



November 16, 2020

VIA E-FILING

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Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2nd Floor North
Harrisburg, PA 17120

Re: StoneyBank Development LLC v. The Walnut Hill Utility Company; Docket No. C-2020-3022179

StoneyBank Development LLC's Amended Answer to Preliminary Objections

Dear Secretary Chiavetta:

In response to The Walnut Hill Utility Company's November 6, 2020 filing of an Updated Exhibit 2, which was referenced in the Preliminary Objections of The Walnut Hill Utility Company, StoneyBank Development LLC is filing the above-referenced Amended Answer to those Preliminary Objections. Copies are being served as shown on the attached certificate of service.

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

Sincerely,

COZEN O'CONNOR

By: Jonathan P. Nase
Counsel for *StoneyBank Development LLC*

JPN:kmg
Enclosure

cc: Per Certificate of Service
Stephen G. Mantakounis

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

StoneyBank Development LLC

v.

The Walnut Hill Utility Company

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:
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Docket No. C-2020-3022179

CERTIFICATE OF SERVICE

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

**DUE TO THE COVID-19 EMERGENCY,
SERVICE IS BEING MADE VIA E-MAIL ONLY:**

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DATED: November 16, 2020



Jonathan P. Nase, Esquire
Counsel for *StoneyBank Development LLC*

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

StoneyBank Development LLC	:	
	:	
v.	:	Docket No. C-2020-3022179
	:	
The Walnut Hill Utility Company	:	

**AMENDED ANSWER OF
STONEYBANK DEVELOPMENT LLC
TO THE PRELIMINARY OBJECTIONS OF
THE WALNUT HILL UTILITY COMPANY**

AND NOW COMES StoneyBank Development LLC (“StoneyBank”), pursuant to 52 Pa. Code §§ 5.101(f) and 5.65, to submit this Amended Answer (“Amended Answer”) to the Preliminary Objections (“Preliminary Objections”) filed by the Walnut Hill Utility Company (“Walnut Hill”) on October 19, 2020. On November 6, 2020, Walnut Hill filed an updated Exhibit 2 to its Answer to StoneyBank’s Complaint. Since Walnut Hill referenced this exhibit in its Preliminary Objections, Walnut Hill stated that it did not object to StoneyBank filing a Supplemental Answer to the Preliminary Objections within ten days.

For the convenience of the reader, this Amended Answer replaces in its entirety StoneyBank’s Answer to the Preliminary Objections, filed on October 29, 2020. For the reasons that follow, StoneyBank respectfully requests that the Preliminary Objections be denied.

I. OVERVIEW

The Pennsylvania Public Utility Code (“Code”) requires a person or corporation to obtain a certificate of public convenience (“Certificate”) from the Pennsylvania Public Utility

Commission (“Commission”) before offering, rendering, or furnishing public utility service to the public for compensation. 66 Pa. C.S. § 1101. StoneyBank’s Complaint alleges that Walnut Hill is in fact providing wastewater service (a type of public utility service, 66 Pa. C.S. § 102) to the public for compensation without a Certificate.

In addition, StoneyBank’s Complaint alleges that Walnut Hill held itself out to StoneyBank as being able to provide wastewater service to StoneyBank, although Walnut Hill does not have a Certificate. Specifically, StoneyBank alleges that it needs wastewater service for a development it wishes to construct. In June 2017, StoneyBank entered into the Sewage Agreement¹ by which Walnut Hill agreed to provide wastewater service to StoneyBank’s development. In July 2020, however, Walnut Hill sent StoneyBank an unsolicited draft of a contract that would terminate the Sewage Agreement because, according to the agreement, as drafted solely by Walnut Hill, the Code prevents Walnut Hill from providing the promised wastewater service to the development. The Complaint represents that StoneyBank has not signed the Termination Agreement.

Accepting these facts as true, as the Commission must when ruling on Preliminary Objections, StoneyBank has demonstrated a direct, immediate, and substantial interest sufficient to confer standing to maintain the instant Complaint. StoneyBank was victimized by a violation of the Code (Walnut Hill operated as a *de facto* utility by offering to provide wastewater service to it without a Certificate). In addition, StoneyBank has a direct, immediate and substantial interest in the Sewage Agreement, which Walnut Hill seeks to terminate because it claims that the Code prevents it from performing its obligations under the contract. The Commission should therefore reject the Preliminary Objection arguing that StoneyBank lacks standing.

¹ Unless otherwise noted, capitalized terms used herein have the same definitions as set forth in the Complaint.

The Commission should also reject the Preliminary Objection arguing that StoneyBank's Complaint is legally insufficient. As discussed above, StoneyBanks' Complaint alleged facts sufficient to support its claim that Walnut Hill violated the Code by offering to provide wastewater service to it without a Certificate.

Walnut Hill's Preliminary Objections claim that Walnut Hill did not need a Certificate. First, Walnut Hill claims that it was not providing service pursuant to the Code. Instead, it was providing service pursuant to the Declaration of Covenants, Easements, Conditions and Restrictions of Walnut Hill Utility Company, filed of record in the Office of the Recorder of Deeds of Delaware County, Pennsylvania on September 6, 1988 at Volume 0605, Page 2311 *et seq.* (the "Declaration"). Even assuming that the Declaration demonstrates that Walnut Hill's system was designed and constructed only to serve a specific group, the Sewage Agreement provided for extensive changes in the system to increase the number of customers. Additionally, the Second Amendment to the Declaration ("Second Amendment") permitted anyone to become a member, and obtain service from Walnut Hill, upon the affirmative vote of 67% of the existing members. These changes increased the number of customers and altered the select nature of the original customer group, effecting a change to public utility status. 52 Pa. Code § 69.1401(e).

Second, Walnut Hill claims that it is a *bona fide* cooperative association. Walnut Hill admits, however, that the residents of StoneyBank's Development, and the Beards, are not members of the association. Thus, when Walnut Hill offered to provide service to StoneyBank, it offered to provide service to a member of the general public, not a member of the association.

In any event, Walnut Hill's allegations that it does not need a certificate of public convenience should have been pleaded as New Matter in the Answer, not as the basis for a Preliminary Objection that the Complaint was legally insufficient.

For all of the above reasons, StoneyBank requests that the Commission deny the Preliminary Objections.

II. RESPONSE TO PRELIMINARY OBJECTIONS

A. Introduction

1. Denied. This paragraph is contradictory. The introductory clause states that Walnut Hill is filing its Preliminary Objections for two reasons, and the remainder of the paragraph lists three reasons: standing, legal insufficiency and lack of jurisdiction. The Preliminary Objections do not explain why the Commission lacks jurisdiction. Clearly, the Commission has jurisdiction to adjudicate a claim that an entity is a *de facto* utility. *Shryock Brothers, Inc. v. Uwchlan Township*, Docket No. C-20066648 (Final Order entered December 18, 2009) (“*Shryock*”).

B. Legal Standard

2. This paragraph states a legal conclusion to which no response is required.

C. StoneyBank’s Complaint

3. Denied. StoneyBank’s Complaint is a written document that speaks for itself.

D. Preliminary Objection 1 Should be Rejected because StoneyBank has a Direct, Immediate and Substantial Interest in This Proceeding

4. Denied. Walnut Hill’s Preliminary Objection 1 is founded on the notion that StoneyBank lacks standing to maintain the instant Complaint unless StoneyBank is a customer of Walnut Hill. Walnut Hill never cites authority for that proposition because that proposition is

wrong. *See, e.g., Shryock* (a complainant who was denied service by a township providing extraterritorial service had standing to claim that the township was a *de facto* utility). StoneyBank's Complaint alleges a direct, immediate and substantial interest in this proceeding, even though StoneyBank is not a customer of Walnut Hill.

First, StoneyBank is a developer in need of wastewater service to its development. It sought wastewater service to its development, and Walnut Hill held itself out as being able to provide that service, even though Walnut Hill did not have a Certificate.

The Code prohibits a person or corporation from *offering* wastewater service to or for the public for compensation without a Certificate. 66 Pa. C.S. § 1101 ("Upon the application of any proposed public utility and the approval of such application by the commission evidenced by its certificate of public convenience first had and obtained, it shall be lawful for any such proposed public utility to begin to *offer*, render, furnish, or supply service within this Commonwealth.") (emphasis added). Consequently, a Certificate is required if a person or corporation *holds itself out* to the public as being able to provide public utility service to or for the public for compensation. *See, e.g., Bethlehem Steel Corp. v. Pa. Pub. Util. Comm'n*, 552 Pa. 134, 143, 713 A.2d 1110, 1114 (1998); *Borough of Ambridge v. Pub. Serv. Comm'n*, 108 Pa. Super. 298, 304, 165 A. 47, 49 (1933).

StoneyBank's Complaint alleges that Walnut Hill held itself out to it as being able to provide wastewater service, even though Walnut Hill did not have a Certificate. This was a violation of the Code perpetrated on StoneyBank. StoneyBank has an immediate, substantial and direct interest in seeking to redress this violation. 66 Pa. C.S. § 701.

Second, StoneyBank entered into the Sewage Agreement with Walnut Hill, by which Walnut Hill agreed to provide wastewater service to StoneyBank's development. In July 2020,

Walnut Hill sought to terminate that agreement, claiming that the Code prohibits it from performing its obligations under the Sewage Agreement. As a party to the Sewage Agreement, StoneyBank clearly has a direct, immediate and substantial interest in requiring Walnut Hill to obtain a Certificate so it can provide the promised service.

5. This paragraph states a conclusion of law to which no response is required. By way of further answer, StoneyBank's Complaint alleges a substantial, direct and immediate interest in this proceeding for the reasons set forth in Paragraph 4, *supra*.

6. *George v. Pa. Pub. Util. Comm'n*, 735 A.2d 1282, 1286 (Pa. Cmwlth. 1989) is a written document that speaks for itself. The remainder of this paragraph is denied.

Walnut Hill mischaracterizes StoneyBank's Complaint. StoneyBank's Complaint includes a claim that Walnut Hill is holding itself out to the public (including holding itself out to StoneyBank) as being able to provide wastewater service, even though Walnut Hill does not have a Certificate. Complaint, Part III.

Walnut Hill puts great weight on a provision of the Sewage Agreement that states "Walnut Hill has not generally offered the use of its sewage treatment facilities to the general public, and the Plant has not been operated as, nor is it intended to be operated as, a public utility." Complaint, Exhibit 1, p. 1, referenced in Walnut Hill's Preliminary Objections ¶¶ 6 and 11. The Commission, however, determines whether a project is a public utility based on all the facts and circumstances of the particular transaction. *Implementation of the Alternative Energy Portfolio Standards Act of 2004*, Docket No. M-00051865 (Order entered November 30, 2006) (adopting 52 Pa. Code § 69.1401 ("Guidelines for determining public utility status--statement of policy")).

The facts of this particular transaction are that Walnut Hill held itself out to StoneyBank as being able to provide public utility service to the homes that StoneyBank wishes to construct,

and in fact entered into a contract with StoneyBank to provide that service. Walnut Hill now claims that the Code prevents it from providing that same service. As discussed in Paragraph 4, *supra*, StoneyBank's Complaint sufficiently alleges facts that establish a direct, immediate and substantial interest in this proceeding, in accordance with *George, supra*.

7. This paragraph states a legal conclusion to which no response is necessary. To the extent this paragraph alleges facts, they are denied for the reasons explained in Paragraphs 4 and 6, *supra*.

8. This paragraph states a conclusion of law, to which no response is required.

E. Preliminary Objection 2 Should be Rejected Because the Complaint Alleges Sufficient Facts to Establish its Claim that Walnut Hill is Operating as a *De Facto* Utility

9. Denied. The Complaint seeks redress for the wrong done to StoneyBank. Walnut Hill held itself out to StoneyBank as being able to provide sewage service at a time when Walnut Hill lacked legal authority to offer such service. Walnut Hill executed a contract agreeing to provide that service to StoneyBank, but Walnut Hill now claims that the Code prevents it from providing the promised service. The Complaint asks the Commission to either (a) order Walnut Hill to obtain a Certificate so it can provide the promised service, or (b) force Walnut Hill to be sold to a capable public utility that can provide the promised service. In addition, the Complaint asks the Commission to impose a penalty on Walnut Hill for wrongfully holding itself out to StoneyBank (and others, if any) as being able to provide sewage service when it lacked the legal authority to do so.

1. Legal Standard

10. This paragraph states a legal conclusion to which no response is required.

2. The Complaint Alleges Sufficient Facts to Support a Claim that Walnut Hill Held Itself Out as Being Able to Provide Public Utility Service to the Public for Compensation Without a Certificate

11. Denied. The Complaint alleges sufficient facts to support a claim that Walnut Hill held itself out to StoneyBank as being able to provide public utility service to the public for compensation, even though Walnut Hill did not have a Certificate. StoneyBank incorporates by reference the averments of Paragraphs 4, 6 and 9, *supra*.

Walnut Hill alleges that it did not need a Certificate because it did not offer to provide public utility service. Rather, Walnut Hill alleges that it offered to provide service pursuant to the Declaration. On November 6, 2020, Walnut Hill filed an incomplete copy of the Declaration (the filed copy does not include Exhibits A and B, which show the location of the Property and the Additional Real Estate to be served by Walnut Hill). Nevertheless, StoneyBank admits that its development is not located on the Property or the Additional Real Estate. Walnut Hill also failed to file the First Amendment to the Declaration (the Second Amendment to the Declaration was previously filed in Exhibit 2 to the Answer to the Complaint).

Walnut Hill failed to provide any explanation of why service pursuant to the Declaration is not public utility service under the Code. Apparently, Walnut Hill believes it is not a public utility because the Declaration shows that Walnut Hill's "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." 52 Pa. Code § 69.1401(c)(2). The Sewage Agreement, however, provides that StoneyBank will construct extensive facilities, which will become the property of Walnut Hill, so that Walnut Hill can serve the residents of StoneyBank's development (as well as the Beards). Additionally, the Second Amendment allows any person to become a member, and receive service from Walnut Hill, upon the affirmative vote of 67% of the existing members.

The Commission's statement of policy regarding guidelines for determining public utility status states:

(e) *Modification of project or service.* Implementation of contractual provisions that result in an actual increase in the original customer number, an actual alteration to the nature of the relationship between the project developer and the original customer group, an alteration to the select nature of the original customer group or other material change in regard to the original customer group may result in a change to the nonpublic utility status of the utility project or service.

52 Pa. Code § 69.1401(e). Thus, even assuming that the Declaration demonstrates that Walnut Hill was not a public utility previously, the Sewage Agreement and the Second Amendment to the Declaration effected a change in the nonpublic utility status of Walnut Hill by increasing the original customer number and altering the select nature of the original customer group.

StoneyBank respectfully submits that the allegations in this paragraph raise an affirmative defense and should have been pleaded in the Answer as New Matter, 52 Pa. Code § 5.62(b), so that the Parties could conduct appropriate discovery concerning Walnut Hill's allegations. These allegations, which StoneyBank denies, are inappropriate in a Preliminary Objection alleging that StoneyBank's pleading is legally insufficient.

12. Denied, for the reasons set forth in Paragraph 11.

3. The Complaint Alleges Sufficient Facts to Support the Requested Relief – That the Commission Order Walnut Hill to Obtain a Certificate or be Sold to a Capable Public Utility

13. Denied. Again, Walnut Hill claims that it does not need a Certificate, this time because Walnut Hill alleges that it is a *bona fide* cooperative association. Walnut Hill alleges that I&E conducted an informal investigation of whether Walnut Hill is a *de facto* utility and closed the investigation without bringing a Complaint, subject to the termination of the Sewage Agreement. StoneyBank was not a party to I&E's informal investigation and is not bound by its results.

Moreover, the documents submitted by Walnut Hill fail to support the claim that it is a *bona fide* cooperative association. Those documents demonstrate:

(1) If Walnut Hill would provide service to the residents of StoneyBank's development, those residents would not be members of the cooperative. Walnut Hill's Answer to Interrogatory Set II Number 8 from I&E. The residents of StoneyBank's development, and the Beards, were not subject to the Declaration as originally recorded. The Second Amendment to the Declaration permits additional Users to join the cooperative association upon an affirmative vote of 67% of the members attending a meeting, but the above-referenced interrogatory response admits that no such vote has ever been held. Thus, by executing the Sewage Agreement, Walnut Hill offered to provide service to members of the general public, not to members of the cooperative association.

(2) I&E closed its informal investigation of Walnut Hill, without prejudice, predicated on the termination of the Sewage Agreement. August 20, 2020 Letter from I&E to Walnut Hill. The Sewage Agreement has not been terminated.

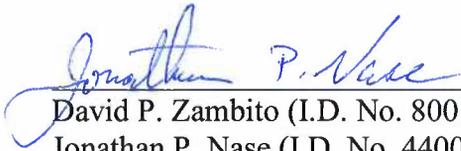
(3) The Termination Agreement, drafted by Walnut Hill, seeks to terminate the Sewage Agreement because Walnut Hill's provision of wastewater service to StoneyBank's development would violate the Code.

Finally, StoneyBank respectfully submits that the allegations of this paragraph, which are specifically denied, raise an affirmative defense and should have been pleaded in the Answer as New Matter, 52 Pa. Code § 5.62(b), so that the Parties could conduct appropriate discovery concerning Walnut Hill's allegations. These allegations are inappropriate in a Preliminary Objection alleging that StoneyBank's pleading is legally insufficient.

III. Conclusion

WHEREFORE, StoneyBank Development LLC respectfully requests that the Commission deny the Preliminary Objections filed by the Walnut Hill Utility Company on October 19, 2020.

Respectfully submitted,



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Date: November 16, 2020

Counsel for *StoneyBank Development LLC*

VERIFICATION

I, STEPHEN MANTAKOONIS, hereby state that the facts set forth above are true and correct to the best of my knowledge, information and belief and that I expect to be able to prove the same at a hearing held in this matter. I understand that the statements herein are made subject to the penalties of 18 Pa. C.S. § 4904 (relating to unsworn falsification to authorities).

Date: November 16, 2020

Stephen Mantakoonis