



COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA PUBLIC UTILITY COMMISSION
COMMONWEALTH KEYSTONE BUILDING
400 NORTH STREET, HARRISBURG, PA 17120

BUREAU OF
INVESTIGATION
&
ENFORCEMENT

November 18, 2022

Via Electronic Filing

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street
Harrisburg, PA 17120

Re: Conyngham Township v.
Sanitary Sewer Authority of the Borough of Shickshinny
Docket No. C-2021-3023624
I&E Main Brief

Dear Secretary Chiavetta:

Enclosed please find the Main Brief of the Bureau of Investigation and Enforcement in the above-referenced proceeding. Copies have been served on the parties of record in accordance with the Certificate of Service.

Should you have any questions, please do not hesitate to contact me.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Stephanie M. Wimer'.

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cc: Honorable Conrad A. Johnson (*via email*)
Nick Miskanic, Legal Assistant (*via email*)
Michael L. Swindler, Deputy Chief Prosecutor (*via email*)
As per Certificate of Service

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Conyngham Township	:	
	:	
v.	:	Docket No. C-2021-3023624
	:	
Sanitary Sewer Authority of the	:	
Borough of Shickshinny	:	

**MAIN BRIEF
OF THE
BUREAU OF INVESTIGATION AND ENFORCEMENT**

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Dated: November 18, 2022

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I. INTRODUCTION

A. QUESTIONS PRESENTED

The question central to the disposition of this matter is whether the Sanitary Sewer Authority of the Borough of Shickshinny (“Authority”) operated as an uncertificated, *de facto* public utility providing sewage treatment and disposal service for compensation to customers located in Conyngham Township (“Township” or “Conyngham Township”) after the Authority terminated the bulk Sewage Treatment Agreement with the Township. I&E submits that the answer to this question is clearly “yes.” Accordingly, the Pennsylvania Public Utility Commission (“Commission”) should impose a civil penalty in the amount of \$100,000 pursuant to 66 Pa.C.S. § 3301(a)-(b), issue refunds to Township customers in the amount that the Authority unlawfully collected from them along with the legal rate of interest pursuant to 66 Pa.C.S. § 1312(a), and direct the Authority to apply for a Certificate of Public Convenience pursuant to 66 Pa.C.S. §§ 1101, 1103.

B. PROCEDURAL HISTORY

Conyngham Township filed a Formal Complaint (“Complaint”) against the Authority on January 8, 2021, which initiated the instant proceeding. The Township alleges that the Authority is impermissibly operating in the Township without a Certificate of Public Convenience issued by the Commission. The Township requests that the Authority immediately stop billing Township residents and return all monies collected after a Certificate of Public Convenience is obtained.

On January 26, 2021, the Authority filed an Answer disputing the material allegations set forth in the Township’s Complaint. The Authority’s Answer also raised New Matter.

Separately, but concurrently on January 26, 2021, the Authority also filed Preliminary Objections raising a lack of standing on behalf of the Township to represent the Township's residents, legal insufficiency of the Complaint, lack of Commission jurisdiction over the subject matter, and a lack of jurisdiction for the Commission to award the requested relief.

On January 29, 2021, the Township filed an Answer to the Authority's Preliminary Objections. Also on January 29, 2021, the Township filed a Reply to the New Matter raised by the Authority.

By Motion Judge Assignment Notice dated February 8, 2021, Administrative Law Judge Conrad A. Johnson ("ALJ Johnson") was assigned as the presiding officer in the above-captioned matter.

By First Interim Order dated March 5, 2021, ALJ Johnson sustained the Authority's Preliminary Objections to the extent that the Township lacks standing to represent the Township's residents. ALJ Johnson denied the Authority's Preliminary Objections in all other respects as well as the Authority's request to dismiss the Complaint.

By Notice dated March 8, 2021, a telephonic prehearing conference was scheduled for April 7, 2021. Also on March 8, 2021, a Prehearing Conference Order was issued.

On March 31, 2021, the Township and the Authority filed their respective prehearing conference memoranda.

The telephonic prehearing conference was held on April 7, 2021 during which a litigation schedule was established.

By letter dated April 22, 2021, the Authority requested that the matter be assigned to a mediator.

By Second Interim Order dated May 27, 2021, ALJ Johnson referred the matter to mediation and held the litigation schedule in abeyance pending completion of the mediation process.

By Notice dated August 13, 2021, an initial call-in telephonic hearing was scheduled for September 15, 2021 at 10:00 a.m. On August 16, 2021, a Prehearing Order was issued to the parties.

On September 3, 2021, the Bureau of Investigation and Enforcement (“I&E”) filed a Notice of Intervention and an unopposed Motion for Continuance of the initial call-in telephone hearing. I&E stated in its Notice of Intervention that it had initiated an informal investigation of the Authority by letter dated February 1, 2021 at Bp8CaseIDNo. 3023904. The information obtained through I&E’s informal investigation led I&E to a determination that violations of the Public Utility Code, 66 Pa.C.S. §§ 101 *et seq.*, were substantiated and I&E was prepared to initiate a formal enforcement proceeding against the Authority, pursuant to 52 Pa. Code § 3.113(b)(2). Rather than filing a separate complaint against the Authority alleging similar violations, I&E instead elected to intervene in the instant matter to conserve time and resources.

Also on September 3, 2021, I&E served Interrogatories and Requests for Production of Documents – Set I directed to the Authority.

By Third Interim Order issued on September 9, 2021, the initial call-in telephonic hearing that was scheduled for September 15, 2021 was converted into a Second Prehearing Conference and the parties were directed to each file a Prehearing Memorandum. On September 14, 2021, the parties filed their respective Prehearing Memoranda.

On September 23, 2021, the Authority responded to I&E's Interrogatories and Requests for Production of Documents – Set I.

On September 27, 2021, I&E served Interrogatories and Requests for Production of Documents – Set II directed to the Authority.

The Second Prehearing Conference was held as scheduled and afterwards, ALJ Johnson issued a Fourth Interim Order on October 15, 2021 that established a litigation schedule, including dates for the submission of written Direct Testimony and written Rebuttal Testimony, and scheduled an evidentiary hearing for January 19, 2022.

On October 17, 2022, the Authority responded to I&E's Interrogatories and Requests for Production of Documents – Set II.

On October 21, 2022, I&E served I&E Statement No. 1, the written Direct Testimony of Matthew T. Lamb, P.E. and accompanying exhibits. Also on October 21, 2022, the Township served Conyngham Township Statement No. 1, the written Direct Testimony of Ed Whitebread, and Conyngham Township Statement No. 2, the written Rebuttal Testimony of Eric Kubasek.

The Authority did not submit written Direct Testimony. Accordingly, by letter dated November 22, 2021, I&E advised that it would not be submitting written Rebuttal Testimony at that time.

On January 12, 2022, the Township, the Authority, and I&E filed a Joint Stipulation of Facts.

On January 14, 2022, ALJ Johnson issued a Corrected Fifth Interim Order rescheduling the evidentiary hearing for March 1, 2022 based on the Authority's request for a continuance due to a scheduling conflict.

A Sixth Interim Order was issued on March 1, 2022, rescheduling the evidentiary hearing for May 17, 2022 based on the Authority's request for a continuance to provide additional time to achieve a settlement of the Complaint.

On May 11, 2022, the Authority filed a Motion for Stay, which was opposed by the Township and I&E. The Authority averred that it was seeking a stay in order to file in the Court of Common Pleas of Luzerne County an action for declaratory judgment on the legal effect of the Authority's letter that terminated the bulk service sewage treatment agreement between the Authority and the Township.

By email dated May 11, 2022, ALJ Johnson informed the parties that the telephonic hearing scheduled for May 17, 2022 would convene as a Third Prehearing Conference to discuss the Authority's Motion for Stay and other procedural matters.

The Third Prehearing Conference was held on May 17, 2022 and concluded with a directive that the Township and I&E file a written response to the Authority's Motion for Stay by June 10, 2022.

Conyngham Township filed an Answer to the Motion for Stay on June 8, 2022 and I&E filed an Answer in Opposition to the Motion for Stay on June 10, 2022.

ALJ Johnson issued a Seventh Interim Order on July 1, 2022 finding, *inter alia*, that resolution of the allegation that the Authority is operating in the Township without a Certificate of Public Convenience is squarely within the Commission's jurisdiction notwithstanding the legal effect of the Authority's letter that terminated the Sewage Treatment Agreement with the Township. ALJ Johnson further found that a stay of the proceedings would substantially harm the Township and customers in the Township. Accordingly, ALJ Johnson denied the Authority's Motion for Stay.

On July 13, 2022, the Authority filed a Motion to Establish a Reestablished Litigation Schedule.

On July 19, 2022, I&E filed an Answer in Opposition to the Authority's Motion to Establish a Reestablished Litigation Schedule. On July 21, 2022, the Authority also filed an Answer opposing the Authority's Motion to Establish a Reestablished Litigation Schedule.

By Notice dated August 8, 2022, a Further Call-In Telephonic Prehearing Conference was scheduled for August 19, 2022.

A Fourth Prehearing Conference was convened on August 19, 2022 wherein a litigation schedule was reestablished.

On August 25, 2022, ALJ Johnson issued an Eighth Interim Order that reestablished the litigation schedule by providing the Authority with the opportunity to submit written Direct Testimony by September 1, 2022, establishing September 16, 2022 as the date for the Township and the Authority to submit written Rebuttal Testimony, establishing September 30, 2022 as the date for the parties to amend any factual stipulations, and rescheduling the evidentiary hearing for October 4, 2022.

On September 1, 2022, the Authority served the written Direct Testimony and accompanying exhibits of its witness, Barry Noss.

On September 16, 2022, I&E served I&E Statement No. 1-R, the written Rebuttal Testimony of Matthew T. Lamb, P.E.

On October 4, 2022, the evidentiary hearing was held telephonically before ALJ Johnson.

I&E submits this Main Brief in accordance with the briefing schedule that was established at the conclusion of the evidentiary hearing.¹ Proposed Findings of Fact, Proposed Conclusions of Law and Proposed Ordering Paragraphs are attached as Appendix A, B and C, respectively.

II. STATEMENT OF THE CASE

The Borough of Shickshinny formed the Authority on September 25, 1973 as a municipal authority for, *inter alia*, the purpose of constructing, improving, furnishing and equipping a sanitary sewage system and treatment works.² The Borough of Shickshinny is the sole member of the Authority.³

The Authority operates and maintains a sewage treatment plant in Conyngham Township.⁴ The general scope of the Authority's activities includes providing treatment of domestic wastewater and discharging the treated wastewater in accordance with a permit issued by the Pennsylvania Department of Environmental Protection ("DEP").⁵

The Authority provides sewage treatment and disposal service to the Borough of Shickshinny, a portion of Salem Township, a portion of Conyngham Township called the Village of Mocanaqua, and to the Pennsylvania State Correctional Institute – Retreat.⁶ The Conyngham Township Sewer Authority owns and maintains lines in Conyngham Township that convey sewage to the Authority's processing plant, which is located on property owned by the Authority in Conyngham Township.⁷

¹ N.T. at 337.

² I&E Statement No. 1 at 5; I&E Exhibit 1, 2, and 4; Joint Stipulation of Facts No. 5.

³ I&E Statement No. 1 at 7; I&E Exhibit 5; Joint Stipulation of Facts No. 7.

⁴ I&E Statement No. 1 at 8.

⁵ Joint Stipulation of Facts, No. 6.

⁶ I&E Statement No. 1 at 8, 9; I&E Exhibit 8; Joint Stipulation of Facts, No. 9; N.T. at 209, 257-258.

⁷ Joint Stipulation of Facts, No. 8.

The Township never joined the Authority and has no representation on the Authority's Board.⁸

The Authority and the Township entered into a Sewage Treatment Agreement on November 18, 1992 where the Authority agreed to provide sewage treatment and disposal services to the Township as a single bulk customer.⁹ Additionally, pursuant to an Act 537 Sewage Facilities Plan that was approved by DEP, the Authority is obligated to treat and dispose of the wastewater generated by Township customers.¹⁰

By letter dated September 11, 2020, the Authority notified the Township that it was immediately cancelling the bulk Sewage Treatment Agreement.¹¹ However, due to the Act 537 Sewage Facilities Plan approved by DEP, the Authority remains obligated to provide wastewater disposal and treatment service to the Township.¹²

The Authority then commenced furnishing wastewater treatment service for compensation directly to Township customers, who fell outside of the Authority's corporate limits after the Authority's cancellation of the bulk Sewage Treatment Agreement. Prior to the issuance of the September 11, 2020 letter, the Authority requested records of Township customers for billing purposes.¹³ The Authority then began directly invoicing customers located in the Township on January 1, 2021, and such billing continued on a quarterly basis through the third quarter of 2021.¹⁴

⁸ Joint Stipulation of Facts, No. 7; Conyngham Township Statement No. 1 at 3.

⁹ I&E Statement No. 1 at 12; I&E Exhibit 10; Joint Exhibit A.

¹⁰ N.T. at 311.

¹¹ I&E Statement No. 1 at 13; I&E Exhibit 11; Joint Exhibit B; N.T. at 211; N.T. at 278.

¹² N.T. at 311-313.

¹³ N.T. at 239-240.

¹⁴ I&E Statement No. 1 at 14; I&E Exhibit 12; Joint Stipulation of Facts No. 13; Conyngham Township Statement No. 2 at 3; N.T. at 207, 263, 279.

The Conyngham Township Sewer Authority was forced to adjust its billing.¹⁵ Prior to the Authority's notice that it was terminating the Sewage Treatment Agreement, customers in the Township received a single bill from the Conyngham Township Sewer Authority that consisted of the wastewater treatment charges that the Conyngham Township Sewer Authority received from the Authority pursuant to the bulk Sewage Treatment Agreement, as well as charges related to the Conyngham Township Sewer Authority's conveyance of the wastewater.¹⁶ Subsequent to the September 11, 2020 letter, the Conyngham Township Sewer Authority issued quarterly bills to Township customers for charges solely related to conveyance.¹⁷

For sewage treatment and disposal service, the Authority charged Township customers a rate of \$75.00 per calendar year quarter.¹⁸ This rate was \$5.00 more per calendar year quarter than customers located in Salem Township and the Borough of Shickshinny.¹⁹ The Authority's quarterly bill to Township customers also included a charge of \$4.61 for conveyance, which is a service that the Authority does not provide to Township customers.²⁰ The Authority has not conducted a rate study for the past five years, including the time that it established rates for and directly charged Township customers.²¹

Approximately 220 residential customers and eight commercial customers located in the Township receive and paid for the Authority's wastewater treatment and disposal

¹⁵ N.T. at 328-329.

¹⁶ *Id.*

¹⁷ N.T. at 246, 261.

¹⁸ I&E Statement No. 1 at 14; I&E Exhibit 13; Joint Stipulation of Facts No. 13.

¹⁹ I&E Statement No. 1 at 15; I&E Exhibit 14.

²⁰ I&E Statement No. 1 at 16; I&E Exhibit 16.

²¹ I&E Statement No. 1 at 15; I&E Exhibit 15.

service.²² From January 1, 2021 to September 23, 2021, the Authority collected \$54,684.68 from ratepayers located in the Township.²³

The Authority has never applied for a Certificate of Public Convenience from the Commission.²⁴ It does not serve individual customers in the Township pursuant to a contract, has no control over the selection of Township customers, has no control over the sale or leasing of customer properties in the Township, and has never denied a request for sewage treatment service from a customer located in the Township.²⁵ The Authority is also able to provide sewage treatment and disposal service to additional customers in the Township if the Conyngham Township Sewer Authority expands its collection and conveyance of the wastewater to the Authority's sewage treatment plant.²⁶

III. BURDEN OF PROOF

Conyngham Township, as the proponent of a rule or order, bears the burden of proof to establish that the Authority violated 66 Pa.C.S. §§ 1102(a)(5) by furnishing wastewater treatment and disposal service for compensation to the public outside of the Authority's corporate limits without first obtaining a Certificate of Public Convenience issued by the Commission.²⁷ In a case such as this one, pending before an administrative tribunal, Commonwealth Court has held that a "litigant's burden of proof is satisfied by establishing a preponderance of evidence which is substantial and legally credible."²⁸ In order to meet its burden of proof, Conyngham Township must "present evidence more convincing, by even

²² I&E Statement No. 1 at 16; I&E Exhibit 17; Joint Stipulation of Facts No. 14.

²³ Joint Stipulation of Facts No. 15.

²⁴ I&E Statement No. 1 at 21; N.T. at 299.

²⁵ I&E Statement No. 1 at 20; I&E Exhibit 20; Joint Stipulation of Facts No. 21.

²⁶ I&E Statement No. 1 at 20.

²⁷ 66 Pa.C.S. § 332(a).

²⁸ *Samuel J. Lansberry, Inc. v. Pa. P.U.C.*, 578 A.2d 600, 602 (Pa. Cmwlth. 1990).

the smallest amount, than that presented by any opposing party.”²⁹ Additionally, any finding of fact necessary to support the Commission’s adjudication must be based on substantial evidence.³⁰ More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established.³¹

Upon the presentation by Conyngham Township and aligned intervenors of evidence sufficient to initially satisfy the burden of proof, the burden of going forward to rebut the evidence shifts to the Authority to present evidence of co-equal weight.³²

As evident in the record of this case and as supported in I&E’s Main Brief, the Authority has failed to credibly rebut evidence that it did not furnish wastewater service for compensation to the public in the Township, who are outside of the Authority’s corporate bounds after the Authority terminated the Sewage Treatment Agreement with the Township.

IV. SUMMARY OF ARGUMENT

The evidence in this proceeding illustrates that the Authority cancelled the bulk Sewage Treatment Agreement it had entered into with the Township. The termination of the Sewage Treatment Agreement rendered the wastewater treatment and disposal service provided by the Authority to Conyngham Township to fall outside of the Authority’s corporate limits. Subsequent to the cancellation of the Sewage Treatment Agreement, the Authority directly billed Township customers a more expensive rate than any other rate charged to a customer served by the Authority. The Authority charged Township customers for the first three calendar year quarters of 2021. The Authority’s continued provision of

²⁹ *Se-Ling Hosiery v. Margulies*, 70 A.2d 854 (Pa. 1950).

³⁰ *Mill v. Pa. Pub. Util. Comm’n*, 447 A.2d 1100 (Pa. Cmwlth. 1982); *Edan Transp. Corp. v. Pa. Pub. Util. Comm’n*, 623 A.2d 6 (Pa. Cmwlth. 1993); 2 Pa.C.S. § 704.

³¹ *Norfolk & W. Ry. v. Pa. Pub. Util. Comm’n*, 413 A.2d 1037 (Pa. 1980).

³² *Burleson v. Pa. Pub. Util. Comm’n*, 443 A.2d 1373 (Pa. Cmwlth. 1982), *aff’d*, 461 A.2d 1234 (Pa. 1983).

wastewater treatment and disposal service to the Township requires a Certificate of Public Convenience as nothing prevents the Authority from resuming billing again.

A civil penalty of \$100,000 is appropriate to cure the Authority's current non-compliance, penalize it for its misconduct, and deter it from committing future violations. The Commission should also direct the Authority to issue refunds to Township customers for the unlawful rates collected from them and apply for a Certificate of Public Convenience.

V. ARGUMENT

A. THE AUTHORITY OPERATED AS A *DE FACTO* PUBLIC UTILITY WHEN IT DIRECTLY CHARGED TOWNSHIP CUSTOMERS FOR WASTEWATER TREATMENT AND DISPOSAL SERVICE

i. Conyngham Township is Beyond the Authority's Corporate Limits

Section 1102(a)(5) of the Public Utility Code, 66 Pa.C.S. § 1102(a)(5), requires a Certificate of Public Convenience issued by the Commission “[f]or any municipal corporation to acquire, construct, or begin to operate, any plant, equipment, or other facilities for the rendering or furnishing to the public of any public utility service beyond its corporate limits.” The Public Utility Code further mandates that “[a]ny 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, with the same force and in like manner as if such service were rendered by a public utility.”³³

“Municipal corporation” is defined in the Public Utility Code as “[a]ll cities, boroughs, towns, townships, or counties of this Commonwealth, and also any public corporation, *authority*, or body whatsoever created or organized under any law of this

³³ 66 Pa.C.S. § 1501 (emphasis added).

Commonwealth for the purpose of rendering any service similar to that of a public utility.”³⁴ Because the definition of “municipal corporation” includes “authority,” the Commission maintains regulatory jurisdiction over the public utility service of municipalities and their authorities beyond the corporate limits of the municipality.³⁵

The Municipality Authorities Act, 53 Pa.C.S. §§ 5601 *et seq.*, governs municipal authorities. It provides, in pertinent part, that when a municipality desires to organize an authority, the municipality shall adopt a resolution or ordinance signifying its intention to do so.³⁶ Following the adoption of the resolution or ordinance at a public hearing, the resolution or ordinance must be published in a legal periodical and newspaper of general circulation pursuant to the requirements set forth in 53 Pa.C.S. § 5603(b). The municipal authority then must file Articles of Incorporation with the Secretary of the Commonwealth pursuant to 53 Pa.C.S. § 5603(c). A Certificate of Incorporation is then issued provided that the Articles of Incorporation conform to law.³⁷ The power and authority of a municipal authority is limited to that granted it by its enabling legislation.³⁸

On August 8, 1973, the Borough of Shickshinny passed a resolution signifying its intent to form an Authority for the purpose of constructing, improving, furnishing, and equipping a sanitary sewage system and treatment works, acquiring the land necessary for that purpose, and performing all necessary things incident thereto.³⁹ The Authority filed

³⁴ 66 Pa.C.S. § 102 (emphasis added).

³⁵ *State College Borough Authority v. Pa. Pub. Util. Comm’n*, 31 A.2d 557 (Pa. Super. 1943).

³⁶ 53 Pa.C.S. § 5603(a).

³⁷ 53 Pa.C.S. § 5603(e).

³⁸ *In Re Acquisition of Water System in White Oak Borough*, 93 A.2d 437 (Pa. 1953); *Fisher v. Se. Pa. Transp. Auth.*, 431 A.2d 394 (Pa. Cmwlth. 1981).

³⁹ I&E Exhibit 1.

Articles of Incorporation on that same day.⁴⁰ The Authority was then issued a Certificate of Incorporation dated September 25, 1973.⁴¹ Subsequently, the Authority constructed a sewage treatment plant in Conyngham Township on property owned by the Authority.⁴²

The Borough of Shickshinny is the only incorporating municipality for the Authority⁴³ and is the only municipality that joined the Authority.⁴⁴ Conyngham Township is not a member of and has not joined the Authority and, therefore, it falls outside of the limits as dictated by the Authority's Resolution, Articles of Incorporation, and Certificate of Incorporation. Moreover, Conyngham Township is also beyond the geographic boundaries of the Borough of Shickshinny. Therefore, Conyngham Township is beyond the corporate limits of the Authority and service provided by the Authority to Township customers is subject to Commission jurisdiction.

The purpose of subjecting a municipally operated public utility which renders service beyond its corporate limits to the Commission's jurisdiction is to protect users of the service who are not residents of the municipality.⁴⁵ Commonwealth Court has stated as follows:

Prior to the Public Utility Law of 1937, the Public Service Commission had no jurisdiction over a municipally operated public utility whether or not it rendered service beyond its corporate limits.... A realistic appreciation of the temptation to discriminate against the outside users impelled the change. When a municipality limits its service to its own voters the power of the ballot is perhaps an adequate protection. The officials who manage the property are elected by and, therefore, beholden to the consumers for their power to manage.... It is the consumer outside the corporate limits, who has no right to participate in the governmental affairs of the municipality and, therefore, in its

⁴⁰ I&E Exhibit 2.

⁴¹ I&E Exhibit 4.

⁴² I&E Exhibit 7.

⁴³ I&E Exhibit 1.

⁴⁴ I&E Exhibit 5; N.T. at 279-280.

⁴⁵ *County of Dauphin v. Pa. Pub. Util. Comm'n*, 634 A.2d 281, 283 (Pa. Cmwlth. 1993).

selection of management, who needs protection against the natural inclination of management to favor its constituents at the expense of the outsider who has no voice.

Id. citing *State College Borough Authority v. Pa. Pub. Util. Comm'n*, 31 A.2d 557, 562 (Pa. Super. 1943).

- ii. The Authority's Cancellation of the Sewage Treatment Agreement and Subsequent Actions Demonstrate that Conyngham Township Lacks any Ability to Exercise Power over the Authority's Service

Conyngham Township officials were able to exercise control on behalf of their constituents, Township customers, related to the Authority's provision of sewage treatment and disposal service through entering into the Sewage Treatment Agreement. On November 18, 1992, the Authority and the Township entered into a Sewage Treatment Agreement where the Authority agreed to provide sewage treatment and disposal service to the Township as a single bulk customer.⁴⁶ The Conyngham Township Sewer Authority would then issue a single bill to Township customers consisting of the wastewater treatment and disposal charges that it received from the Authority pursuant to the bulk Sewage Treatment Agreement, as well as charges related to the Conyngham Township Sewer Authority's conveyance of the wastewater.⁴⁷

Prior to the Authority's cancellation of the Sewage Treatment Agreement and subsequent actions, the Authority's wastewater treatment and disposal service to the Township was not subject to the Commission's regulatory jurisdiction. Municipal authorities have the power to "make contracts of every name and nature and to execute all instruments

⁴⁶ I&E Exhibit 10; Joint Exhibit A.

⁴⁷ *Id.*

necessary or convenient for the carrying on of its business.”⁴⁸ A municipal authority may enter into an inter-governmental agreement with another municipality that is not a member of the municipal authority, where the municipal authority agrees to serve the municipality pursuant to the terms and conditions of the agreement. The agreement acts as protection and provides the requisite “voice,” pursuant to *County of Dauphin*, 634 A.2d at 283, *supra.*, for the municipality that is outside of the municipal authority’s corporate limits. Indeed, the Sewage Treatment Agreement represented mutually agreeable terms and conditions with respect to the Authority’s provision of wastewater service to the Township and protected the users of the service – Township customers.

The Sewage Treatment Agreement remained in place until September 11, 2020 when the Authority notified the Township by letter that it was immediately cancelling the Sewage Treatment Agreement.⁴⁹ Thereafter, the Authority took multiple overt actions evidencing that it was furnishing wastewater service to the public for compensation *sans* any agreement from the Township. Such actions were to the detriment of the Township and Township customers.

For example, after requesting records from the Township concerning Township customers, the Authority began directly invoicing customers located in the Township on January 1, 2021.⁵⁰ For sewage treatment and disposal service, the Authority charged Township customers a rate of \$75.00 per calendar year quarter.⁵¹ This rate was \$5.00 more per calendar-year quarter than customers located in the Borough of Shickshinny and Salem

⁴⁸ 53 Pa.C.S. § 5607(d)(13).

⁴⁹ I&E Exhibit 11; Joint Exhibit B.

⁵⁰ I&E Statement No. 1 at 14; I&E Exhibit 12; Joint Stipulation of Facts No. 13; Conyngham Township Statement No. 2 at 3; N.T. at 207, 239-240, 263, 279.

⁵¹ I&E Statement No. 1 at 14; I&E Exhibit 13; Joint Stipulation of Facts No. 13.

Township.⁵² The Authority's quarterly bill to Township customers also included a charge of \$4.61 for conveyance, which is a service that the Authority does not provide to Township customers.⁵³

The Authority also admitted that it has not conducted a rate study for the past five years, including the time that it established rates for and directly charged Township customers.⁵⁴ These facts reveal the arbitrary nature of the Authority's charges as it relates to Township customers.

Additionally, Mr. Edward Whitebread, Chairman of the Board of Conyngham Township, testified as follows:

JUDGE: Well, what is it that you want the Commission to do for you?

WITNESS: I guess alleviate the issue where Shickshinny can come right in and dictate what amounts they want to pay without any - based upon the amounts they're going to be charging. The Township Building alone, we were paying one EDU⁵⁵ within the Township for the building, because it's a small Township Building with one male, one female bathroom. And because we have two bathrooms, they decided to bill us for two EDUs just because we have two individual bathrooms, which is ridiculous. And we did a Right-to-Know Request to their borough to find out how much they were being billed, and we found out they weren't even billing their Township - or their Borough Building. So it's a pretty - it was an unfair billing system.

N.T. at 209.

Approximately 220 residential customers and eight commercial customers located in the Township received invoices and paid these arbitrarily-based charges for the Authority's wastewater treatment and disposal service.⁵⁶ From January 1, 2021 to September 23, 2021,

⁵² I&E Statement No. 1 at 15; I&E Exhibit 14.

⁵³ I&E Statement No. 1 at 16; I&E Exhibit 16.

⁵⁴ I&E Statement No. 1 at 15; I&E Exhibit 15.

⁵⁵ "EDU" refers to equivalent dwelling unit.

⁵⁶ I&E Statement No. 1 at 16; I&E Exhibit 17; Joint Stipulation of Facts No. 14.

the Authority collected \$54,684.68 from ratepayers located in the Township.⁵⁷

The Authority's argument that its unilateral termination of the Sewage Treatment Agreement was legally invalid, rendering the Agreement to remain in effect, should be swiftly rejected as not credible. The Authority's September 11, 2020 letter that it issued to counsel for the Township expressly states that "[t]his notice of cancellation takes effect immediately."⁵⁸ The Authority's witness, Barry Noss, who is the chairperson of the Board for the Authority, testified that he authorized that the Authority's legal counsel to notify the Township in September of 2020 that the Authority was terminating the Sewage Treatment Agreement.⁵⁹ Additionally, on January 12, 2022, the Authority filed a Joint Stipulation of Facts, which it executed, stipulating that the Sewage Treatment Agreement was terminated. Then, on the day of the evidentiary hearing, the Authority altered its position by refusing to honor the stipulation admitting that the Sewage Treatment Agreement was terminated.⁶⁰

Regardless of the legal effect of the Authority's September 11, 2020 "cancellation letter," the actions taken by the Authority after issuing the letter plainly show that Conyngham Township officials lacked any control on behalf of Township customers with respect to the wastewater treatment and disposal service that the Authority provided to them. The Township was unable to prevent the Authority from directly invoicing customers located in the Township. The Township also had no influence over the rates that the Authority charged Township customers, which were greater than what the Authority charged any other

⁵⁷ Joint Stipulation of Facts No. 15.

⁵⁸ I&E Exhibit 11; Joint Exhibit B.

⁵⁹ N.T. at 278.

⁶⁰ N.T. at 171-180.

municipality, including the Borough of Shickshinny. The Authority’s discriminatory charges upon Township customers following the notice cancelling the Sewage Treatment Agreement illustrate why Commission oversight in this instance is crucial.

iii. In its Service to Township Customers, the Authority Acts as a Public Utility

a. The Authority’s Service is Provided to the Public

A public utility is defined, in pertinent part, as “[w]astewater collection, treatment, or disposal for the public for compensation.”⁶¹ Section 1101 of the Public Utility Code requires a “proposed public utility” to obtain a Certificate of Public Convenience issued by the Commission prior to offering, rendering, furnishing or supplying service within the Commonwealth.⁶²

The Commission has issued a Policy Statement at 52 Pa. Code § 69.1401 concerning Guidelines for Determining Public Utility Status (“Guidelines”). Under these Guidelines, the Commission makes a fact-based determination and takes the following criteria into consideration when deciding the public utility status of a service or project:

- (1) The service being provided by the utility project is merely incidental to nonutility business with the customers which creates a nexus between the provider and customer.
- (2) The facility is designed and constructed only to serve a specific group of individuals or entities, and others cannot feasibly be served without a significant revision to the project.
- (3) The service is provided to a single customer or to a defined, privileged and limited group when the provider reserves its right to select its customers by contractual arrangement so that no one among the public, outside of the selected group, is privileged to demand service

⁶¹ 66 Pa.C.S. § 102(1)(vi).

⁶² 66 Pa.C.S. § 1101.

52 Pa. Code § 69.1401(c)(1)-(3). It is not necessary that all criteria be met in order for a service or project to be given public utility status.⁶³

With regard to the first factor, the Authority admitted that its sole purpose is to engage in the collection, treatment, and disposal of sewage.⁶⁴ Therefore, the Authority has no other relationship with customers in the Township other than to treat and dispose of the customers' wastewater. Treatment and disposal of wastewater are actions that fit within the meaning of "public utility," pursuant to 66 Pa.C.S. § 102(1)(vi).

With regard to the second factor, the Authority admitted that it is capable of providing sewage treatment service to additional customers in the Township provided that the Conyngham Township Sewer Authority also expands its collection and conveyance of the wastewater to the Authority's sewage treatment plant.⁶⁵

With regard to the third and final factor, the Authority admitted that it does not serve customers in the Township pursuant to a contract, has no control over the selection of its customers, has no control over the sales or leasing of customer properties in the Township, and has never denied a request for sewage treatment service from a customer located in the Township.⁶⁶ These facts illustrate that the Authority's service is open to the use of all members of the public who may require it and not merely to particular individuals or a

⁶³ See *Petition of Skytop Lodge Corporation for a Declaratory Order*, Docket No. P-2013-2354659 (Order entered July 24, 2014) (finding that while Skytop's provision of utility services is incidental to its primary business, consideration of the other two factors did not support Skytop's Petition to be exempt from public utility status).

⁶⁴ I&E Exhibit 19.

⁶⁵ I&E Exhibit 16.

⁶⁶ I&E Exhibit 20; Joint Stipulation of Fact 21.

special class of persons.⁶⁷ Therefore, the Authority's wastewater treatment and disposal service is open to the indefinite public.

b. The Authority Provided Public Utility Service for Compensation

The Authority issued quarterly invoices directly to Township customers on January 1, 2021, April 1, 2021, and July 1, 2021, for the first three calendar year quarters of 2021.⁶⁸ The Authority charged Township customers \$75.00 per quarter and between January 1, 2021 and September 23, 2021, collected approximately \$54,684.68 from Township customers.⁶⁹ While the Authority ceased invoicing Township customers starting with the fourth quarter of 2021,⁷⁰ it is likely not sustainable for the Authority to continue providing free wastewater treatment and disposal service to Township customers. The reality is that the Authority is able to resume charging Township customers for wastewater treatment and disposal service at any time and at any rate absent regulation by the Commission. Moreover, nothing currently prevents the Authority from retroactively collecting wastewater treatment and disposal charges from Township customers. Therefore, the temporary cessation of the Authority's billing should not alter the conclusion that it continues to provide public utility service to the indefinite public.

⁶⁷ *Drexelbrook Associates v. Pa. Pub. Util. Comm'n*, 212 A.2d 237, 239 (Pa. 1965); *Waltman v. Pa. Pub. Util. Comm'n*, 596 A.2d 1221, 1223-4 (Pa. Cmwlth. 1991); See *Borough of Ambridge v. P.S.C.*, 165 A. 47 (Pa. Super. 1933); *Aronimink Transp. Co. v. P.S.C.*, 170 A. 375 (Pa. Super. 1934).

⁶⁸ Joint Stipulation of Facts No. 13.

⁶⁹ *Id*; Joint Stipulation of Facts No. 15.

⁷⁰ Joint Stipulation of Facts No. 17.

B. THE COMMISSION SHOULD DIRECT THE AUTHORITY TO PAY A CIVIL PENALTY, ISSUE CUSTOMER REFUNDS, AND APPLY FOR A CERTIFICATE OF PUBLIC CONVENIENCE

i. I&E's Requested Civil Penalty of \$100,000 is Appropriate

For violations of the Public Utility Code, the Commission is authorized to impose a civil penalty of up to \$1,000 per day for each and every day's continuance of the violation.⁷¹

A civil penalty payment has both curative and punitive effects, and incentives an entity to improve regulatory compliance.⁷²

The Commission's Policy Statement regarding *Factors and Standards for Evaluating Litigated and Settled Proceedings Involving Violations of the Public Utility Code and Commission Regulations* ("Policy Statement") considers specific factors and standards in evaluating whether a fine for violating a Commission order, regulation, or statute is appropriate in a litigated matter is appropriate.⁷³ I&E submits that a civil penalty of \$100,000 is necessary and appropriate for the reasons demonstrated below.

The first factor of the Commission's Policy Statement considers whether the conduct at issue was of a serious nature, such as willful fraud or misrepresentation, or if the conduct was less egregious, such as an administrative or technical error.⁷⁴ Conduct of a more serious nature may warrant a higher penalty.⁷⁵ I&E submits that the alleged conduct is serious. A municipal authority that provides service beyond its corporate limits requires Commission oversight to protect customers who are not residents of the incorporating municipality.⁷⁶

⁷¹ 66 Pa.C.S. § 3301(a)-(b).

⁷² *Pa. Pub. Util. Comm'n, Law Bureau Prosecutory Staff v. UGI Utilities, Inc.*, Docket No. M-2010-2138591 (Order entered October 25, 2010) (adopting the Law Bureau Prosecutory Staff's argument that the imposition of a civil penalty in lieu of a monetary contribution to a hardship fund is appropriate).

⁷³ 52 Pa. Code § 69.1201.

⁷⁴ 52 Pa. Code § 69.1201(c)(1).

⁷⁵ *Id.*

⁷⁶ *County of Dauphin v. Pa. Pub. Util. Comm'n*, 634 A.2d 281, 283 (Pa. Cmwlth. 1993).

These “outside customers” lack the ability to vote for the officials who manage the municipal authority, and the officials who manage the municipal authority are not beholden to “outside customers” for their power. “It is the consumer outside the corporate limits, who has no right to participate in the governmental affairs of the municipality and, therefore, in its selection of management, who needs protection against the natural inclination of management to favor its constituents at the expense of the outsider who has no voice.”⁷⁷ The Authority continues to provide wastewater treatment and disposal service to Township customers, who are outside of the Authority’s corporate limits, without Commission approval.

The second factor considered is whether the resulting consequences of the Authority’s alleged conduct were of a serious nature.⁷⁸ When consequences of a serious nature are involved, such as personal injury or property damage, the consequences may warrant a higher penalty.⁷⁹ I&E alleges that the resulting consequences of the Authority’s conduct were serious in that Township customers experienced discriminatory charges. They were charged more by the Authority than customers located in the Authority’s incorporating municipality – the Borough of Shickshinny.⁸⁰ Customers may also have experienced financial harm in that the Authority’s rates were greater than those paid under the former Sewage Treatment Agreement⁸¹ and the rates included a charge for conveyance, which is a service that the Authority does not provide.⁸²

⁷⁷ *Id.* citing *State College Borough Authority v. Pa. Pub. Util. Comm’n*, 31 A.2d 557, 562 (Pa. Super. 1943).

⁷⁸ 52 Pa. Code § 69.1201(c)(2).

⁷⁹ *Id.*

⁸⁰ I&E Statement No. 1 at 15; I&E Exhibit 14.

⁸¹ I&E Statement No. 1 at 15; I&E Exhibit 14.

⁸² I&E Statement No. 1 at 16; I&E Exhibit 16.

The third factor to be considered under the Policy Statement is whether the alleged conduct was intentional or negligent.⁸³ The fact the Authority continues to provide Township customers with a public utility service and has not applied for a Certificate of Public Convenience demonstrates that its conduct is intentional.

The fourth factor to be considered is whether the Authority has made efforts to change its practices and procedures to prevent similar conduct in the future.⁸⁴ Beginning with the fourth quarter of 2021, the Authority ceased charging Township customers for wastewater treatment and disposal service.⁸⁵ However, the cessation of charges to Township customers should not be construed to be a permanent modification as nothing currently prevents the Authority from resuming directly billing Township customers at any rate the Authority desires. Permanent compliance has not been achieved as Township customers remain outside of the Authority's corporate limits.

The fifth factor to be considered relates to the number of customers affected by the Authority's actions and the duration of the violations.⁸⁶ The Authority serves approximately 220 residential customers and eight commercial customers who are located in the Township,⁸⁷ which is beyond the Authority's corporate limits. The Authority impermissibly charged Township customers for wastewater treatment and disposal service for the first three (3) calendar year quarters of 2021.⁸⁸

The sixth factor to be considered relates to the Authority's compliance history with

⁸³ 52 Pa. Code § 69.1201(c)(3).

⁸⁴ 52 Pa. Code § 69.1201(c)(4).

⁸⁵ Joint Stipulation of Facts No. 17.

⁸⁶ 52 Pa. Code § 69.1201(c)(5).

⁸⁷ I&E Statement No. 1 at 16; I&E Exhibit 17; Joint Stipulation of Facts No. 14.

⁸⁸ Joint Stipulation of Facts No. 15.

the Commission.⁸⁹ An isolated incident from an otherwise compliant company may result in a lower penalty, whereas frequent, recurrent violations by a company may result in a higher penalty.⁹⁰ The Authority has not been subject to the Commission's oversight since it failed to obtain a Certificate of Public Convenience prior to furnishing wastewater treatment and disposal service for compensation beyond its corporate limits. Therefore, the Commission's records do not reflect any compliance history related to the Authority.

The seventh factor to be considered relates to whether the Respondent cooperated with the Commission's investigation.⁹¹ "Facts establishing bad faith, active concealment of violations, or attempts to interfere with Commission investigations may result in a higher penalty."⁹² The Authority cooperated with I&E's investigation and timely responded to I&E's data requests. However, such cooperation does not negate the serious violations that occurred.

The eighth factor to be considered is the appropriate settlement amount necessary to deter future violations.⁹³ The size of the company may be considered to determine an appropriate penalty amount.⁹⁴ I&E submits that a civil penalty of One Hundred Thousand Dollars (\$100,000), which may not be claimed as a tax deduction by operation of law,⁹⁵ is sufficient to deter the Authority from continuing to serve customers outside of its corporate limits. Pursuant to 66 Pa.C.S. § 3301(a)-(b), I&E could have sought and the Commission could have imposed a civil penalty of \$1,000 for each day the Authority provided wastewater

⁸⁹ 52 Pa. Code § 69.1201(c)(6).

⁹⁰ *Id.*

⁹¹ 52 Pa. Code § 69.1201(c)(7).

⁹² *Id.*

⁹³ 52 Pa. Code § 69.1201(c)(8).

⁹⁴ *Id.*

⁹⁵ 26 U.S.C.S. § 162(f).

service for compensation beyond its corporate limits. These violations endured for the first three calendar year quarters of 2021, from January 1, 2021 to September 30, 2021, or for a total of 272 days. The civil penalty amount sought by I&E is far less than the maximum amount of \$272,000 that could have been imposed since it considers the Authority's size. The Authority's budgeted income for 2021 was \$311,850.⁹⁶

The ninth factor to be considered relates to past Commission decisions in similar matters.⁹⁷ I&E's research did not reveal any Commission decisions related to fully litigated complaint proceedings involving alleged violations of 66 Pa.C.S. § 1102(a)(5). Therefore, this matter is unique and should be viewed on its own merits. Nevertheless, in looking at the relevant factors that are comparable to other complaint proceedings, the proposed civil penalty amount is consistent with past Commission decisions in that it is sufficient to deter future violations.

Therefore, I&E's requested civil penalty of \$100,000 is appropriate upon consideration of the factors and standards set forth in the Commission's Policy Statement at 52 Pa. Code § 69.1201(c).

- ii. The Commission is Authorized to Order the Authority to Refund Township Customers the Unlawful Rates the Authority Collected from Them

I&E requests that the Commission direct the Authority to refund the unlawful amounts that were charged to and paid by Township customers for the first three calendar year quarters of 2021. Section 1312(a) of the Public Utility Code provides, in pertinent part, that if:

⁹⁶ I&E Statement No. 1 at 28; I&E Exhibit 15.

⁹⁷ 52 Pa. Code § 69.1201(c)(9).

... 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, . . . 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.

66 Pa.C.S. § 1312(a). Between January 1, 2021 and September 23, 2021, the Authority collected \$54,684.68 from customers located in the Township.⁹⁸ Such rates were unlawfully collected as Township customers are beyond the Authority's corporate limits. The legal rate of interest is six percent per year.⁹⁹ One year has passed since the Authority's unlawful collection of \$54,684.68 from Township customers, six percent of which is \$3,281. Therefore, the Commission should direct the Authority to issue refunds to customers in the total amount of \$57,965.68.

iii. The Commission should Direct the Authority to Apply for a Certificate of Public Convenience

The Authority has not filed an application for a Certificate of Public Convenience with the Commission and therefore is uncertificated.¹⁰⁰ Since the Authority is obligated to continue providing wastewater treatment and disposal service to Township customers pursuant to an Act 537 Sewage Facilities Plan that was approved by DEP,¹⁰¹ and may reinstitute charging Township customers for this service at any time, the Commission should order the Authority to apply for a Certificate of Public Convenience.

⁹⁸ Joint Stipulation of Facts No. 15.

⁹⁹ 41 P.S. § 202.

¹⁰⁰ I&E Statement No. 1 at 21; N.T. at 299.

¹⁰¹ N.T. at 311.

VI. CONCLUSION

I&E respectfully requests that presiding Administrative Law Judge Conrad A. Johnson and the Commission find that the Authority operated as an uncertificated, *de facto* public utility providing sewage treatment and disposal service for compensation to Township customers following the Authority's cancellation of the Sewage Treatment Agreement. For relief, I&E requests that a civil penalty of \$100,000 be imposed, that the Authority refund the unlawful rates it collected from Township customers, and the Authority be directed to apply for a Certificate of Public Convenience.

Respectfully submitted,



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Pennsylvania Public Utility Commission
Bureau of Investigation and Enforcement
Commonwealth Keystone Building
400 North Street
Harrisburg, PA 17120
(717) 772-8839

Dated: November 18, 2022

APPENDIX A

PROPOSED FINDINGS OF FACT

The Bureau of Investigation and Enforcement (“I&E”) hereby incorporates by reference the Joint Stipulation of Facts that was admitted into the record during the October 4, 2022 evidentiary hearing. Additionally, I&E proposes the following Findings of Fact:

1. The rate charged by the Sanitary Sewer Authority of the Borough of Shickshinny (“Authority”) to customers located in Conyngham Township (“Township”) for sewage treatment and disposal service provided during the first three (3) calendar year quarters of 2021 was \$5.00 more per calendar year quarter than customers located in Salem Township and the Borough of Shickshinny. I&E Statement No. 1 at 15; I&E Exhibit 14.

2. The Authority’s quarterly bill to Township customers also included a charge of \$4.61 for conveyance, which is a service that the Authority does not provide to Township customers. I&E Statement No. 1 at 16; I&E Exhibit 16.

3. The Authority has not conducted a rate study for the past five (5) years, including the time that it established rates for and directly charged Township customers. I&E Statement No. 1 at 15; I&E Exhibit 15.

4. The Authority never applied for a Certificate of Public Convenience from the Commission. I&E Statement No. 1 at 21; N.T. at 299.

5. The Authority does not serve individual customers in the Township pursuant to a contract, has no control over the selection of Township customers, has no control over the sale or leasing of customer properties in the Township, and has never denied a request for sewage treatment service from a customer located in the Township. I&E Statement No. 1 at 20; I&E Exhibit 20; Joint Stipulation of Facts No. 21.

6. The Authority is also able to provide sewage treatment and disposal service to additional customers in the Township if the Conyngham Township Sewer Authority expands its collection and conveyance of the wastewater to the Authority's sewage treatment plant.

I&E Statement No. 1 at 20.

APPENDIX B

PROPOSED CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the subject matter and the parties to this proceeding. 66 Pa.C.S. § 501.

2. A Certificate of Public Convenience is required for any municipal corporation to begin to operate any plant, equipment or other facilities for the rendering or furnishing to the public of any public utility service beyond its corporate limits. 66 Pa.C.S. § 1102(a)(5).

3. 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, with the same force and in like manner as if such service were rendered by a public utility. 66 Pa.C.S. § 1501.

4. The Commission maintains regulatory jurisdiction over the public utility service of municipalities and their authorities beyond the corporate limits of the municipality. 66 Pa.C.S. § 102 (related to definition of “Municipal corporation”); *State College Borough Authority v. Pa. Pub. Util. Comm’n*, 31 A.2d 557 (Pa. Super. 1943).

5. Sewage collection, treatment, or disposal for the public for compensation is a public utility service. 66 Pa.C.S. § 102(1)(vii) (related to the definition of “Public utility”).

6. A municipal authority’s corporate limits are defined by that which is granted by its enabling legislation. 53 Pa.C.S. § 5603; *In Re Acquisition of Water System in White Oak Borough*, 93 A.2d 437 (Pa. 1953); *Fisher v. Se. Pa. Transp. Auth.*, 431 A.2d 394 (Pa. Cmwlth. 1981).

7. The purpose of subjecting a municipally operated public utility which renders service beyond its corporate limits to the Commission’s jurisdiction is to protect users of the

service who are not residents of the municipality. *County of Dauphin v. Pa. Pub. Util. Comm'n*, 634 A.2d 281, 283 (Pa. Cmwlth. 1993).

8. Municipal authorities have the power to contract with other municipalities related to the carrying on of its business. 53 Pa.C.S. § 5607(d)(13).

9. The Commission's Guidelines for determining public utility status consider the following criteria: (1) the service provided is merely incidental to nonutility business with the customers which creates a nexus between the provider and customer; (2) the facility is designed and constructed only to serve a specific group of individuals or entities, and others cannot feasibly be served without a significant revision to the project; and (3) the service is provided to a single customer or to a defined, privileged and limited group when the provider reserves its right to select its customers by contractual arrangement so that no one among the public, outside of the selected group, is privileged to demand service. 52 Pa. Code § 1401(c)(1)-(3).

10. It is not necessary that all criteria set forth in 52 Pa. Code § 1401(c)(1)-(3) be met in order for a service or project to be given public utility status. *See Petition of Skytop Lodge Corporation for a Declaratory Order*, Docket No. P-2013-2354659 (Order entered July 24, 2014).

11. The Commission is authorized to impose a civil penalty of up to \$1,000 per day for each and every day's continuance of the violation. 66 Pa.C.S. § 3301(a)-(b).

12. The Commission's Policy Statement regarding *Factors and Standards for Evaluating Litigated and Settled Proceedings Involving Violations of the Public Utility Code and Commission Regulations* ("Policy Statement") considers specific factors and standards in

evaluating whether a fine for violating a Commission order, regulation, or statute is appropriate in a litigated matter is appropriate. 52 Pa. Code § 69.1201.

13. The Commission is authorized to require a public utility to refund the amount of any excess rate paid by any patron that was unlawfully collected 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. 66 Pa.C.S. § 1312(a).

14. Conyngham Township, as the proponent of a rule or order, bears the burden of proving that the Authority violated the Public Utility Code by a preponderance of the evidence, or evidence which is more convincing than the evidence presented by opposing parties. 66 Pa.C.S. § 332(a); *Se-Ling Hosiery v. Margulies*, 70 A.2d 854 (Pa. 1950); *Samuel J. Lansberry, Inc. v. Pa. Publ. Util. Comm'n*, 578 A.2d 600 (Pa. Cmwlth. 1990).

15. Upon the presentation by Conyngham Township of evidence sufficient to initially satisfy the burden of proof, the burden of going forward to rebut the evidence shifts to the Authority to present evidence of co-equal weight. *Burleson v. Pa. Pub. Util. Comm'n*, 443 A.2d 1373 (Pa. Cmwlth. 1982), *aff'd*, 461 A.2d 1234 (Pa. 1983).

APPENDIX C

PROPOSED ORDERING PARAGRAPHS

It is Ordered:

1. That the Formal Complaint filed by Conyngham Township on January 8, 2021 at Docket No. C-2021-3023624, is sustained.

2. That the provision of wastewater treatment and disposal service by the Sanitary Sewer Authority of the Borough of Shickshinny to Conyngham Township is jurisdictional as it is public utility service within the intendment of Sections 102 and 1102(a)(5) of the Public Utility Code, 66 Pa.C.S. §§ 102 and 1102(a)(5).

3. That the Sanitary Sewer Authority of the Borough of Shickshinny is directed to file an Application for a Certificate of Public Convenience, pursuant to 66 Pa.C.S. § 1101, within thirty (30) days of the entry date of the Commission's Opinion and Order.

4. That within thirty (30) days of the entry date of the Commission's Opinion and Order, the Sanitary Sewer Authority of the Borough of Shickshinny shall remit a civil penalty of \$100,000, pursuant to 66 Pa.C.S. § 3301(a)-(b), payable by certified check or money order to "Commonwealth of Pennsylvania" with the docket number of this proceeding listed, and sent to:

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street
Harrisburg, PA 17120

5. That within thirty (30) days of the entry date of the Commission's Opinion and Order, the Sanitary Sewer Authority of the Borough of Shickshinny shall issue refunds based on actual billings and amounts paid, plus interest, to current and former customers in

Conyngham Township totaling \$57,965.68. Within ten (10) days of completion of its refund obligations, the Sanitary Sewer Authority of the Borough of Shickshinny shall file at this docket, with copies served on Conyngham Township and the Bureau of Investigation and Enforcement, a verified notice that it complied with its refund obligations.

6. That a copy of the Commission's Opinion and Order shall be served on the Financial and Assessment Chief of the Bureau of Administration.

7. That a copy of the Commission's Opinion and Order shall be served upon the Bureau of Technical Utility Services for monitoring of compliance.

8. That, if the Sanitary Sewer Authority of the Borough of Shickshinny fails to make the payment required by Ordering Paragraph No. 4, above, within thirty (30) days of the entry date of the Commission's Opinion and Order, the Bureau of Administration shall refer this matter to the Pennsylvania Office of Attorney General for the collection of the civil penalty. 71 P.S. § 732-204(c).

9. That, upon the filing of an Application for a Certificate of Public Convenience, the payment of the civil penalty, and the filing of the notice indicating compliance with refund obligations by the Sanitary Sewer Authority of the Borough of Shickshinny, the Secretary shall mark this proceeding closed.

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Conyngham Township	:	
Complainant	:	
	:	
v.	:	Docket No. C-2021-3023624
	:	
Sanitary Sewer Authority of the	:	
Borough of Shickshinny	:	
Respondent	:	

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of the foregoing document upon the parties, listed below, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a party).

Notification by Electronic Mail as indicated:

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