, and maintained by the Township's sewer authority, and those lines convey sewage to the SSABS's processing plant located on property owned by SSABS located in Conyngham Township.

*Id.*

In New Matter, Respondent asserts the following affirmative defenses: failure to state a claim for which relief can be granted; issue and claim preclusion, Complainant's lack of standing; lack of Commission jurisdiction over non-public utility entities; lack of standing to pursue issues related to Conyngham Township's Complaint; federal and state preemption; estoppel; and laches. New Matter ¶11. As relief, Respondent requests dismissal of the Complaint with prejudice, and that the Commission assess costs and counsel fees and grant such other and further relief it deems just and proper.

Complainant filed a response to the New Matter on January 29, 2021, averring that the allegations of the New Matter were essentially conclusions of law to which no response was required, and Complainant averred it has standing to bring the Complaint as a customer of Respondent. Complainant reiterated its request for the relief as stated in its Complaint.

In its PO, SSABS raised the following objections:

1) The Authority lacked standing to seek relief on behalf of others; and the Public Utility Code (Code) does not provide for the filing of class actions. PO ¶9.

2) The rights asserted by the Township are derived from a private contract, over which the Commission lacks jurisdiction. Therefore, the Complaint is legally insufficient. PO ¶21.

3) The Commission lacked jurisdiction to grant monetary compensation in the form of refunds to Complainant. PO ¶25.

4) The Complaint is legally insufficient because the Authority is not acquiring or beginning to operate any plant, equipment, or other facility, or doing any other activity which would trigger the need for a Certificate of Public Convenience, as required by Section 1102(a)(5) of the Code. 66 Pa.C.S. § 1102(a)(5). PO ¶¶13-14.

In its PO, SSABS requests that the Complaint be dismissed in its entirety.

On January 29, 2021, the Township filed an Answer to Respondent’s Preliminary Objections, averring in part that the PO were conclusions of law to which no response was required. The Township further averred as follows:

1) The Township has standing because it was unlawfully billed by Respondent for the billing period January 1, 2021 to March 31, 2021 for sewage treatment at the Township Municipal Building. Answer to PO ¶8.

2) The Commission has authority to grant refunds “with interest” and “on

behalf of all patrons subject to the same rate of the public utility. 66 Pa.C.S. § 1312. *Id.*

3) Prior to September 11, 2020, Complainant and Respondent were parties to a bulk services agreement whereby Respondent would bill the Conyngham Township Sewer Authority (CTSA) for sewage treatment for customers of CTSA. A Certificate of Public Convenience was not required for that arrangement. Respondent unilaterally terminated the arrangement on or about September 11, 2020, by written notice to the Township and began operations beyond its corporate limits by billing Conyngham Township customers directly. Conyngham Township is beyond the corporate limits of Respondent. Answer to PO ¶14.

4) The rights asserted by Conyngham Township in this action derive from the PUC Code and Pennsylvania Law, not from a private contract. Regardless of the actual date of termination of the bulk services agreement by Respondent the parties agree the agreement was terminated by Respondent. Respondent was at no point in time authorized by law or contract to act as a “public utility” within the corporate limits of Conyngham Township without a Certificate of Public Convenience.

Accordingly, the Township requests that the Commission deny and dismiss Respondent’s PO.

 By notice dated February 8, 2021, the Parties were informed that this matter was assigned to me.

DISCUSSION

Legal Principles

 Complaints

 Section 701 of the Code, 66 Pa.C.S. § 701, provides that any person may complain, in writing, about any act or thing done or omitted to be done by a public utility in violation, or claimed violation, of any law which the Commission has the jurisdiction to administer, or of any regulation or order of the Commission.

 Commission Jurisdiction

As in every case coming before this forum, 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 authority the state legislature has specifically granted to it in the Public Utility Code. 66 Pa.C.S. §§ 101, et seq. Its jurisdiction must arise from the express language of the pertinent enabling legislation or by strong and necessary implication therefrom. *Feingold v. Bell of Pa.*, 383 A.2d 791 (Pa. 1977).

The Commission must act within, and cannot exceed, its jurisdiction. *City of Pittsburgh v. PA Public Utility Comm’n*, 43 A.2d 348 (Pa. Super. 1945). Jurisdiction may not be conferred by the parties where none exists. *Roberts v. Martorano,* 235 A.2d 602 (Pa. 1967). Neither silence nor agreement of the parties will confer jurisdiction where it otherwise would not exist, *Commonwealth v. Van Buskirk,* 449 A.2d 621 (Pa. Super. 1982), nor can jurisdiction be obtained by waiver or estoppel, *In Re Borough of Valley-Hi,* 420 A.2d 15 (Pa. Commw. 1980).

Subject matter jurisdiction is a prerequisite to the exercise of the power to decide a controversy. Cf., *Hughes v. PA State Police*, 152 Pa. Commw. 409, 619 A.2d 390 (1992), *alloc. den*., 637 A.2d 293 (1993).

Municipal Corporations

Under Section 1501 of the Code, 66 Pa.C.S. § 1501, a municipal corporation providing utility services beyond its corporate limits is subject to the Commission’s jurisdiction. Section 1501 reads in pertinent part as follows:

Any public utility service being furnished or rendered by a municipal corporation beyond its corporate limits shall be subject to regulation and control by the commission as to service and extensions, in the same force and in like manner as if such service were rendered by a public utility.

Preliminary Objections

The Commission’s Rules of Practice and Procedure permit parties to file preliminary objections. The grounds for preliminary objections are limited to those set forth

in 52 Pa.Code § 5.101(a) as follows:

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.

7. Standing of a party to participate in the proceeding.

Commission preliminary objection practice is analogous to Pennsylvania civil practice regarding preliminary objections. *Equitable Small Transportation Intervenors v. Equitable Gas Company*, 1994 Pa. PUC LEXIS 69, Docket No. C‑00935435 (July 18, 1994). Preliminary objections in civil practice requesting dismissal of a pleading will be granted only where the right to relief is clearly warranted and free from doubt. *Interstate Traveller Services, Inc. v. Pa. Dept. of Environment Resources*, 406 A.2d 1020 (Pa. 1979); *Rivera v. Philadelphia Theological Seminary of St. Charles Borromeo, Inc.,* 595 A.2d 172 (Pa.Super. 1991). The Commission follows this standard. *Montague v. Philadelphia Electric Company*, 66 Pa. PUC 24 (1988).

The Commission may not rely upon the factual assertions of the moving party but must accept as true for purposes of disposing of the motion all well-pleaded, material facts of the nonmoving party, as well as every inference from those facts. *County of Allegheny v. Commonwealth of Pennsylvania,* 490 A. 2d 402 (Pa. 1985); *Commonwealth of Pennsylvania v. Bell Telephone* *Co. of Pa.,* 551 A.2d 602 (Pa.Cmwlth. 1988). The Commission must view the Complaint in this case in the light most favorable to Complainant and should dismiss the complaint only if it appears that Complainant would not be entitled to relief under any circumstances as a matter of law. *Equitable Small Transportation Intervenors v. Equitable Gas*

*Company,* 1994 Pa. PUC LEXIS 69, Docket No. C-00935435 (July 18, 1994).

 Contracts

 Under Section 508 of the Code, the Commission has the authority address contract issues in certain circumstances. Section 508 of the Code provides as follows:

**§ 508.  Power of commission to vary, reform and revise contracts.**

The commission shall have power and authority to vary, reform, or revise, upon a fair, reasonable, and equitable basis, any obligations, terms, or conditions of any contract heretofore or hereafter entered into between any public utility and any person, corporation, or municipal corporation, which embrace or concern a public right, benefit, privilege, duty, or franchise, or the grant thereof, or are otherwise affected or concerned with the public interest and the general well-being of this Commonwealth.

66 Pa.C.S. § 508.

Refunds

Section 1312 of the Code provides, in relevant part, for the ordering of refunds by the Commission as follows:

**§ 1312.  Refunds.**

**(a)  General rule.--**If, in any proceeding involving rates, the commission shall determine that any rate received by a public utility was unjust or unreasonable, or was in violation of any regulation or order of the commission, or was in excess of the applicable rate contained in an existing and effective tariff of such public utility, the commission shall have the power and authority to make an order requiring the public utility to refund the amount of any excess paid by any patron, in consequence of such unlawful collection, within four years prior to the date of the filing of the complaint, together with interest at the legal rate from the date of each such excessive payment. In making a determination under this section, the commission need not find that the rate complained of was extortionate or oppressive. Any order of the commission awarding a refund shall be made for and on behalf of all patrons subject to the same rate of the public utility.

66 Pa.C.S. § 1312(a).

Complaint and Objections

 The Township alleges the Authority is operating in the Township without a Certificate of Public Convenience. The Township requests that the Commission order Respondent to immediately stop billing residents of the Township and return all monies collected until after a valid Certificate of Public Convenience is obtained.

 The Authority objects that 1) the Township lacks standing to seek relief on behalf of others, namely the Township’s residents; 2) the Township’s asserted rights are derived from a private contract, over which the Commission lacks jurisdiction; 3) the Commission lacks jurisdiction to grant monetary compensation in the form of refunds; and 4) the Authority is not acquiring or beginning to operate any plant, equipment, or other facility, or doing any other activity which would trigger the need for a Certificate of Public Convenience.

Analysis

 Lack of Standing Objection

 To the extent the Complaint may be construed as class action seeking billing relief for residents of the Township, Respondent is correct. As mentioned above the Commission’s jurisdiction is limited by its legislative grant of authority. In the present case the relief, in part, that the Township requests is beyond the Commission’s jurisdiction. The Township asks the Commission to order the Authority “to immediately stop billing residents of the Township, until after a valid Certificate of Public Convenience is obtained.” Such a request is generally made in civil proceedings in a class action lawsuit. However, the Commission’s enabling authority does not extend to class actions.  Class actions are unnecessary in the administrative setting and unauthorized by the applicable law, since the General Rules of Practice and Procedure deal with the problem of similarly situated parties and no evidence indicates that the mechanisms provided therein are inadequate. *Sullivan v. Insurance Department*, 408 A.2d 1174 (Pa. Cmwlth. 1979). Furthermore, an individual customer may represent himself or herself before the Commission. See 52 Pa.Code § 1.21. However, all other persons must be represented by an attorney. See 52 Pa.Code § 1.22. Accordingly, Respondent’s preliminary objection that the Township lacks standing to represent all residents of the Township must be sustained.

 While the Township may not represent the interests of residents of the Township,

The Township, through its counsel, may prosecute the Complaint on its own behalf, under Section 701 of the Code. 66 Pa.C.S. § 701. Section 701 of the Code provides that any person may complain, in writing, about any act or thing done or omitted to be done by a public utility in violation, or claimed violation, of any law which the Commission has the jurisdiction to administer, or of any regulation or order of the Commission.

 Jurisdiction Objection — Contracts

 Respondent argues the Parties’ rights are governed by a private contract, over which the Commission lacks jurisdiction. Complainant retorts that the Parties’ bulk service agreement was terminated by Respondent in late 2020, and Complainant’s rights are governed by the Code. On this issue Respondent’s argument is misplaced. The Commission has jurisdiction over contracts between a public utility and municipal corporation, which implicates the public interest. *See* 66 Pa.C.S. § 508, cited above. Additionally, the terms and conditions of the bulk service agreement, which are not before this administrative body at this stage of the proceeding, raise questions of fact that cannot be resolved upon a preliminary objection. Accordingly, Respondent’s objection that the Commission lacks jurisdiction over a private contract must be denied.

 Jurisdiction Objection — Refunds

 Respondent argues the Commission lacks the authority to grant refunds, which is the relief requested by Complaint. Again, the Respondent’s objection is misplaced. The Commission may order refunds for any rate received by a public utility which is determined to be unjust, or unreasonable, or in violation of any regulation, or order of the Commission, or to exceed the applicable rate contained in an existing and effective tariff of the public utility. *See* 66 Pa.C.S. § 1312(a). Accordingly, Respondent’s objection that the Commission lacks jurisdiction to grant or order refunds must be denied.

 Legal Insufficiency of the Complaint

SSABS claims it is not acquiring or beginning to operate any plant, equipment, or other facility, or doing any other activity which would trigger the need for a Certificate of Public Convenience. Thus, SSABS submits the Complaint is legally insufficient. In its Answer, SSABS suggests the construction of a processing plant and site selection were under the Township’s directions. SSABS admits the processing plant conveys sewage to SSABS’s facility located in the Township. Answer ¶4. However, SSABS argues it cannot be said to be extending service outside its municipal boundaries. SSABS’s suggestion and argument raise questions of fact.

Furthermore, the crux of the Complaint is that the Township alleges SSABS is operating in the Township without a Certificate of Public Convenience. In ruling upon SSABS’ legal insufficiency objection, the Township allegation must be accepted true. Also, there is a question of fact as to whether the Authority is conducting “any other activity” in the Township which requires SSABS to have a Certificate of Public Convenience. This question of fact cannot be resolved upon a preliminary objection.

Notably upon a finding that SSABS is operating in the Township without a Certificate of Convenience, the Commission has the authority to compel SSABS to obtain a Certificate of Public Convenience. *See Ridgway v. Pennsylvania Public Utility Com*. 83 Pa. Commw. 379, 480 A.2d 1253 (1984). Additionally, SSABS may ultimately face a civil penalty and/or an order to take remedial action, in the event the Township prevails in establishing that SSABS is operating in the Township without a Certificate of Public Convenience. Accordingly, Respondent’s objection that the Complaint is legally insufficient must be denied.

SSABS’ Dismissal Request

 For the reasons stated above, SSABS’s request to dismiss the Complaint in its

entirety must be denied. There are questions of fact concerning the Township’s allegation that SSABS is operating without a Certificate of Public Convenience as required by the Code. While the ultimate determination of facts will guide the outcome of the case, a factual *dispute* will prevent the grant of a preliminary motion to dismiss the case in its entirety. Any doubt must be assumed in favor of the nonmoving party.

 The Township is cautioned that SSABS’ preliminary request for dismissal of the Complaint in its entirety is denied on purely procedural grounds and does not, in any way, give credence to either the substance of the Complaint or to the likelihood of Complainant’s success on the merits.

 A complainant has the burden of showing that the named utility is responsible or accountable for the problem described in the complaint to prevail. *Patterson v. Bell Telephone Company of Pennsylvania*, 72 Pa. PUC 196 (1990); *Feinstein v. Philadelphia Suburban Water Company*, 50 Pa. PUC 300 (1976). This must be shown by a preponderance of the evidence. *Samuel J. Lansberry, Inc. v. Pa. Pub. Util. Comm’n*, 578 A.2d 600 (1990), *alloc. den.*, 602 A.2d 863 (1992). That is, by presenting evidence more convincing, by even the smallest amount, than that presented by the other party. *Se-Ling Hosiery v. Marqulies*, 70 A.2d 854 (1950).

 Respondent’s offense must be a violation of the Code, the Commission’s regulations, or an outstanding order of the Commission. 66 Pa.C.S. § 701. Complainant is responsible for proving that Respondent has acted improperly, by providing testimony and documentary evidence, such as expert reports, photographs, and any other relevant materials necessary to support that finding, and that the Commission has the jurisdiction to provide the remedy.

The parties are directed to attempt to resolve this matter themselves, and they are

strongly encouraged to participate in settlement negotiations. Settlement discussions are consistent with the Commission’s regulations. See 52 Pa.Code § 5.231.

 This matter will be scheduled for a prehearing conference to establish a litigation schedule.

CONCLUSIONS OF LAW

 1. The Commission’s Rules of Administrative Practice and Procedure permit

the filing of preliminary motions.

 2. The Commission has been granted broad powers to regulate all public utilities doing business within the Commonwealth.

 3. The Commission is empowered to determine whether a public utility is in violation of the Public Utility Code, a Commission regulation or order, or the public utility’s tariff.

 4. An individual customer may represent himself or herself before the Commission. See 52 Pa.Code § 1.21. However, all other persons must be represented by an attorney. See 52 Pa.Code § 1.22.

5. The Commission has the authority to grant refunds in certain circumstances.

ORDER

 THEREFORE,

 IT IS ORDERED:

 1. That Respondent Sanitary Sewer Authority of the Borough of Shickshinny’s Preliminary Objections filed to the Formal Complaint of Conyngham Township

at Docket No. C-2019-3013416 are sustained in part and denied in part.

 2. That Respondent Sanitary Sewer Authority of the Borough of Shickshinny’s Preliminary Objections at Docket No. C-2021-3023624 are sustained to the extent that Conyngham Township lacks standing to represent the residents of Conyngham Township; the Preliminary Objections are denied in all other respects consistent with this Order.

3. That Respondent Sanitary Sewer Authority of the Borough of Shickshinny’s request to dismiss the Complaint filed by Conyngham Township against Sanitary Sewer Authority of the Borough of Shickshinny at Docket No. C-2021-3023624 is denied.

 4. That consistent with the reasoning in this Order, this case shall be scheduled for a prehearing conference for the establishment of a litigation schedule.



Date: March 5, 2021

**C-2021-3023624 - CONYNGHAM TOWNSHIP v. SANITARY SEWER AUTHORITY OF THE BOROUGH OF SHICKSHINNY**

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