

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Conyngham Township	:	
	:	
v.	:	C-2021-3023624
	:	
Sanitary Sewer Authority	:	
of the Borough of Shickshinny	:	

**INITIAL DECISION**

Before  
Conrad A. Johnson  
Administrative Law Judge

**INTRODUCTION**

This decision sustains the Complaint filed by Complainant Conyngham Township, alleging that Respondent Sanitary Sewer Authority of the Borough of Shickshinny is operating as a public utility service by providing wastewater treatment and disposal service beyond its jurisdictional limits and doing so without a Commission-issued Certificate of Public Convenience. This decision denies, as unwarranted under the circumstances, 1) Complainant’s request for a refund and 2) Intervenor Bureau of Investigation and Enforcement’s request for the assessment of a civil penalty. This decision directs Respondent 1) to file an application for a Certificate of Public Convenience and 2) to include with its application an accounting of previous customer billed and unbilled charges to calculate and provide any customer credits.

## HISTORY OF THE PROCEEDING

### Complaint

On January 6, 2021, Complainant Conyngham Township (the Township or Complainant) filed a Formal Complaint (Complaint) with the Pennsylvania Public Utility Commission (Commission) against the Sanitary Sewer Authority of the Borough of Shickshinny (SSABS, Sewer Authority or Respondent). The Township alleges the Sewer Authority is operating in the Township without a Certificate of Public Convenience. Complaint ¶ 4. For relief, the Township requests “that the Commission order Respondent to immediately stop billing residents of Conyngham Township and return all monies collected until after a valid Certificate of Public Convenience is obtained.” Complaint ¶ 5.

### Answer and New Matter and Response to New Matter

The SSABS filed an Answer and New Matter and Preliminary Objections (PO) on January 26, 2021. The SSABS maintained the allegation contained in Paragraph 4 of the Complaint was 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 requested dismissal of the Complaint with prejudice, and that the Commission assess costs and counsel fees and grant such other and further relief it deems just and proper.

Complainant filed a response to the New Matter on January 29, 2021, averring that the allegations of the New Matter were essentially conclusions of law to which no response was required, and Complainant averred it has standing to bring the Complaint as a customer of Respondent. Complainant reiterated its request for the relief as stated in its Complaint.

### Preliminary Objections

On January 26, 2021, the SSABS also filed Preliminary Objections. In its PO, SSABS raised the following objections:

- 1) The Authority lacked standing to seek relief on behalf of others; and the Public Utility Code (Code) does not provide for the filing of class actions. PO ¶ 9.
- 2) The rights asserted by the Township are derived from a private contract, over which the Commission lacks jurisdiction. Therefore, the Complaint is legally insufficient. PO ¶ 21.
- 3) The Commission lacked jurisdiction to grant monetary compensation in the form of refunds to Complainant. PO ¶ 25.
- 4) The Complaint is legally insufficient because the Authority is not acquiring or beginning to operate any plant, equipment, or other facility, or

doing any other activity which would trigger the need for a Certificate of Public Convenience, as required by Section 1102(a)(5) of the Code. 66 Pa.C.S. § 1102(a)(5). PO ¶¶ 13-14.

In its PO, SSABS requested that the Complaint be dismissed in its entirety.

On January 29, 2021, the Township filed an Answer to Respondent's Preliminary Objections, averring in part that the PO were conclusions of law to which no response was required. The Township further averred as follows:

- 1) The Township has standing because it was unlawfully billed by Respondent for the billing period January 1, 2021 to March 31, 2021 for sewage treatment at the Township Municipal Building. Answer to PO ¶ 8.
- 2) The Commission has authority to grant refunds "with interest" and "on behalf of all patrons subject to the same rate of the public utility. 66 Pa.C.S. § 1312. *Id.*
- 3) Prior to September 11, 2020, Complainant and Respondent were parties to a bulk services agreement whereby Respondent would bill the Conyngham Township Sewer Authority (CTSA) for sewage treatment for customers of CTSA. A Certificate of Public Convenience was not required for that arrangement. Respondent unilaterally terminated the arrangement on or about September 11, 2020, by written notice to the Township and began operations beyond its corporate limits by billing Conyngham Township customers directly. Conyngham Township is beyond the corporate limits of Respondent. Answer to PO ¶ 14.
- 4) The rights asserted by Conyngham Township in this action derive from the PUC Code and Pennsylvania Law, not from a private contract. Regardless of the actual date of termination of the bulk services agreement by Respondent the parties agree the agreement was terminated by Respondent. Respondent was at no point in time authorized by law or contract to act as a "public utility" within the corporate limits of Conyngham Township without a Certificate of Public Convenience. Answer to PO ¶ 21.

Accordingly, the Township requested that the Commission deny and dismiss Respondent's PO.

By notice dated February 8, 2021, the Parties were informed that this matter was assigned to me.

### Ruling on Preliminary Objections

After due consideration, on March 5, 2021, I issued a *First Interim Order Sustaining in Part 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 April 7, 2021, a prehearing conference convened for the purpose of establishing a litigation schedule. The Township was represented by Attorney Vito J. DeLuca, Esquire (Attorney DeLuca), and SSABS was represented by Sean W. Logsdon, Esquire (Attorney Logsdon). During the prehearing conference a litigation schedule was proposed whereby an evidentiary hearing would be scheduled to convene on August 24, 2021. However, I advised counsel that before I issued a prehearing order concerning the litigation schedule, they were to submit a status report concerning possible settlement of the case. The status report was due April 30, 2021.

### Mediation Request

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

Referring this matter to mediation impacted the proposed litigation schedule. Accordingly, on May 25, 2021, I issued a *Second Interim Order Holding Establishment of Litigation Schedule In Abeyance Until Completion of Mediation* in the event mediation proved unsuccessful.

The Parties engaged in mediation. However, by email dated August 12, 2021, the mediator informed me that mediation did not achieve resolution of the Complaint, and the Parties had requested that the case be set for hearing.

#### Hearing Notice, Notice of Intervention, and Intervenor's Motion for Continuance

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

On September 3, 2021, the Commission's Bureau of Investigation and Enforcement (I&E) by and through its counsel, Stephanie M. Wimer, Esquire (Attorney Wimer), filed a Notice of Intervention (Notice). Pursuant to Section 308.2(a)(11) of the Code, 66 Pa.C.S. § 308.2(a)(11), I&E averred that it serves as the Commission's prosecutory bureau for the purposes of representing the public interest in ratemaking, service matters, and Code and regulation enforcement. Notice ¶ 2. I&E further averred through its prosecutors that it had standing to participate in all Commission proceedings. *Id.* ¶ 3. I&E asserted that on February 1, 2021, it initiated an informal investigation of the Sewer Authority and focused on the Sewer Authority's alleged wastewater service to Pennsylvania consumers for compensation without holding a Certificate of Public Convenience issued by the Commission. *Id.* ¶¶ 5-6. I&E alleged its investigation determined that violations of the Code were substantiated. *Id.* ¶ 8.

Accordingly, I&E asserted it was prepared to initiate a formal proceeding against the Sewer Authority. *Id.* ¶ 9. I&E submitted that it was intervening in this proceeding to protect the public interest. *Id.* ¶ 24. I&E further submitted that time and resources would be conserved with its intervention in this proceeding now because I&E would have filed a separate complaint against the Sewer Authority concerning similar alleged violations. *Id.* ¶ 26.

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

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

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

Motion ¶¶ 5-6.

### Second Prehearing Conference

After due consideration of I&E's Motion, I issued a *Third Interim Order Converting Initial Call-In Telephone Hearing Into A Second Prehearing Conference (Third Interim Order)*. The *Third Interim Order* informed the Parties that the evidentiary hearing scheduled for September 15, 2021, would be converted into a second prehearing conference.

The second prehearing conference convened as scheduled. Counsel for the respective parties, Attorney Deluca for the Township, Attorney Logsdon for SSABS, and Attorney Wimer for I&E, were present for the conference. During the conference the litigation schedule was developed. Afterwards, on October 15, 2021, I issued a *Fourth Interim Order For Litigation Schedule And Prehearing Matters*, under which an evidentiary hearing was scheduled for January 19, 2022.

### Respondent's Request for Continuance and Stipulation of Facts

By email on January 11, 2022, Attorney Logsdon for the Sewer Authority requested a continuance of the hearing due to a conflicting appearance in a court proceeding in Luzerne County. Attorney Logsdon further represented that neither Attorney DeLuca for Conyngham Township nor Attorney Wimer for I&E objected to the continuance request. Consequently, after due consideration, on January 13, 2022, I issued a *Fifth Interim Order Granting Respondent's Continuance Request (Fifth Interim Order)*. Under the *Fifth Interim Order*, the evidentiary hearing scheduled for January 19, 2022, was rescheduled to March 2, 2022. By a Corrected Notice dated January 14, 2022, the Parties were informed that a Further Call-In Telephonic Hearing was scheduled before me for the captioned proceeding on Tuesday, March 1, 2022.

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

By email on February 24, 2022, counsel for Respondent Sewer Authority requested a second continuance of the hearing scheduled for March 1, 2022. As the reason for the continuance request, Respondent's counsel represented the parties had been in earnest negotiations regarding reaching a settlement in this matter. Respondent's counsel further represented, that neither counsel for Conyngham Township nor counsel for I&E objected to the continuance request. After due consideration, on March 1, 2022, I issued a *Sixth Interim Order Granting Respondent's Continuance Request*, under which the evidentiary hearing was rescheduled for May 17, 2022.

### Respondent's Motion for Stay

On May 11, 2022, SSABS filed Motion for Stay (Stay Motion). SSABS suggested that it 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. Stay Motion ¶ 67. The Stay Motion noted that the Conyngham Township and I&E did not consent to the stay. 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.

Stay Motion at 2. The SSABS further argued:

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

. . . .

26. Pursuant to *Process Gas* [*Pa. Pub. Util. Comm'n v. Process Gas Consumers Group*, 467 A.2d 805 (Pa. 1983) (*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.

27. Counsel for SSABS has raised significant legal issues and made a substantial case on the merits.

28. 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.

29. The agreement also contains an arbitration clause, which the 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.

58. SSABS has not billed any resident/ratepayer of Conyngham Township since the October of 2021 (the 4<sup>th</sup> 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.

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

In addition to the request for a stay, the Stay 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.” Stay 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 Stay 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 Stay Motion was orally argued. Attorney Logsdon for SSABS reiterated the points raised in the Stay Motion. Tr. 79-87. Notably, Attorney Logsdon represented that the Sewer Authority 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 and residents of the Township outside of SSABS' territorial limits, without having a Certificate of Public Convenience. *Id.*

Attorney Wimer for I&E argued as follows:

[t]he 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 [intend], 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 Stay Motion by June 10, 2022, after which I would rule on the Stay Motion. The Township filed a response to the Stay Motion on June 8, 2022, and I&E filed a response to the Stay Motion on June 10, 2022.

#### Seventh Interim Order Denying Motion for Stay

On July 1, 2022, I issued a *Seventh Interim Order Denying Respondent's Motion For Stay And Directing Parties To Confer And Propose A Reestablished Litigation Schedule (Seventh Interim Order)*. The *Seventh Interim Order* analyzed whether the Sewer Authority's Motion for Stay established the factors set forth in *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.

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

The *Seventh Interim Order* explained that the first prong of SSABS's argument failed on two accounts. First, SSABS had not filed for a declaratory judgment in the Court of

Common Pleas. Consequently, there was no court pleading for me 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 argued it was waiting for permission from me to file the action for a declaratory judgment. Also, SSABS requested an order directing SSABS to file for a declaratory judgment. The *Seventh Interim Order* noted that the filing for a declaratory judgment by SSABS or any Party to the proceeding did not require the permission of the presiding officer. Additionally, it was not the role of presiding officer to orchestrate the litigation strategy of any Party to the 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 remained with the individual litigant.

Second, the *Seventh Interim Order* reminded that Parties that as 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. Thus, resolution of this allegation was 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.

The *Seventh Interim Order* further stated that SSABS' arguments on the other prongs to warrant a stay of the proceedings also lacked merit. SSABS argued it will sustain irreparable injury in terms of financial costs because it is not currently billing customers in the Township. However, SSABS conceded that at some point when litigation ends it will seek payment for unbilled services. Tr. 97. Additionally, as I&E argued "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, I&E claimed that a stay of the proceedings would in effect substantially harm the Township and other customers in the Township.

Lastly, the *Seventh Interim Order* noted the following. The Complaint in this case was filed January 6, 2021. The case has had an extended procedural history, numerous continuances had been granted, three prehearing conferences had been held, the evidentiary hearing had been postponed several times. However, a litigant was not entitled to never-ending continuances. *See Steadwell, v. Unemployment Comp. Bd. of Rev.*, 463 A.2d 1298 (Pa. Cmwlth. 1983). Importantly, it was in the public interest that a contested proceeding be addressed expeditiously. *See also In re Estate of Hartman*, 582 A.2d 648 (Pa. Super. 1990). 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, that is, there is a public interest in the timely completion of litigation.

Accordingly, based upon the foregoing and after due consideration, the *Seventh Interim Order* denied the Motion for Stay. Under the *Seventh Interim Order*, the Parties were directed to confer and agree upon and propose a reestablished litigation schedule, including a fourth prehearing conference date, the submission of any additional written testimony and an evidentiary hearing date. Upon the Parties conferring and agreeing upon a reestablished litigation schedule, counsel for Complainant Conyngham Township was directed to file and serve a proposed and reestablished litigation schedule by Friday, July 15, 2022.

#### Sewer Authority's Motion for Reestablished Litigation Schedule

On July 13, 2022, the Sewer Authority filed a Motion for Reestablished Litigation Schedule (Litigation Motion), stating the Parties were unable to agree on a reestablished litigation schedule. Consequently, the Sewer Authority proposed a schedule that provided dates for the amendments to the pleadings, written direct and rebuttal testimony, amendments to stipulations of fact, a fourth prehearing conference and an evidentiary hearing. The Sewer Authority noted that the Township and I&E had disagreed to a schedule that included the submission of any written testimony or the amendment of the stipulations.

On July 19, 2022, I&E filed an Answer to the Sewer Authority's Litigation Motion. I&E objected that 1) the Sewer Authority had decided in 2021 not to file any written testimony in accordance with the provisions of the *Fourth Interim Order*; accordingly any provision for the filing of written testimony in this late stage of the proceedings was unreasonable; 2) providing for the amending the Joint Stipulations of Facts agreed upon on January 12, 2022, was unreasonable; 3) extending the procedural schedule would unreasonably prolong the conclusion of the proceeding; and 4) "The public interest is harmed by any further delay in this proceeding. Preservation of the status quo constitutes per se harm to Township customers who have been and continue to be served by the Authority absent regulation by the Commission, as the Authority may resume billing Township customers at any time." I&E's Answer to Litigation Motion, ¶ 26.

On July 21, 2022, the Township filed an Answer to the Litigation Motion. Essentially, the Township raised objections similar to I&E's objections in opposing the Sewer Authority's proposal for the re-establishment of the litigation schedule.

#### Fourth Prehearing Conference

By Notice dated August 8, 2022, the Parties were advised that a further prehearing conference would convene on August 19, 2022. Consequently, a fourth prehearing conference convened in this matter as scheduled. Respective counsel for the Parties were present for the conference and argued the Litigation Motion. As a result, on August 25, 2022, I issued an *Eighth Interim Order Reestablishing Litigation Schedule (Eighth Interim Order)*. Under the *Eighth Interim Order*, dates were set for the filing of the Sewer Authority's direct and rebuttal testimony and the Township's and I&E's rebuttal testimony. The evidentiary hearing was scheduled to October 4, 2022. Notice of the scheduled hearing was served upon the Parties on August 26, 2022.

#### Evidentiary Hearing

The evidentiary hearing convened as scheduled. Respective counsel, Attorney DeLuca for the Township, Attorney Logsdon for the Sewer Authority and Attorney Wimer for I&E, were present for the hearing together with their witnesses.

On behalf of the Township, Attorney DeLuca called two witnesses: Eric Kubasek, Chairperson of the Conyngham Township Sewer Authority, and Edward Whitebread, the head of the Board of Supervisors for the Township. The Township's Witness Whitebread sponsored his Direct Written Testimony as the Township's Exhibit 1 (Whitebread Statement 1 (St. 1)), which was admitted into the record. The Township's Witness Kubasek sponsored his Direct Written Testimony as Township's Kubasek St.1 and the Township's attached Exhibits 1 through 9, which was admitted into the record.

On behalf of the Sewer Authority, Attorney Logsdon called one witness, Barry Noss, Chairperson of the SSABS Board, who sponsored his Direct Written Testimony as Sewer Authority's Exhibit 1 (Noss St. 1) and the Sewer Authority's attached Exhibits 1 through 6, which were admitted into the record.

On behalf of I&E, Attorney Wimer called one witness, Matthew Lamb, a Fixed Utility Valuation Engineer with I&E. Witness Lamb sponsored I&E Statement Number 1, Written Testimony of Matthew Lamb and Appendix A (I&E St. 1), I&E Statement 1-R Written Rebuttal Testimony of Matthew Lamb (I&E St. 1-R) and I&E's Exhibit 1 through 22, which were admitted into the record.

The Parties' Joint Exhibit A – (Sewer Treatment Agreement), Joint Exhibit B – (a September 11, 2020,<sup>1</sup> letter from SSABS to the Township), and Joint Stipulation of Facts (Jt. Stip.) (with the exception of Stipulation No. 12) were also admitted into the record.

#### Closing, Reopening and Reclosing the Record

On October 26, 2022, the Township and I&E sent their admitted exhibits to the court reporting agency for the October 4, 2022 hearing for inclusion in the record.

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<sup>1</sup> At page 219 of the Transcript, Joint Exhibit B is identified as dated September 11, 2011. The correct date is September 11, 2020. See Tr. 205-207, 237-239.



On October 26, the transcript of the evidentiary hearing was filed with the Commission's Secretary's Bureau (Secretary), thereby resulting in a 342-page transcript for this matter.

On October 27, 2022, SSABS sent their admitted exhibits to the court reporting agency for the October 4, 2022 hearing for inclusion in the record.

On November 18, 2022, the Township, SSABS and I&E filed their respective Main Briefs.

On November 21, 2022, Michael L. Swindler, Deputy Chief Prosecutor, filed a Withdrawal and Entry of Appearance, thereby withdrawing the appearance of Attorney Wimer and entering his appearance on behalf of I&E.

On November 23, 2022, I issued a *Ninth Interim Order Closing the Record*. On the same date, SSABS sought clarification regarding the filing of Reply Briefs and stated as follows:

It is the Authority's understanding that the parties would be filing reply briefs in this matter, but that no deadline was set. Given the issues raised in I&E's main brief, the Authority believes reply briefs are needed to address the issues raised.

The Authority suggests that, based on 52 Pa. Code § 5.502(f), that the reply briefs be due Thursday, December 8, 2022 (20 days after main briefs were submitted).

By email on November 23, 2022, I informed the Parties that an interim order reopening the record would issue shortly for the submission of Reply Briefs, which would be due by December 12, 2022.

By emails on November 24, 2022, both I&E and the Township objected to the Sewer Authority's request for the filing of Reply Brief. I&E argued as follows:

The very clear and unambiguous litigation schedule has long been set and the Township did not object to the filing of Main Briefs only at the time it was submitted and approved by Your Honor. The positions of the parties have been adequately presented in Main Briefs. Your Honor has closed the record. The Township's request should be denied.

The Township agreed with I&E's argument.

After due consideration, I informed the Parties by email dated November 30, 2022, that the Parties had had ample opportunity and time to litigate and brief the issues in this proceeding. Accordingly, I&E's and the Township's objections to the filing of Reply Briefs were sustained. Thus, the *Ninth Interim Order Closing the Record* remained in effect.

On February 1, 2023, I reviewed the docket in this proceeding and noted that the parties' admitted documents had not been docketed. Accordingly, I issued a *Tenth Interim Order Opening The Record For The Docketing Of The Parties' Admitted Written Testimonies And Exhibits (Tenth Interim Order)*. The *Tenth Interim Order* opened the record and directed the court reporter for the evidentiary hearing to submit the parties' admitted documents to the Commission's Secretary for docketing. The *Tenth Interim Order* stated the record would be reclosed upon the docketing of the parties' admitted documents.

On February 23, 2023, the parties' admitted written testimonies and exhibits were docketed by the Secretary. On February 23, 2023, the transcript for the evidentiary hearing together with the Parties' admitted written testimonies and exhibits were submitted by the court reporter to the Secretary and docketed by the Secretary.

On March 8, 2023, I received a copy of the transcript, written testimonies and exhibits submitted by the court reporter to the Secretary on February 23, 2023. On March 14, 2023, I issued an *Eleventh Interim Order Reclosing the Record*.

## The Record

The record in this proceeding consists of the transcripts of the prehearing conferences and evidentiary hearing, written testimonies, exhibits, stipulations, briefs, and orders issued herein. This case is procedurally ready for ruling.

### FINDINGS OF FACT

1. Complainant, Conyngham Township, situated in Luzerne County, is a political subdivision of the Commonwealth of Pennsylvania.
2. The municipal building for the Township is located at 10 Pond Hill Road, in the Village of Mocanaqua, which is an unincorporated community/section of Conyngham Township, Pennsylvania. Tr. 257-260, 282-283; Whitebread St. 1 at line 18.
3. Respondent, the Sanitary Sewer Authority of the Borough of Shickshinny located in Luzerne County, Pennsylvania, was established on September 25, 1973, by the Borough of Shickshinny as a municipal authority for, *inter alia*, the purpose of constructing, improving, furnishing, and equipping a sanitary sewage system and treatment works. I&E St. 1 at 5; I&E Exhibits 1, 2, and 4; Jt. Stip. No. 5.
4. The Borough of Shickshinny is the sole member of the Sewer Authority. I&E St. 1 at 7; I&E Exhibit 5; Noss St. 1 at 1.
5. Sometime in the early 1990s, the Department of Environmental Resources, now the Pennsylvania Department of Environmental Protection (DEP) ordered the Township to join with the Borough of Shickshinny to undergo a project to improve the purity of the waters of the Commonwealth pursuant to the provisions of the Clean Streams Law (Preservation Project). Jt. Stip. No. 1; Noss St. 1 at 2.

6. The Sewer Authority operates and maintains a sewage treatment facility in the Village of Mocanaqua in Conyngham Township. I&E St. 1 at 8. Tr. 282-283.

7. The general scope of the Sewer Authority's activities includes providing treatment of domestic wastewater and discharging the treated wastewater to the Susquehanna River, in accordance with a permit issued by DEP. Jt. Stip. No. 6.

8. The Sewer Authority provides sewage treatment and disposal service to the Borough of Shickshinny, a portion of Salem Township, the Village of Mocanaqua community of Conyngham Township, and to the Pennsylvania State Correctional Institute – Retreat. I&E St. 1 at 8, 9; I&E Exhibit 8; Jt. St. No. 9; Tr. at 209, 257-258.

9. The Conyngham Township Sewer Authority (CTSA) owns and maintains lines in Conyngham Township that convey sewage to the Sewer Authority's processing plant, which is located on property owned by the Sewer Authority in Conyngham Township. Jt. Stip. No. 8.

10. The Township is not a member of the Sewer Authority and has no representation on the Sewer Authority's Board. Jt. Stip. No. 7; Township St. 1 at 3.

11. The Sewer Authority and the Township entered into a Sewage Treatment Agreement (bulk service agreement) on November 18, 1992, under which the Sewer Authority agreed to provide sewage treatment and disposal services to the Township as a single bulk customer. Tr. 279-280; I&E St. 1 at 12; I&E Exhibit 10; Joint Exhibit A.

12. Under the bulk service agreement and until the end of 2020, the Sewer Authority billed CTSA for sewer treatment and conveyance, and in turn CTSA billed Township customers, which included the Township for services to the Township municipal building, and SSABS invoiced its other customers. Whitebread St. 1, lines 11-16, 49-56; Noss St. 1 at 2.

13. In 2018, 2019 and 2020, SSABS experienced issues concerning large amount of water influx and infiltration coming into the system from the Township. Noss St. 1 at 3; SSABS Exhibit 3.

14. The Sewer Authority has continually provided sewage processing and disposal service to Township residents and customers from the onset of the agreement to the present. Jt. Stip. No. 19; Noss St. 1 at 5.

15. The Authority is obligated to treat and dispose of the wastewater generated by Township customers, pursuant to an Act 537 Sewage Facilities Plan that was approved by DEP. Tr. 311-313; Noss St. 1 at 5.

16. On September 11, 2020, the Sewer Authority sent the Township a letter, stating, "Please allow this letter to serve as notice that the SSABS is cancelling the Sewage Treatment Agreement . . . dated November 18, 1992, between the SSABS and the Township of Conyngham." I&E St. 1 at 13; I&E Exhibit 11 at 2; Joint Exhibit B; Tr. 211 and 278-279.

17. Prior to the Sewer Authority's cancellation of the bulk service agreement on September 11, 2020, CTSA billed customers in the Township in a single bill that consisted of the wastewater treatment charges that CTSA received from the Sewer Authority pursuant to the bulk service agreement, as well as charges related to the CTSA 's conveyance of the wastewater. Tr. 328-329.

18. Subsequent to the September 11, 2020 cancellation of the bulk service agreement, CTSA issued quarterly bills to Township customers for charges solely related to conveyance of wastewater. Tr. 246, 261.

19. Prior to the issuance of the September 11, 2020, letter terminating the bulk service agreement, the Sewer Authority had requested records of the Township's wastewater customers residing in the Township. Tr. 239-240.

20. After cancelling the bulk service agreement on September 11, 2020, the Sewer Authority furnished wastewater treatment service for compensation directly to customers/ratepayers residing in the Township, who were beyond the Sewer Authority's jurisdiction/corporate limits. Tr. 239-240.

21. On January 1, 2021, the Sewer Authority began directly invoicing customers located in the Township, and such billing continued quarterly through the third quarter of 2021. I&E St. No. 1 at 14; I&E Exhibit 12; Jt. Stip. No. 13; Township St. No. 2 at 3; Tr. 207, 263, 279.

22. Upon directly invoicing Township customers for sewage treatment and disposal service, the Sewer Authority charged Township customers a rate of \$75.00 per calendar year quarter. I&E St. No. 1 at 14; I&E Exhibit 13; Jt. Stip. No. 13. The \$75.00 charge included \$4.61 for conveyance. Noss St. 1 at 3 and 5; Lamb St. 1 at 16 and I&E's Exhibits 13 and 15.

23. In 2020 SSABS charged its ratepayers \$60.00 per quarter and under the 1992 sewer service agreement, SSABS directly billed CTSA, which in turn billed Township customers at a \$134.00 quarterly rate. Noss St. 1 at 2, 4. Out of the \$134.00, CTSA paid SSABS \$45.00 for its services to the Township customers and retained the remaining \$89.00. *Id.* at 4.

24. In 2020 the total quarterly amount CTSA paid SSABS was approximately \$11,565.00. *Id.*

25. For each of first three quarters of 2021, SSABS directly billed Township customers \$75.00, and CTSA billed the Township customers \$59.00 quarterly. *Id.*

26. Approximately 220 residential customers and eight commercial customers located in the Township receive and paid for the Sewer Authority's wastewater treatment and disposal service following the Sewer Authority's cancellation of the bulk service agreement. I&E St. No. 1 at 16; I&E Exhibit 17; Jt. Stip. No. 14.

27. From January 1, 2021 to September 23, 2021, the Sewer Authority collected \$54,684.68 from ratepayers receiving service located in the Township. Jt. Stip. No. 15.

28. The Sewer Authority, starting with the fourth quarter of 2021, stopped invoicing customers located in the Township. Jt. Stip. No. 17.

29. Neither the CTSA nor any Township individual ratepayer or customer has paid for the sewage processing or disposal service provided by the Sewer Authority since September 1, 2021. Jt. Stip. No. 20.

30. The Authority has continually provided sewage processing and disposal service to Township residents and customers from the onset of the agreement to the present. Jt. Stip. No. 19.

31. The Sewer Authority does not hold a Certificate of Public Convenience to provide wastewater and disposal service in the Township. I&E St. No.1; Tr. 278, 299.

32. The Sewer Authority, at some point when litigation ends, intends to seek payment for unbilled services to Township customers. Tr. 97.

## DISCUSSION

### Legal Standards

#### Municipal Corporations

Section 102 of the Code, defines a municipal corporation as follows:

**“Municipal Corporation.”** All 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 Commonwealth for the purpose of rendering any service similar to that of a public utility.

66 Pa.C.S. § 102.

### Commission Jurisdiction Over Municipal Utilities

Under the Code, the Commission has jurisdiction over a municipal utility operating beyond its corporate limits. The Code specifically states as follows:

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.

### Complaints

Section 701 of the Public Utility Code (Code), 66 Pa.C.S. § 701, provides in pertinent part that “any person, corporation, or municipal corporation having an interest in the subject matter” may complain, in writing, about any act or thing done or omitted to be done by a public utility in violation, or claimed violation, of any law which the Commission has the jurisdiction to administer, or of any regulation or order of the Commission.

### Burden of Proof

In this proceeding Complainant, the Township, as the party seeking affirmative relief from the Commission, bears the burden of proof. 66 Pa. C.S. §332(a). To satisfy this burden, the Township must demonstrate that the Respondent, Sewer Authority, is responsible for the problem alleged in its Complaint through a violation of the Code or a regulation or outstanding order of the Commission. 66 Pa. C.S. § 701. This must be established by a preponderance of the evidence. *Patterson v. Bell Tel. Co. of Pa.*, 72 Pa.P.U.C. 196 (1990). Preponderance of the



evidence means that the party with the burden of proof has presented evidence that is more convincing than that presented by the other party. *Samuel J. Lansberry, Inc. v. Pa. Pub. Util. Comm'n.*, 578 A.2d 600 (Pa. Cmwlth. 1990). In addition, the Commission's findings of fact must be supported by "substantial evidence," which consists of evidence that a reasonable mind might accept as adequate to support a conclusion. A mere trace of evidence or a suspicion of the existence of a fact is insufficient. *Norfolk & W. Ry. Co. v. Pub. Util. Comm'n.*, 413 A.2d 1037 (Pa. 1980).

Upon the presentation by Complainant of evidence sufficient to initially satisfy the burden of proof, the burden of going forward with the evidence, to rebut the evidence of the Complainant, shifts to Respondent. If the evidence presented by Respondent is of co-equal weight, Complainant has not satisfied its burden of proof. Complainant now must provide some additional evidence to rebut that of Respondent. *Burleson v. Pa. Pub. Util. Comm'n.*, 443 A.2d 1373 (Pa. Cmwlth. 1982), *aff'd*, 461 A.2d 1234 (Pa. 1983).

While the burden of persuasion may shift back and forth during a proceeding, the burden of proof never shifts. The burden of proof always remains on the party seeking affirmative relief from the Commission. *Milkie v. Pa. Pub. Util. Comm'n.*, 768 A.2d 1217 (Pa. Cmwlth. 2001).

#### Certificate of Public Convenience

Under the Code, a Certificate of Public Convenience issued by the Commission is required "[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." 66 Pa.C.S. § 1102(a)(5). See *Ridgway v. Pa. Pub. Util. Comm'n.* 480 A.2d 1253 (Pa. Cmwlth. 1984).

## Positions of the Parties

### Township's Position

The Township submits that on September 11, 2020, the Sewer Authority unilaterally terminated the 1992 bulk services agreement under which it provided sewage treatment and disposal services to the Township as a single bulk customer, and in turn CTSA billed Township ratepayers consisting of approximately 220 residential and 8 commercial customers. Whitebread St. 1 at 3; Jt. Stip. Nos. 10, 11 and Joint Exhibits A and B; Tr. 215; Township Memorandum at 2. The Township contends that the sewer lines located in the Township, while owned and maintained by CTSA, convey sewage to SSABS's processing plant located on property owned by SSABS in the Township. Jt. Stip. No. 8; Township Memorandum at 2. The Township asserts that it is a customer of the Sewer Authority. Tr. 14-21. The Township proffers that on January 1, 2021, April 1, 2021, and July 1, 2021, the Sewer Authority sent a quarterly invoice directly to ratepayers/customers located in the Township at a rate of \$75.00 per quarter. Whitebread St. 1 at 4; Jt. Stip. No 13; Memorandum at 3. The Township asserts that it received and paid to the Sewer Authority the three quarterly billings. Tr. 70-74. The Township contends the Sewer Authority billed it and other Township customers without securing from the Commission a Certificate of Public Convenience. Tr. 203, 208, 210, 247-248; I&E St. 1; Township Memorandum at 3.

Continuing with its position, the Township argues the Sewer Authority upon terminating the bulk service agreement and beginning to directly bill Township customers beyond its jurisdiction thereby became a public utility as defined under Section 102 of the Code, requiring Commission oversight. Township Memorandum at 4, 6-7. Since the Sewer Authority billed Township customers for service during the first three quarters of 2021 without holding a Certificate of Public Convenience, the Township claims it and other Township customers are entitled to a refund under Section 1312 of the Code. 66 Pa.C.S. § 1312(a). For relief, the Township requests that the Commission order the Sewer Authority to "immediately take actions to secure said Certificate of Public Convenience, and further order the refund of all monies

unlawfully billed with interest and impose the maximum civil penalty allowed by law along with such other relief as this Court deems just and proper.” Township Memorandum at 8.

I&E’s Position

I&E submits the following:

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.

I&E Brief at 1.

In support of its position, I&E relies upon the testimony of its witness, Matthew T. Lamb, a professional engineer, and the Joint Stipulation of Facts. I&E proffers as follows:

The Authority operates and maintains a sewage treatment plant in Conyngham Township.<sup>4</sup> 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”).<sup>5</sup>

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<sup>4</sup> I&E Statement No. 1 at 8.

<sup>5</sup> Joint Stipulation of Facts No. 6.

I&E Brief at 7.

The Authority provides sewage treatment and disposal service to . . . a portion of Conyngham Township called the Village of Mocanaqua . . . .<sup>6</sup>

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

I&E Brief at 7.

Continuing with its position, I&E maintains that following the Sewer Authority's cancellation of the November 18, 1992, Sewage Treatment Agreement between the Sewer Authority and the Township on September 11, 2020, the Sewer Authority commenced furnishing wastewater treatment service for compensation directly to Township customers. *Id.* at 8. I&E posits that the Sewer Authority directly invoiced Township customers for the first three quarters of 2021. Jt. Stip. No. 13.

I&E argues that under the Code, 66 Pa.C.S. § 1102(2)(5), a Certificate of Public Convenience issued by the Commission is required for a municipal corporation to begin to operate any facility for the furnishing to the public any public utility service beyond its corporate limits. I&E Brief at 12. I&E notes under the Code, 66 Pa.C.S. § 102, the Sewer Authority is by definition a municipal corporation. I&E Brief at 12-13.

I&E further maintains the following:

The Authority has never applied for a Certificate of Public Convenience from the Commission.<sup>24</sup> 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.<sup>25</sup> 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.<sup>26</sup>

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<sup>24</sup> I&E Statement No. 1 at 221; N.T. at 299.

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

<sup>26</sup> I&E Statement No. 1 at 20.

I&E Brief at 10.

Considering the above factors under the Commission's Guidelines for Determining Public Utility Status (Guidelines), 52 Pa. Code § 69.1401, I&E contends the Sewer Authority is a *de facto* public utility. I&E argues that pursuant to 52 Pa. Code § 69.1401(c)(1)-(3), the Commission makes a fact-based determination of a public utility status of service or project based on the following criteria:

(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 . . .

I&E Brief at 19-20.

Applying the above criteria to the Sewer Authority's operations in the Township, I&E asserts the following:

1) The Authority admitted that its sole purpose is to engage in the collection, treatment, and disposal of sewage. I&E Exhibit 16. 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).

2) 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. I&E Exhibit 16.

3) 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. I&E Exhibit 20; Joint Stipulation of Fact 21. 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 special class of persons.

I&E Brief at 20.

Based upon the above analysis, I&E offers that the Sewer Authority acts as public utility, notwithstanding it has ceased billing Township customers. I&E notes it is not sustainable for the Sewer Authority to continue to provide free wastewater treatment and disposal services to Township customers. “The reality is that the Authority is able to resume charging Township customers for wastewater treatment disposal service at any time at any rate absent regulation by the Commission.” I&E Brief at 21.

Accordingly, I&E requests that the Commission 1) impose a civil penalty of \$100,000 upon the Sewer Authority for providing utility service for compensation beyond its corporate limits without Certificate of Public Convenience, thereby violating the Code; 2) order the Sewer Authority to refund the unlawful amounts charged to and paid by Township customers for the first three quarters of 2021; and 3) to order the Sewer Authority to apply for a Certificate of Public Convenience. Tr. 209; I&E Brief at 26-27.

### Sewer Authority's Position

The SSABS maintains that under the November 18, 1992, Sewage Treatment Agreement it provided sewage treatment services to the Township and billed CTSA quarterly for the processing of the sewage coming from the Township. Noss St. 1 at 2. In 2018, 2019 and 2020, SSABS experienced issues concerning large amounts of water influx and infiltration coming into the system from the Township. Noss St. 1 at 3; SSABS Exhibit 3. SSABS states that on June 17, 2019, it sent a letter to the Township proposing to amend the sewage treatment agreement to address the influx of water issue by changing the payment structure to a flow based quarterly charge structure; however, the Township rejected the amendment. Noss St. 1 at 4-5; SSABS Exhibit 6. SSABS asserts it cannot shut off sewage service to the Township without the Township and DEP indicating they are building their own plant and sending the sewage to another plant. *Id.* at 5.

SSABS contends that although it sent a letter to the Township on September 11, 2020, purporting to terminate the sewage treatment agreement, the Township never agreed to terminate the agreement, and the agreement cannot be unilaterally terminated. *Id.*; Tr. 195, 242-243; SSABS Brief at 4. SSABS notes that it never discontinued or interrupted sewage processing service to the Township. Noss St. 1 at 5.

SSABS submits that its September 11, 2020 letter purporting to terminate the bulk service agreement is of no legal effect. SSABS Brief at 17. SSABS argues the September 11, 2020 letter's legal result, if any, is under the jurisdiction of the Court of Common Pleas. *Id.* Thus, SSABS filed a lawsuit against the Township alleging breach of contract and unjust enrichment and seeking a declaration of rights under the agreement and injunctive relief. Noss St. 1 at 8; SSABS Brief at 5. Continuing with its position, SSABS posits the following:

In fact, the Township is still participating in the 1992 Sewage Treatment Agreement as it is still utilizing SSABS's treatment plant,<sup>61</sup> despite not paying for the treatment service being provided by the SSABS. This non-payment is before the Court of Common Pleas and SSABS has instituted the appropriate breach of contract (among other) action with the Court of

<sup>61</sup> Record Hearing N.T. p. 203.

SSABS Brief at 17.

According to SSABS on September 30, 2020, it sent a notice to the Township stating that beginning in January 2021, the Sewer Authority would begin invoicing Township customers directly in the amount of \$75.00 per quarter. Noss St. 1 at 5; Township Exhibit 2. SSABS asserts the \$75.00 quarterly charge was \$5.00 more than the \$70.00 quarterly charge to ratepayers in Shickshinny because of the water infiltration issue in the Township and also to conduct a study to remediate the issue since CTSA would not. SSABS . Noss St. 1 at 5-6. SSABS asserts that it billed ratepayers in the Township for services at the \$75.00 quarterly rate for the first three quarters of 2021, and it ceased billing after I&E intervened in the matter. *Id.* at 6.

SSABS argues that the Commission's jurisdiction does not extend to the treatment service it provides to the Township. SSABS claims that neither the September 11, 2020 letter, nor its billings issued to customers, transformed SSABS into a de facto public utility. SSABS reasons that the nature and character of the wastewater treatment service it provides in the Township was and remains the same, that is, SSABS can only receive wastewater that is delivered by the Township's wastewater conveyance system. *Id.* at 18. According to SSABS, if the 1992 sewage treatment service agreement is valid, the Township is contractually required to pay for the service provided by SSABS, and if the agreement is no longer valid, the Township is obligated to pay for sewage service under the doctrine of unjust enrichment. *Id.* Additionally, SSABS argues that its billing of individual Township residents, while not triggering the Commission's jurisdiction, if anything, would be a breach of agreement, which would properly lie with the Court of Common Pleas. *Id.* at 19.

SSABS notes in a similar proceeding, *Bureau of Investigation and Enforcement v. East Dunkard Water Authority (EDWA)*, Docket No. C-2021-3027615, I&E reached a proposed



settlement with the East Dunkard Water Authority. In *EDWA*, the water authority based in East Dunkard provided service to other municipalities. SSABS suggests, “The logic in that proposed settlement provides that consent of the “other” municipalities is enough for I&E to “forgo” compliance with the Public Utility Code.” *Id.* SSABS argues that I&E did not appear to be concerned with the water authority’s continued billing of the “other” municipalities in *EDWA*, since the “other” municipalities consented to the continued billing. Thus, SSABS asserts, “To the extent that consent of the Township is the actual issue, SSABS requests that the record be reopened and that an additional hearing be conducted to address the “consent” issue (which appears to be the dispositive issue in the East Dunkard complaint proceeding).” *Id.* at 20.

### Analysis

While this case has an extensive procedural history, at the outset of the proceeding the *First Interim Order* clarified that at issue was whether SSABS was operating in the Township without a Certificate of Public Convenience. *First Interim Order* at 10. The *First Interim Order* also explained the following:

Notably upon a finding that SSABS is operating in the Township without a Certificate of Convenience, the Commission has the authority to compel SSABS to obtain a Certificate of Public Convenience. *See Ridgway v. Pennsylvania Public Utility Com.* 83 Pa. Commw. 379, 480 A.2d 1253 (1984) [*Ridgway*]. Additionally, SSABS may ultimately face a civil penalty and/or an order to take remedial action, in the event the Township prevails in establishing that SSABS is operating in the Township without a Certificate of Public Convenience.

*Id.* An examination of the facts in *Ridgway*, which bear some similarity to the facts in the present case, are instructive, and correspondingly the Commonwealth Court’s ruling in *Ridgway* guides the outcome of this proceeding.

In *Ridgway*, the Borough of Ridgway (Borough) sought appellate redress from the Commission’s decision and order requiring the Borough to permit Ridgway Limited Partnership (Partnership) to connect, at its own expense, with the Borough operated sewer system. The

Partnership proposed to construct an apartment complex in Ridgway Township and had requested permission to connect to the Borough's sewer line which extended into Ridgway Township approximately 500 to 1,000 feet from the proposed apartment complex. The Borough, which is completely surrounded by Ridgeway Township, denied the Partnership's request.

The evidence established that 1) the Borough operated a sewer system in both the Borough and Ridgway Township; and 2) the sewage disposal plant in Ridgway Township was operated by Borough. While metering customers in the Ridgway Township's east and west areas, the Ridgway Township Municipal Authority (RTMA), only directly billed and collected from customers in the east and then paid the Borough for the service. The Borough directly billed and collected from customers in the west areas of Ridgway Township.

In deciding the jurisdictional issue in *Ridgway*, Commonwealth Court reasoned as follows:

With respect to the question of the PUC's jurisdiction over this matter, where it is determined that a municipality has *unilaterally extended uncertified utility service directly to the public beyond its boundaries for compensation*, it is within the jurisdiction of the PUC to order reasonable extensions of the extraterritorial service. [citation omitted]

The primary consideration in making such a determination is whether the municipality holds itself out, by express or implied terms, as a supplier of the utility service to the public beyond its boundaries, as a class or a limited portion thereof, to the extent that the capacity of the municipality's utility permits. [citation omitted]

That an independent authority or another municipality intervenes in the transaction between a municipality's utility and extraterritorial consumers does not preclude a conclusion that the provision of service to the public beyond the municipality's borders subjects the municipality to PUC regulation. [citation omitted] In such circumstances, if ultimate control of the decision whether to provide extraterritorial service to a particular customer and of the particulars of the transaction itself remains vested with the municipality which owns the utility, then jurisdiction of the PUC and a determination that the

municipality is providing service beyond its corporate limits for the purposes of Section 1501 of the Code is appropriate.

. . . .

Hence, the answer to the question of whether the Borough is subject to the jurisdiction of the PUC in this matter, inasmuch as it is controlled by the conclusion that the Borough is a direct provider of extraterritorial sewer service to the public, must be yes. [footnote omitted] Such being the case, a certificate of public convenience is necessary, *Section 1102(a)(5)* of the Code, *66 Pa. C.S. § 1102(a)(5)*, and we affirm the order of the PUC requiring the Borough to apply for one.<sup>[2]</sup>

*Ridgway*, A.2d at 1257-1258. (emphasis added).

Applying the ruling in *Ridgway*, to the present case, the evidence establishes the following. SSABS located in Luzerne County, Pennsylvania, was established on September 25, 1973, by the Borough of Shickshinny as a municipal authority for, inter alia, the purpose of constructing, improving, furnishing, and equipping a sanitary sewage system and treatment works. Jt. Stip. No. 5. The Sewer Authority operates and maintains a sewage treatment facility in the Village of Mocanaqua which is in the Township. Tr. 282-283. CTSA owns and maintains lines in the Township that convey sewage to the Sewer Authority's processing plant located in the Township. Jt. Stip. No. 8. Under a 1992 bulk service agreement and until the end of 2020, the Sewer Authority billed CTSA for sewer treatment and conveyance, and in turn CTSA billed Township customers, which included the Township for services to the Township municipal building. Whitebread St. 1, lines 11-16, 49-56; Noss St. 1 at 2. On January 1, 2021, the Sewer Authority began directly invoicing and collecting from customers located in the Township, and such billing and collection continued quarterly through the third quarter of 2021. I&E St. No. 1 at 14; I&E Exhibit 12; Jt. Stip. No. 13; Township St. No. 2 at 3; Tr. 207, 263, 279.

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<sup>2</sup> Commonwealth Court also affirmed the Commission decision that under 66 Pa.C.S. § 1501 the Borough's denial of the Partnership's request to connect to Borough's sewer system was unreasonable. The Court reasoned there was substantial evidence to support the Commission's determination that 1) the Borough's existing service was within close proximity to the Partnership's project; 2) the Borough system had sufficient capacity to meet the project's needs; and 3) permitting the requested tap-in would be of future benefit to the Borough's systems. *Ridgway*, A.2d at 1259-1260.

Starting with the fourth quarter of 2021, the Sewer Authority stopped invoicing customers located in the Township but continued to provide service to the customers in the Township. Jt. Stip. Nos. 17 and 19. Neither the CTSA nor any Township individual ratepayer or customer has paid for the sewage processing or disposal service provided by the Sewer Authority since September 1, 2021. Jt. Stip. 20. The Sewer Authority, at some point when litigation ends, intends to seek payment for unbilled services to Township customers. Tr. 97. The Sewer Authority does not hold a Certificate of Public Convenience to provide wastewater and disposal service in the Township. I&E St. No.1; Tr. 278, 299.

#### First Ruling – SSABS is Operating as Public Utility

The above analysis and evidence compel a finding that the Township established its burden of proving that SSABS is operating as a public utility without a Commission-issued Certificate of Public Convenience. As in *Ridgeway*, SSABS' delivery of service to the public, i.e., the Township customers beyond its territorial limits and direct billing of those customers are pivotal to the determination that SSABS is acting a public utility.

SSABS argues that the pivotal issue in this case is a contractual matter. SSABS submits the legal effect of its purported termination of the 1992 sewage treatment agreement between the Parties is pending in the Luzerne County Court of Common Pleas. Thus, SSABS concludes that the Commission lacks jurisdiction over the contractual matter.

The outcome of the pending civil litigation does not change the fact that SSABS provided a public service and directly billed Township customers beyond its jurisdiction without holding a Commission-issued Certificate of Public Convenience. These facts cannot be undone. Additionally, at some point SSABS intends to recover from the Township customers the unbilled charges for the service provided since the fourth quarter of 2021. Thus, SSABS' argument lacks merit. Accordingly in the ordering paragraphs below, SSABS will be directed to file an application with the Commission for a Certificate of Public Convenience.

## Second Ruling – Civil Penalties Are Unwarranted

Operating as an uncertificated public utility, SSABS violated Section 1102(a)(5) by furnishing wastewater treatment and disposal service for compensation to the public beyond its territorial limits. 66 Pa.C.S. § 1102(a)(5). As the prosecutorial arm of the Commission, I&E submits that the Commission is authorized to impose a civil penalty of up to \$1,000 per day for each day of the violation. 66 Pa.C.S. § 3301 (a)-(b). “A civil penalty payments has both curative and punitive effects, and incentives an entity to improve regulatory compliance.” I&E Brief at 22. Thus, I&E asserts a civil penalty against SSABS is necessary and appropriate in the amount of \$100,000. *Id.* at 22-27.

In *Rosi v. Bell Atlantic-Pa., Inc.*, Docket No. C-00992409 (Order entered February 10, 2000) (*Rosi*), the Commission adopted certain standards that must be applied when imposing a civil penalty. The Commission determined that the *Rosi* factors are generic in nature and are applicable in determining the amount of a civil penalty for all violations of a Commission statute, regulation or order. *See Pa. Pub. Util. Comm’n v. NCIC Operator Servs.*, M-00001440 (Order entered Dec. 21, 2000). Therefore, the *Rosi* standards serve as a guide in this proceeding. The factors and standards first articulated by the Commission in *Rosi* are published as *Policy Statements and Guidelines (Rosi Guidelines)*. *See* 52 Pa. Code § 69.1201. Section 69.1201 applies to both litigated and settled cases involving the calculation of civil penalties. Under the *Rosi Guidelines*, in part, the Commission considers the following factors:

- (1) Whether the conduct at issues was of a serious nature, such a willful fraud or misrepresentation.
- (2) Whether the resulting consequences of the conduct at issue were of a serious nature such as personal injury or property damage.
- (3) Whether the conduct at issue was deemed intentional or negligent. This factor may only be considered in evaluating litigated cases.

- (4) Whether the regulated entity made efforts to modify internal practices and procedures to address the conduct at issue and prevent similar conduct in the future.
- (5) The number of customers affected and the duration of the violation.
- (6) The compliance history of the regulated entity which committed the violation.
- (7) Whether the regulated entity cooperated with the Commission's investigation.
- (8) The amount of the civil penalty or fine necessary to deter future violations. The size of the utility may be considered to determine an appropriate penalty amount.
- (9) Past Commission decisions in similar situations
- (10) Other relevant factors.

52 Pa. Code § 69.1201.

For this case, the following determinations are warranted under the *Rosi* factors and standards. One, SSABS' conduct in operating as an uncertificated public utility deprived the Commission of oversight to protect the public interest. This conduct was of a serious nature. Two, the consequences of SSABS' conduct were serious because Township customers had no voice or influence over the service they received or the rates that they were charged for the first three quarters of 2021. However, Township residents have received the benefit of not being billed for services since September 2021. Three, SSABS' conduct was intentional because SSABS sent a letter on September 30, 2020, informing Township customers that it would begin to directly bill them for service starting on January 1, 2021, and SSABS did so. Four, starting with the fourth quarter of 2021, SSABS modified its conduct by ceasing its practice of directly billing Township customers. Five, approximately 220 residential customers and eight commercial customers were affected by SSABS' conduct during the first three quarters of 2021. Six, there is no evidence in the record that SSABS has a compliance history with the Commission as a regulated utility. Seven, SSABS cooperated with the Commission during its investigation of this matter. I&E Brief at 25. Eight, SSABS is a municipal authority, in contrast

to a for profit corporation. Nine, research did not reveal any Commission decisions related to a similar fully litigated complaint. Ten, in determining the appropriate penalty, all relevant factors were considered.

Here, note is taken that based upon individual circumstances, there are numerous cases in which the Commission found a statutory or regulatory violation and in the exercise of its discretion decided not to impose a penalty or approved reduction of the requested penalty. For illustrative cases *see, Scheffer v. Columbia Gas of Pennsylvania, Inc.*, Docket No. C-2010-2153353 (Opinion and Order entered Nov. 1, 2011) (penalty eliminated); *Trivelpiece v. PECO Energy Co.*, Docket No. C-2015-2462644 (Opinion and Order entered Sept. 22, 2016) (penalty eliminated); *Pa. Pub. Util. Comm'n v. Limousine Services Transportation, Inc.*, Docket Nos. C-2011-2219826, and A-00110190 (Opinion and Order entered Feb. 14, 2013) (no penalty imposed); *Pa. Pub. Util. Comm'n v. Peter Molnar, t/a Molnar Limousine Service*, Docket No. C-2010-2190069 (Opinion and Order entered July 5, 2011) (penalty reduced to \$50.00) and *Pa. Pub. Util. Comm'n, v. Ladybug Transportation & Construction, Inc.*, Docket No. C-2011-2248322 (Opinion and Order dated Jan. 12, 2012) (penalty reduced to \$100.00).

In the present proceeding, the evidence clearly establishes that SSABS violated the Code. However, in applying the *Rosi* factors to SSABS's conduct, I do not find that a penalty is warranted under the circumstances. First, SSABS is a municipal authority. Governmental agencies like SSABS generally do not operate to make a profit in the same fashion as a utility with shareholders. Such corporations have an opportunity to earn a reasonable return on their investment. In contrast, a governmental agency generally operates annually for its expenditures to equal or very closely match its revenue. In any year when the revenue exceeds expenditures, the excess revenue is categorized as a surplus and deposited back into the agency's general fund for operational expenses, system improvements or to reduce, in the case of an authority, the rates charged to ratepayers.

Second, since SSABS does not operate to make a profit, imposing a penalty would ultimately fall upon its ratepayers by an increase in rates to cover the cost of the penalty. Such a result is counterproductive.

Third, counsel for SSABS explained the Borough of Shickshinny's financial circumstances:

I honestly thought that this matter would be able to be settled between all the parties and save the cost of going and opening another avenue of litigation in the Court of Common Pleas.

My client is - they're a distressed community. They're - this is not a high-income area, your Honor. This is a very modest area in terms of - of funding that they have, so I tried to do what I could in order to settle the cases rather than immediately opening up a second front and incurring more costs at the Court of Common pleas level on top of what we've incurred at the PUC level.

Tr. 110-111. Considering the financial circumstances of the ratepayers in the Borough of Shickshinny, imposing a penalty upon SSABS would be unduly burdensome. Now that SSABS is being ordered to apply for a Certificate of Public Convenience, the cost of paying the penalty would also fall upon the SSABS' ratepayers in the Township. By necessity this would mean an increase in rates for sewage treatment service in the Township.

Fourth, SSABS did take steps to mitigate its violation when it ceased directly billing Township customers.

Fifth, SSABS has continued to provide unbilled sewage treatment services to Township customers, pending the outcome of litigation.

Based upon the above reasoning, the imposition of a penalty upon SSABS under the circumstances is unwarranted. Accordingly, in the ordering paragraphs below the Township's and I&E's requests for a penalty will be denied.

### Third Ruling – Request for Refund

The Township and I&E request that the Commission order SSABS to refund charges it collected from Township customers as authorized under 66 Pa.C.S. § 1312(a). Under



Section 1312(a) of the Code, when the Commission determines a rate received by a public utility was unjust or unreasonable or in violation of the Code, the Commission has the power and authority to issue an order requiring the public utility to refund with interest the amount in excess paid by any patron, as the result of the unlawful collection.

In requesting a Commission refund order, I&E submits the following:

Between January 1, 2021 and September 23, 2021, the Authority collected \$54,684.68 from customers located in the Township. [footnote omitted] 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. [footnote omitted] One year has passed since the Authority's unlawful collection of the \$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.

I&E Brief at 27.

Commonwealth Court decisions hold that the Commission has discretion to order a refund. *See, Emporium Water Co. v. Pa. Pub. Util. Comm'n*, 859 A.2d 20 (Pa. Cmwlth 2003) (citing *Nat'l Fuel Gas Distrib. Corp. v. Pa. Pub. Util. Comm'n*, 464 A.2d 546 (Pa. Cmwlth. 1983) (*NFG*)). As the Court explained in *NFG*, refunds are authorized only if the Commission determines that the rates received by the utility (a) were unlawful; or (b) were unjust or unreasonable; or (c) were in excess of the rates contained in the utility's applicable tariff filing. The purpose of Section 1312 is to guard against a utility unlawfully receiving revenues unreasonably advantageous to the utility all to the detriment of the ratepayers. *NFG*, 464 A.2d at 566.

Here, the evidence establishes that for the first three quarters of 2021, Township ratepayers were charged the same amount as they were previously charged for the quarters in 2020. SSABS's board chairperson, Mr. Noss, explained the parity. In 2020 SSABS charged its ratepayers \$60.00 per quarter. In 2020 under the 1992 sewer service agreement, SSABS directly billed CTSA, which in turn billed Township customers at a \$134.00 quarterly rate. Noss St. 1 at

2, 4. Out of the \$134.00, CTSA paid SSABS \$45.00 for its services to the Township customers and retained the remaining \$89.00. *Id.* at 4. In 2020 the total quarterly amount CTSA paid SSABS was approximately \$11,565.00. *Id.* For each of first three quarters of 2021, SSABS directly billed Township customers \$75.00, and CTSA billed the Township customers \$59.00 quarterly. *Id.* at 6. These amounts total \$134.00.

SSABS' \$75.00 quarterly charge to Township customers was a \$10.00 increase from its \$60.00 charge to the Borough's customers and included a \$4.61 charge labelled conveyance to study the large amount of water influx and infiltration coming from the Township. Noss St. 1 at 3 and 5; Lamb St. 1 at 16 and Exhibits 13 and 15.

Since Township customers paid the same sewer treatment rates before and after January 1, 2021, a finding that SSABS's entire \$75.00 quarterly charge was unjust and unreasonable is not warranted. In other words, SSABS did not receive an unreasonable advantage or excessive fees at the expenses of Township ratepayers. Because Township ratepayers received sewer treatment services during the first three quarters of 2021, ordering SSABS to refund, the full \$54,684.68 it collected from Township ratepayers would be an unreasonable and inequitable result.

However, there remains the issue that SSABS' three quarterly billings of Township customers as an uncertificated public utility was unlawful under the Code. Therefore, in keeping with the intent and purpose of Section 1312, I will exercise my discretion and order SSABS to refund without interest to Township customers the amounts in excess of the quarterly \$60.00 it invoiced CTSA for each Township customer. These amounts are the additional \$10.00 and \$4.61 (rounded to \$5.00) mentioned above for a quarterly total of \$15.00. For Township customers directly billed by SSABS during the first three quarters of 2021 and continue to be customers of SSABS, the \$15.00 quarterly total shall be applied to their accounts as a credit for a total credit of \$45.00 (3 quarterly billings x \$15.00 = \$45.00). For customers who were billed during the first three quarters of 2021 and are no longer customers of SSABS the \$45.00 shall be directly refunded to those customers.

## CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the parties and the subject matter of this proceeding. 66 Pa.C.S. § 701.

2. Complainant carries the burden of proving the named utility has in some manner violated the provisions of the Public Utility Code or the Commission's regulations or orders. 66 Pa.C.S. § 332(a).

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. Municipal authority is included within the definition of municipal corporation. 66 Pa.C.S. § 102.

5. A Certificate of Public Convenience issued by the Commission is required for a municipal authority to begin to operate any facility for the furnishing to the public any public utility service for compensation beyond its corporate limits. 66 Pa.C.S. § 1102(a)(5); *See Ridgway v. Pa. Pub. Util. Comm'n*, 480 A.2d 1253 (Pa. Cmwlth. 1984)

6. Sewage collection, treatment, or disposal for the public for compensation is a public utility service. 66 Pa.C.S. § 102(1)(vii).

7. Complainant Conyngham Township carried its burden of proof that Respondent Sanitary Sewer Authority of the Borough of Shickshinny provided sewer treatment service beyond its Borough limits for compensation in violation of Section 1102(a)(5) of the Code. 66 Pa.C.S. § 1102(a)(5).

8. The Commission is authorized to consider and impose civil monetary penalties against a public utility for violating the Code. 66 Pa.C.S. § 3301.

9. The Commission's Policy Statement, *Factors and Standards for Evaluating Litigated and Settled Proceedings Involving Violations of the Public Utility Code and Commission Regulations* provides guidelines for determining whether the violation of the violation of the Public Utility Code and the Commission's regulations or orders is appropriate. 52 Pa. Code § 69.1201.

10. The imposition of a penalty against Respondent is not warranted under the evidence and circumstances of this case. *See Scheffer v. Columbia Gas of Pa., Inc.*, Docket No. C-2010-2153353 (Opinion and Order entered Nov. 1, 2011) (penalty eliminated); *Trivelpiece v. PECO Energy Co.*, Docket No. C-2015-2462644 (Opinion and Order entered Sept. 22, 2016) (penalty eliminated); *Pa. Pub. Util. Comm'n v. Limousine Services Transportation, Inc.*, Docket Nos. C-2011-2219826, and A-00110190 (Opinion and Order dated Feb. 14, 2013) (no penalty imposed); *Pa. Pub. Util. Comm'n v. Peter Molnar, t/a Molnar Limousine Service*, Docket No. C-2010-2190069 (Opinion and Order dated July 5, 2011) (penalty reduced to \$50.00); *Pa. Pub. Util. Comm'n, v. Ladybug Transp. & Constr., Inc.*, Docket No. C-2011-2248322 (Opinion and Order dated Jan. 12, 2012) (penalty reduced to \$100.00).

11. 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).

12. The Commission has discretion to order a utility to issue a refund to customers. *See, Emporium Water Co. v. Pa. Pub. Util. Comm'n*, 859 A.2d 20 (Pa. Cmwlth 2003) (citing *Nat'l Fuel Gas Distrib. Corp. v. Pa. Pub. Util. Comm'n*, 464 A.2d 546 (Pa. Cmwlth. 1983)).

13. A partial refund as a credit to Respondent's customers in Conyngham Township is appropriated under the circumstance of this case.

ORDER

THEREFORE,

IT IS ORDERED:

1. That the Complaint of Conyngham Township v. Sanitary Sewer Authority of the Borough of Shickshinny at Docket No. C-2021-3023624 is sustained.

2. 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 sixty (60) days of the entry date of the Commission's Opinion and Order in this matter.

3. That Complainant Conyngham Township's and the Bureau of Investigation and Enforcement's requests to order Respondent Sanitary Sewer Authority of the Borough of Shickshinny to issue refunds to Conyngham Township customers is granted in part and without interest, consistent with the reasoning in this decision.

4. That the Sanitary Sewer Authority of the Borough of Shickshinny's Application for a Certificate of Public Convenience shall include an accounting of previous customer billed and unbilled charges to calculate and provide those customers who were directly billed by the Sanitary Sewer Authority of the Borough of Shickshinny a \$45.00 account credit or refund consistent with the reasoning in this decision.

5. That within thirty days of the Commission's approval of the Sanitary Sewer Authority of the Borough of Shickshinny's Application for a Certificate of Public

Convenience, the Authority shall issue to customers refunds or credits required by Ordering Paragraph 4 above.

6. That within twenty days of completion of its refund/credit 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/credit obligations.

7. That Conyngham Township's and the Bureau of Investigation and Enforcement's requests to impose a penalty upon Sanitary Sewer Authority of the Borough of Shickshinny is denied as unwarranted under the circumstances.

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

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

10. That, upon the Commission's approval of the filing Sanitary Sewer Authority of the Borough of Shickshinny's Application for a Certificate of Public Convenience, and the Authority's filing of the notice indicating compliance with refund/credit obligations, the Secretary shall mark Docket No. C-2021-303624 closed.

Date: June 12, 2023

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/s/  
Conrad A. Johnson  
Administrative Law Judge