*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 :

**SECOND INTERIM ORDER**

**HOLDING ESTABLISHMENT OF LITIGATION SCHEDULE**

**IN ABEYANCE UNTIL COMPLETION OF MEDIATION**

PROCEDURAL BACKGROUND

Complaint

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.

Answer and New Matter and Response to New Matter

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 Conyngham Township sewer 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.

Preliminary Objections

On January 26, 2021, the SSABS also filed Preliminary Objections (PO). 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 requested 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. Answer to PO ¶21.

Accordingly, the Township requested 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.

Ruling on Preliminary Objections

After due consideration, on March 5, 2021, I issued a *First Interim Order Sustaining inPart and Denying in Part Preliminary Objections and Denying Respondent’s Request for Dismissal of the Complaint* (*First Interim Order*). The preliminary objections were sustained to the extent that Conyngham Township lacked standing to represent the residents of Conyngham Township and denied in all other respects consistent with the *First Interim Order.*

Prehearing Conference

On March 8, 2021, I issued a *Prehearing Conference Order* (*Order*), which informed the Parties that a prehearing conference would be held on April 7, 2021. The *Order* directed the Parties to review the regulations pertaining to prehearing conferences, 52 Pa.Code § 5.221-§ 5.224, and to file Prehearing Conference Memorandums. The Parties timely filed their respective Prehearing Conference Memorandums.

The prehearing conference convened as scheduled. The Township was

represented by Attorney Vito J. DeLuca, Esquire, and SSABS was represented by Sean W.

Logsdon, Esquire. During the prehearing conference the following schedule was proposed.

|  |  |
| --- | --- |
| **Date** | **Event** |
|  |  |
| April 30, 2021 | Status Report – Settlement Negotiations |
| July 9, 2021 | Discovery Ends |
| July 23, 2021 | Direct Written Testimony Due |
| August 5, 2021 | Rebuttal Testimony Due |
| August 5, 2021 | Stipulations Due |
| August 24, 2021 | Evidentiary Hearing |

I advised counsel that before I issued a prehearing order concerning the litigation schedule, they were to submit a status report concerning possible settlement of the case. The status report was due April 30, 2021.

Mediation Request

By letter dated April 22, 2021, counsel for SSABS requested the appoint of a mediator to assist the Parties in reaching an amicable resolution of the Complaint. Counsel for SSABS further represented that counsel for the Conyngham Township did not object to the appointment of a mediator to assist the Parties in reaching a settlement. Consequently, on April 30, 2021, this matter was referred to the Commission’s Mediation Unit for mediation review. By email on the same date, counsel for the respective Parties were informed that a Commission mediator would be discussing the case with them on May 5, 2021. Accordingly, the April 30, 2021 status report was not required.

This matter continues to undergo mediation. Therefore, the litigation schedule proposed during the prehearing conference may require revisions in the event mediation proves unsuccessful. Accordingly, in the ordering paragraphs below establishment of the litigation will be held in abeyance pending completion of mediation.

ORDER

THEREFORE,

IT IS ORDERED:

1. That Respondent Sanitary Sewer Authority of the Borough of Shickshinny having requested mediation in this proceeding; and Complainant Conyngham Township having had no objection to referring this matter to mediation; and accordingly, this matter has been referred to mediation; therefore, the establishment of the litigation schedule in this proceeding will be held in abeyance until completion of the mediation process.

2. That the Parties are encouraged to talk with each other to resolve this matter or a portion thereof. It is the Commission’s policy to encourage settlements. 52 Pa.Code §5.231.



Date: May 27, 2021

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

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