

DONALD G. *K*ARPOWICH ATTORNEY-AT-LAW, P.C.

85 Drasher Road
Drums, PA 18222

Phone: (570) 788-6647
Fax: (570) 788-0654
www.karpowichlaw.com

June 30, 2023

Via Electronic Filing

Rosemary Chiavetta, Secretary
PA Public Utility Commission
PO Box 3265
Harrisburg, PA 17105-3265

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

Dear Secretary Chiavetta:

Enclosed for filing with the Pennsylvania Public Utility Commission (Commission) please find the Exceptions of the Sanitary Sewer Authority of the Borough of Shickshinny in the above-referenced proceedings. Copies will be provided as indicated on the Certificate of Service.

Please contact me if you have any questions regarding this filing.

Very Truly Yours,

Sean W. Logsdon
Sean W. Logsdon, Esquire

SWL:

cc: Sanitary Sewer Authority of the Borough of Shickshinny
Vito J. DeLuca, Esquire (Via electronic means)
Michael L. Swindler, Esquire (Via electronic means)
PUC Office of Special Assistants (Via electronic means at Ra-OSA@pa.gov)

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

CONYNGHAM TOWNSHIP	:	
	:	
v.	:	Docket No. C-2021-3023624
	:	
SANITARY SEWER AUTHORITY OF THE	:	
BOROUGH OF SHICKSHINNY	:	

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that this day I served a copy of the **Exceptions of the Sanitary Sewer Authority of the Borough of Shickshinny** upon the persons listed below in the manner indicated in accordance with the requirements of 52 Pa. Code Section 1.54.

Via Email Only to:

Vito J. DeLuca, Esquire
DeLuca Law Offices
26 Pierce Street
Kingston, PA 18704
vjd@delucalawoffices.com

Via Email Only to:

Michael L. Swindler
Pennsylvania Public Utility Commission
Bureau of Investigation and Enforcement
Commonwealth Keystone Building
400 North Street
Harrisburg, PA 17120
mwindler@pa.gov

Date: June 30, 2023

Sean W. Logsdon

Sean W. Logsdon, Esquire

*Attorney for Sanitary Sewer Authority of the
Borough of Shickshinny*

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

CONYNGHAM TOWNSHIP

v.

SANITARY SEWER AUTHORITY OF THE
BOROUGH OF SHICKSHINNY

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Docket No. C-2021-3023624

**EXCEPTIONS OF THE
SANITARY SEWER AUTHORITY
OF THE BOROUGH OF SHICKSHINNY**

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I. INTRODUCTION

Legislation was passed, in 1945, that placed exclusive jurisdiction over the rates and service of municipal authorities in the courts of common pleas. The clear and express language in the Municipality Authorities Act states:¹

The **court of common pleas shall have exclusive jurisdiction** to determine questions involving rates or service [of a municipal authority.]

More than seventy years of appellate and Pennsylvania Public Utility Commission (“Commission” or “PUC”) precedent (discussed herein) have held that, based the above-quoted language in the Municipality Authorities Act, **municipal authorities are not subject to the Commission’s jurisdiction** — even *if* operating outside of the municipal boundaries of their incorporating municipality.

In 2017, PUC Chairman Gladys Brown Dutrieuille summarized the state of the law in testimony before the Pennsylvania House Consumer Affairs Committee. She testified that:²

[The] **Commission’s jurisdiction presently does not extend to [municipal] authorities, but rather, only to municipalities.** This is the case due to the enactment of the Municipal Authorities Act ... , which declared that the courts of common pleas hold exclusive jurisdiction over authorities. ...

This distinction in exclusive jurisdiction between municipal utilities and [municipal] authorities operating beyond their political boundaries has been further supported by case law. The Pennsylvania Supreme Court determined that the [Municipal Authorities Act] provides an exclusive remedy for passing upon the reasonableness of

¹ 53 Pa. C.S. § 5607(d)(9)(emphasis added). 53 Pa. C.S. § 5607, which was 53 P.S. § 306 under the Municipality Authorities Act of 1945. That 1945 Act repealed and replaced the Municipality Authorities Act of 1935, Act of June 28, 1935, P.L. 463.

² https://www.puc.pa.gov/General/pdf/Testimony/Brown-Consumer_Affairs-HB798_092517.pdf. (emphasis added).

the rates or service of an authority because it provides exclusive jurisdiction to the courts of common pleas.³ (footnote renumbered).

The Initial Decision (“I.D.”)⁴ wrongly concludes that the Commission has jurisdiction over the rates and service of by the Sanitary Sewer Authority of the Borough of Shickshinny (“SSABS” or “Authority”) in Conyngham Township (the “Township” or “Conyngham”). That conclusion conflicts with the above-quoted plain language in the Municipality Authorities Act and the precedent interpreting that language. The I.D. does not address the express removal of municipal authorities from the Commission’s jurisdiction, even though the issue was raised by SSABS in its Main Brief.⁵ The I.D. ignores the above-quoted language in the Municipality Authorities Act and the precedent interpreting the impact of that language on the Commission’s jurisdiction over municipal authorities. The I.D. recommends that SSABS take corrective actions, namely obtaining a Certificate of Public Convenience from the Commission and making partial refunds to “patrons” within the Township. Those recommendations cannot be adopted due to the lack of the Commission’s jurisdiction over the rates and service of SSABS.

The question of the Commission’s jurisdiction over municipal authorities in general and SSABS in particulate is one of such substantial public importance as to require prompt and definitive resolution.⁶ SSABS has not been paid by its singular customer, Conyngham Township,

³ *Calabrese v. Collier Twp. Mun. Auth.*, 240 A.2d 544, 548 (Pa. 1968); *Elizabeth Twp. v. Mun. Auth. of McKeesport*, 447 A.2d 245, 246 (Pa. 1982).

⁴ In these Exceptions, (1) the Initial Decision is referred to as the “ID” or the “Initial Decision”; (2) Findings of Fact are referenced as “FOF at ¶ ___”; (2) Conclusions of Law are referenced as “COL at ¶ ___”; and (3) Ordering Paragraphs are referenced as “Ordering ¶ ___” or “Ordering Paragraph.”

⁵ <https://www.puc.pa.gov/pcdocs/1765405.pdf>

⁶ The Initial Decision dated June 27, 2023 (by ALJ Marta Guhl) issued in *Pennsylvania Public Utility Commission v. East Dunkard Water Authority*, PUC Docket No. C-2021-3027615, <https://www.puc.pa.gov/pcdocs/1790361.pdf>, approves a settlement between I&E and East Dunkard Municipal Authority. That initial decision and the related settlement suggests that the Commission has jurisdiction over municipal authorities operating outside of the municipal boundaries of their incorporating municipality. SSABS asserts that said initial decision and the related settlement should not be viewed as "precedent," since doing so would

since September 1, 2021 for the wastewater treatment provided to CTSA’s “patrons” in the Township. It is not sustainable for SSABS to continue to provide wastewater treatment free of charge and without compensation despite the 1992 Sewage Treatment Agreement between SSABS and the Township still being in force and effect.⁷ While SSABS is pursuing remedies before the courts of common pleas, that civil action is on hold⁸ until the conclusion of this Complaint proceeding.

II. EXCEPTIONS BY SSABS

SSABS’s exceptions to the I.D. of Administrative Law Judge Conrad A. Johnson (“ALJ”) request that the Commission reject the I.D. in its entirety due to the Commission’s lack of subject matter jurisdiction over the rates and service of municipal authorities.

A. Exception 1: The Commission lacks jurisdiction over the rates and service by municipal authorities, including SSABS.

FOF at ¶ 31; COL at ¶ 1, 3, 4, 5, 7; Ordering Paragraphs at ¶ 1-6, 8-10; I.D. at 23-25, 43, 45-46.

1. The Commission’s jurisdiction over municipal corporations does not extend to municipal authorities.

The threshold question presented is whether the Commission’s jurisdiction over “municipal corporations”⁹ extends to municipal authorities. **It does not.** The plain language of

defeat the Commission's policy of encouraging settlements by disregarding the fact that settlements, by their express nature, do not bind non-parties. That being said, SSABS disagrees with that initial decision and settlement since they are in conflict with the clear and express language in the Municipality Authorities Act and precedent interpreting that language. Further reasons for disagreement are expressed in footnote 42 herein.

⁷ See SSABS Main Brief at 16.

⁸ The Complaint filed by SSABS in the Court of Common Pleas of Luzerne County was preliminarily objected to by Conyngham Township. The Hon. Lesa Gelb issued an order holding the matte in abeyance until the PUC complaint is resolved.

⁹ See, e.g., 66 Pa. C.S. § 102 (definition, municipal corporation), 1102(a)(5) (acts requiring certificate, municipal corporation), 1301(b) (rates, municipal corporation), 1304 (discrimination in rates, municipal corporation), 1501 (service, municipal corporation).

the Municipal Authorities Act removed the Commission's jurisdiction over the rates and services by municipal authorities.¹⁰ The question of the Commission's jurisdiction over municipal authorities has been settled for more than seventy years. This was brought to the attention of the ALJ,¹¹ but the blackletter law was ignored in the ID.

The Municipality Authorities Act¹² expressly grants municipal authorities the power to fix rates for services provided by them. The Commission does not have a role in either process under that Act. In fact, Section 5607 of the Municipality Authorities Act¹³ vests the courts of common pleas with **exclusive jurisdiction** to review the rates and service of municipal authorities. In doing so, Section 5607(d)(9) of the Municipality Authorities Act exempts municipal authorities from regulation by the Commission. It states, in the relevant part, as follows:¹⁴

Any person questioning the reasonableness or uniformity of a rate fixed by an authority or the adequacy, safety and reasonableness of the authority's services, including extensions thereof, may bring suit against the authority in the court of common pleas of the county where the project is located or, if the project is located in more than one county, in the court of common pleas of the county where the principal office of the project is located. The court of common pleas shall have exclusive jurisdiction to determine questions involving rates or service. (emphasis added).

¹⁰ 53 Pa. C.S. § 5607(d)(9)(emphasis added).

¹¹ <https://www.puc.pa.gov/pcdocs/1765405.pdf>

¹² The Municipality Authorities Act was officially codified in 2001. Act 22 of 2001 (S.B. 780), P.L. 287, as amended, 53 Pa. C.S. § 5601, *et seq.* It was intended as a continuation of the prior law, the Municipality Authorities Act of 1945, Act of May 2, 1945, P.L. 382, as amended, 53 P.S. §§ 301-322.

¹³ 53 Pa. C.S. § 5607, which was 53 P.S. § 306 under the Municipality Authorities Act of 1945. That 1945 Act repealed and replaced the Municipality Authorities Act of 1935, Act of June 28, 1935, P.L. 463.

¹⁴ 53 Pa. C.S. § 5607(d)(9).

This statutory language has been reviewed by the appellate courts in 1945, the Superior Court held (in *Rankin*¹⁵) that the court of common pleas, not the Commission, “has exclusive jurisdiction to inquire into the reasonableness of rates charged by a municipal authority beyond as well as within the corporate boundaries of the municipality which created it.” The court explained that the “exclusive jurisdiction” language was added to the Municipal Authorities Act of 1945 **to reject** the holding of a prior case (*State College*¹⁶) that municipal authorities were subject to the Commission’s jurisdiction with respect to activity beyond the corporate boundaries of the authority’s incorporating municipality.

The Pennsylvania Supreme Court made a similar holding in 1982.¹⁷ In doing so, the court explained that “exclusive jurisdiction” language was intended to preclude challenges to the rates of municipal authorities from being heard by the Commission.

In 1984,¹⁸ the Commonwealth Court held that the 1945 case (*Rankin*) remained good law. Specifically, the court explained that “exclusive jurisdiction” language in Municipal Authorities Act of 1945 remained in force and modified the Public Utility Code¹⁹ in the same

¹⁵ *Rankin v. Chester Municipal Authority*, 68 A.2d 458 (Pa. Super. 1949).

¹⁶ *State College Borough Authority v. PUC*, 31 A.2d 557 (Pa. Super.1943).

¹⁷ *Elizabeth Twp. v. Mun. Auth. of McKeesport*, 447 A.2d 245, 246 (Pa. 1982). Prior to *Elizabeth Twp*, the Supreme Court held that The court of common pleas sitting in equity lacked jurisdictional competency to entertain action by residents of township against township municipal authority for relief as to sewage fees fixed by the authority. *Calabrese v. Collier Twp. Mun. Auth.*, 240 A.2d 544, 548 (Pa. 1968).

¹⁸ *Graver v. PUC*, 469 A.2d 1154 (Pa. Cmwlt. 1984).

¹⁹ Public Utility Code was a codification without substantial change of the previously existing provision for utility regulation, the Public Utility Law, Act of May 28, 1937, P.L. 1053. The Public Utility Law was in effect from 1937 to 1978.

manner as it modified the Public Utility Law (which was in effect at the time of the long rejected *State College* case). The Commonwealth Court reached the same result in 1988²⁰ and in 1990.²¹

None of those above-described holdings are impacted by the 2001 codification of the Municipality Authorities Act, since the “exclusive jurisdiction” language is the same today as when ruled upon by the appellate courts, and those appellate rulings are precedent which the ID ignored. The Commission must not make the same mistake.

Notably, PUC Chairman Gladys Brown Dutrieuille testified (in 2017) before the Pennsylvania House Consumer Affairs Committee as follows regarding the Commission’s jurisdiction over municipal authorities:²²

Importantly though, this Commission’s jurisdiction presently does not extend to [municipal] authorities, but rather, only to municipalities. This is the case due to the enactment of the Municipal Authorities Act of 1945 (MAA), which declared that the courts of common pleas hold exclusive jurisdiction over authorities. . . .

This distinction in exclusive jurisdiction between municipal utilities and [municipal] authorities operating beyond their political boundaries has been further supported by case law. The Pennsylvania Supreme Court determined that the MAA provides an exclusive remedy for passing upon the reasonableness of the rates or service of an authority because it provides exclusive jurisdiction to the courts of common pleas.²³ (footnote renumbered).

²⁰ See, *Glennon's Milk Serv., Inc. v. W. Chester Area Mun. Auth.*, 538 A.2d 138 (Pa. Cmwlth. 1988) (common pleas court decides whether water authority has power to determine maintenance responsibilities and require customers to regularly service pipes at their own expense); *Borough of Sewickley Water Authority v. Mollica*, 544 A.2d 1122 (Pa. Cmwlth. 1988) (Water Authority providing service outside of its boundaries was not a public utility under Public Utility Code).

²¹ *White Rock Sewage Corp. v. PUC*, 578 A.2d 984, 988 (Pa. Cmwlth. 1990) (“... based on *Graver* and Section 306 B(h) of the Act, the PUC correctly determined that they were unable to review the rates charged to White Rock by South Middleton.”).

²² https://www.puc.pa.gov/General/pdf/Testimony/Brown-Consumer_Affairs-HB798_092517.pdf.

²³ *Calabrese v. Collier Twp. Mun. Auth.*, 240 A.2d 544, 548 (Pa. 1968); *Elizabeth Twp. v. Mun. Auth. Of McKeesport*, 447 A.2d 245, 246 (Pa. 1982).

The Chairman's statement is supported by the above-described judicial precedent as well as Commission precedent (discussed below).

The I.D.'s reliance on the provisions in the Public Utility Code does not warrant a departure from the above described binding precedent. That above-described judicial precedent examined both (x) the provisions of the Public Utility Code, which include both municipalities and municipal authorities under the "umbrella" definition of "municipal corporation," and (y) the "exclusive jurisdiction" language of the Municipality Authorities Act. The judicial precedent dealt with the conflicting provisions by uniformly holding that the Commission lacks jurisdiction over municipal authorities. The I.D. did not deal with the conflicting provisions and ignores more than seventy years of precedent from the appellate courts to force a conclusion against clear precedential law.

2. The holding of the I.D. conflicts with a holdings of the appellate courts and the Commission.

The positions being advanced by the I.D., I&E and the Township conflict with the language in Section 5607 of the Municipality Authorities Act. Adopting those positions would be inconsistent with said statutory language as well as the above-described judicial precedent as well as Commission precedent.

The holding of the I.D. conflicts with a holdings of the appellate courts that the Commission does not regulate municipal authorities, such as SSABS, based on the statutory language in the Municipality Authorities Act. The key appellate cases are discussed above. There are other appellate cases, such as *Chester Water Auth. v. Pennsylvania Public Util. Comm'n*, 868 A.2d 384, 392 (Pa. 2005) (explaining that "the PUC lacks regulatory control over services by and rates charged by municipal authorities"); *Municipal Auth. of Borough of West View v. Public Util. Comm'n*, 41 A.3d 929, 934 (Pa. Cmwlth. 2012) (noting that PUC claimed that it did not

regulate a municipal authority in addressing a standing issue); and *Graver v. Pennsylvania Public Util. Comm'n*, 469 A.2d 1154 (Pa. Cmwlth. 1984) (affirming PUC’s dismissal, for lack of PUC’s jurisdiction, a complaint by developers that a water authority created under the Municipality Authorities Act of 1945 wrongfully disconnected water meters because PUC lacked “jurisdiction to determine questions of the reasonableness of rates fixed or of the services provided by a municipal authority beyond the limits of the municipality”).

The holding of the I.D. conflicts with prior holdings of the Commission.²⁴ For example, in *Schnieder v. Borough of New Wilmington and New Wilimington Water Authority*,²⁵ in that case a complaint was commenced against the Borough of New Wilmington and the New Wilmington Water Authority. ALJ Paist found that the municipal authority (and not the borough) was providing water service. She then examined the Commission’s jurisdiction over municipal authorities:²⁶

Municipal authorities are organized under and governed by the Municipality Authorities Act. “Municipal authorities are not creatures, agents or representatives of municipalities which organize them, but rather are independent agencies of the Commonwealth and a part of its sovereignty.” *White Rock Sewage Corp. v. Pennsylvania Public Utility Commission*, 133 Pa. Commonwealth Ct. 608, 614-15,

²⁴ See, e.g., *Implementation of Chapter 32 of the Public Utility Code Re Pittsburgh Water And Sewer Authority*, M-2018-2640802 (water); M-2018-2640803 (wastewater), Tentative Implementation Order entered January 18, 2018; 2018 Pa. PUC LEXIS 2, *4-*5 (“... approximately 70 years ago, municipal authorities were removed from Commission jurisdiction by the Municipal Authorities Act (MAA) ... 53 Pa. C.S. § 5607(d)(9)(emphasis added). Thus, the Commission had no authority whatsoever over entities created and operating under the MAA.”); *Paul E. Zimmerman v. Township of Whitpain et al.*, C-822905, Opinion and Order entered October 19, 1984; 1984 Pa. PUC LEXIS 16 (concluding that the PUC does not have jurisdiction over municipal authorities providing extraterritorial service); *Glen Alsace Water Company v. Mt. Penn Borough Authority*, Complaint Docket No. 19413, Opinion and Order entered May 23, 1972; 1972 Pa. PUC LEXIS 28; 46 Pa. PUC 187 (“... inasmuch as the named defendant in the instant action is an authority and the Commission is not the appropriate forum before whom an action against an authority can be brought, it is necessary and appropriate that the motion to dismiss be granted.”).

²⁵ *Schnieder v. Borough of New Wilmington and New Wilimington Water Authority*, PUC Docket No. C-00924506, Final Order (Act 294) entered March 23, 1993, adopting the Initial Decision dated February 8, 1993, 1993 Pa.PUC LEXIS 4.

²⁶ *Id.* at *3 (footnote added).

578 A.2d 984, 987 (1990); accord section 4A of the Municipality Authorities Act, 53 P.S. § 306A.

Section 4B(h) of the Municipality Authorities Act, 53 P.S. § 306B(h),²⁷ declares that

[a]ny person questioning . . . the adequacy, safety and reasonableness of the Authority's services, including extensions thereof, may bring suit against the Authority in the court of common pleas of the county wherein the project is located The court of common pleas shall have exclusive jurisdiction to determine all such questions involving rates or service.

(Emphases added.) Consequently, pursuant to section 4B(h), “the courts of common pleas have exclusive jurisdiction concerning the utility services of municipal authorities beyond, as well as within, the limits of the municipality which created the authorities.” *Borough of Sewickley Water Authority*, 118 Pa. Commonwealth Ct. at 246, 544 A.2d at 1124 (quoting *Graver v. Pennsylvania Public Utility Commission*, 79 Pa. Commonwealth Ct. 528, 531-32, 469 A.2d 1154, 1156 (1984)).

Accordingly, I conclude that the Commission lacks jurisdiction over Landowners' complaint because it concerns a municipal authority's provision of water service.

That above-quoted analysis in *Schnieder* is correct, and the I.D. did nothing to distinguish or overrule either that decision or the Commission’s other decisions and positions regarding the Commission lacks jurisdiction over municipal authorities. Regarding prior positions of the Commission,²⁸ SSABS emphasizes that the Commission’s position was made clear by the statements of PUC Chairman Gladys Brown Dutrieuille, which are quoted above.

²⁷ 53 P.S. § 306B(h) is now, 53 Pa. C.S. § 5607(d)(9)(emphasis added).

²⁸ See *In re Heckman*, 560 B.R. 657, 661 (Bankr. E.D. Pa. 2016) (explaining that litigant filed informal complaint with the Pennsylvania Public Utilities Commission, asking it to direct RAWA to “investigate his situation to determine if the excessive water consumption was caused by a defective meter or other equipment causing the water meter to malfunction,” and the Commission responded by “stating that it does not regulate municipal authorities”).

The I.D.'s reliance on *Ridgway*²⁹ is misplaced. On its face, *Ridgway* involved a municipality (borough), not a municipal authority. Municipalities and municipal authorities are separate legal entities created by separate laws, and the I.D. simply misses this key point when incorrectly apply *Ridgway*.³⁰ So, a case involving a municipality (borough) cannot be used to show the Commission's jurisdiction over a municipal authority³¹ because they are different types of entities organized and existing under different laws. Since the decision in *Ridgway* did not involve a municipal authority and contains no discussion or analysis of the Municipality Authorities Act, it lacks any value in deciding the Commission's jurisdiction over municipal authorities.

In this proceeding, I&E relied upon the 1943 decision in *State College*³² to support the Commission's jurisdiction over municipal authorities. Reliance on that decision is misplaced. The 1943 decision in *State College* is bad law as it was expressly refuted by the 1945 decision in *Rankin*,³³ as explained above. The 1943 decision in *State College* was made before the 1945 addition of the "exclusive jurisdiction" language in the Municipality Authorities Act. *Rankin* and the other precedent discussed above hold that the court's exclusive jurisdiction under the Municipality Authorities Act prevails over the definition of "municipal corporation" in the Public Utility Code.

²⁹ *Ridgway v. PUC*, 480 A.2d 1253 (Pa. Cmwlth. 1984).

³⁰ The primary distinction is that each municipality is created by the Legislature, while municipal authorities are independent agencies of the Commonwealth created by one or more municipalities under the Municipality Authorities Act. See, e.g., *O'Hare v. County of Northampton*, 782 A.2d 7, 13 (Pa. Cmwlth. 2001).

³¹ "Municipal authorities are not creatures, agents or representatives of municipalities which organize them, but rather are independent agencies of the Commonwealth and a part of its sovereignty." *White Rock Sewage Corp. v. PUC*, 578 A.2d 984, 987 (Pa. Cmwlth. 1990).

³² *State College Borough Authority v. PUC*, 31 A.2d 557 (Pa. Super.1943).

³³ *Rankin v. Chester Municipal Authority*, 68 A.2d 458 (Pa. Super. 1949).

3. The recommendations in the I.D., if adopted, would violate SSABS's constitutional right to due process.

The absence of prior notice of the Commission's interpretations before those interpretations were announced, applied to, and enforced against, SSABS, denies SSABS its constitutional right to due process.³⁴ The I.D., if adopted, would violate SSABS's right to due process because the findings and conclusions therein penalize SSABS on the basis of criteria of which SSABS had no advance notice.³⁵ These new *ex post facto* standards also violate the statutory requirement for notice and comment rulemaking, disregarding "fundamental fairness" that the Pennsylvania and Federal constitutional guarantees to due process require.³⁶

B. Exception 2: The Commission lacks jurisdiction to determine the corporate limits of SSABS.

FOF at ¶ 4-5; COL at ¶ 1, 3, 5, 7; Ordering Paragraphs at ¶ 1, 2, 8, 9, 10; I.D. at 2-3, 19, 43, 45-46.

1. The Court, not the Commission, has jurisdiction over service area of SSABS

The Municipality Authorities Act clearly states that: "The **court of common pleas shall have exclusive jurisdiction** to determine questions involving ... service [of a municipal

³⁴ *Pennsylvania State Board of Pharmacy v. Cohen*, 292 A.2d 277, 282-283 (Pa. 1972) (an agency may not implement a rule or policy having a substantive effect unless it has promulgated a regulation)("Cohen"). *See also Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 497 (1982). *See also Commonwealth v. Parker White Metal Col.*, 515 A.2d 1358, 1367 (Pa. 1986) (due process requires that the proscribed conduct be unambiguously identified).

³⁵ *Cohen*, 292 A.2d at 282-83 (holding that no agency may substitute a statute or a rule with a "purely subjective criterion which may reflect merely the personal or professional views of individual members of the [agency].").

³⁶ *See, e.g., South Hills Movers, Inc. v. PUC*, 601 A.2d 1308, 1310 (Pa. Cmwlth. 1992) (reversing Commission decision that "retroactively imposes a new condition on certificate of authority" where "fundamental fairness requires that such general criteria be promulgated as published regulations through the rule-making process, instead of being adopted in an ad hoc, retroactive, case-by-case basis"); *F.C.C. v. Fox*, 132 S.Ct. at 2309 (explaining due process demands fair notice to entities of conduct required or proscribed and that precision and guidance are necessary for due process so that those enforcing the law do not act in an arbitrary or discriminatory way); Pa. Const., art. I, §§ 1, 11; U.S. Const., amends. V, XIV.

authority].”³⁷ As explained above, that statutory language removes service provided by municipal authorities, including but not limited to SSABS, from the Commission’s jurisdiction.

The I.D. errs in concluding that the Commission has jurisdiction over the service provided by SSABS outside of corporate limits of SSABS’s incorporating municipality. Here, SSABS is legitimately operating by invitation and the 1992 Sewage Treatment Agreement, since SSABS is operating consistent with not only the Township’s Act 537 Plan and DEP Permits issued to SSABS. Lack of clear definition of the service area can give rise to disputes over the rights or obligations for an authority to serve areas beyond the boundaries of the incorporating municipality. If there is an unresolved dispute of the nature and extent of the service area, the courts will interpret the same.³⁸ The courts can refer to other documents, such as the Act 537 Plan and DEP Permits, to interpret the service area of a municipal authority. The I.D. did not make similar inquiries.

2. SSABS is a multi-municipal authority that can legally provide service outside of the municipal boundaries of its incorporating municipality

The I.D. does not acknowledge the rights of multi-municipal authorities, such as SSABS, to provide service beyond the outside of the municipal boundaries of their incorporating municipality.

SSABS is a multi-municipal authority. The Pennsylvania Department of Community and Economic Development has described two categories of municipal authorities.³⁹

³⁷ 53 Pa. C.S. § 5607(d)(9)(emphasis added).

³⁸ *Beaver Falls Mun. Auth. v. Mun. Auth. of the Borough of Conway*, 689 A.2d 379 (Pa. Cmwlth. 1997) appeal denied, 704 A.2d 639 (Pa. 1997) (municipal authority is authorized in its legislation to service the City of Beaver Falls and is not entitled to additional protections that are outside of stipulated contractual rights).

³⁹ Department of Community and Economic Development, MUNICIPAL AUTHORITIES IN PENNSYLVANIA (11 edition, April 2020, at p. 2. <https://dced.pa.gov/download/municipal-authorities-in-pennsylvania/>)

Many public services can be administered efficiently only if a large service area is covered. Political boundaries and the boundaries of this ideal service area seldom coincide. A multi-municipal authority⁴⁰ or a joint authority⁴¹ can provide a specific utility service for a larger geographic area. . . . Water and sewer authorities commonly serve more than one municipality to take advantage of the economies of scale and natural drainage areas. Larger “territory” authorities also exist to serve expansive needs, such as airports, trash, recycling collection and processing, and mass transit.

SSABS can legally provide service outside of the municipal boundaries of its incorporating municipality, according to the Municipality Authorities Act.⁴² The Municipality Authorities Act imposes no geographic restrictions on the ability of a municipal authority to provide service.

3. The I.D. did not expressly define SSABS’s corporate limits.

The I.D. did not attempt to analyze the case law and define what activities would constitute “rendering or furnishing to the public of any public utility service beyond its corporate limits” Contrary to the I.D., the membership in a municipal authority does not determine the “corporate limits” of the municipal authority. The Municipality Authorities Act imposes no geographic restrictions on the ability of a municipal authority to provide service, as noted above.

⁴⁰ An authority created by only one municipality but serving other political subdivisions (usually by a contractual agreement) is considered a multi-municipal authority. *Id.*

⁴¹ An authority created by several municipalities to serve their residents, and potentially other political subdivisions, is known as a joint authority. *Id.*

⁴² The initial decision in *East Dunkard* suggests that a resolution by the Township is required by 53 Pa. C.S. § 5607(b)(3)(i) for SSABS to provide service in the Township. *See* footnote 6. That suggestion is wrong. That Section is limited by its wording to “an authority incorporated or joined by a county or counties.” That is not the case here and does not appear to be the case for the East Dunkard Municipal Authority. In addition, the wording of 53 Pa. C.S. § 5607(b)(3) is limited to such an authority undertaking “a project solely for revenue-producing purposes.” Again, that is not the case here and does not appear to be the case for the East Dunkard Municipal Authority. In *East Dunkard*, I&E is misreading the purpose and intent of 53 Pa. C.S. § 5607(b)(3), since the language in that Section (“... solely for revenue-producing purposes ...”) is intended to limit the statutory authorization for municipal authorities from buying golf courses, ski resorts, office buildings and the like as purely business ventures. It was not intended to limit water, wastewater or stormwater projects in any municipality, as is being done by I&E.

C. Exception 3: The Commission lacks jurisdiction over bulk wastewater treatment service provided by SSABS.

FOF 14, 15, 21-31; COL 1, 3, 5, 6, 7; Ordering Paragraphs 1, 2, 8, 9, 10; I.D. at 22-23, 30, 36, 43 45-46.

1. SSABS provides bulk treatment to a single customer, Conyngham Township Sewer Authority (“CTSA”)

The I.D. overlooked or misapprehended material facts of record by changing the “bulk” (wholesale) wastewater treatment service being provided into “individual” wastewater treatment to homes and businesses.

Here, SSABS only provides wastewater treatment to CTSA. No homeowner or business in the Township has a direct connection to facilities owned and operated by SSABS. CTSA is the receiving treatment service from SSABS. CTSA has a relationship with homeowners and businesses.⁴³ CTSA collects and conveys the wastewater from homes and businesses connected to CTSA’s system for treatment and disposal. CTSA is responsible for the wastewater from the point where it first enters CTSA’s collection and conveyance system until the wastewater leaves CTSA’s system (and is discharged into SSABS’s system). That wastewater is treated by the SSABS.

To reiterate, none of the Township’s wastewater customers (other than the Township itself) is able to deliver wastewater directly to facilities owned and operated by SSABS. Before filing the instant complaint, the Conyngham Township Sewer Authority invoiced customers in Conyngham Township \$134.00, with no delineation on the invoice as to whether the charges

⁴³ The Municipality Authorities Act would prohibit SSABS from operating a collection and conveyance system in the Township that would duplicate or complete with the collection and conveyance system of CTSA in the Township. *See* 53 Pa. C.S. § 5607(b)(2). Assuming arguendo that the Commission has jurisdiction over municipal authorities (despite the language in the Municipality Authorities Act), the Commission should make it clear that SSABS has no duty to repair and maintain the portions of CTSA’s collection and conveyance system in the Township that deliver wastewater to SSABS’s facilities for treatment and disposal.

were for conveyance or processing. SSABS stopped invoicing ratepayers in the Township in September of 2020, and the Township and its ratepayers have failed to pay for service since then, despite the same being provided. (See the direct written testimony of Barry Noss, p. 6-7, admitted into evidence at 277). From January 1, 2021, to the first calendar year quarter of 2022 (and to the present), CTSA has been billing its ratepayers/customers located in the Township at the reduced rate of \$59.00 per EDU per quarter (*see* Joint Stipulation of the Parties), while still sending the wastewater to the SSABS plant. Conyngham Township has made no effort to contact DEP to seek alternative treatment of its sewage like, sending its sewage to Wyoming Valley Sanitary Authority, building its own treatment plant, or for temporarily collection and conveyance of its sewage. *See* Direct written testimony of Barry Noss, p. 9, admitted into evidence at 277. See also, Record Hearing N.T. p. 254.

2. The I.D. overlooks, and fails to consider, applicable exceptions to the Commission’s jurisdiction.

Assuming arguendo that the Commission has jurisdiction over municipal authorities (despite the language in the Municipality Authorities Act), the I.D. overlooked or misapprehended material facts of record that relate to potential exemptions from the definition of “public utility” under the Public Utility Code.

First, SSABS does not satisfy the definition of “public utility” because SSABS is providing wholesale (or bulk) wastewater service to a single customer, CTSA. Pennsylvania appellate case law has long held that private utility service to a single customer does not make the seller a public utility.⁴⁴

⁴⁴ *Bethlehem Steel Corporation v. PUC*, 713 A.2d 1110, 1114 (Pa. 1998) (service to single customer was not service to the public; the contract provides that natural gas production and transportation pipeline be sold to and used by Bethlehem Steel exclusively); *See also Borough of Ambridge v. Public Service Commission*, 165 A.47

Second, SSABS only provides wholesale (or bulk) wastewater service under its 1992 Sewage Treatment Agreement with CTSA/ Township. Service provided by contract is not subject to the jurisdiction of the Commission.⁴⁵ Therefore, the I.D. errs when it concludes that the validity of the 1992 Sewage Treatment Agreement has no bearing on the Commission’s jurisdiction over SSABS.

Indeed, I&E’s own testimony in this matter admits a critical point by the inverse of its logic – if the 1992 Sewage Treatment Agreement remains in effect (i.e. the agreement was *not* legally terminated) then the Authority has not “been acting as a *de facto* public utility with respect to its action of providing sewage treatment service.”⁴⁶ Similarly, the Township recognizes that whether or not the Authority becomes a “public utility” hinges on the validity of the 1992 Sewage Treatment Agreement.⁴⁷ The recognition by the parties that the validity of the 1992 Sewage Treatment Agreement is the critical first step in the analysis of whether the Authority was acting as a “*de facto*” utility shows that the complaint should be dismissed, or at least stayed, until a court of common pleas determines the continued validity of the contract by and between a Municipal Authority and a customer (the Township).

(Pa.Super. 1933) (the provision of water service by one manufacturer to another manufacturer did not constitute public utility service. [Company], in selling water to Spang–Chalfant Company was not operating as a public utility. There is no averment of the sale to any other person or corporation, nor of holding out or readiness to serve the public).

⁴⁵ See, e.g., *Application of Laser Northeast Gathering Company, LLC for Approval to Begin to Offer, Render, Furnish, or Supply Natural Gas Gathering and Transporting or Conveying Service by Pipeline to the Public in Certain Townships of Susquehanna County, Pennsylvania*, Docket No. A-2010-2153371, Opinion Order entered December 5, 2011; 2011 Pa. PUC LEXIS 536, in which an Applicant sought to withdraw its Application, after a PUC decision was entered (discussed below), on the grounds that it changed its business model so that it would no longer be offering “public utility” service under Section 102 of the Code. The new business model focused on offering service by contract.

⁴⁶ I&E St. No. 1 at 21.

⁴⁷ See CT MB at 4. (Concluding, without legal support, that “SSABS became a ‘public utility’ as that term is defined by the Pennsylvania Public Utilities [sic] Code and triggered PUC oversight and regulation when in September 2020 it terminated the bulk services agreement between the parties...” CT MB at 4. See also CT MB at 6, concluding without legal support that the Authority’s “termination of the agreement... triggered PUC oversight.”)

The Authority asserts that the record does not support any claim that the 1992 Sewage Treatment Agreement was in fact terminated, nor could it be by the September 11, 2020 letter. On its face, the 1992 Sewage Treatment Agreement does not authorize either the Authority or the Township to unilaterally terminate that agreement.⁴⁸ Indeed, the Township's witness at the hearing admitted that the Township did not respond or consent to the termination of the 1992 Sewage Treatment Agreement.⁴⁹ As the record contains no evidence that the Township assented to the Authority's unilateral termination attempt, or that a Court has determined the contract was terminated, the Township and I&E have failed to meet their burden of proof on this critical first step in asserting the Commission's jurisdiction over the Authority.

Simply put, the Township's and I&E's arguments and conclusions that the Commission has jurisdiction over the Authority as a result of the September 11, 2020 letter puts the proverbial "cart before the horse" which would require the Commission to answer questions outside of its express powers under the Public Utility Code. Even if the Commission *did* want to exceed its jurisdiction to answer questions regarding the validity of the 1992 Sewage Treatment Agreement (a contract), the record is devoid of any evidence that the Agreement between the Township and the Authority was validly terminated. Therefore, the Commission must dismiss the Complaint (or stay the Complaint pending a court of common pleas ruling on the validity of the agreement/contract) and find that the Township and I&E have failed their burden of proof, let alone provided persuasive legal authority assert the Commission's jurisdiction over a clear matter of contract law subject to the Courts of Common Pleas.

⁴⁸ Section 3.02 of the Sewage Treatment Agreement states that: "[S]ubject to the covenants and conditions set forth herein, the term of this Service Agreement shall be for such period of time as [SSABS] shall provide Conyngham with Sewage treatment and disposal service in the treatment plant, or until terminated by mutual written agreement of the parties."

⁴⁹ N.T. 195-196. ("Q. Mr. Whitebread, did Conyngham Township, in writing, mutually consent to the termination of the Bulk Service Agreement? A. I don't think we had a chance to respond to it.")

Third, SSABS is not holding itself out to homeowners or businesses in the Township. Only CTSA/Township by way of its/their 1992 Sewage Treatment Agreement with SSABS, can purchase wholesale (or bulk) wastewater service from SSABS. The general public does not have a right to use wholesale (or bulk) service from the SSABS, since SSABS does not own or operate a conveyance or collection system that directly connects the homes or businesses to SSABS's facilities. SSABS is not "holding out" a general/open "offer" to sell wastewater (sewage services) to any and all members of the public.⁵⁰ On its face, consistent with *Laser*, *Pilot Travel Centers*⁵¹ and *Bethlehem Steel*, the SSABS's defined, privileged and limited group is the CTSA/Township (which has limited capacity to send wastewater to SSABS's wastewater treatment plant).

3. SSABS's actions do not warrant oversight by the Commission

Assuming arguendo that the Commission has jurisdiction over municipal authorities (despite the language in the Municipality Authorities Act), the I.D. fails to properly consider the lack of payment to SSABS and other circumstances present.

CTSA is ultimately responsible for paying for the costs associated with treatment and disposal by SSABS under the 1992 Sewage Treatment Agreement, since CTSA is directing the wastewater collected by it to SSABS for treatment only. CTSA/Township stopped collecting costs associated with treatment and disposal from homes and businesses and failed to pay the undisputed portion of current wastewater treatment bills when due.

⁵⁰ An "offer" has been distinguished from negotiation concerning the possibility of public utility activity. The Courts have made it clear that where the main activity which occurs is negotiation concerning the possibility of public utility activity, there is no public utility activity. *Bethlehem Steel Corporation v. PUC*, 713 A.2d 1110 (Pa. 1998).

⁵¹ *Pilot Travel Centers LLC v. PUC*, 933 A.2d 123 (Pa. Cmwlth. 2007) (sewage treatment facility providing services pursuant to private contractual agreements, i.e., to a defined, privileged and limited group, was not a public utility).

SSABS proceeded to notify affected premises and indicated that they could pay their portion of the costs for treatment services provided by SSABS. Those payments, if any, were deducted from the amounts owed to SSABS by CTSA/Township. At most, these payments were voluntary but necessary where CTSA was violating the terms of the 1992 Sewage Treatment Agreement and not paying its bills (a matter for the court of common pleas, not this Commission).

The bills were sent by SSABS in an effort to be paid for wastewater treatment. Those bills were not tendered to an end user with the ability to directly convey wastewater to SSABS for treatment by SSABS.⁵² The subject collection and conveyance system is owned and operated by CTSA. SSABS lacks facilities to collect, convey or transmit the wastewater from homes or businesses to SSABS's wastewater treatment plant. Therefore, SSABS cannot hold itself out as offering wastewater treatment service to homes and businesses in the Township who have a need for wastewater treatment.

D. Exception 4: The Commission lacks jurisdiction over rates charged by SSABS and cannot order a refund under 66 Pa. C.S. § 1312.

COL at ¶ 1, 13 Ordering Paragraphs at ¶ 1-6, 8-10; I.D. at 40-43, 45-46.

1. Court has jurisdiction over rates and the I.D. errs by concluding that SSABS must make refunds of rates charged by SSABS

The Municipality Authorities Act clearly states that: “The **court of common pleas shall have exclusive jurisdiction** to determine questions involving rates ... [of a municipal authority].”⁵³ As explained above, that statutory language removes rates charged provided by municipal authorities, including but not limited to SSABS, from the Commission's jurisdiction.

⁵² SSABS's inability to provide collection and conveyance service is explained .

⁵³ 53 Pa. C.S. § 5607(d)(9)(emphasis added).

The I.D. errs in concluding that the Commission has jurisdiction over the rates charged by SSABS outside of corporate limits of SSABS's incorporating municipality. It further errs by concluding that SSABS must make refunds of rates charged by SSABS. Only the courts can make such determinations.⁵⁴ The Municipality Authorities Act⁵⁵ expressly grants municipal authorities the power to fix rates for services provided by them. The Commission does not have a role in that process under that Act. In fact, Section 5607 of the Municipality Authorities Act⁵⁶ vests the courts of common pleas with jurisdiction to review the rates and service of municipal authorities. In doing so, Section 5607(d)(9) of the Municipality Authorities Act exempts municipal authorities from regulation by the Commission.⁵⁷ The Commission, therefore, lacks jurisdiction to rule on the parties' responsibilities under a private agreement (the 1992 Sewage Treatment Agreement), or to determine the validity of the agreement or to award damages under that agreement.⁵⁸

Assuming arguendo that the Commission has jurisdiction over municipal authorities (despite the language in the Municipality Authorities Act), the I.D. fails to make sufficient findings to support a refund under 66 Pa. C.S. § 1312. The I.D. merely found that the “outside” rates were different from the “inside” rates. The I.D. did not make sufficient findings to support a

⁵⁴ See *Rankin v. Chester Mun. Auth.*, 68 A.2d 458 (Pa. Super. 1949) (The water rates exacted by the municipal authority were reasonable.)

⁵⁵ The *Municipality Authorities Act* was officially codified in 2001. Act 22 of 2001 (S.B. 780), P.L. 287, as amended, 53 Pa. C.S. § 5601, et seq. It was intended as a continuation of the prior law, the *Municipality Authorities Act of 1945*, Act of May 2, 1945, P.L. 382, as amended, 53 P.S. §§ 301-322. .

⁵⁶ 53 Pa. C.S. § 5607, which was 53 P.S. § 306 under the *Municipality Authorities Act of 1945*. That 1945 Act repealed and replaced the *Municipality Authorities Act of 1935*, Act of June 28, 1935, P.L. 463.

⁵⁷ See 53 Pa. C.S. § 5607(d)(9) (“Any person questioning the reasonableness or uniformity of a rate fixed by an authority or the adequacy, safety and reasonableness of the authority's services, including extensions thereof, may bring suit against the authority in the court of common pleas of the county where the project is located or, if the project is located in more than one county, in the court of common pleas of the county where the principal office of the project is located. The court of common pleas shall have exclusive jurisdiction to determine questions involving rates or service.”) (emphasis added).

⁵⁸ See, e.g., *Feingold v. Bell Tel. Co. of Pa.*, 383 A.2d 791 (Pa. 1977).

conclusion that the “outside” rates were unjust or unreasonable. Therefore, no relief is warranted under 66 Pa. C.S. § 1312.

2. The I.D. overlooks, and fails to consider: Who are the PUC-jurisdictional customers?

Assuming arguendo that the Commission has jurisdiction over municipal authorities (despite the language in the Municipality Authorities Act), the I.D. overlooked or misapprehended material facts of record that relate to who are the (alleged) Commission-jurisdictional customers (patrons) of SSABS.

The I.D. fails to make sufficient findings regarding who are patron(s) of SSABS. Only CTSA has facilities that can deliver wastewater to SSABS. Yet, the I.D. suggests that homeowners and businesses are customers of SSABS. That cannot be the case because the homeowner and businesses have no control over where their wastewater flows. All decisions on wastewater are within the control of the Township/CTSA.

In addition, the I.D. further errs by concluding that SSABS must make refunds of rates charged by SSABS. Refunds are not appropriate since SSABS has not been paid since September 2021. If CTSA is the customer of SSABS, then CTSA owes SSABS for wastewater treatment provided by SSABS. The fact that others paid bills owing by CTSA reduces CTSA’s liability to SSABS. It does not require SSABS to refund amounts paid to SSABS. If the homeowners and businesses are the customers of SSABS, then the homeowners and businesses owe SSABS for wastewater treatment provided by SSABS. Any “excess” paid by them should be used to reduce their outstanding balance owed to SSABS.

- E. **Exception 5: Township lacks standing to bring this Complaint, since there is no allegation that the Township is served by SSABS and the Township cannot represent the interests of the Township residents.**

FOF at ¶ 21-30; Ordering Paragraphs at ¶ 1-6, 8-10; I.D. at 22-23, 30, 36 45-46.

SSABS challenged the Township’s standing.⁵⁹ SSABS’s preliminary objections regarding the Township’s lack of standing 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.⁶⁰

The I.D. errs by holding that Township has standing to bring this Complaint. No effort was made by the Township to prosecute the Complaint on its own behalf, under Section 701 of the Code.⁶¹ The Township did not actually establish the Township’s standing on its own behalf. The I.D. does not contain findings of fact that wastewater from the Township’s buildings is conveyed by CTSA to SSABS for treatment by SSABS. Nor does the I.D. contain findings of fact that the Township is a “patron” of SSABS (outside of the bulk contract) or that the Township was sent an “individual” bill for wastewater treatment by SSABS.

F. Exception 6: CTSA is an indispensable party, since it controls collection and conveyance system that delivers wastewater to SSABS.

FOF 9, 12, 17, 18, 23, 24, 25, 29: Ordering Paragraphs 1-6, 8-10; I.D. at 21-23, 26-27, 45-46.

Assuming arguendo that the Commission has jurisdiction over municipal authorities (despite the language in the Municipality Authorities Act), the I.D. failed to join CTSA as an indispensable party.

An indispensable party is one whose rights are so connected with the claims of the litigants that no relief can be granted without impairing or infringing upon those rights. The failure to join an indispensable party deprives a court of subject matter jurisdiction and renders

⁵⁹ <https://www.puc.pa.gov/pcdocs/1691591.pdf>.

⁶⁰ <https://www.puc.pa.gov/pcdocs/1695470.docx>.

⁶¹ 66 Pa. C.S. § 701.

null any subsequent judgment. An issue concerning the absence of an indispensable party may be raised at any time and may also be raised *sua sponte*.⁶²

The rights of CTSA are impaired or infringed upon by the I.D., since the CTSA owns and controls the facilities that deliver wastewater to SSABS for treatment by SSABS. CTSA is not, however, a party to this proceeding. This means that any decision by the Commission would be a nullity.

⁶² *Church of Lord Jesus Christ of the Apostolic Faith, Inc. v. Shelton*, 740 A.2d 751 (Pa. Cmwlth. 1999).

III. CONCLUSION

For the reasons set forth above, the SSABS respectfully requests that the Commission grant these Exceptions, and reject the reasoning and recommendations of the Initial Decision consistent with the foregoing discussion so that the Complaint is denied in its entirety.

Respectfully submitted,

Sean W. Logsdon

Sean W. Logsdon, Esquire

ID # 93096

sean@karpowichlaw.com

85 Drasher Road

Drums, PA 18222

(570) 788-6647

Fax (570) 788-0654

*Attorney for Sanitary Sewer Authority of the
Borough of Shickshinny*

Verification

I, Sean W. Logsdon, Esquire, hereby declare that I am Solicitor for the Sanitary Sewer Authority of the Borough of Shickshinny; that as such I am authorized to make this verification on its behalf; that the facts set forth in the foregoing Exceptions are true to the best of my knowledge, information and belief, as provided to me by my clients, and that I make this verification subject to the penalties of 18 Pa. C.S. §4904 pertaining to false statements to authorities.

Dated: June 30, 2023


