

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Sheila Weaver	:	
t/d/b/a Enterprise 22, LLC	:	
	:	
v.	:	C-2021-3028959
	:	
Aqua Pennsylvania	:	
Wastewater, Inc.	:	

**INITIAL DECISION**

Before  
Darlene Heep  
Administrative Law Judge

**INTRODUCTION**

Sheila Weaver t/d/b/a Enterprise 22, LLC (Complainant) filed a formal complaint seeking either the immediate connection of a residential subdivision in Whitehaven, Pennsylvania to the original pressure sewer main maintained by Aqua Pennsylvania Wastewater, Inc. or indemnification for costs associated with connecting the subdivision to the nearest sewer main. Aqua Pennsylvania Wastewater, Inc. (Aqua or Company) filed a Preliminary Objection seeking the dismissal of the formal complaint averring the Pennsylvania Public Utility Commission (Commission) lacks jurisdiction to grant the relief requested.

The Preliminary Objection is granted because the Complainant has not alleged that Aqua has violated the Public Utility Code, Commission regulations, or an order of the Commission and also because the claims and relief sought by the Complainant are not within the jurisdiction of the Commission.

## HISTORY OF THE PROCEEDING

On October 6, 2021, the Complainant, through counsel, filed a Complaint with the Commission against Aqua. The Complainant is developing a residential subdivision in White Haven, Pennsylvania. The Complainant avers that a pressure sewer main, the Woodhaven Force Main (Woodhaven Main), maintained by Aqua Pennsylvania, has existed in the property of the proposed subdivision since at least 2003. The Complainant asserts that it had confirmation and permission from Aqua to connect to the Woodhaven Main when the subdivision became ready, and that by correspondence dated September 14, 2016, Aqua confirmed that it was willing to accept the subdivision's utilities as proposed. The Complainant contends that there were multiple in-person and telephone conversations between Aqua and the Complainant and that Aqua's engineer directed the Complainant to build a doghouse manhole over the Woodhaven Main for safety purposes. The Complainant further avers that when the Complainant attempted to finalize the plans for the subdivision, Aqua informed the Complainant that the sewer connection had been abandoned and Aqua had no intention of reconnecting it.

The Complainant further asserts that Aqua informed the Complainant that a new planning module at a cost of approximately \$18,645.00 would be required and that, to connect to Aqua's nearest line, the Complainant will have to hire an excavation company for a cost of about \$56,225.00. As relief, the Complainant requests immediate utilization of the original sewer main or, alternatively, indemnification by Aqua if the Complainant provides the funding required to obtain another planning module, to connect to another sewer line and for PennDOT permit and inspection costs. Attached to the Complaint is a 2003 letter from the Pennsylvania Department of Environmental Protection (DEP) approving, with conditions: a Planning Module (Exhibit A); Correspondence from Aqua to the Complainant dated September 2016 regarding the utilities for the subdivision (Exhibit B); plans for the doghouse manhole (Exhibit C); Estimate of Professional Costs for a Planning Module (Exhibit D); and Excavation Proposal and Costs (Exhibit E).

On October 26, 2021, counsel for Aqua filed an Answer to the Formal Complaint and New Matter. In the Answer, Aqua states that it is certified by the Commission to provide

water and wastewater services in White Haven, Pennsylvania. Aqua denies that the Complainant has met all requirements to connect to Aqua's facilities and declares that Aqua has provided reasonable and adequate service to the Complainant. Aqua also asserts that the DEP approved the Complainant's 2002 Planning Module for connection to the Woodhaven Main in September of 2003; that at the request of the Complainant, the subdivision was connected to the water system in 2006; and that the Complainant did not request at that time to be connected to the wastewater system.

Aqua further avers in the Answer that in 2008, Aqua entered into an agreement with Foster Township to provide wastewater service. As no customer was connected to the Woodhaven Main, the Woodhaven Main was abandoned by Aqua and replaced with the Foster Township Force Main (Foster Main), which was installed in a new location.

Aqua further asserts that in 2016, the Complainant met with Aqua to discuss connecting the subdivision to the sewer system. Aqua avers that in a memo dated September 14, 2016, Aqua outlined items required to proceed with the Project, including fire hydrants, installation costs for water and wastewater, hydrostatic testing and also advised that the Complainant may have to hire a professional engineer. Aqua further asserts in the Answer that none of the items on the memo have been completed.

Additionally, Aqua explains that the Complainant contacted the Company in July of 2018 stating that the wastewater infrastructure was designed and installed based on the tap location at the Woodhaven Main reflected in the 2002 Planning Module. Aqua asserts that the 2002 Planning Module is no longer valid and attached to the Answer a January 11, 2021 letter on behalf of the Complainant acknowledging that DEP is requiring a new planning module. Aqua further asserts that the Complainant has no right to connect to its system based on a 2002 Planning Module and that it was reasonable and prudent for Aqua to abandon the Woodhaven Main. Aqua also states that the Complainant has presented no legal or other authority that would require the Company to maintain the Woodhaven Main. Aqua denies that the Complainant has any right to its facilities, contractual or otherwise. Aqua further states that the Commission cannot award the damages requested by the Complainant.

In New Matter, Aqua contends that a 2002 Planning module approved by DEP for connection to the Woodhaven Main is no longer valid and that a new planning module must be reviewed and approved by the DEP before any connection to the wastewater system can occur. Aqua further asserts in New Matter that the Commission does not have jurisdiction to award money damages and that the Complaint does not allege that Aqua has violated any provision of the Code, a Commission Order, Commission Regulations or its Commission-approved tariff.

Also on October 26, 2021, Aqua filed a Preliminary Objection. In the Preliminary Objection, Aqua contends that the Complaint should be dismissed under § 5.101(a)(2) as containing impertinent matters. Aqua requests that the Commission: 1) find that the Commission lacks jurisdiction to order Aqua to connect its system when there is no valid Planning Module issued by DEP, 2) strike the Complainant's request for monetary damages and, 3) grant the Company such other relief as may be just and reasonable.

On November 5, 2021, the Complainant filed an Answer to Aqua's Preliminary Objection. In the Answer, the Complainant denies the averments of the Company and asserts that many are legal conclusions which require no response. The Complainant further asserts that Respondent has admitted that it represented to DEP that connections to its system were available for the Complainant's subdivision and that the Company should not have abandoned the Woodhaven Main. The Complainant also asserts that this matter is within the special competence jurisdiction of the Commission and therefore is in the proper forum.

On November 9, 2021, the Complainant filed a Reply to the New Matter. In the Reply, the Complainant denies Aqua's characterization of the Planning Module as no longer valid. The Complainant further asserts that Aqua was aware of the Company's plan to attach to the sewer line.

On November 15, 2021, a Motion Judge Assignment Notice assigned the Preliminary Objection to the undersigned. The matter is now ready for a decision.

## FINDINGS OF FACT

1. On October 6, 2021, Complainant Sheila Weaver t/d/b/a Enterprise 22, LLC filed a Complaint against Aqua Pennsylvania Wastewater, Inc.
2. On October 26, 2021, Aqua filed an Answer and New Matter.
3. On October 26, 2021, Aqua filed a Preliminary Objection.
4. On November 5, 2021, the Complainant filed an answer to the Preliminary Objection of Aqua.
5. On November 9, 2021, the Complainant filed an answer to the New Matter.
6. The Complainant is developing a subdivision in White Haven, Pennsylvania. Complaint ¶4.
7. Aqua provides water and wastewater service in White Haven, Pennsylvania.
8. Since at least 2003, Aqua and the Complainant have engaged in discussions regarding the connection of the subdivision to the Aqua wastewater system. Complaint ¶4.

## DISCUSSION

The grounds for granting Preliminary Objections are found in Section 52 Pa. Code § 5.101(a)). It states in pertinent part:

### **§ 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.
- (7) Standing of a party to participate in the proceeding.

52 Pa. Code § 5.101(a).

A preliminary objection will be granted only where relief is clearly warranted and free from doubt. *Interstate Traveller Servs., Inc. v. Pa. Dep't of Env't Res.*, 406 A.2d 1020 (Pa. 1979). 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 other party, as well as every inference fairly deducible from those facts. *County of Allegheny v. Commonwealth of Pa.*, 490 A.2d 402 (Pa. 1985). The preliminary objection may be granted only if the moving party prevails as a matter of law. *Rok v. Flaherty*, 527 A.2d 211 (Pa. Cmwlth. 1987). Any doubt must be resolved in favor of the non-moving party by refusing to sustain the preliminary objections. *Dep't of Auditor General, et al. v. State Emps.' Ret. Sys., et al.*, 836 A.2d 1053 (Pa. Cmwlth. 2003) (citing *Boyd v. Ward*, 802 A.2d 705 (Pa. Cmwlth. 2002)).

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 Transp. Intervenors v. Equitable Gas Co.*, 1994 Pa. PUC LEXIS 69, Docket No. C-00935435

(July 18, 1994); *see also, Interstate Traveler Servs., Inc. v. Commonwealth, Dep't of Env't Res.*, 406 A.2d 1020 (Pa. 1979). 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. *Ridge v. State Emps.' Ret. Bd.*, 690 A.2d 1312 (Pa. Cmwlth. 1997).

Therefore, a preliminary objection can be granted only if recovery or relief is not possible after all of the Complainant's averments in the complaint are viewed as true for purposes of deciding the preliminary objection, using only those facts specifically admitted.

Aqua avers that the Complaint should be dismissed under 52 Pa. Code § 5.101(a)(2) because the pleadings include impertinent matters. Particularly, Aqua asserts that the purpose of the DEP sewage facilities program is to implement the Pennsylvania Sewage Facilities Act (Act 537) to address existing sewage disposal needs, and to prevent future problems through the proper planning, permitting, and design of all types of sewage facilities. Aqua further asserts that it is not permitted to connect any new service unless DEP has approved a Planning Module. Aqua also contends that counsel for the Complainant has admitted that there is no valid DEP Planning Module for the Complainant's planned subdivision. Aqua next avers that the Commission lacks jurisdiction to award the damages sought by the Complainant, namely indemnification by Aqua if the Complainant provides the funding required for another planning module.

In response, the Complainant denied the material averments. The Complainant asserts that Aqua contends that the planning module is no longer "valid" because Aqua abandoned the sewer line to which Complainant's subdivision was going to be attached. Moreover, Complainant argues, Aqua was aware of the existence of Complainant's subdivision plans and, consequently, should not have abandoned the line. By way of further response, the Complainant contends that Respondent has admitted that it represented to DEP that connections to its system were available for Complainant's subdivision, referencing Respondent's Answer and New Matter at ¶ 1. The Complainant is requesting immediate utilization of the original sewer main or, alternatively, indemnification by Aqua if the Complainant provides the funding

required to obtain another planning module to connect to another sewer line and any PennDOT permit and inspection costs.

Aqua contends that it cannot connect the subdivision to the sewer system absent a new DEP approved planning module. The Complainant contends that a new planning module would not be required if Aqua had not abandoned the Woodhaven Main.

All of the averments of the Complainant 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. *Ridge, supra*. Here, the Complainant avers that the Complainant had confirmation and permission to connect the subdivision to the Aqua system when the subdivision became ready, and that by correspondence dated September 14, 2016, Aqua confirmed that it was willing to accept the subdivision's utilities as proposed. The Complainant also avers that Aqua has admitted that it represented to DEP that connections to its system were available for the Complainant's subdivision. Nevertheless, the Preliminary Objections should be granted because the Complaint presents issues to the Commission that are not within the purview of the Commission.

First, the Complainant has not asserted that Aqua has violated a Commission Order, the Public Utility Code, Commission regulations, or its own Commission-approved tariff. 66 Pa.C.S. § 701.

Second, enforcement of state and federal environmental statutes is "specifically vested in DEP and the Federal Environmental Protection Agency. *Rovin v. Pa. PUC*, 502 A.2d 785 (Pa. Cmwlth. 1986). Sewage facilities planning and the Pennsylvania Sewage Facilities Act are squarely within the jurisdiction of the DEP. *See* 35 P.S. §750.1, *et seq.*; *Pickford v. Pa. PUC*, 4 A.3d 707 (Pa. Cmwlth. 2017); *Country Place Waste Treatment Co., Inc. v. Pa. PUC*, 654 A.2d 72 (Pa. Cmwlth. 1995); The validity of the planning module and whether the Complainant must develop another planning module are beyond the jurisdiction of the Commission. Those are determinations to be made by the DEP.

Third, the question whether there exists or existed an agreement between the Complainant regarding Aqua's abandonment of the Woodhaven Main or the subdivision's connection thereto is contractual in nature. Such contractual issues are also beyond the purview of the Commission. As held in *Allport Water Auth. v. Winburne Water Co.*, 393 A.2d 673 (Pa. Super. 1978), "[t]he PUC is not jurisdictionally empowered to decide private contractual disputes between a citizen and a utility." The Commission therefore lacks the jurisdiction to decide Complainant's alleged contractual dispute.

Fourth, the "indemnification" sought by the Complainant is essentially a claim for damages. Equity or damage claims are not within the jurisdiction of the Commission and are a matter for the Court of Common Pleas. See *Poorbaugh v. Pa. PUC*, 666 A.2d 744 (Pa. Cmwlth. 1995).

#### CONCLUSIONS OF LAW

1. A party may file preliminary objections alleging that there is lack of Commission jurisdiction or pleadings contain impertinent matters 52 Pa. Code § 5.101(a)(1) and (2).
2. 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. *Ridge v. State Emps.' Ret. Bd.*, 690 A.2d 1312 (Pa. Cmwlth. 1997).
3. Sewage facilities planning and the Pennsylvania Sewage Facilities Act are squarely within the jurisdiction of the DEP. See 35 P.S. §750.1, *et seq.*; *Pickford v. Pa. PUC*, 4 A.3d 707, 713-14 (Pa. Cmwlth. 2017)
4. The Commission lacks jurisdiction to award damages sought by the Complainant. *Poorbaugh v. Pa. PUC*, 666 A. 2d 744 (Pa. Cmwlth. 1995).

5. The dispute between Aqua and the Complainant is of a contractual nature and not within the purview of the Commission. *Allport Water Auth. v. Winburne Water Co.*, 393 A.2d 673 (Pa. Super. 1978)

ORDER

THEREFORE,

IT IS ORDERED

1. That the Preliminary Objection filed by Aqua Pennsylvania Wastewater, Inc. in the matter of Sheila Weaver t/d/b/a Enterprise 22, LLC v. Aqua Pennsylvania Wastewater, Inc. at Docket Number C-2021-3028959 is granted.

2. That the Complaint in the matter of Sheila Weaver t/d/b/a Enterprise 22, LLC v. Aqua Pennsylvania Wastewater, Inc. at Docket Number C-2021-3028959 is dismissed.

3. That this matter be marked closed.

Date: December 28, 2021

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/s/  
Darlene D. Heep  
Administrative Law Judge