

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

COMMONWEALTH OF
PENNSYLVANIA, DEPARTMENT
OF ENVIRONMENTAL
PROTECTION,

Petitioner,

v.

GRANT TOWNSHIP OF INDIANA
COUNTY AND THE GRANT
TOWNSHIP BOARD OF
SUPERVISORS,

Respondents,

and,

PENNSYLVANIA GENERAL
ENERGY COMPANY, LLC,

Intervenor.

No. 126 M.D. 2017

MOTION TO CONFIRM ISSUES FOR TRIAL

Intervenor Pennsylvania General Energy Company, L.L.C. (“PGE”) respectfully moves this Honorable Court to confirm issues for trial. In support of its Motion, PGE states as follows:

1. Petitioner Department of Environmental Protection (“DEP”) initiated this action to challenge the validity of Respondents’ Home Rule Charter prohibiting “**Depositing** of Waste from Oil and Gas Extraction” and making it “unlawful within Grant Township for any corporation or government to engage in the **depositing** of waste from oil and gas extraction.” Petition ¶ 24 (emphasis added).

2. In their Answer, New Matter, and Counterclaims, Respondents defend the validity of the Home Rule Charter and seek a declaration that the DEP’s conduct has violated the Home Rule Charter by issuing a permit to PGE to engage “in the depositing of waste from oil and gas extraction.” Counterclaim ¶¶ 123-127.

3. While the pleadings raise issues regarding the validity of the **disposal** of oil and gas-related waste in Grant Township, neither the DEP nor Respondents mention (let alone raise) any other issues related to oil and gas operations. In fact, the Home Rule Charter only attempts to prohibit **disposal** of oil and gas-related waste in the Township and otherwise permits other oil and gas activities within the Township.

4. The Home Rule Charter that is the foundation of this litigation does not address hydraulic fracturing and is limited, in pertinent part, to a prohibition of the

depositing of waste from oil and gas extraction.¹ No pleading in this case alleges that hydraulic fracturing is so dangerous as to violate the Environmental Rights Amendment.

5. The Court's May 2, 2018, opinion in this case stated that "[s]cientific and historical evidence concerning environmental issues, and evidence of DEP's actions may be necessary to fully adjudicate these Counterclaims as well as DEP's Complaint." *Dep't of Env'tl. Prot. v. Grant Ind. County*, 2018 Pa. Commw. Unpub. LEXIS 707, *22 (Pa. Commw. Ct. May 2, 2018) (emphasis added). Respondents' remaining Counterclaims (Counts 3 and 4) relate to the Home Rule Charter, which as stated above, does not address hydraulic fracturing.

6. In the Court's prior opinion in this case, *Dep't of Env't Prot. v. Grant Twp. of Indiana Cnty. and The Grant Twp. Bd. of Supervisors*, (Pa. Cmwlth., No. 126 M.D. 2017) filed March 2, 2020, the Court stated, "In sum, the Township seeks to prove that hydrofracking and disposal of its waste is so dangerous to the environment as to be in violation of the [Environmental Rights Amendment], and thus that the statutes upon which DEP bases its preemption claims are constitutionally invalid. While the Township may or may not be able to prevail on its constitutional claims, this Court has already ruled that it may attempt to do so in

¹ **Section 301. Depositing of Waste from Oil and Gas Extraction.** It shall be unlawful within Grant Township for any corporation or government to engage in the depositing of waste from oil and gas extraction.

defense of DEP's lawsuit..." (emphasis added). The Court also quoted that sentence in its most recent March 26, 2021 Opinion. (Pa. Cmwlth., No. 126 M.D. 2017, filed January 26, 2021, p. 6.)

7. In the status conference held in this matter on February 24, 2021, the Court stated that Respondents would be obligated to produce expert testimony to prove their claims that "hydrofracking" and disposal of its waste was so dangerous to the environment as to be in violation of the Environmental Rights Amendment.

8. The Case Management Order dated February 26, 2021, requires simultaneous filing and service of lists of witnesses, exhibits, and expert reports on July 16, 2021, meaning that PGE will not have an opportunity to determine whether Respondents will seek to submit expert testimony regarding the purported dangers of hydraulic fracturing (despite not previously having made that allegation) prior to PGE's being required to submit its own lists of witnesses, exhibits, and expert reports.

9. Based on the apparent conflict between the Court's Orders and the issues pled by the parties, PGE seeks confirmation from the Court as to the matters to be addressed at trial so as to avoid the cost and burden of preparing expert testimony on a question not at issue in the case.

10. PGE requests the Court to confirm that the question of whether hydraulic fracturing is so dangerous to the environment as to be in violation of the

Environmental Rights Amendment is not at issue in this matter and that accordingly Respondents may not introduce evidence at trial on this issue.

11. PGE contacted the Petitioner and the Respondents concerning this Motion. DEP supports the relief requested herein. Grant Township opposes the Motion.

WHEREFORE, for the foregoing reasons, Pennsylvania General Energy Company, L.L.C. respectfully requests that this Honorable Court grant its Motion to Confirm Issues for Trial and rule that the question of whether hydraulic fracturing is so dangerous to the environment as to be in violation of the Environmental Rights Amendment is not at issue in this matter and accordingly that Respondents may not introduce evidence at trial related to this issue.

DATE: March 25, 2021

Respectfully submitted,

/s/ Lisa C. McManus

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CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provisions of the Case Records Public Access Policy of the Unified Judicial System of Pennsylvania that require filing confidential information and documents differently than non-confidential information and documents.

DATE: March 25, 2021

/s/ Kevin J. Garber

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CERTIFICATE OF SERVICE

I hereby certify that on March 25, 2021, a copy of the foregoing Motion to Confirm Issues for Trial of Pennsylvania General Energy Company, L.L.C. was served electronically via the PACFile filing system, in accordance with PA.R.A.P. 121 upon the following counsel of record:

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/s/ Kevin J. Garber

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[PROPOSED] ORDER

AND NOW, this _____ day of _____, 2021, upon consideration of the Motion to Confirm Issues for Trial filed by Pennsylvania General Energy Company, L.L.C. in the above-captioned matter, it is hereby ORDERED that the Motion to Confirm is GRANTED. The question of whether hydraulic fracturing is so dangerous to the environment as to be in violation of the

Environmental Rights Amendment is not at issue in this matter and accordingly Respondents may not introduce evidence related to whether hydraulic fracturing is so dangerous to the environment as to be in violation of the Environmental Rights Amendment.

BY THE COURT:

B. BRIGANCE LEADBETTER,
Senior Judge