**BEFORE THE**

**PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Conyngham Township :

:

 v. :C-2021-3023624

 :

Sanitary Sewer Authority :

of the Borough of Shickshinny :

**SEVENTH INTERIM ORDER**

**DENYING RESPONDENT’S MOTION FOR STAY AND DIRECTING PARTIES TO CONFER AND PROPOSE A REESTABLISHED LITIGATION SCHEDULE**

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, New Matter and Preliminary Objections

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 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.

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 litigation schedule was established, under which the case would be submitted upon stipulated fact and exhibits, cross motions for summary judgments, with main and reply briefs due on May 6, 2021 and May 27, 2021, respectively.

Mediation Request

 On April 22, 2021, counsel for SSABS requested the appointment of a mediator to assist the Parties in reaching an amicable resolution of the Complaint. Consequently, pursuant to a Second Interim Orderissued on May 25, 2021,the litigation schedule developed during the prehearing conference was held in abeyance, pending the outcome mediation. Mediation did not achieve resolution of the Complaint, and the case was scheduled for an evidentiary hearing on September 15, 2021.

Intervention of I&E and Continuance Requests

 On September 3, 2021, the Commission’s Bureau of Investigation and Enforcement of the (I&E) filed a Notice of Intervention and Request for Continuance of the hearing scheduled for September 15, 2021, in order to conduct discovery. As a result, a Third Interim Orderwas issued September 9, 2021, which converted the hearing scheduled for September 15, 2021 into a second prehearing telephone conference. Afterwards, a Fourth Interim Order, was issued on October 15, 2021, under which an evidentiary hearing was scheduled for January 19, 2022.

 On January 12, 2022, the Parties filed a Stipulation of Facts.

 On January 14, 2022, in response to SSABS request for a continuance because of its counsel’s scheduling conflict, a Corrected Fifth Interim Orderwas issued rescheduling the evidentiary hearing for March 1, 2022. On February 24, 2022, SSABS requested a continuance of the March 1, 2022 hearing to provide additional time to achieve a settlement of the Complaint. Consequently, a Sixth Interim Orderwas issued on March 1, 2022, rescheduling the evidentiary hearing for May 17, 2022.

SSABS’ Motion for Stay

 On May 11, 2022, SSABS filed Motion for Stay (Motion). The Motion suggested

that SSABS was seeking a stay in order to file in the Court of Common Pleas of Luzerne County for a declaratory judgement on the legal effect of SSABS’s September 11, 2020 letter, under which SSABS terminated the bulk service sewage treatment agreement between SSABS and the Township. Motion ¶ 67. The Motion noted that the Township and I&E did not consent to the stay. Motion at 1.

As grounds for the stay SSABS argued, in part, as follows:

SSABS respectfully asserts and seeks a declaration that the September 11, 2020 unilateral termination of the Parties' Sewage Treatment Agreement was void ab initio. This issue of whether the agreement was terminated or could have been terminated in September of 2020 goes directly to the jurisdiction of this court [Commission]. Although the ALJ' s March 5, 2021 Order on the Preliminary Objections states that the Commission has jurisdiction over contracts between a public utility and a municipal corporation, which implicates the public interest, the SSABS respectfully asserts that it is not a public utility. The SSABS is a Municipal Authority, and its contract was/is with a Municipal Corporation.

Motion at 2.

12. The sewage treatment agreement at issue, . . . , is the operative document that was purported to be terminated by letter on September 11, 2020.

. . . .

1. Pursuant to Process Gas, a petitioner need not demonstrate that it will win the case; it need only demonstrate that it has raised significant legal issues and made a substantial case on the merits. 502 Pa. at 554, 467 A.2d at 809.
2. Counsel for SSABS has raised significant legal issues and made a substantial case on the merits.
3. The agreement contains a provision for termination on page 8, which as stated above, clearly indicates that SSABS's attempt at terminating the agreement unilaterally is of no effect.
4. The agreement also contains an arbitration clause, which the
5. parties should have been compelled to participate in, even if SSABS attempted to unilaterally terminate the agreement.

. . . .

54. SSABS would be irreparably harmed if it would be forced to try this case before it has an opportunity to obtain a declaration from a court of competent jurisdiction as to legal effect of the September 11, 2020 letter.

. . . .

57. The activity complained of in this complaint is the direct billing of Conyngham Township ratepayers by SSABS for a period of 3 quarters in 2021.

1. SSABS has not billed any resident/ratepayer of Conyngham Township since the October of 2021 (the 4th quarter of 2021).

59. Since the activity complained of has ceased, there is no harm to any other interested party.

. . . .

63. The public interest favors giving all persons a fair trial, regardless of the allegations they face.

64. If a stay is denied, SSABS would be denied a fair trial because it would be required to go to trial while a threshold issue as to the legal effect of the alleged termination is outstanding.

65. This Court [Commission] cannot decide the effect of the September 11, 2020 letter as it is not a contract between a public utility and municipal corporation, it is a contract between a municipal corporation and a municipal authority.

Motion ¶¶ 12, 26-29, 54, 57-59, 63-65.

 In addition to the request for a stay, the Motion also requested that the undersigned "direct the SSABS to file their declaratory judgment action within 10 days of the order staying this matter, seeking an expedited hearing from the Court on the same.” Motion at 15.

Third Prehearing Conference

On May 11, 2022, via email, the Parties were informed that the telephonic hearing scheduled for Tuesday, May 17, 2022 would convene as a third prehearing conference to discuss the Motion and other procedural matters. Tr. 77. The third prehearing conference convened as scheduled with counsel for the respective Parties present.

During the conference the Motion was orally argued. Attorney Logsdon for SSABS reiterated the points raised in the Motion. Tr. 79-87. Notably, Attorney Logsdon represented that the Township had not yet filed for a declaratory judgment in the court of common pleas but was waiting for permission from the Commission to file. Tr. 88-89, 110.

Attorney DeLuca for the Township argued that the Commission had jurisdiction over the Complaint whether or not the sewage treatment service agreement was properly terminated. Tr. 90-91. Attorney DeLuca posited that the Complaint was properly before the Commission because SSABS billed the Township, which was outside of its territorial limits, without having a Certificate of Public Convenience. *Id.*

Attorney Stephanie Wimer for I&E argued as follows:

The Authority admitted in joint stipulations that were filed on January 12th of this year that it cancelled the sewage treatment agreement with the Township. And indeed, the facts show that it charged Township customers, both residential and businesses, for wastewater service between January 1 and October 1 and that those rates that were charged to Township customers were greater than any other rate charged by the Authority for the other customers that it showed. As Attorney DeLuca pointed out, this is, indeed, the very situation that regulation by the Public Utility Commission is intended to protect. Township customers effectively have no representation on the Authority because the Township did not join the Authority. And also, without an operative agreement, or an agreement in which the terms are adhered to, these Township customers are simply not protected. Staying this proceeding even further is not in the public interest because tomorrow the Authority can decide to change its mind and lift its self-imposed moratorium from refraining from the collection of rates. And Attorney Logsdon just admitted that the Authority does, indeed, to seek to collect back payment for the services that it’s provided since the third quarter of 2021.

 It’s I and E’s position that Your Honor should deny the motion for stay after first allowing an opportunity for I and E to provide a written response and promptly reschedule the evidentiary hearing because there are factual issues here related to whether the Authority committed actions that require a Certificate of Public Convenience that are not dependent on the outcome of an outside court.

Tr. 98-99.

 The third prehearing conference concluded with a directive to counsel for the Township and I&E to file a written response to the Motion by June 10, 2022, after which I would rule on the Motion. The Township filed a response to the Motion on June 8, 2022, and I&E file a response to the Motion on June 10, 2022.

DISCUSSION

 In support of its Motion to Stay, SSABS submits *Pennsylvania Public Utility Commission v. Process Gas Consumers Group,* 502 Pa. 545, 467 A.2d 805 (1983) (*Process Gas*). Under *Process Gas,* the movant must establish four factors in order to prevail on a motion to stay the proceedings:

 1) The movant has shown a strong likelihood of success on the merits; 2) Irreparable injury to the movant if a stay is denied;

 3) Issuance of a stay will not substantially harm other interested parties; and

 4) Issuance of a stay will not adversely affect the public interest.

 Thus, SSABS argues 1) it is likely to succeed on the merits of a declaratory judgment; 2) it will incur injury if a stay is not granted in terms of financial costs; 3) the Township and other customers will not be substantially harmed with the grant of a stay because they are not being billed for services; and 4) a stay will not adversely affect the public interest.

 The first prong of SSABS’s argument fails on two accounts. First, SSABS has not

filed for a declaratory judgment in the court of common pleas. Consequently, there is no court pleading for the undersigned to review to determine the likelihood of SSABS prevailing on the merits of a declaratory judgment action. In other words, any ruling on a yet to be filed declaratory judgment would be speculative at best. SSABS argues it is waiting for permission from the undersigned to file the action for a declaratory judgment. Also, SSABS requests an order directing SSABS to file for a declaratory judgment. Importantly, the filing for a declaratory judgment by SSABS or any Party to this proceeding does not require the permission of the undersigned. Additionally, it is not the role of undersigned to orchestrate the litigation strategy of any Party to this proceeding by directing a party to file a pleading in the court of common pleas. Any decision to file a pleading in another judicial forum remains with the individual litigant.

 Second, at stated in the First Interim Order entered on March 5, 2021, which addressed SSABS’ preliminary objections, “the crux of the Complaint is that the Township alleges SSABS is operating in the Township without a Certificate of Public Convenience.” First Interim Order at 10. Resolution of this allegation is squarely within the Commission’s jurisdiction notwithstanding the legal effect of SSABS’s September 11, 2020 letter terminating the sewage treatment service agreement between SSABS and the Township.

 SSABS’ argument on the other prongs to warrant a stay of the proceedings also lack merit. SSABS argues it will sustain irreparable injury in terms of financial costs because it is not currently billing customers in the Township. However, SSABS concedes that at some point when litigation ends it will seek payment for unbilled services. Tr. 97. Additionally, as I&E argues “Township customers effectively have no representation on the Authority because the Township did not join the Authority. And also, without an operative agreement, or an agreement in which the terms are adhered to, these Township customers are simply not protected.” Tr. 98-99. As a result, a stay of the proceedings would in effect substantially harm the Township and other customers in the Township.

Lastly, the Complaint in this case was filed January 6, 2021. The case has had an extended procedural history, numerous continuances have been granted, three prehearing conferences have been held, the evidentiary hearing has been postponed several times. A litigant is not entitled to never-ending continuances. *See Steadwell, v. Unemployment Compensation Board of Review, Respondent*, 76 Pa. Commw.439, 463 A.2d 1298 (1983). Importantly, it is in the public interest that a contested proceeding be addressed expeditiously. S*ee*  [*also In re Estate of Hartman*, 399 Pa.Superior Ct. 386, 582 A.2d 648 (1990)](https://www.lexis.com/research/buttonTFLink?_m=be792acc1a82467f38b81857a66a1560&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b158%20Pa.%20Commw.%20204%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=18&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b399%20Pa.%20Super.%20386%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLbVzt-zSkAl&_md5=461d0e531880fec088d6cbb687c1cff9), *appeal denied*, [527 Pa. 634, 592 A.2d 1301, 1302 (1991)](https://www.lexis.com/research/buttonTFLink?_m=be792acc1a82467f38b81857a66a1560&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b158%20Pa.%20Commw.%20204%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=19&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b592%20A.2d%201301%2c%201302%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLbVzt-zSkAl&_md5=d7cc55f097770dcdf55d200a4cefb1ec). In *Hartman,* the Superior Court reversed the trial court’s stay of the sale of the estate realty. The Superior Court ruled, in part, that there was a public interest in the timely completion of the estate administration. The ruling in *Hartman* applies to the present proceeding.

 Accordingly, based upon the foregoing and after due consideration, the Motion for Stay will be denied in the ordering paragraphs below and the Parties directed to confer and agree upon and propose a reestablished litigation schedule, which provides for a fourth prehearing conference date, the submission of any additional written testimony and an evidentiary hearing date.

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

THEREFORE,

IT IS ORDERED:

1. That Respondent Sanitary Sewer Authority of the Borough of Shickshinny’s Motion to Stay filed in this proceeding at Docket No. C-2021-3023624 is denied.
2. That the Parties shall confer and agree upon a reestablished litigation schedule, which provides for a fourth prehearing conference date, the submission of any additional written testimony, and an evidentiary hearing date.
3. That after the Parties have conferred and agreed upon a reestablished litigation schedule, counsel for Complainant Conyngham Township shall file and serve a proposed and reestablished litigation schedule by **Friday, July 15, 2022**.
4. That after Friday, July 15, 2022, a fourth prehearing conference shall be scheduled to discuss a reestablished litigation schedule and any other procedural matters.



Date: July 1, 2022

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

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