



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

January 7, 2016

**Via Electronic Filing**

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

Re: Pennsylvania Public Utility Commission, Bureau of Investigation  
and Enforcement v. Bushkill Group Inc.  
Docket No. C-2015-2512950

Dear Secretary Chiavetta:

Enclosed for electronic filing is the Answer of the Bureau of Investigation and Enforcement of the Pennsylvania Public Utility Commission to the Preliminary Objections of the Bushkill Group Inc. in the above referenced case. Copies have been served on the parties of record in accordance with the Certificate of Service.

Should you have any questions, please do not hesitate to contact me.

Sincerely,

A handwritten signature in cursive script, appearing to read "Stephanie M. Wimer".

Stephanie M. Wimer  
Prosecutor  
PA Attorney ID No. 207522

Enclosures

cc: As per Certificate of Service

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Pennsylvania Public Utility Commission,	:	
Bureau of Investigation and Enforcement,	:	
Complainant	:	
	:	
v.	:	C-2015-2512950
	:	
Bushkill Group Inc.,	:	
Respondent	:	

**ANSWER OF THE BUREAU OF INVESTIGATION AND ENFORCEMENT  
TO THE PRELIMINARY OBJECTIONS OF BUSHKILL GROUP INC.**

NOW COMES, the Bureau of Investigation and Enforcement (I&E or Complainant) of the Pennsylvania Public Utility Commission (Commission) by and through its prosecuting attorneys, and files this Answer to the Preliminary Objections of Bushkill Group Inc. (Respondent or Bushkill), pursuant to 52 Pa. Code § 5.101(f).<sup>1</sup> In support thereof, I&E avers as follows:

**I. INTRODUCTION**

On November 12, 2015, I&E filed a Formal Complaint against Respondent at Docket No. C-2015-2512950, alleging that Respondent violated the Gas and Hazardous Liquids Pipeline Act, 58 P.S. § 801.101, *et seq.* (Pipeline Act or Act 127) as well as certain provisions of the Code of Federal Regulations related to pipeline safety. I&E avers that Respondent operates a propane distribution system and portions of the

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<sup>1</sup> By Secretarial Letter dated December 22, 2015 in the above-captioned proceeding, I&E was granted an extension of time until January 7, 2016 to file its response to Bushkill's Preliminary Objections.

system serve ten (10) or more customers on private property in Middle Smithfield Township, Monroe County, Pennsylvania. Respondent's system, despite being on private property, is accessible to any member of the public who may rent a villa or purchase a timeshare and receive propane distributed by Respondent to the individual unit. Therefore, I&E alleges that Bushkill is a "pipeline operator" subject to Act 127 and Federal pipeline safety laws. I&E appropriately seeks relief, including that the Commission: (1) find Respondent to be in violation of Act 127 and the Code of Federal Regulations for each of the six (6) counts set forth in the Formal Complaint; (2) impose a civil penalty upon Respondent in the amount of Seventy-Thousand Dollars (\$70,000); (3) direct Respondent to file 2012, 2013, 2014 and 2015 Pennsylvania Pipeline Operator Annual Registration Forms, as well as file subsequent forms in a timely manner; and (4) order such other remedy as the Commission may deem to be appropriate.

On December 16, 2015, Respondent, through counsel, filed Preliminary Objections at the above docket.<sup>2</sup> In its Preliminary Objections, Respondent asserts that the averments of I&E's Complaint are insufficiently specific to enable Bushkill to prepare a defense. Respondent further asserts that I&E's Complaint is legally insufficient and argues that the definition of "pipeline operator" in Act 127 is vague in its application and therefore deprives businesses such as Bushkill of due process of law.

Bushkill's Preliminary Objections are meritless and should be rejected. Much of what Bushkill has styled as "Preliminary Objections" is devoted to disagreeing with

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<sup>2</sup> Respondent had been granted an extension of time to respond to the Complaint.

I&E's determination that Respondent is a pipeline operator and complaining about I&E's pre-complaint investigation and communications with Respondent. Bushkill is certainly entitled to its opinions on the validity of I&E's claims, but preliminary objections are not the proper vehicle for espousing these positions. In fact, the entirety of the "Background" section of Bushkill's Preliminary Objections, which consists of sixty-eight (68) paragraphs and raise numerous affirmative defenses that are more appropriately "New Matter," is completely devoid of any discussion related to the Commission's limited grounds for granting preliminary objections. *See* 52 Pa. Code § 5.62(b) (permitting a party to set forth another material fact that is not merely a denial of the averments of the preceding pleading and requiring a party to plead affirmative defenses under the heading of "New Matter"). As such, Bushkill's Preliminary Objections are procedurally deficient and the "Background" section should be stricken and if not stricken, not considered in any ruling on the Preliminary Objections.<sup>3</sup>

Bushkill's Preliminary Objections are also flawed because they rely largely on documents and factual references that are beyond the four corners of I&E's Complaint and it is well-settled that such material is not considered when ruling on a preliminary objection.<sup>4</sup> If anything, the averments set forth in Bushkill's Preliminary Objections demonstrate the existence of a valid legal controversy such that dismissal of I&E's Complaint at this early stage would be entirely inappropriate.

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<sup>3</sup> I&E has nevertheless responded to the averments listed in the voluminous "background" section, should it not be stricken.

<sup>4</sup> When ruling on a preliminary objection, the Commission may not rely upon the factual assertions of the moving party but must accept as true for purposes of disposing of the motion all well pleaded, material facts of the nonmoving party, as well as every inference from those facts. *County of Allegheny v. Commonwealth of*

For the reasons stated herein, I&E contends that Respondent's Preliminary Objections are without merit and should be dismissed, and I&E's Complaint should be sustained.

## II. LEGAL STANDARD

The Commission's Rules of Administrative Practice and Procedure permit the filing of preliminary objections. 52 Pa. Code §§ 5.101(a)(1)-(7). The grounds for preliminary objections are 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 the proceeding.

52 Pa. Code § 5.101(a).

Commission preliminary objection practice is similar to Pennsylvania civil practice. *Equitable Small Transportation Intervenors v. Equitable Gas Company*, 1994 Pa. PUC LEXIS 69, Docket No. C-000935435 (Order entered July 18, 1994). When considering the preliminary objection, the Commission must determine "whether on the facts averred, the

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*Pennsylvania*, 490 A.2d 402, 408 (Pa. 1985); *Commonwealth of Pennsylvania v. Bell Telephone Co. of Pa.*, 551 A.2d 602, 604 (Pa. Cmwlth. 1988). The Commission must view the Complaint in this case in the light most favorable to I&E and should dismiss the complaint only if it appears that I&E would not be entitled to relief under any circumstances as a matter of law. *Equitable Small Transportation Intervenors v. Equitable Gas Company*, 1994 Pa. PUC LEXIS 69, Docket No. C-00935435 (Order entered July 18, 1994). The legal standards regarding preliminary objections are set forth in greater detail herein.

law states with certainty that no recovery is possible.” *Boyd v. Ward*, 802 A.2d 705, 707 (Pa. Cmwlth. 2002), citing *Hawks by Hawks v. Livermore*, 629 A.2d 270 (Pa. Cmwlth. 1993). Any doubt must be resolved in favor of the non-moving party by refusing to sustain the preliminary objections. *Boyd*, 802 A.2d at 707; *Dept. of Auditor General, et al., v. State Employees’ Retirement System, et al.*, 836 A.2d 1053, 1064 (Pa. Cmwlth. 2003). All of the non-moving party’s averments in the complaint must be viewed as true for purposes of deciding the preliminary objections, and only those facts specifically admitted may be considered against the non-moving party. *Ridge v. State Employees’ Retirement Board*, 690 A.2d 1312 (Pa. Cmwlth. 1997).

In resolving Bushkill’s Preliminary Objections, only the facts pled in I&E’s Complaint can be considered, and such facts must be accepted as true and viewed in the light most favorable to I&E, along with any reasonable inferences from those facts. Facts averred by Bushkill cannot be considered.

### **III. ANSWER**

#### **Background**

1. The averment states a conclusion of law to which no response is required.
2. The averment states a conclusion of law to which no response is required.
3. The averment states a conclusion of law to which no response is required.

By way of further answer, the final three statements set forth in Paragraph 3 are specifically denied. The following are the *correct* legal citations related to the provisions discussed in the final three statements of Paragraph three: 58 P.S. § 801.501(a) (related to Commission authority to supervise and regulate pipeline operators within the

Commonwealth); 58 P.S. § 801.502(a) (related to civil penalties for violations of Act 127); and 58 P.S. § 801.503(a) (related to the annual assessment for pipeline operators).

4. Denied. The averment states a conclusion of law to which no response is required. To the extent a response is deemed to be required, it is denied. By way of further answer, Section 501(a) of Act 127, 58 P.S. § 801.501(a), authorizes, but does not mandate, the Commission to promulgate regulations regarding its duties pursuant to Act 127. Section 501(a) provides, in pertinent part, the following: “The commission *may* adopt regulations, consistent with the Federal pipeline safety laws, as *may* be necessary or proper in the exercise of its powers and perform its duties under this act.” 58 P.S. § 801.501(a) (emphasis added).

5. Denied. The averment states a conclusion of law to which no response is required. To the extent a response is deemed to be required, it is denied. By way of further answer, the *correct* legal citation for the definition section of Act 127 is 58 P.S. § 801.102. Any implication that Bushkill is a “public utility” or an “ultimate consumer who owns a service line on his real property” is specifically denied. Act 127 also defines “person” as “an individual, firm, joint venture, partnership, corporation, association, municipality, cooperative association or joint stock association, including any trustee, receiver, assignee or personal representative thereof. The term does not include a public utility.” 58 P.S. § 801.102. Respondent, as a corporation, fits within the definition of “person” under Act 127.

6. Denied. The averment states a conclusion of law to which no response is required. To the extent a response is deemed to be required, it is denied.

7. Denied. The averment states a conclusion of law to which no response is required. To the extent a response is deemed to be required, it is denied. Any implication that Bushkill fits within the exemptions of Federal pipeline safety regulations is specifically denied. It is also specifically denied that Bushkill is deemed a “customer” with regard to the exemptions set forth in 49 C.F.R. § 192.1(b)(5).

8. Denied. The averment states a conclusion of law to which no response is required. To the extent a response is deemed to be required, it is denied. It is specifically denied that exceptions to the definition of “pipeline operator” can be found at 58 P.S. § 301.102 [sic]. Any implication that Bushkill fits within the exemptions of Federal pipeline safety regulations or Act 127 is denied. It is also specifically denied that Bushkill is deemed a “customer” with regard to the exemptions set forth in 49 C.F.R. § 192.1(b)(5) or an “ultimate consumer” with regard to the exemptions set forth in the definition of “pipeline operator” at 58 P.S. § 801.102.

9. Denied. The averment states a conclusion of law to which no response is required. To the extent a response is deemed to be required, it is denied. It is specifically denied that a statutory definition of the terms referenced in Paragraph 9 is necessary. *See* 1 Pa.C.S. § 1903(a) (words and phrases not defined in a statute shall be construed according to rules of grammar and according to their common and approved usage); *See also Commonwealth v. Hart*, 28 A.3d 898, 909 (Pa. Cmwlth. 2011) (holding that it is well-established that the common and approved meaning of a word may be ascertained from an examination of its dictionary definition).

10. Denied. The averment states a conclusion of law to which no response is required. To the extent a response is deemed to be required, it is denied. It is specifically denied that a statutory or regulatory definition of the terms referenced in Paragraph 10 is necessary. *See* 1 Pa.C.S. § 1903(a) (words and phrases not defined in a statute shall be construed according to rules of grammar and according to their common and approved usage); *See also Commonwealth v. Hart*, 28 A.3d 898, 909 (Pa. Cmwlth. 2011) (holding that it is well-established that the common and approved meaning of a word may be ascertained from an examination of its dictionary definition).

11. The statements in Paragraph 11 are admitted in part and denied in part. I&E admits that the Commission adopted an annual registration form, established a registration fee, and initiated the determination and collection of assessments as part of its implementation of Act 127. The Commission's Order at *Act 127 of 2011 – The Gas and Hazardous Liquids Pipeline Act; Assessment of Pipeline Operators*, Docket No. M-2012-2282031 (Order entered February 17, 2012) speaks for itself. Any implication that the Commission was mandated by Act 127 to promulgate regulations implementing Act 127 is denied. *See* I&E's response to Paragraph 4, above.

12. The statements in Paragraph 12 are admitted in part and denied in part. I&E admits that the Commission *ordered* that a Secretarial Letter, Tentative Implementation Order and Registration Form be sent to entities that are likely to be pipeline operators. The Commission's Order at *Act 127 of 2011 – The Gas and Hazardous Liquids Pipeline Act; Assessment of Pipeline Operators*, Docket No. M-2012-2282031 (Tentative Order entered January 12, 2012) speaks for itself. I&E, as a separate

and independent prosecutory bureau of the Commission, is without knowledge sufficient to form a belief as to whether the Commission distributed the documents to entities that could be subject to Act 127 and the same is therefore denied and proof thereof demanded.

13. Denied. I&E, as a separate and independent prosecutory bureau of the Commission, is without knowledge sufficient to form a belief as to the truth of the matters asserted and the same is therefore denied and proof thereof demanded.

14. The statements in Paragraph 14 are admitted in part and denied in part. It is admitted that the Commission maintains a Pipeline Operators Registry, which is accessible on the Commission's website at

[http://www.puc.pa.gov/filing\\_resources/issues\\_laws\\_regulations/act\\_127\\_pipeline\\_act.aspx](http://www.puc.pa.gov/filing_resources/issues_laws_regulations/act_127_pipeline_act.aspx). It is denied that one may ascertain from a mere reading of the names of the listed pipeline operators the business activities in which they are engaged.

15. I&E admits the statement set forth in Paragraph 15.

16. Denied. I&E is without knowledge sufficient to form a belief as to the truth of the matters asserted and the same is therefore denied and proof thereof demanded.

17. Denied. I&E is without knowledge sufficient to form a belief as to the truth of the matters asserted and the same is therefore denied and proof thereof demanded.

18. The statements in Paragraph 18 are admitted in part and denied in part. It is admitted that Bushkill uses propane. As to the remainder of the averments in Paragraph 18, I&E is without knowledge sufficient to form a belief as to the truth of the matters asserted and the same is therefore denied and proof thereof demanded.

19. I&E admits the statement set forth in Paragraph 19.

20. Denied. I&E is without knowledge sufficient to form a belief as to the truth of the matters asserted and the same is therefore denied and proof thereof demanded.

21. The statements in Paragraph 21 are admitted in part and denied in part. It is admitted that service lines connect the propane tanks to buildings. As to the remainder of the averments in Paragraph 21, I&E is without knowledge sufficient to form a belief as to the truth of the matters asserted and the same is therefore denied and proof thereof demanded.

22. Denied. I&E is without knowledge sufficient to form a belief as to the truth of the matters asserted and the same is therefore denied and proof thereof demanded.

23. Denied. Bushkill has service lines that transport propane to, from and on its properties.

24. The statements in Paragraph 24 are admitted in part and denied in part. It is admitted that Bushkill does not meter propane consumption on an individual customer basis. It is specifically denied that Bushkill does not collect charges for propane use from any person. As to the remainder of the averments in Paragraph 24, I&E is without knowledge sufficient to form a belief as to the truth of the matters asserted and the same is therefore denied and proof thereof demanded.

25. Denied. It is specifically denied that Bushkill is the ultimate consumer and does not collect charges for its propane supply. As to the remainder of the averments in Paragraph 25, I&E is without knowledge sufficient to form a belief as to the truth of the matters asserted and the same is therefore denied and proof thereof demanded.

26. The statements in Paragraph 26 are admitted in part and denied in part. I&E denies that the incident can be fairly characterized as a fire and not an explosion. I&E admits the remainder of the statements set forth in Paragraph 26.

27. The statements in Paragraph 27 are admitted in part and denied in part. I&E denies that the incident can be fairly characterized as a fire and not an explosion. I&E admits the remainder of the statements set forth in Paragraph 27.

28. I&E admits the statements set forth in Paragraph 28.

29. Denied. After reasonable investigation, I&E is without knowledge or information sufficient to form a belief as to the truth of the matters asserted and the same is therefore denied and proof thereof demanded.

30. Denied. I&E denies that Michael Chilek sent an e-mail to Bushkill on October 23, 2015. Proof thereof is demanded.

31. Denied. After reasonable investigation, I&E is without knowledge or information sufficient to form a belief as to the truth of the matters asserted and the same is therefore denied and proof thereof demanded.

32. Denied. After reasonable investigation, I&E is without knowledge or information sufficient to form a belief as to the truth of the matters asserted and the same is therefore denied and proof thereof demanded.

33. Admitted in part and denied in part. After reasonable investigation, I&E is without knowledge or information sufficient to form a belief as to the truth of the matters asserted and the same is therefore denied and proof thereof demanded. Mr. Metro does not specifically recall speaking to representatives of Bushkill on October 28, 2014. It is

admitted that Mr. Metro explained to Bushkill why portions of Bushkill's propane distribution system are jurisdictional, including an explanation that a "customer" is the ultimate user of the propane.

34. I&E admits the statements set forth in Paragraph 34.

35. I&E admits the statements set forth in Paragraph 35.

36. The statements in Paragraph 36 are admitted in part and denied in part. It is admitted that Mark Turner, Bushkill's Chief Operating Officer, sent a letter dated December 1, 2014 to Mr. Metro. The truth of the statements made by Bushkill in the letter is denied. It is also denied that I&E was under a duty to further explain or provide additional information to Bushkill after I&E determined that portions of Bushkill's propane distribution system are jurisdictional as set forth in I&E's non-compliance letter dated November 21, 2014 to Bushkill.

37. Denied. After reasonable investigation, I&E is without knowledge or information as to the exact date of delivery of Mr. Turner's letter dated December 1, 2014, and the same is therefore denied and proof thereof demanded.

38. The statements in Paragraph 38 are admitted in part and denied in part. I&E denies that the incident can be fairly characterized as a fire and not an explosion. I&E admits the remainder of the statements set forth in Paragraph 38.

39. Denied. After reasonable investigation, I&E is without knowledge or information sufficient to form a belief as to the truth of the matters asserted and the same is therefore denied and proof thereof demanded.

40. Admitted in part and denied in part. It is admitted that Bushkill sent an e-mail to Mr. Chilek on December 18, 2014. It is denied that I&E was under a duty to further explain or provide additional information to Bushkill after I&E determined that portions of Bushkill's propane distribution system are jurisdictional as set forth in I&E's non-compliance letter dated November 21, 2014 to Bushkill.

41. The statements in Paragraph 41 are admitted.

42. Denied. After reasonable investigation, I&E is without knowledge or information sufficient to form a belief as to the truth of the matters asserted and the same is therefore denied and proof thereof demanded.

43. Denied. After reasonable investigation, I&E is without knowledge or information sufficient to form a belief as to the truth of the matters asserted and the same is therefore denied and proof thereof demanded. By way of further answer, Wayne Scott retired from service with the Commonwealth of Pennsylvania and was not employed with I&E at the time the Complaint was filed.

44. Denied. After reasonable investigation, I&E is without knowledge or information sufficient to form a belief as to the truth of the matters asserted and the same is therefore denied and proof thereof demanded. By way of further answer, Wayne Scott retired from service with the Commonwealth of Pennsylvania and was not employed with I&E at the time the Complaint was filed.

45. Denied. After reasonable investigation, I&E is without knowledge or information sufficient to form a belief as to the truth of the matters asserted and the same is therefore denied and proof thereof demanded. By way of further answer, Wayne Scott

retired from service with the Commonwealth of Pennsylvania and was not employed with I&E at the time the Complaint was filed.

46. Denied. After reasonable investigation, I&E is without knowledge or information sufficient to form a belief as to the truth of the matters asserted and the same is therefore denied and proof thereof demanded. By way of further answer, Wayne Scott retired from service with the Commonwealth of Pennsylvania and was not employed with I&E at the time the Complaint was filed.

47. Denied. After reasonable investigation, I&E is without knowledge or information sufficient to form a belief as to the truth of the matters asserted and the same is therefore denied and proof thereof demanded. By way of further answer, Wayne Scott retired from service with the Commonwealth of Pennsylvania and was not employed with I&E at the time the Complaint was filed.

48. I&E admits the statements set forth in Paragraph 48.

49. Denied. After reasonable investigation, I&E is without knowledge or information sufficient to form a belief as to the truth of the matters asserted and the same is therefore denied and proof thereof demanded. By way of further answer, Wayne Scott retired from service with the Commonwealth of Pennsylvania and was not employed with I&E at the time the Complaint was filed.

50. Denied. After reasonable investigation, I&E is without knowledge or information sufficient to form a belief as to the truth of the matters asserted and the same is therefore denied and proof thereof demanded. By way of further answer, Wayne Scott

retired from service with the Commonwealth of Pennsylvania and was not employed with I&E at the time the Complaint was filed.

51. Denied. After reasonable investigation, I&E is without knowledge or information sufficient to form a belief as to the truth of the matters asserted and the same is therefore denied and proof thereof demanded. By way of further answer, Wayne Scott retired from service with the Commonwealth of Pennsylvania and was not employed with I&E at the time the Complaint was filed.

52. Denied. After reasonable investigation, I&E is without knowledge or information sufficient to form a belief as to the truth of the matters asserted and the same is therefore denied and proof thereof demanded. By way of further answer, Wayne Scott retired from service with the Commonwealth of Pennsylvania and was not employed with I&E at the time the Complaint was filed.

53. Denied. After reasonable investigation, I&E is without knowledge or information sufficient to form a belief as to the truth of the matters asserted and the same is therefore denied and proof thereof demanded. By way of further answer, Wayne Scott retired from service with the Commonwealth of Pennsylvania and was not employed with I&E at the time the Complaint was filed.

54. Denied. After reasonable investigation, I&E is without knowledge or information sufficient to form a belief as to the truth of the matters asserted and the same is therefore denied and proof thereof demanded. By way of further answer, Wayne Scott retired from service with the Commonwealth of Pennsylvania and was not employed with I&E at the time the Complaint was filed.

55. Denied. After reasonable investigation, I&E is without knowledge or information sufficient to form a belief as to the truth of the matters asserted and the same is therefore denied and proof thereof demanded. By way of further answer, Wayne Scott retired from service with the Commonwealth of Pennsylvania and was not employed with I&E at the time the Complaint was filed.

56. Denied. Representatives from I&E had numerous communications with Bushkill regarding I&E's conclusion that portions of Bushkill's facilities are jurisdictional. Bushkill indeed admits as much in its Preliminary Objections. *See* Paragraph 28 (referencing the parties' discussion concerning whether Bushkill fell under the Commission's jurisdiction); Paragraph 30 (wherein I&E provided its conclusion to Bushkill that it was a pipeline operator pursuant to Act 127); Paragraph 33 (referencing Mr. Metro's explanation that the customer is the ultimate user of propane); Paragraph 35 (referring to Mr. Metro's letter concluding that Bushkill is a pipeline operator); and Paragraph 41 (referring to an e-mail from Mr. Metro regarding I&E's conclusion that Bushkill is a pipeline operator). Thus, it appears that Bushkill is merely dissatisfied with I&E's conclusion that portions of its facilities are jurisdictional and not that I&E failed to communicate.

57. I&E admits the statement set forth in Paragraph 57.

58. Admitted in part and denied in part. It is admitted that a basis for I&E's conclusion that Bushkill acts as a pipeline operator is that its propane distribution system serves ten or more customers. It is denied that the "sole basis" for I&E's allegation that Bushkill is a pipeline operator are the averments stated in Paragraph 58.

59. Admitted in part and denied in part. It is admitted that Paragraphs 16 and 17 of I&E's Complaint provide factual details to support I&E's conclusion that Bushkill is a pipeline operator. It is denied that the facts as plead are insufficient. By way of further answer, the map provided to I&E by Bushkill was labeled as "confidential" and any description of the contents of the map would have revealed the location of Bushkill's propane facilities.<sup>5</sup>

60. I&E admits the statements set forth in Paragraph 60. By way of further answer, I&E's Complaint speaks for itself.

61. I&E admits the statements set forth in Paragraph 61. By way of further answer, I&E's Complaint speaks for itself.

62. Admitted in part and denied in part. It is admitted that the actual names of customers served by Bushkill are not identified in I&E's Complaint. It is denied that the names of customers served by Bushkill are necessary to demonstrate that Bushkill is a pipeline operator or for Bushkill to formulate a response to I&E's allegations.

63. Admitted in part and denied in part. It is admitted that I&E did not reveal details in its Complaint regarding the specific portions of Bushkill's propane distribution system that serve ten (10) or more customers. It is denied that a detailed description of the facilities of Bushkill's propane distribution system, which are set forth in a *confidential* map that is in Bushkill's possession, is necessary or proper for Bushkill to

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<sup>5</sup> See the Public Utility Confidential Security Information Disclosure Protection Act, 35 P.S. §§ 2141.1 *et seq.*, which establishes criminal penalties and termination of employment for employees who knowingly or recklessly disclose information that would compromise security of public utility facilities. While Bushkill is not a public utility, it submitted information to I&E pertaining to the location and description of its propane facilities. Bushkill labeled this information as confidential and I&E treated it as such. The confidential map is in Bushkill's possession.

formulate an answer to I&E's allegations in the Complaint. Bushkill can easily determine the portions of its propane distribution system that serve ten (10) or more customers by reviewing the *confidential* map that is in its possession. See also I&E's response to Paragraph 59, above.

64. Admitted in part and denied in part. It is admitted that the Complaint did not include documents containing the findings of the Gas Safety Division. It is denied that such documents are necessary in order for Bushkill to formulate an answer to I&E's allegations in the Complaint.

65. Denied. I&E denies that Bushkill is the "ultimate consumer" of propane gas. I&E also denies that it did not allege specific facts to support the conclusion that Bushkill is a pipeline operator or for Bushkill to formulate an answer to I&E's allegations in the Complaint.

#### **IV. ARGUMENT**

66. Denied. The averment states a conclusion of law to which no response is required. To the extent a response is deemed to be required, it is denied.

67. Denied. The averment states a conclusion of law to which no response is required. To the extent a response is deemed to be required, it is denied. By way of further answer, "in reviewing preliminary objections, only facts that are well pleaded, material, and relevant will be considered as true, together with such reasonable inferences that may be drawn from those facts, and preliminary objections will be sustained only if they are clear and free from doubt." *Santiago v. Pennsylvania National Mutual Casualty Insurance Co.*, 613 A.2d 1235, 1238 (Pa. Super. 1992), citing *Ohio Casualty Group Ins.*

Co. v. Argonaut Ins. Co., 500 A.2d 191 (Pa. Cmwlth. 1985). Preliminary objections should be sustained only where it appears with certainty that, upon the facts averred, the law will not allow the plaintiff to recover. *International Union of Operating Engineers, Local No. 66, AFL-CIO v. Linesville Construction Co.*, 322 A.2d 353 (Pa. 1974).

68. Denied. The averment states a conclusion of law to which no response is required. To the extent a response is deemed to be required, it is denied. By way of further answer, preliminary objections in the nature of a demurrer test the legal sufficiency of the complaint. *Estate of Denmark ex rel. Hurst v. Williams*, 117 A.3d 300, 305 (Pa. Super. 2015), citing *Durst v. Milroy Gen. Contracting, Inc.*, 52 A.3d 357, 359-60 (Pa. Super. 2012) (quoting *Feingold v. Hendrzak*, 15 A.3d 937, 941 (Pa. Super. 2011)). “When considering preliminary objections, all material facts set forth in the challenged pleadings are admitted as true, as well as all inferences reasonably deducible therefrom.” *Id.* “Preliminary objections which seek the dismissal of a cause of action should be sustained only in cases in which it is clear and free from doubt that the pleader will be unable to prove facts legally sufficient to establish the right to relief.” *Id.* “If any doubt exists as to whether a demurrer should be sustained, it should be resolved in favor of overruling the preliminary objections.” *Id.*

**ANSWER TO FIRST PRELIMINARY OBJECTION:  
I&E'S COMPLAINT IS SUFFICIENTLY SPECIFIC**

**Bushkill Is Able To Prepare A Defense To I&E's Allegations Because  
The Documents That Form The Basis For I&E's Conclusion That  
Bushkill Is A Pipeline Operator Are Clearly Identified In I&E's  
Complaint And Are In Bushkill's Possession**

69. Denied. The averment states a conclusion of law to which no response is required. To the extent a response is deemed to be required, it is denied. The case cited by Bushkill, *LT Int'l Beauty Sch., Inc. v. Com., Bureau of Prof'l & Occupational Affairs, State Bd. of Cosmetology*, 13 A.3d 1004 (Pa. Cmwlth. 2011), is distinguishable from the instant matter. In *LT Int'l Beauty School, Inc.*, the Commonwealth Court reversed, in part, the State Board of Cosmetology's imposition of a civil penalty for various violations of the Beauty Culture Law because, even at an administrative hearing, inspectors could not identify which students had incomplete kits or what equipment was missing from the kits. In this matter, I&E alleges that portions of Bushkill's propane distribution system serving ten (10) or more customers are subject to Federal pipeline safety laws. See Paragraph 5 of I&E's Complaint. The Gas Safety Division's conclusion that portions of Bushkill's propane distribution system are jurisdictional is based on a review of a *confidential* map that Bushkill provided to Gas Safety personnel on October 24, 2014, and a spreadsheet of tanks and buildings that Bushkill provided to Gas Safety personnel on October 28, 2014. Both of these documents are clearly identified in I&E's Complaint. See Paragraph 17 of I&E's Complaint. The map and spreadsheets are within Bushkill's possession and, therefore, Bushkill is certainly able to determine by review of its own

facilities' map which portions of its propane system serve ten (10) or more customers and to prepare a defense to I&E's Complaint.

70. Denied. The averment states a conclusion of law to which no response is required. To the extent a response is deemed to be required, it is denied. By way of further answer, I&E's Complaint complies with Section 5.22(a)(5) of the Commission's regulations, 52 Pa. Code § 5.22(a)(5), in that it provides a clear and concise statement of the act being complained of as well as the result of the Gas Safety Division's investigation. The cases cited by Bushkill are distinguishable. In *Steven Higgins v. National Fuel Gas Distr. Corp.*, Docket No. C-2012-2338926, 2013 WL 1100798 (Initial Decision issued February 26, 2013), the complaint was dismissed on preliminary objections because the customer-complainant, a resident of New York, did not state sufficient facts to show that the billing dispute was subject to the Commission's jurisdiction. In the *Department of Transportation v. Shipley Humble Oil Co.*, 370 A.2d 438 (Pa. Cmwlth. 1977), the Commonwealth Court found that the Department of Transportation's (PennDOT) complaint lacked sufficient specificity to enable the defendant to prepare a defense in that PennDOT's property was damaged in two distinct, successive accidents and the complaint failed to describe how the defendant operated its vehicle without care for PennDOT's property and apportion damages. In the instant matter, the Gas Safety Division's conclusion that portions of Bushkill's propane distribution system are jurisdictional is based on a review of a *confidential* map that Bushkill provided to Gas Safety personnel on October 24, 2014, and a spreadsheet of tanks and buildings that Bushkill provided to Gas Safety personnel on October 28, 2014.

Both of these documents are clearly identified in I&E's Complaint. *See* Paragraph 17 of I&E's Complaint. I&E alleges that the portions of Bushkill's propane distribution system serving ten (10) or more customers are subject to Federal pipeline safety laws. *See* Paragraph 5 of I&E's Complaint. Those portions are readily identifiable in the map and spreadsheets that are within Bushkill's possession and, therefore, Bushkill is certainly able to prepare a defense to I&E's Complaint.

71. Denied. The averment states a conclusion of law to which no response is required. To the extent a response is deemed to be required, it is denied.

72. Denied. The averment states a conclusion of law to which no response is required. To the extent a response is deemed to be required, it is denied. *See* I&E's response to Paragraph 70, above.

73. Denied. In the Complaint, I&E alleges that the portions of Bushkill's propane distribution system that serve ten (10) or more customers are subject to Federal pipeline safety laws. *See* Paragraph 5 of I&E's Complaint. The Gas Safety Division's conclusion that portions of Bushkill's propane distribution system are jurisdictional is based on a review of a *confidential* map that Bushkill provided to Gas Safety personnel on October 24, 2014, and a spreadsheet of tanks and buildings that Bushkill provided to Gas Safety personnel on October 28, 2014. *See* Paragraph 17 of I&E's Complaint. The map and spreadsheets are within Bushkill's possession (since they were given to I&E by Bushkill) and the portions of Bushkill's propane distribution system serving ten (10) or more customers are readily apparent from a review of those documents. Further, a reasonable inference may be drawn from I&E's factual allegations that a customer is one

who pays to stay in Bushkill's rental and timeshare properties. *See* Paragraph 16 of I&E's Complaint, which describes Bushkill's vacation villa complex. I&E is not under a duty to identify each customer who consumes propane from Bushkill to support the conclusion that Bushkill is a pipeline operator. Bushkill's mere dissatisfaction with I&E's conclusion that Bushkill is not the "ultimate consumer" of propane is not a valid basis to sustain its Preliminary Objections.

74. Denied. Bushkill's dissatisfaction with I&E's conclusion that it is a pipeline operator, as well as its apparent frustration with I&E's investigation, are not proper grounds for sustaining Bushkill's Preliminary Objections.

75. Denied. There is no legal obligation for I&E to communicate with or enter into a dispute resolution process prior to filing a complaint and Bushkill cites to none. Further, the communications mentioned by Bushkill in its own Preliminary Objections demonstrate that I&E hardly ignored Bushkill. To the contrary, I&E was in constant communication with Bushkill near the end of 2014 and it appears that Bushkill is merely dissatisfied with the results of I&E's investigation. *See* I&E's response to Paragraph 56. I&E also denies that its Complaint lacks sufficient specificity for the reasons asserted above. In particular, *See* I&E's response to Paragraph 70, above.

76. Denied. It is denied that Bushkill's Preliminary Objections should be sustained for insufficient specificity for the reasons asserted above.

**ANSWER TO SECOND PRELIMINARY OBJECTION:  
I&E'S COMPLAINT IS LEGALLY SUFFICIENT**

**Bushkill's Propane Distribution System Fits Within The Plain Meaning  
Of The Statutory Definition Of "Pipeline Operator"**

77. Denied. The averment states a conclusion of law to which no response is required. To the extent a response is deemed to be required, it is denied. By way of further answer, "economic regulation is subject to a less strict vagueness test because its subject matter is often more narrow, and because businesses, which face economic demands to plan behavior carefully, can be expected to consult relevant legislation in advance of action." *Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498 (1982). Greater tolerance is also given to statutory enactments containing "civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe." *Id.* at 499.

78. Denied. It is denied that Act 127 and Federal pipeline safety regulations are unconstitutionally vague and that any regulations promulgated by the Commission are necessary to clarify or render Act 127 and/or Federal pipeline safety regulations to be applicable to Bushkill. Bushkill fits within the plain meaning of the definition of "pipeline operator" set forth in Act 127 because it "owns or operates equipment or facilities in this Commonwealth for the transportation of gas . . . by pipeline or pipeline facility regulated under Federal pipeline safety laws." 58 P.S. § 801.102. Federal pipeline safety laws exempt "any pipeline system that transports only petroleum gas<sup>6</sup> or petroleum gas/air mixtures to fewer than 10 customers, if no portion of the system is

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<sup>6</sup> "Petroleum gas" includes propane pursuant to 49 C.F.R. § 192.3.

located in a public place.” 49 C.F.R. § 192.1(b)(5)(i). Therefore, it follows that the segments of Bushkill’s propane distribution system serving ten (10) or more customers are subject to Act 127. Bushkill is also not exempt from Act 127 because it is not the “ultimate consumer” of the propane, pursuant to 58 P.S. § 801.102. Those staying in the vacation villas on Bushkill’s property consume the propane.

79. Denied. The averment states a conclusion of law to which no response is required. To the extent a response is deemed to be required, it is denied. By way of further answer, Bushkill is not the “ultimate consumer” of the propane; those staying in the vacation villas on Bushkill’s property consume the propane.

80. Denied. The averment states a conclusion of law to which no response is required. To the extent a response is deemed to be required, it is denied. It is specifically denied that exceptions to the definition of “pipeline operator” can be found at 58 P.S. § 301.102 [sic]. Any implication that Bushkill fits within the exemptions of Act 127 or Federal pipeline safety regulations is denied. It is also specifically denied that Bushkill is a “customer” or an “ultimate consumer.”

81. Denied. The averment states a conclusion of law to which no response is required. To the extent a response is deemed to be required, it is denied. It is specifically denied that a statutory or regulatory definition of the terms referenced in Paragraph 81 is necessary to apprise Bushkill that it is subject to the requirements of Act 127 and Federal pipeline safety laws. *See* 1 Pa.C.S. § 1903(a) (words and phrases not defined in a statute shall be construed according to rules of grammar and according to their common and approved usage); *See also Commonwealth v. Hart*, 28 A.3d 898, 909 (Pa. Cmwlth. 2011)

(holding that it is well-established that the common and approved meaning of a word may be ascertained from an examination of its dictionary definition). Therefore, Bushkill's arguments related to "vagueness" do not pass the "less strict vagueness test" as articulated by the Supreme Court in *Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498 (1982). See I&E's response to Paragraph 77, above.

82. Denied. The averment states a conclusion of law to which no response is required. To the extent a response is deemed to be required, it is denied. It is denied that one may ascertain from a mere reading of the names of pipeline operators appearing on the Pipeline Operators Registry the business activities in which they are engaged. I&E, as a separate and independent prosecutory bureau of the Commission, is without sufficient knowledge to know whether or not the Commission provided Bushkill and "similar entities" with a Tentative Implementation Order and Registration Form, and the same is therefore denied and proof thereof demanded.

83. Denied. Bushkill is a pipeline operator because it operates a propane distribution system serving those who stay in its vacation villas. The Gas Safety Division of I&E was in near constant communication with Bushkill at the end of 2014 and Bushkill should not be permitted to cherry-pick pre-complaint communications, which were not relied upon or even referenced in I&E's Complaint, to support its flawed argument of "vagueness." Bushkill is apparently dissatisfied with I&E's conclusion that portions of its propane distribution system are jurisdictional, but this does not render Act 127 and Federal pipeline safety regulations to be unconstitutionally vague.

84. Denied. It is denied that the definition of “pipeline operator” in Act 127 violates due process because it is not vague, as explained above. It is also denied that Bushkill is the “ultimate consumer” of propane as opposed to those who stay in Bushkill’s vacation villas. *See* 58 P.S. § 801.102 (excluding “an ultimate consumer who owns a service line on his real property” from the definition of “pipeline operator”). It is also denied that Act 127 encourages arbitrary and discriminatory enforcement and Bushkill cites to no example where I&E failed to enforce Act 127 with regard to the propane distribution systems of similarly situated entities.

WHEREFORE, the reasons stated above, the Bureau of Investigation and Enforcement of the Pennsylvania Public Utility Commission respectfully requests that the Administrative Law Judge and Commission dismiss Respondent's Preliminary Objections and sustain I&E's Complaint.

Respectfully submitted,



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Dated: January 7, 2016

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Pennsylvania Public Utility Commission,  
Bureau of Investigation and Enforcement,  
Complainant

v.

Bushkill Group Inc.,  
Respondent

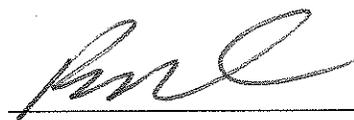
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Docket No. C-2015-2512950

**VERIFICATION**

I, Paul J. Metro, Manager, Gas Safety Division of the Bureau of Investigation and Enforcement, hereby state that the facts above set forth are true and correct to the best of my knowledge, information, and belief and that I expect the Bureau will be able to prove the same at any 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: January 7, 2016



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Paul J. Metro  
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Pennsylvania Public Utility Commission  
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## CERTIFICATE OF SERVICE

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

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