**BEFORE THE**

**PENNSYLVANIA PUBLIC UTILITY COMMISSION**

StoneyBank Development LLC :

 :

 v. : C-2020-3022179

 :

The Walnut Hill Utility Company :

**ORDER**

**DENYING PRELIMINARY OBJECTIONS**

**Introduction**

On September 24, 2020, StoneyBank Development LLC (StoneyBank) filed a formal complaint with the Pennsylvania Public Utility Commission (Commission) against the Walnut Hill Utility Company (Walnut Hill), docket number C-2020-3022179. In its complaint, StoneyBank averred that it is in the process of developing a thirty-three-unit townhouse development in Chester Heights Borough, Chester County which requires wastewater collection and treatment service. StoneyBank added that it entered into a sanitary sewage agreement with Walnut Hill to provide sanitary sewage collection and treatment services for the residences in the development. StoneyBank provided additional averments regarding the agreement and noted that Walnut Hill subsequently sent StoneyBank a termination agreement. StoneyBank then averred that Walnut Hill has been in violation of the Public Utility Code by holding itself out to the public as providing public utility service to the public for compensation without a certificate of public convenience for at least three years. StoneyBank requested that Walnut Hill be ordered to apply for a certificate of public convenience, an investigation be instituted against Walnut Hill pursuant to Section 529 of the Public Utility Code and that Walnut Hill pay a civil penalty for each day it held itself out to the public as offering or providing public utility service for compensation. StoneyBank provided multiple attachments to its complaint in support of its position.

On October 19, 2020, Walnut Hill filed an answer to the complaint filed by StoneyBank. In its answer, Walnut Hill provided background regarding an investigation by the Commission’s Bureau of Enforcement and Investigation (I&E) that sought to determine whether Walnut Hill has been operating and continues to operate as a de facto public utility providing wastewater service for compensation without holding a certificate of public convenience from the Commission. Walnut Hill added that the investigation also examined whether Walnut Hill fit within an exemption to the definition of “public utility” under the Public Utility Code. Walnut Hill added that I&E agreed that Walnut Hill operates as a bona fide cooperative association that it is exempt from the Commission’s regulatory jurisdiction. Walnut Hill added, however, that I&E’s conclusion was predicated on Walnut Hill terminating the sanitary sewage agreement with StoneyBank which it attempted to do by letter to StoneyBank dated July 20, 2020. Walnut Hill provided specific responses to each of StoneyBank’s averments and requested that the complaint be dismissed.

Also on October 19, 2020, Walnut Hill filed preliminary objections in response to StoneyBank’s complaint. In its preliminary objections, which were accompanied by a notice to plead, Walnut Hill argued that the complaint should be dismissed because StoneyBank has not demonstrated that it has standing to file the complaint alleging Walnut Hill is in violation of the Public Utility Code. Walnut Hill noted that StoneyBank is not a customer of Walnut Hill and even accepting the allegations in the complaint as true, StoneyBank has not demonstrated a substantial, direct and immediate interest in the matter as is required to have standing. Walnut Hill also argued that the complaint should be dismissed because it lacks legal sufficiency as it seeks conflicting relief and alleges facts that if accepted as true would not compel the requested relief. Walnut Hill added that the complaint attempts to usurp the Commission’s regulatory process in order to override a non-jurisdictional contract. Walnut Hill noted that the service agreement executed between the parties was not executed pursuant to the Public Utility Code. Walnut Hill references its answer to StoneyBank’s complaint for the fact that I&E investigated the matter and determined that Walnut Hill operates as a non-jurisdictional and bona fide cooperative association. Walnut Hill again requested that the complaint be dismissed.

On October 29, 2020, StoneyBank filed an answer to the preliminary objections filed by Walnut Hill. As discussed further below, however, StoneyBank filed an amended answer to the preliminary objections on November 16, 2020 after Walnut Hill filed an updated exhibit. StoneyBank noted in its amended answer that the amended answer replaces in its entirety its answer to the preliminary objections filed on October 29, 2020. As a result, StoneyBank’s answer filed on October 29, 2020 will not be considered.

A motion judge assignment notice was issued on November 5, 2020 informing the parties that I had been assigned as the presiding officer and am responsible to resolve any issues which may arise during the preliminary phase of this proceeding.

On November 6, 2020, Walnut Hill filed an errata to its answer, noting that exhibit 2 attached to its answer, Walnut Hill’s bylaws, was incomplete. Walnut Hill attached a complete copy of its bylaws as the errata.

Finally, on November 16, 2020, StoneyBank filed an amended answer in response to Walnut Hill’s preliminary objections and the subsequent errata. In its amended answer, StoneyBank stated that it has a direct, immediate and substantial interest in this proceeding and therefore standing to bring the complaint. StoneyBank argued, among other things, that it is a developer in need of wastewater service to its development and Walnut Hill held itself out as being able to provide wastewater service so it entered into a service agreement with Walnut Hill. StoneyBank argued that Walnut Hill’s second preliminary objection should be dismissed because it alleged sufficient facts in the complaint to establish its claim that Walnut Hill is acting as a de facto public utility. StoneyBank referenced the Commission’s policy statement regarding determining public utility status, among other things, in support of its position and argued that the complaint alleges sufficient facts to support the relief requested. StoneyBank requested that Walnut Hill’s preliminary objections be denied.

Walnut Hill’s preliminary objections are now ready for disposition. For the reasons discussed below, Walnut Hill’s preliminary objections will be denied and the complaint will be scheduled for a hearing.

**Legal standard**

Section 5.101 of the Commission’s rules of administrative practice and procedure provides for the filing of preliminary objections. 52 Pa.Code § 5.101. Commission preliminary objection practice is comparable to Pennsylvania civil practice respecting the filing of preliminary objections. Equitable Small Transportation Intervenors v. Equitable Gas Company*,* 1994 Pa PUC LEXIS 69, Docket No. C-00935435 (July 18, 1994) (Equitable). Section 5.101(a) provides:

(a) *Grounds.* Preliminary objections are available to parties and may be filed in response to a pleading except motions and prior preliminary objections. Preliminary objections must be accompanied by a notice to plead, must state specifically the legal and factual grounds relied upon and be limited to the following:

1. Lack of Commission jurisdiction or improper service of the pleading initiating the proceeding.
2. Failure of a pleading to conform to this chapter or the inclusion of scandalous or impertinent matter.
3. Insufficient specificity of a pleading.
4. Legal insufficiency of a pleading.
5. Lack of capacity to sue, nonjoinder of a necessary party or misjoinder of a cause of action.
6. Pendency of a prior proceeding or agreement for alternative dispute resolution.
7. Standing of a party to participate in a proceeding.

52 Pa.Code § 5.101(a)(1)-(7).

For purposes of disposing of preliminary objections, the Commission must accept as true all well pleaded, material facts of the nonmoving party, as well as every reasonable inference from those facts. County of Allegheny v. Commonwealth of Pennsylvania, 490 A.2d 402 (Pa. 1985); Commonwealth of Pennsylvania v. Bell Telephone Co. of Pa., 551 A.2d 602 (Pa. Cmwlth. 1988). The Commission must view the complaint in this case in the light most favorable to StoneyBank and should dismiss the complaint only if it appears that StoneyBank would not be entitled to relief under any circumstances as a matter of law. Equitable, *supra*; *see also*, Interstate Traveler Services, Inc. v. Commonwealth, Department of Environmental Resources, 406 A.2d 1020 (Pa. 1979).

**Preliminary Objection 1 - Standing**

In its first preliminary objection, Walnut Hill argued that StoneyBank has not demonstrated that it has standing to file the complaint because it is not a customer of Walnut Hill and therefore cannot demonstrate a direct, immediate and substantial interest in the matter. Walnut Hill also argued that, although StoneyBank executed the sewage agreement, Walnut Hill never connected StoneyBank to its system. Walnut Hill added that StoneyBank lacks standing to prosecute the complaint of unauthorized public utility service. Walnut Hill added that StoneyBank’s interest “fails to rise beyond the general interest of the public in obedience with the law” and calls StoneyBank’s interest a “speculative future interest.”

In response, StoneyBank argued that it is a developer in need of wastewater service to its development and Walnut Hill held itself out as being able to provide the service. StoneyBank noted that the Public Utility Code prohibits a person or corporation from offering wastewater service to the public without a certificate of public convenience and, therefore, Walnut Hill holding itself out to provide the service is sufficient to show a violation of the Public Utility Code. Furthermore, StoneyBank noted that Walnut Hill entered into the sewage agreement with StoneyBank thereby giving StoneyBank a direct, immediate and substantial interest. StoneyBank added that Walnut Hill has otherwise mischaracterized the complaint.

In order to have standing, a party must have a substantial interest in the subject matter of the litigation, the interest must be direct, and the interest must be immediate. William Penn Parking Garage, Inc. v. City of Pittsburgh*,* 464 Pa. 168, 192, 346 A.2d 269, 280 (1975). The substantial interest requirement means that "there must be some discernible adverse effect to some interest other than the abstract interest of all citizens in having others comply with the law." Id. at 195, 346 A.2d at 282. A direct interest "means that the person claiming to be aggrieved must show causation of the harm to his interest by the matter of which [the person] complains." Id. Finally, the interest must "be 'immediate' and 'not a remote consequence of the judgment.'" Id. at 197, 346 A.2d at 283 (quoting Keystone Raceway Corp. v. State Harness Racing Commission, 405 Pa. 1, 7-8, 173 A.2d 97, 100 (1961)).

In this case, when accepting as true all well pleaded, material facts of the nonmoving party, as well as every reasonable inference from those facts, and viewing the complaint in the light most favorable to StoneyBank, it is clear that StoneyBank has a direct, immediate and substantial interest in the matter complained of and, therefore, has standing to prosecute the complaint.

StoneyBank’s interest is direct because it entered into a sewage agreement with Walnut Hill for Walnut Hill to provide wastewater service to its development of thirty-three-units. Without such agreement, StoneyBank would likely have difficulty selling those thirty-three units and, therefore, there is a show of causation of harm. StoneyBank’s interest is substantial because, among other things, of the significant costs associated with the project. In part, there are tap-in fees of $8,500 per unit and $90 per quarter per unit sewer charges that are at issue. In addition, StoneyBank’s interest is also substantial because StoneyBank would likely have difficulty selling the thirty-three units without an agreement in place that provides sewer service. These are discernable adverse effects on StoneBank as a result of Walnut Hill’s actions. Finally, StoneyBank’s interest is also immediate because it averred in its complaint that Walnut Hill sent StoneyBank a draft agreement to terminate the sewage agreement on July 20, 2020. StoneyBank subsequently attempted to resolve the dispute in August and September, 2020 but was unable to do so and, therefore, filed its complaint on September 24, 2020. It is reasonable to infer that StoneyBank is interested in moving forward with its development project as expeditiously as possible and, therefore, its interest is immediate and not a remote consequence.

In contrast, Walnut Hill’s arguments to the contrary are without merit and will be rejected. For example, it is irrelevant that StoneyBank is not a customer of Walnut Hill and never connected to the system. Walnut Hill is correct that Section 1101 of the Public Utility Code states that “it shall be lawful for any such proposed public utility to begin to ***offer***, render, furnish or supply service within this Commonwealth.” 66 Pa.C.S. § 1101 (emphasis added). Therefore, it is not necessary that StoneyBank be a customer of Walnut Hill’s in order for a violation of Section 1101 to occur. Similarly, Section 1501 of the Public Utility Code broadly states that utility service must be adequate, efficient, safe and reasonable and include “service and facilities as shall be necessary or proper for the accommodation, convenience, and safety of its patrons, employees ***and the public***.” 66 Pa.C.S. § 1501 (emphasis added). Although StoneyBank has not specifically alleged a violation of Section 1501, it is referenced here as an example that an entity does not have to be a customer of a utility to be protected by certain provisions of the Public Utility Code. The same applies with regard to Section 1101. In addition, StoneyBank’s interest is not a “speculative future interest” as Walnut Hill argued. Rather, StoneyBank’s interest involves its development of a thirty-three units for which it needs wastewater service. Such interests are not speculative future interests. Instead, they are direct, immediate and substantial.

As such, Walnut Hill’s first preliminary objection will be denied. StoneyBank has standing to prosecute its complaint because its interests are direct, immediate and substantial.

**Preliminary Objection 2 – Legal Sufficiency**

In its second preliminary objection, Walnut Hill argued that “simply put, the Complainant requests inherently contradictory relief that would be impossible for the Commission to grant” and that “the complaint attempts to usurp the Commission’s regulatory process in order to override a non-jurisdictional contract.” Walnut Hill argued that the plain language of the sewage agreement explicitly provides that Walnut Hill’s obligations to StoneyBank are governed by the terms and conditions of the Declaration rather than any outcome of any Commission determination. Walnut Hill added that the facts pled by StoneyBank do not support the requested relief.

In response, StoneyBank argued that the complaint asks the Commission to impose a penalty on Walnut Hill for wrongfully holding itself out to StoneyBank and others as being able to provide sewage service when it lacked the authority to do so and that the complaint alleged sufficient facts to support such a claim. StoneyBank added that Walnut Hill’s arguments raise an affirmative defense that should have been pleaded in the answer as new matter and are not appropriate as preliminary objections. StoneyBank added that it is not bound by I&E’s investigation of Walnut Hill and argued that Walnut Hill has failed to support its claim that it is a bona fide cooperative association.

In civil practice, a preliminary objection based on legal insufficiency is referred to as a demurrer. Preliminary objections in the form of a demurrer will be sustained only in cases which are free and clear of doubt and where dismissal is clearly warranted by the record. Community Life Support Systems, Inc., *et al*. v. Commonwealth of Pennsylvania, 689 A.2d 1014, 1017 (Pa. Cmwlth. 1997). Any doubt must be resolved in favor of overruling a demurrer. Id. The question presented by the demurrer is whether, on the facts averred, the law states with certainty that no recovery is possible. Hoffman v. Misericordia Hospital of Philadelphia, 439 Pa. 501, 267 A.2d 867 (1970).

In this case, it is not free and clear from doubt that dismissing StoneyBank’s complaint is clearly warranted by the record, especially when resolving any doubts in favor or StoneyBank. In particular, in its complaint, StoneyBank averred that, “in 2017, Walnut Hill represented to StoneyBank in the sewage agreement that it was already providing wastewater collection, treatment and disposal service to residences and businesses in certain developments in shopping centers in the vicinity of the StoneyBank Property.” Stoneybank added that Walnut Hill’s website indicates that the company is providing service to 383 residences and it “does not appear to be service to a defined, privileged and limited group.” StoneyBank also noted in its complaint that, in the sewage agreement, Walnut Hill agreed to provide wastewater collection, treatment and disposal services for compensation to thirty-three townhouses to be constructed by StoneyBank plus additional structures. These averments must be accepted as true for purposes of disposing of Walnut Hill’s preliminary objections. When doing so, it is clear that StoneyBank has raised issues which may demonstrate a violation of the Public Utility Code, including Section 1101.

Again, Walnut Hill’s arguments to the contrary are without merit and will be rejected. Walnut Hill’s arguments that the complaint attempts to usurp the Commission’s regulatory process in order to override a non-jurisdictional contract will be rejected. Simply because I&E has conducted its own investigation and made a decision to proceed in a certain way with regard to Walnut Hill does not preclude StoneyBank from filing its complaint. I&E is vested with protecting the public interest and may have multiple reasons why it decides to bring an investigation, such as financial constraints, among other things. StoneyBank represents its own interests and likely has separate reasons why it may decide to file a complaint. In addition, Walnut Hill’s argument that the complaint raises no Public Utility Code implications because it involves a declaration over which the Commission has no jurisdiction fails to consider that StoneyBank specifically raised issues in its complaint regarding Sections 529, 1101 and 3301 of the Public Utility Code and that such averments must be accepted as true for purposes of disposing of Walnut Hill’s complaint. Walnut Hill has not raised any other argument that warrants granting its second preliminary objection.

As such, Walnut Hill’s second preliminary objection will also be denied. When accepting as true all well plead averments in the complaint, as well as every reasonable inference from those averments, it is not free and clear from doubt that dismissing StoneyBank’s complaint is clearly warranted by the record, or that StoneyBank is not entitled to relief under any circumstances as a matter of law, especially when resolving any doubts in favor of StoneyBank. Instead, StoneyBank’s complaint is legally sufficient.

**Conclusion**

In conclusion, the preliminary objections filed by Walnut Hill must be denied. When accepting as true all well pleaded averments of material fact in StoneyBank’s complaint, as well as every reasonable inference from those averments, and viewing the complaint in the light most favorable to StoneyBank, as is required when disposing of Walnut Hill’s preliminary objections, it is clear and free from doubt that StoneyBank has standing to bring its complaint. StoneyBank has a direct, immediate and substantial interest in the matters in which it complained. In addition, StoneyBank’s complaint is not legally insufficient but, rather, raises issues which may constitute a violation of the Public Utility Code and for which StoneyBank may be entitled to relief as a matter of law. Certainly, at a hearing, StoneyBank must prove by a preponderance of the evidence that Walnut Hill has violated a provision of the Public Utility Code or a Commission order or regulation in order to have its complaint sustained. This standard is higher than that which Walnut Hill’s preliminary objections were addressed. In the interim, however, Walnut Hill’s preliminary objections must be denied.

ORDER

THEREFORE,

IT IS ORDERED:

1. That the preliminary objections filed by the Walnut Hill Utility Company on October 19, 2020 at Docket Number C-2020-3022179 are hereby denied.
2. That the formal complaint filed by StoneyBank Development LLC at Docket Number C-2020-3022179 shall proceed to a hearing.

Date: November 24, 2020 /s/

 Joel H. Cheskis

 Deputy Chief Administrative Law Judge

**C-2020-3022179 - STONEYBANK DEVELOPMENT LLC v. THE WALNUT HILL UTILITY COMPANY**

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