COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

ELECTRONIC INVESTIGATION OF THE JURISDICTIONAL STATUS OF SEVERAL COMPANIES IN PIKE COUNTY, KENTUCKY AND OF THEIR COMPLIANCE WITH KRS CHAPTER 278 AND 807 KAR CHAPTER 005	))))))	**CASE NO. 2024-00271**

TWIN DIAMOND, LLC'S VERIFIED RESPONSE TO THE COMMISSION'S ORDER OF OCTOBER 1, 2024

Comes now Twin Diamond, LLC ("Twin Diamond"), by counsel, pursuant to the Commission's October 1, 2024 Order ("Order") in the above-styled docket, and does hereby tender its response to the averments set forth in the Commission's Order, respectfully stating as follows.

FACTUAL BACKGROUND

1. Water and Sewage Services to the Village View Townhouses.

In October 2023, Twin Diamond purchased the Village View Townhouses and underlying real property from Roopani Development Corporation ("Roopani Development"). The pump house was an included improvement located on the real property and is now owned by Twin Diamond. The pump house provides water services to the Village View Townhouses owned by Twin Diamond using water purchased by Twin Diamond from Mountain Water District. Twin Diamond leases the Village View Townhouses for rent. The cost of water services is included in rent to tenants of Village View Townhouses and Twin Diamond does not separately charge tenants of the Village View Townhouses for water service.

Sewage services to the Village View Townhouses are provided through underground septic tanks, with a separate septic tank serving each building comprising the Village View Townhouses. The cost of sewage services is included in rent to tenants of Village View Townhouses and Twin

Diamond does not separately charge tenants of the Village View Townhouses for sewage services. Twin Diamond does not provide any additional sewage services to any entity, whether by septic tank or otherwise.

2. Use of Water by Prater Construction.

When Twin Diamond purchased the underlying real property in 2023, Prater Construction Inc. ("Prater Construction") was using water services, presumably pursuant to an unwritten agreement with Roopani Development. As part of the property purchase, Roopani Development granted Twin Diamond an easement to access the pump house, and, as a condition of the conveyance of that easement, required Twin Diamond to continue allowing Prater Construction to utilize the pump house.[1] Prater Construction has installed a meter to measure the water usage used by Prater Construction, which such usage Prater Construction provides to Twin Diamond on a monthly basis. Twin Diamond invoices Prater Construction by directly passing through the costs charged by Mountain Water District for the amount of water used by Prater Construction, as measured by the meter installed by Prater Construction and communicated to Twin Diamond by Prater Construction. Twin Diamond also includes an administrative fee to cover operation and maintenance costs of the pump house, including electricity consumed by the pump house, as well as to cover the administrative fees associated with billing Prater Construction. A sample invoice to Prater Construction from Twin Diamond is attached as Exhibit B.

Twin Diamond does not allow any other person or entity to utilize the pump house. Further, Twin Diamond has no intent to allow any other person or entity to utilize the pump house and has never held itself out as being willing to allow any other person or entity to utilize the pump house.

[1] Exhibit A, Supplemental Deed of Correction.

ANALYSIS

To be subject to KRS Chapter 278 and the Commission's regulations, Twin Diamond must be a "utility" as defined by KRS 278.010(3). Specifically, Twin Diamond must be engaged in "diverting, developing, pumping, impounding, distributing, or furnishing water to or for the public, for compensation."[2] Based upon longstanding Commission precedent, which is in accord with utility commissions across the country, Twin Diamond does not provide any services "to or for the public." Therefore, Twin Diamond is not subject to the Commission's jurisdiction.

> [I]t is well settled that the defining characteristic of a public utility is service to, or readiness to serve, an indefinite public, which has a legal right to demand the utility's service. . . . A public utility expressly holds itself out to the general public and may not refuse any legitimate demand for service. Providing what is traditionally characterized as utility service does not create the presumption that an entity is a public utility; there must also be an intent to provide the service to or for the public. . . . An entity demonstrates its intent to offer service to the public when it "holds itself out as willing to serve all who apply up to the capacity of the facilities. It is immaterial that the service is limited to a specific area and the facilities are limited in capacity. It is a well-established legal principle that utility service that is limited to a defined, privileged class of persons is not service to or for the public.[3]

Stated differently, "[i]n order to find that an entity provides service 'to the public' pursuant to KRS 278.010, this Commission must find that the entity in question provides service to, or stands ready to provide service to, 'an indefinite public (or portion of the public as such) which has a *legal right to demand and receive its services or commodities*. There must be a dedication or holding out, either express or implied . . . of services to the public as a class.'"[4] Twin Diamond has not expressly or impliedly dedicated its facilities or held itself out as providing service to the public and, therefore, is not a utility.

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[2] KRS 278.010(3)(d) (emphasis added).
[3] *In the Matter of: Electronic Investigation of Commission Jurisdiction Over Electric Vehicle Charging Stations*, Case No. 2018-00372, Order, at 14-15 (Ky. PSC Jun. 14, 2019).
[4] *In the Matter of: Chris Warner and Charles Norton v. Villa Hills Neighborhood Association, Inc.*, Case No. 99-205, Order, at 4 (Ky. PSC May 8, 2000).

First, the Commission has consistently held that a landlord providing services to a tenant does not constitute service to the public.[5] Thus, Twin Diamond's provision of water and sewer services to the tenants of the Village View Townhomes does not constitute service "to or for the public."

Second, Twin Diamond's authorizing Prater Construction to utilize the pump house, as conditioned in the conveyance of the easement from Roopani Development, likewise does not constitute providing service "to or for the public." Indeed, precedent frequently cited by the Commission[6] confirms that Twin Diamond's allowing Prater Construction to utilize the pump house does not constitute service "to or for the public." Specifically, in *Drexelbrook Associates v. Pennsylvania Public Utility Commission,* the Pennsylvania Supreme Court noted several useful examples in distinguishing between public versus private service. "In *Borough of Ambridge v. PSC*, . . . where a manufacturer who furnished water to another manufacturer was held not to be rendering a public service, the court said that 'the public or private character of the enterprise does not depend 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 the members of the public who may require it."[7] Likewise, "*Overlook*

[5] *E.g.*, *Application of Metropolitan Sew. Dist. for Approval to Acquire and Operate the Fairhaven Mobile Home Village Sewage Treatment Plant*, Case No. 90-169, Order (Ky. PSC June 22, 1990) (holding that an entity providing sewer service to tenants of a mobile home park only did not provide service to or for the public because it intended to serve a limited class defined by the relationship of landlord and tenant); *An Investigation of the Rates, Charges, Billing Practices, and Provision of Utility Service by Envirotech Utility Management Services*, Case No. 96-448, Order (Ky. PSC Apr. 29, 1997) (finding that an apartment complex contracting with a regulated water utility to receive water through a single meter, then submetered to apartment residents did not provide service "to or for the public"); *see also In City of Sun Prairie v. Wisconsin Pub. Serv. Comm'n*, 154 N.W.2d 360 (Wis. 1967) ("The tenants of landlord are not the public.").

[6] *See Application of Metropolitan Sew. Dist. for Approval to Acquire and Operate the Fairhaven Mobile Home Village Sewage Treatment Plant*, Case No. 90-169, Order (Ky. PSC June 22, 1990) (favorably citing *Drexelbrook*); *In the Matter of: Eugene McGruder d/b/a Big Valley Mobile Home Subdivision Sewage Treatment Plant; Investigation into the Condition and Jurisdictional Status of Sewage Utility Facilities*, Case No. 94-451, Order (Ky. PSC Dec. 1, 1994) (same); *An Investigation of the Rates, Charges, Billing Practices, and Provision of Utility Service by Envirotech Utility Management Services*, Case No. 96-448, Order (Ky. PSC Apr. 29, 1997) (same); *In the Matter of: Electronic Investigation of Commission Jurisdiction Over Electric Vehicle Charging Stations*, Case No. 2018-00372, Order (Ky. PSC Jun. 14, 2019) (same).

[7] *Drexelbrook Associates v. Penn. Pub. Util. Comm'n*, 212 A.2d 237, 239 (Pa. 1965) (emphasis added).

Dev. Co. v. PSC . . . involved a land development company which distributed water not only to vendees situated on its previously owned tract of land, but also to owners of adjacent land. The court held that the service was not open to the indefinite public, but being confined to privileged individuals, was private in nature."[8]

The facts presented here are practically identical to the *Borough of Ambridge* and *Overlook* opinions that shaped the Pennsylvania Supreme Court's decision in *Drexelbrook*. The pump house is utilized by Twin Diamond for property it owns and it also authorizes an adjacent property owner, Prater Construction, to utilize the pump house. Use of the pump house is not "open to the use and service of all the members of the public who may require it" but is "confined to privileged individuals." Consistent with precedent upon which the Commission has routinely relied, any services provided by Twin Diamond are "private in nature."

This conclusion is also consistent with the Commission's decision involving electric vehicle charging stations (EVCS). There, the Commission concluded that:

> an EVCS does not provide electric service to or for the public because EVCSs provide a limited service of charging EV batteries to a select group of people, namely EV owners. An EVCS does not have a duty to serve the public at large nor do they hold themselves out as ready to furnish electric service to the public at large on a non-discriminatory basis.[9]

Similarly, the pump house owned by Twin Diamond provides a limited service to a select group of people. Twin Diamond does not have a duty to serve the public at large nor has Twin Diamond ever held itself out as ready to make the pump house available to the public at large on a non-discriminatory basis.

[8] *Id.* at 239 (emphasis added).
[9] *In the Matter of: Electronic Investigation of Commission Jurisdiction Over Electric Vehicle Charging Stations*, Case No. 2018-00372, Order, at 19 (Ky. PSC Jun. 14, 2019).

Twin Diamond simply sought to purchase the Village View Townhouses, not provide water services or access to the pump house. Twin Diamond is not engaged in the business of supplying water, has never offered the use of the pump house to any party (other than continuing to allow Prater Construction to utilize the pump house as existed at the time of purchase), and has no intention of ever allowing any other party to utilize the pump house. Twin Diamond has and intends only to provide services to the real property owned by Twin Diamond and to an adjoining property owner, Prater Construction; Twin Diamond does not serve an indefinite public or a subset thereof. [10]

CONCLUSION

WHEREFORE, for the reasons set forth herein, Twin Diamond respectfully submits that it is not a "utility," as defined by KRS 278.010(3)(d), subject to the jurisdiction of the Commission, and respectfully requests that the Commission enter an order: (1) finding that Twin Diamond is not a utility subject to the Commission's jurisdiction, (2) finding that Twin Diamond did not violate KRS Chapter 278 or any Commission regulation promulgated thereunder, and (3) dismissing Twin Diamond from this proceeding.

Dated this 28th day of February, 2025.

[10] *Borough of Ambridge v. P. S. C.*, 108 Pa. Super. 298, 165 A. 47 (1933) (finding that to be classified as a utility a person must "hold 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 serving or ready to serve only particular individuals" (emphasis added)).

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that foregoing was submitted electronically to the Commission on February 28, 2025 and that there are no parties that have been excused from electronic filing. Pursuant to prior Commission orders, no paper copies of this filing will be submitted.

/s/ R. Brooks Herrick
Counsel for Twin Diamond

VERIFICATION

Comes now, Charles M. McCoy, in his official capacity as CEO of Twin Diamond, LLC, and after first being duly sworn, does hereby swear and affirm that the factual averments set forth in the Factual Background, including any Exhibits included therein, are true and correct to the best of his knowledge and belief.

Charles M. MCoy, CEO
Twin Diamond, LLC

COMMONWEALTH OF KENTUCKY)
) SS:
COUNTY OF FLOYD)

The foregoing Verification was sworn to, subscribed, and acknowledged before me, a Notary Public, by Charles M. McCoy, in his official capacity as CEO of Twin Diamond, LLC, on this the 24th day of February 2025.

Tonya Foley KyNP 36516
NOTARY PUBLIC

Commission Expires: April 23, 2028