**BEFORE THE**

**PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Conyngham Township :

:

v. :C-2021-3023624

:

Sanitary Sewer Authority :

of the Borough of Shickshinny :

**FOURTH INTERIM ORDER**

**FOR LITIGATION SCHEDULE AND PREHEARING MATTERS**

TELEPHONIC HEARING

An initial telephonic hearing in this case is scheduled for **Wednesday, January 19, 2022, at 10:00 a.m.** The initial telephonic prehearing conference will be conducted by the undersigned presiding officer, **Administrative Law Judge Conrad A. Johnson** (ALJ).

To participate in the hearing, you must dial the toll-free number listed below. You will be prompted to enter a PIN number, which is also listed below. You will be asked to state your name and then the telephone system will connect you to the hearing. If you have any person(s) you want present during the hearing, you must provide them with the telephone number and PIN number.

**Toll-free Bridge Number: 1-866-566-0826**

**PIN Number: 76982683**

**You must call into the hearing on the scheduled day and time. You will not be called by the ALJ. You must participate in the telephonic hearing. If you fail to do so, your case will be dismissed.**

PROCEDURAL BACKGROUND

Complaint

On January 6, 2021, Conyngham Township (Township or Complainant) filed a 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 that the 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 Conygham 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, SSABS also filed Preliminary Objections (PO). In its

PO, SSABS raised the following objections:

1) The Township lacks standing to seek relief on behalf of others, and the Pennsylvania 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. *Allport Water Authority v. Winburne Water Company.* PO ¶ 21. Therefore, the Complaint is legally insufficient. PO ¶ 22.

3) The Commission lacks 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, Complainant and Respondent (the Parties) were informed that this matter was assigned to the ALJ.

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 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

By letter dated April 22, 2021, counsel for SSABS requested the appointment of a mediator to assist the Parties in reaching an amicable resolution of the Complaint. Counsel for SSABS further represented that counsel for the 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.

Referring this matter to mediation impacted the litigation schedule. Accordingly, on May 25, 2021, I issued a *Second Interim Order Holding Establishment of Litigation Schedule in Abeyance Until Completion of Mediation* in the event meditation proved unsuccessful. The Parties engaged in mediation. However, by email dated August 12, 2021, the mediator informed me that mediation did not achieve resolution of the Complaint, and the Parties requested that the case be set for hearing.

Hearing Notice, Notice of Intervention, and Intervenor’s Request for Continuance

On August 13, 2021, an Initial Call-In Telephone Hearing Notice was issued to the Parties informing them that an initial telephonic hearing would convene in this matter before me on September 15, 2021, at 10:00 a.m. The Hearing Notice provided the procedure to follow to participate in the hearing. On August 16, 2021, I issued a Prehearing Order informing the Parties about the procedural rules for the hearing and reminding them of the procedure to follow to participate in the hearing.

On September 3, 2021, the Commission’s Bureau of Investigation and

Enforcement (I&E) filed a Notice of Intervention (Notice). Pursuant to Section 308.2(a)(11) of the Code, 66 Pa.C.S. § 308.2(a)(11), I&E avered that it serves as the Commission’s prosecutory bureau for the purposes of representing the public interest in ratemaking, service matters, and Code and regulation enforcement. Notice ¶ 2. I&E further averred, through its prosecutors, it has standing to participated in all Commission proceedings. *Id.* ¶ 3. I&E asserted that on February 1, 2021, it initiated an informal investigation of the Authority and focused on the Authority’s alleged wastewater service to Pennsylvania consumers for compensation without holding a Certificate of Public Convenience issued by the Commission. *Id.* ¶¶ 5-6. I&E alleged its investigation determined that violations of the Code were substantiated. *Id.* ¶ 8. Accordingly, I&E asserted it was prepared to initiate a formal proceeding against the Authority. *Id.* ¶ 9. I&E submitted that it was intervening in this proceeding to protect the public interest. *Id.* ¶ 24. I&E further submitted that time and resources are conserved with its intervention in this proceeding now because I&E would have filed a separate complaint against the Authority concerning similar alleged violations. *Id.* ¶ 26.

Also on September 3, 2021, I&E filed a Motion for Continuance (Motion). As reasons for the continuance request, I&E averred in relevant part as follows:

5. A continuance of the Initial Call-In Telephone Hearing in this matter would allow time for I&E to conduct additional discovery, the re-establishment of a litigation schedule that contains the service of written testimony including written testimony from an I&E expert witness, and potential settlement discussions.

6. Counsel for the Township and the Authority have indicated that they have no objection to a continuance of the Initial Call-In Telephone Hearing.

Motion ¶¶ 5-6.

Second Prehearing Conference

After due consideration of the Motion, the initial hearing scheduled in this proceeding for September 15, 2021, at 10:00 a.m., was converted into a second prehearing conference. In preparation for the second prehearing conference, the Township, SSABS and I&E (the parties) were directed to the *Order* entered in this proceeding on March 8, 2021, concerning the regulations governing prehearing conferences.

The parties were directed to consult with each other to reach consensus, if possible, on a proposed litigation schedule.

Additionally, each party was directed to prepare and distribute a prehearing memorandum which set forth a brief history of the proceeding, the issues they intended to present, a listing of their proposed witnesses and the subject of their testimony, a proposed litigation schedule and a list of any exhibits or documents they intended to present at the hearing in this proceeding on or before by Tuesday, September 14, 2021. Prehearing memorandums were timely filed by the parties.

Litigation Schedule

The second prehearing conference convened as scheduled. Counsel for the

respective parties, Vito J. Deluca, Esquire, for the Township, Sean W. Logsdon, Esquire, for SSABS, and Stephanie M. Wimer, Esquire, for I&E, were present for the conference, during which the litigation schedule was established as follows:

|  |  |
| --- | --- |
| **Date** | **Event** |
|  |  |
| October 21, 2021 | Written Direct Testimony of All Parties Due |
| November 22, 2021 | Rebuttal Testimony Due |
| December 22, 2021 | Discovery Ends |
| January 5, 2022 | Stipulations Due |
| January 19, 2022 | Telephonic Evidentiary Hearing |
| TBD | Briefs |

Also, the parties are hereby directed to comply with the following requirements.

Electronic Service

1. The documents described in the litigation schedule referenced above shall

be served electronically on the date indicated, by 4:00 p.m. The email address for the ALJ is [cojohnson@pa.gov](mailto:cojohnson@pa.gov).

2. You must email the ALJ’s Legal Assistant Nicholas Miskanic at [nmiskanic@pa.gov](mailto:nmiskanic@pa.gov) a copy of any documents that you electronically **file** with the Secretary’s Bureau in this proceeding. If you email my legal assistant any documents or correspondence, you must also send a copy to all parties in this case. The current Service List (with available email addresses) is attached to this Order.

3. If you intend to present any documents for my consideration during the hearing, you must email them to the ALJ’s legal assistant at[nmiskanic@pa.gov](mailto:nmiskanic@pa.gov).  You must also submit a copy of each document you submit to me to all parties in this case.  Your documents must be received by me and all parties at least five (5) business days before the scheduled hearing.

4. All parties to proceedings pending before the Commission are encouraged to EITHER open and use an efiling account through the Commission’s website at [www.puc.pa.gov](http://www.puc.pa.gov)  OR to ensure timely arrival, submit the filing by overnight delivery to: Secretary, Pennsylvania Public Utility Commission, 400 North Street, Harrisburg, Pennsylvania 17120.  Emailed or faxed submissions are not acceptable.  If a filing contains confidential or proprietary material, the filing should be submitted by overnight delivery to ensure timely arrival.  Large filings containing confidential or proprietary material may also be submitted through the Commission’s Share Point File system.  These filings should be followed by a hard copy with a flash drive or CD for the Commission’s file. Filers should contact the Secretary’s Bureau in advance to set up a Share Point File before submitting the filing.

5. The parties are reminded of the Commission’s requirements for the

preparation and filing of written testimony. 52 Pa.Code § 5.412. Written testimony must be

accompanied by all exhibits to which it relates. The above-stated dates are in-hand dates for electronic service on the parties and the ALJ. The ALJ’s email address is [cojohnson@pa.gov](mailto:cojohnson@pa.gov). The ALJ will not accept facsimile transmissions greater than ten pages in length without prior authorization. If the parties have any questions, they may call the office of the ALJ at (412) 565-3550.

6. Any party, wishing to submit written testimony, pursuant to 52 Pa. Code § 5.412(f), is advised to comply with the Commission’s requirement concerning the electronic filing of written testimony as specified in the Commission’s Implementation Order, dated January 10, 2013, at Docket No. M-2012-2331973. Furthermore, the parties are reminded that a parties serving pre-served testimony in proceedings pending before the Commission pursuant to 52 Pa. Code §5.412(f), shall be required, within thirty (30) days after the final hearing in an adjudicatory proceeding (unless such time period is otherwise modified by the presiding officer), to either eFile with or provide to the Secretary’s Bureau a Compact Disc (CD) containing all testimony furnished to the court reporter during the proceeding. In addition to the testimony that is electronically submitted to the Commission either by eFiling or by the submission of a CD to the Secretary’s Bureau, parties must submit electronic copies of such testimony to the court reporter at the hearing of this matter.

Hearing Change

7. A request for a change of the scheduled hearing date must state the

agreement or opposition of other parties and must be emailed to **my legal assistant** and all

parties no later than five (5) business days prior to the hearing. 52 Pa.Code § 1.15(b). Email the ALJ’s legal assistant at[nmiskanic@pa.gov](mailto:nmiskanic@pa.gov) with any request for a change of the hearing date.  A change in the hearing date may be granted for good cause shown.

8. The telephonic hearing will begin promptly at 10:00 a.m. The parties

must confer before commencement of the hearing to schedule their witnesses to avoid “holes” or

“dead time” during the hearing.

Issues

9. In their respective prehearing memorandums, the parties identified various issues they may wish to pursue. The reader is directed to those documents to review a recitation of those issues. Additional issues may arise as the discovery process unfolds.

Discovery

10. The parties shall engage in informal discovery whenever and wherever possible to resolve any discovery disputes amicably. 52 Pa.Code § 5.322. If this process fails, the parties have recourse to the Commission’s procedures for formal discovery, as herein modified. 52 Pa.Code §§ 5.321, *et* *seq*. Except as herein allowed, the parties must not send the ALJ discovery material or cover letters, unless attached to a motion to compel or a motion for sanctions. All such motions must contain a certification of counsel of the informal discovery undertaken and their efforts to resolve their discovery disputes informally. If a motion to compel fails to contain such certification, the ALJ will contact the parties and direct them to pursue informal discovery.

11. The parties must, in good faith and on an informal basis, attempt to resolve any discovery dispute amicably among themselves, before contacting the ALJ for

resolution. If the parties cannot resolve their discovery dispute informally, they may confer informally with the ALJ to resolve any outstanding discovery disputes.

Settlement and Stipulations

12. The parties are reminded it is the Commission’s policy to encourage settlements. 52 Pa.Code § 5.231(a). The parties are strongly urged to seriously explore this possibility. Submission of a Joint Settlement Petition executed by representatives of all parties, together with all parties’ Statements in Support of Settlement, must be filed with the Secretary for the Commission and received electronically by the ALJ no later than the close of business on **Friday, January 14, 2022**. In addition to service of a hard copy, the Secretary must receive these documents on a CD ROM in searchable PDF format. Where possible, the parties must submit to the ALJ one hard copy of these documents and one copy by email. The electronic version of the documents served on the ALJ must be prepared on an IBM compatible system in Microsoft Office Word 2016 format or in an earlier version of this software application.

13. If settlement is not feasible, the parties are encouraged to stipulate to any matters they reasonably can to expedite this proceeding, lessen the burden of time and expenses in litigation on all parties and conserve administrative hearing resources. 52 Pa.Code §§ 5.232 and 5.234. All stipulations agreed to by the parties must be reduced to writing, signed by the parties to be bound thereby, and moved into the record during the hearing in this case. An exception to this requirement may occur when circumstances of time and expediency warrant. If so, an oral presentation of a stipulation is permissible, if it is followed by a reduction to writing as herein directed.

Witnesses

14. If you, or anyone you plan to call as a witness on your behalf, have a limited ability to speak or understand English or are deaf or hearing-impaired, a qualified interpreter can be provided upon your request. If you want an interpreter, please contact the

Scheduling Office at least ten (10) days before the scheduled Prehearing Conference or Hearing

to make your request at the following number:

Scheduling Office: (717) 787-1399

AT&T Relay Service number for persons who are deaf or hearing-impaired:

1‑800‑654‑5988

Cross-Examination

15. Friendly cross-examination or cumulative cross-examination will not be

permitted. 52 Pa.Code §§ 5.76 & 5.243.

Briefs

16. The parties must comply with 52 Pa.Code §§ 5.501, *et* *seq*., regarding the

preparation and filing of briefs. Page limitations on briefs will be discussed at the hearing. Where possible, the parties shall submit to the ALJ one hard copy of their briefs and one copy by email. If a party cannot provide a copy by email or on computer disc, it must submit two hard copies of briefs. **The electronic version of a brief must be prepared on an IBM compatible system in Microsoft Office Word 2016 format or in an earlier version of this software application.** If any questions arise, please call the office of the ALJ for clarification.

Modification

17. Any of the provisions of this Fourth Interim Order may be modified upon motion and good cause shown by any party in interest.



Dated: October 15, 2021

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

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

STEPHANIE M WIMER ESQUIRE

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