COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA PUBLIC UTILITY COMMISSION
P.O. BOX 3265, HARRISBURG, PA 17105-3265

IN REPLY PLEASE
REFER TO OUR FILE

December 6, 2016

Via E-Filing

Secretary Rosemary Chiavetta
Pennsylvania Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105-3265

Re: Petition of Republic Development Corp. for a Declaratory Order that its Provision of Water Service to a Small, Defined, Privileged and Limited Group Does Not Constitute the Provision of Public Utility Service under 66 Pa. C.S. §102
Docket No. P-2016-2576068

Dear Secretary Chiavetta:

Enclosed please find the Bureau of Investigation and Enforcement's (I&E) **Answer to the Republic Development Corp. Petition for Declaratory Order** in the above-captioned proceeding.

Copies are being served on parties as identified in the attached certificate of service. If you have any questions, please contact me at (717) 783-6156.

Sincerely,

Carrie B. Wright

Carrie B. Wright
Prosecutor
Bureau of Investigation and Enforcement
PA Attorney I.D. #208185

Enclosure
CBW/sea

cc: Chairman Gladys M. Brown
Vice Chairman Andrew Place
Commissioner John F. Coleman
Commissioner Robert F. Powelson
Commissioner David Sweet
Bohdan Pankiw, Esquire – Law Bureau
Cheryl Walker Davis – Office of Special Assistants
Certificate of Service

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Petition of Republic Development Corp. for a Declaratory Order that its Provision of Water Service to a Small, Defined, Privileged and Limited Group Does Not Constitute the Provision of Public Utility Service under 66 Pa. C.S. §102	:	Docket No. P-2016-2576068

CERTIFICATE OF SERVICE

I hereby certify that I am serving the foregoing **Answer to Petition for Declaratory Order** dated December 6, 2016, either personally, by first class mail, electronic mail, express mail and/or by fax upon the persons listed below, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a party):

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BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Petition of Republic Development Corp. for a Declaratory Order that its Provision of Water Service to a Small, Defined, Privileged and Limited Group Does Not Constitute the Provision of Public Utility Service under 66 Pa. C.S. §102	:	Docket No. P- 2016-2576068

BUREAU OF INVESTIGATION AND ENFORCEMENT
ANSWER TO THE
REPUBLIC DEVELOPMENT CORP.
PETITION FOR DECLARATORY ORDER

I. INTRODUCTION

The Bureau of Investigation and Enforcement (I&E) of the Pennsylvania Public Utility Commission (Commission), pursuant to Section 5.61 of the Commission's regulations, 52 Pa. Code §5.61, hereby respectfully submits this Answer to the Petition of Republic Development Corp. for a Declaratory Order that its Provision of Water Service to a Small, Defined, Privileged, and Limited Group Does Not Constitute the Provision of Public Utility Service under 66 Pa.C.S. §102 (Petition).

I&E is charged with representing the public interest in Commission proceedings related to rates, rate-related services, and applications affecting the public interest. I&E has reviewed the Petition of Republic Development Corp. (Republic) to determine whether and how grant of the relief requested would benefit the public interest and ensure that the public interest is served.

As stated in further detail below, I&E concludes that grant of Republic's Petition would be inappropriate and does not serve the public interest. Accordingly, I&E respectfully requests that the Commission deny the Petition and refuse to grant the request of Republic to have its Certificate of Public Convenience cancelled.

II. ANSWER

Republic has been operating the Vantage Hills water system in Milford Township, Pennsylvania since 1986 when it provided water service to the nine residential units in the Orchard Hills Apartments. In 1999 Republic filed for, and received a Certificate of Public Convenience in order to expand its service to the Vantage Hills Development. Republic now mistakenly believes the Commission erred in granting that Certificate of Public Convenience and wishes to have it cancelled.[1] Republic currently serves 118 customers in the Orchard Hills Apartments and 67 customers in the Vantage Hills Development with the possibility of serving an additional 45 lots if developed.[2] It is I&E's understanding that Republic does not own the homes or lots in the Vantage Hills Development.

Republic claims that service to the Orchard Hills Apartment was exempt from Commission jurisdiction because of the landlord/tenant relationship between the customers and Republic.[3] Further, Republic opines that its service to those residents of the Vantage Hills Development remains confined to a defined, privileged, and limited

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[1] Petition ¶ 12.
[2] Petition ¶ 7.
[3] Petition ¶ 14.

group because only those customers residing in the Vantage Hills Development "will be privileged to request and demand water service from Republic"[4] and, therefore, cannot be subject to Commission jurisdiction.[5] Therefore, Republic asks that its service to the Vantage Hills Development be exempted from Commission jurisdiction.[6]

As laid out in detail below, Republic's analysis is flawed. The relevant case law indicates that Republic's service is, in fact, subject to Commission jurisdiction. Cancelling Republic's Certificate of Public Convenience would remove all of the Commission guaranteed protections afforded to Republic's customers based on Republic's status as a public utility. To do so would not be in the public interest.

A. Legal Standard

The often-cited standard for determining if a particular service constitutes public utility service was set forth long ago by the Superior Court as follows:

> The test is, therefore, *whether or not such person holds himself out, expressly or impliedly, as engaged in the business of supplying his product or service to the public, as a class, or to any limited portion of it,* as contradistinguished from holding himself out as service or ready to serve only particular individuals. ... The public or private character of the enterprise does not depend, however, upon the number of persons by whom it is used, but upon whether or not it is open to the use and service of all members of the public who may require it, to the extent of its capacity; and *the fact that only a limited number of persons may have occasion to use it does not make of it a private undertaking if the public generally has a right to such use.*[7]

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[4] Petition ¶ 16.
[5] Petition ¶ 15.
[6] Petition ¶ 15.
[7] *Borough of Ambridge v. P.S.C.*, 165 A. 47, 49 (Pa. Super 1933) (emphasis added).

From this fact-driven inquiry devolved a recognized exception from the definition of public utility service: If the service is provided to a "defined, privileged, and limited class" over which the service provider may exert control, as opposed to open to the indefinite public, it is private and not public utility service.[8]

B. Republic's Status as a Public Utility

Republic relies heavily on cases of *Drexelbrook*[9] and *Overlook.*[10] In its Petition the only argument Republic advances for why its Certificate of Public Convenience should be cancelled is that the Commission erred in granting its 1999 Application requesting a Certificate of Public Convenience by failing to properly consider the *Drexelbrook* and *Overlook* decisions.[11] Republic argues that its service to the Orchard Hills Apartments and the Vantage Hills Development constitutes service to a defined, privileged, and limited group because only those residents can request water service from Republic and, thus, should not be subject to Commission jurisdiction. I&E disagrees with this. As explained further below, Republic's service to the Vantage Hills Development does not constitute service to a defined, privileged and limited group.

The Commission and the courts have addressed this issue with similarly situated companies numerous times. This issue has been well settled as seen by a review of the

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[8] *See e.g. Drexelbrook,* 212 A.2d at 240, wherein the Court determined that because the service being provided was by the landlord, Drexelbrook Associates, which landlord exerted control over prospective users by limiting them to tenants only, the public generally had no right to demand service and the service was deemed private in nature and not open to the public indefinitely.

[9] *Drexelbrook Associates v. Pa. PUC*, 212 A.2d 237 (Pa. 1965) (*Drexelbrook*); Petition at p. 4.

[10] *Overlook Develop. Co. v. Pub. Serv. Comm'n.* 101 Pa. Super. 217 (Pa. Super. Ct. 1931) *aff'd,* 158 A. 836 (Pa. 1932) ("Overlook"); Petition at p. 4.

[11] Petition at p. 6.

relevant case law. The holdings in *Drexelbrook,*[12] *Re Megargel's Golf Inc.,*[13] *Burkhart,*[14] *Warwick,*[15] *Nemacolin,*[16] and *Skytop*[17] provide clear guidance for the Commission as to Republic's status as a public utility. The holdings in all six cases clearly indicate that Republic is in the business of providing public utility service, and, therefore, should remain subject to Commission jurisdiction. The water service provided by Republic is not private in nature.

In two cases, the *Borough of Ambridge*[18] and *Drexelbrook,*[19] the courts distinguished between service to customers over which the provider could exert control and those where it could not. This distinction was based not on the provider's self-serving declaration that it would serve no *new* customers prospectively, but rather on the nature of the relationship between the provider and the customer. In other words, it was "the character of service which it renders which determines its status" as public or private, and not simply whether the service was now "closed," because even a "closed" system can continue to serve the public, just a "limited portion" of the public.[20]

In *Drexelbrook*, the pivotal fact was that the service in question was provided by the landlord to tenants over which the landlord could exert control because the landlord

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[12] *Drexelbrook Associates v. Pa. PUC*, 212 A.2d 237 (Pa. 1965)
[13] *Re Megargel's Golf, Inc.*, 59 Pa. P.U.C. 517 (June 21, 1985)
[14] *Burkhart v. Galen Hall Corp*, Docket No. C-00934961 (Order entered May 11, 1994) (*Burkhart*).
[15] *Warwick Water Works*, 699 A.2d 770 (Pa. Commw. 1997) (*Warwick*).
[16] *In re Nemacolin Woodlands Resort and Spa*, Docket No. 00981408 (Order entered September 18, 1998) (*Nemacolin*).
[17] *Petition of Skytop Lodge Corporation for Declaratory Order*, Docket No. P-2013-2354659 (Order entered July 24, 2014) (*Skytop*)
[18] *Borough of Ambridge v. P.S.C.*, 165 A. 47 (Pa. Super 1933) (*Borough of Ambridge*).
[19] *Drexelbrook,* 212 A.2d 237.
[20] *Borough of Ambridge*, 165 A. at 49.

was able to select whom it would take on as tenants. On that basis, because the landlord controlled the relationship and could refuse to enter into a relationship with any member of the public as a tenant, the service was considered not "public" but rather private service to a "defined, privileged and limited group."[21]

More recently, in *Warwick,*[22] it was precisely this lack of ability by the provider to control who from the public would comprise the customer base that was determinative in concluding the entity was a public utility. In *Warwick*, the court determined that since the entity supplied water to an association, and that entity had no control over who resided in the association, it had no control over the customers. Warwick's customers were owners of their homes who could sell them to whomever they chose without Warwick's permission. It, therefore, was serving the public because anyone from the public could obtain service so long as they lived in the association.[23] As Commonwealth Court stated:

> In this case, however, we cannot agree with Warwick that the PUC focused on an irrelevant factor – the absence of "control" or a relationship between Warwick and the Association – in determining that Warwick was a public utility. *While the existence of a relationship above and beyond that of provider and customer may not be dispositive of whether the provider is offering service as a private or public entity, when such a relationship exists, it does tend to show the private nature of the service.* In *Drexelbrook,* for example, the Supreme Court looked to the case of *Aronimink Transportation Company v. Public Service Commission,* 111

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[21] *Drexelbrook*, 212 A.2d at 240, citing *Aronimink Transp. Co. v. P. S. C.*, 170 A. 375 (Pa. Super 1934)(wherein the court found that a corporation that operated apartment houses and furnished bus transportation to its tenants served only those who were selected as tenants-a special class of persons not open to the indefinite public, and was therefore private service in nature).

[22] *Warwick*, 699 A.2d 770 (Pa. Commw. 1997) ("*Warwick Water Works*").

[23] *Id.*, 699 A.2d at 773-74.

Pa.Superior Ct. 414, 170 A. 375 (1934), for guidance. There, a corporation operated apartment houses and furnished bus transportation to "those who were selected as tenants-a special class of persons not open to the indefinite public," *Drexelbrook,* 212 A.2d at 239. In deciding that the limited partnership managing apartments in *Drexelbrook* was also providing a private, incidental service, the Supreme Court said:

> [i]n the present case the only persons who would receive service are those who have entered into or will enter into a landlord-tenant relationship with [Drexelbrook]. Here as in Aronimink those to be serviced consist only of a special class of persons-those to be selected as tenants-and not the general public. Such persons clearly constitute a defined, privileged and limited group and the proposed service to them would be private in nature.

Id., 212 A.2d at 240.

Thus, it is erroneous to say, as Warwick does here, that there is no legal or logical basis for a discussion of the relationship between Warwick and the Association, for that precisely is one of the factors on which the Supreme Court based its conclusion in *Drexelbrook.*

Warwick provides water and waste water service individually to property owners in the Association, as well as to its own properties. *There is no special class of persons that it, as the provider, chooses to service. Unlike in Drexelbrook, no relationship other than service provider and customer exists as between Warwick and the Association members, who are billed and who make payments individually. The Association members, while limited to a definite number, are an open class of persons, who may sell or lease their property without regard to Warwick.* The private or public nature of the utility does not depend on the number of persons served. The service Warwick provides the Association members is incidental to no other business or service it offers them.[24]

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[24] *Id.* (emphasis added).

Other cases involving property owners, as distinguished from tenants, found that because the provider had no control over those members of the indefinite public who could occupy the premises served, it was not a private service provider.

For example, in *Megargel's Golf, Inc.*, the Court stated "[t]herefore, we conclude that the term 'defined, privileged and limited' group does not mean 'the residents of a particular development' but connoted a situation where the purveyor of water service has control over the persons selected to be provided water service."[25] Therefore, a company who only serves a particular housing development and no other customers is still considered to provide public utility service.

Further, in *Burkhart v. Galen Hall Corp.*,[26] following the holding in *Megargel's Golf, Inc.*, Galen Hall Corporation (GHC) was found to be a public water utility subject to Commission jurisdiction. The court stated

> [w]e find persuasive....that several Homeowners involved in the matter before us were not the original owners of their homes. For example, Complainant Laundeslager is third owner of its property. Accordingly, we are of the Opinion and so find, that unlike the case in Drexelbrook, GHC does not provide service to a limited, particular group of people, nor does GHC retain any control over the definiteness of the class of persons to which service is entitled.[27]

Therefore, the Respondent GHC was directed to file for a Certificate of Public Convenience.

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[25] *In re Megargel's Golf, Inc.*, 59 Pa. P.U.C. 517 (June 21, 1985) (*Megargel's Golf, Inc.*)
[26] *Burkhart v. Galen Hall Corp*, Docket No. C-00934961 (Order entered May 11, 1994).
[27] *Id.*at 10.

In *Nemacolin,*[28] the Commission followed the precedent set forth in both *Drexelbrook* and *Warwick.* In the *Nemacolin* case, the Company was asked to provide water service to sixty condominiums and six privately owned villas. Nemacolin owned only twenty of the sixty condominiums. Because Nemacolin lacked the requisite control over who purchased the remaining forty condominiums and six villas, the service was not considered to be confined to a defined, privileged or limited group and, thus, if Nemacolin did choose to provide service to those customers, it would, in fact, be subject to Commission jurisdiction.

Finally, the Commission continued to follow this line of reasoning in the *Skytop*[29] case. Skytop provided water service to seventy-four properties situated on its resort grounds, and sewer service to approximately 30 of these properties. As in *Warwick* and *Nemacolin*, Skytop's customers were purchasers of these residences, and not renters. The Commission held that "...based on the facts presented, Skytop is a public utility pursuant to the holdings of the *Drexelbrook, Warwick,* and *Nemacolin* cases."

As discussed in *Drexelbrook,*[30] *Overlook*[31] involved the question of whether the Public Service Commission had issued a confiscatory order when it required a land developer, who had laid his own water pipes through which a public utility water company was supplying water, to allow an adjacent land owner to hook up with his pipes.

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[28] *Nemacolin,* Docket No. 00981408 (Order entered September 18, 1998).
[29] *Petition of Skytop Lodge Corporation for Declaratory Order*, Docket No. P-2013-2354659 (Order entered July 24, 2014).
[30] *Drexelbrook*, 212 A.2d 237, 244 (Pa. 1965).
[31] *Overlook.* 101 Pa. Super. 217 (Pa. Super. Ct. 1931) *aff'd,* 158 A. 836 (Pa. 1932).

This developer had laid his own water pipes through which a public utility water company was supplying water. The court held that allowing the water company to supply water through his pipes to those who purchased plots from him did not constitute a dedication of the developer's pipes to public use. Clearly, this is not the case in Republic's situation. Republic itself is the utility. But for the water company, Overlook would not have been able to supply water to anyone. In addition, Overlook was given by contract the exclusive permission to sell the right to connect to the developer main. The factors present in the *Overlook* case are not present in the instant proceeding. Unlike the developer in *Overlook* who was able to control who purchased access to its mains, Republic has no control over who purchases the homes or lots to which it supplies water, thus, making Republic a public utility because its service is open to the indefinite public.

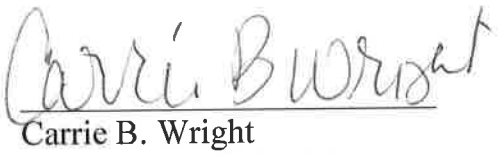
Following the holdings in the above mentioned cases, it is clear that Republic should continue to be subject to Commission jurisdiction. Republic maintains that its service is private and not subject to Commission regulation because only residents in the Orchard Hills Apartments and Vantage Hills Development can request service. Under this reasoning, all utilities serving residential developments would be exempt from Commission jurisdiction. As indicated in *Drexelbrook*, *Warwick*, *Nemacolin, Burkhart,* and *Megargel's Golf, Inc.*, Republic does not have the requisite control over who buys the homes or lots in the Vantage Hills Development. Thus, Republic's service is being held open to the public. The holding in *Megargel's Golf, Inc.*, makes clear that a company who merely serves one housing development is not necessarily serving a defined, privileged, and limited group. Republic has presented no evidence to show that

it has any control over who purchases the homes or lots in the Vantage Hills Development. Because any member of the public may purchase the Vantage Hills lots or homes, Republic's service to those customers is not private in nature, but open to the indefinite public. It is important to note that *Drexelbrook*, *Warwick*, *Nemacolin, Burkhart,* and *Megargel's Golf, Inc.* were all decided before Republic applied for and was granted a Certificate of Public Convenience. As such, granting Republic a Certificate merely followed the line of reasoning laid out in those cases. Further, the Commission's 2014 Order in *Skytop* shows that it continues to follow this same line of reasoning when determining public utility status. Republic has provided no evidence that it has control over who the customers of the Vantage Hills Development are and, further, the limited landlord/tenant relationship that existed between Republic and the Orchard Hills Apartments does not render its service private in nature because the service to the Vantage Hills Development customers is public in nature. Therefore, Republic must remain subject to Commission jurisdiction and no error was made in granting Republic's 1999 request for a Certificate of Public Convenience.

III. CONCLUSION

I&E respectfully requests that the Commission reject Republic's Petition. Republic and its customers have been under Commission jurisdiction since 1999 and, following a long line of Commission decisions, it is clear that Republic should continue to be subject to Commission jurisdiction. Accordingly, the Commission's Bureau of Investigation and Enforcement recommends that the Commission deny Republic's Petition and refuse Republic's request to have its Certificate of Public Convenience cancelled.

Respectfully submitted,



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Dated: December 6, 2016