



December 13, 2021

**VIA E-FILING**

**David P. Zambito**

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Rosemary Chiavetta, Secretary  
Pennsylvania Public Utility Commission  
Commonwealth Keystone Building  
400 North Street, Second Floor North  
P.O. Box 3265  
Harrisburg, PA 17105-3265

**Re: In re: Petition of Westover Property Management Company, L.P. d/b/a Westover Companies for a Declaratory Order Regarding the Applicability of the Gas and Hazardous Liquids Pipeline Act; Docket No. P-2021-\_\_\_\_\_**

**Petition of Westover Companies for Declaratory Order**

Dear Secretary Chiavetta:

Enclosed for filing with the Pennsylvania Public Utility Commission ("Commission") is the above-referenced Petition for Declaratory Order ("Petition"). Copies of the Petition are being served on all parties, as indicated on the enclosed Certificate of Service.

If you have any question or concern regarding this filing, please direct them to me. Thank you for your attention to this matter.

Sincerely,

COZEN O'CONNOR

By: David P. Zambito  
Counsel for *Westover Property Management Company, L.P. d/b/a Westover Companies*

DPZ:kmg  
Enclosures

cc: Per Certificate of Service  
Alexander Stefanelli, CFO, Westover Companies  
Peter Quercetti, Vice President Operations Management, Westover Companies

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**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

In re: Petition of Westover Property Management :  
Company, L.P. d/b/a Westover Companies for a : Docket No. P-2021-\_\_\_\_\_  
Declaratory Order Regarding the Applicability of :  
the Gas and Hazardous Liquids Pipeline Act :

**CERTIFICATE OF SERVICE**

I hereby certify that I have this 13<sup>th</sup> day of December, 2021 served a true copy of the foregoing **Petition of Westover Companies for Declaratory Order**, upon the parties, listed below, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a party).

**VIA E-MAIL AND FIRST CLASS MAIL**

Richard A. Kanaskie, Esq.  
**(with Confidential Exhibits)**  
Director and Chief Prosecutor  
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David P. Zambito, Esq.  
Counsel for *Westover Property Management  
Company, L.P. d/b/a Westover Companies*

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

In re: Petition of Westover Property Management :  
Company, L.P. d/b/a Westover Companies for a : Docket No. P-2021-\_\_\_\_\_  
Declaratory Order Regarding the Applicability of :  
the Gas and Hazardous Liquids Pipeline Act :

**NOTICE TO PLEAD**

Pursuant to 52 Pa. Code § 5.61, you are hereby notified that you have twenty (20) days from the service of the enclosed petition of Westover Property Management Company, L.P. d/b/a Westover Companies (“Westover”) to file an answer to the petition. All pleadings, such as an answer, must be filed with the Secretary of the Pennsylvania Public Utility Commission, with a copy served to counsel for Westover, and where applicable the Administrative Law Judge presiding over the case.

**File with:**

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

**With a copy to:**

David P. Zambito, Esq. (PA ID #80017)  
Jonathan P. Nase, Esq. (PA ID #44003)  
Cozen O’Connor  
17 North Second St., Suite 1410  
Harrisburg, PA 17101



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David P. Zambito  
Counsel for  
*Westover Property Management Company, L.P.  
d/b/a Westover Companies*

Dated: December 13, 2021

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

In re: Petition of Westover Property Management :  
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**PETITION OF WESTOVER COMPANIES  
FOR DECLARATORY ORDER**

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Westover Property Management Company, L.P. d/b/a Westover Companies (“Westover”) files this Petition for a Declaratory Order (“Petition”), pursuant to 66 Pa. C.S. § 331(f) and 52 Pa. Code § 5.42, to resolve an actual case and controversy regarding whether Westover is subject to the Gas and Hazardous Liquids Pipelines Act, 58 P.S. § 801.101 *et seq.* (“Act 127”). Westover respectfully requests that the Commission declare that Westover is not subject to Act 127.

In support thereof, Westover avers and argues as follows:

**I. INTRODUCTION – ON-GOING CASE AND CONTROVERSY**

1. This Petition concerns an on-going case and controversy regarding whether Westover is subject to Act 127. Westover owns several apartment complexes in Pennsylvania. In each complex, Westover purchases gas at a point in Pennsylvania from a Commission-regulated public utility (a natural gas distribution company (“NGDC”)) and distributes it to the tenants in

the complex, charging them for the gas through a meter or rents in compliance with the requirements of 66 Pa. C.S. § 1313 (regarding “Price upon resale of public utility services”).<sup>1</sup>

2. By correspondence dated July 28, 2021, the Bureau of Investigation and Enforcement (“I&E”) of the Pennsylvania Public Utility Commission (“Commission”) notified Westover that I&E had commenced an investigation into whether Westover is in compliance with Act 127. **Appendix 1.** That correspondence stated “[t]his investigation focuses on determining which apartment complexes owned or managed by Westover meet the definitions of ‘pipeline operator’ and ‘master meter system’ set forth in 58 P.S. § 801.102 and 49 CFR § 191.3, respectively, such that compliance with Federal pipeline safety laws and regulations, including 49 CFR Part 192, is obligatory.”

3. In addition, I&E field investigators have notified Westover that it must comply with Federal pipeline safety laws. *See, e.g., Appendix 2.* As a result, Westover filed an Act 127 pipeline operator registration with the Commission and has already incurred over \$70,000 in compliance costs.

4. By correspondence dated November 4, 2021, Westover advised I&E of its position that it is not an “operator” of a “master meter system.” **Appendix 3.**

5. By correspondence dated November 22, 2021, I&E notified Westover that I&E disagreed with Westover’s position. **Appendix 4.** I&E demanded that Westover advise I&E, by December 13, 2021, whether Westover will submit to the Commission’s jurisdiction pursuant to Act 127 and finalize the steps necessary to fully comply with the Federal pipeline safety laws.

6. For the reasons discussed below, Westover respectfully requests that the Commission declare that Westover’s Facilities are not subject to Act 127.

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<sup>1</sup> Westover’s natural gas transportation facilities will be referred to herein as the “Westover Facilities.”

## **II. THE PARTIES**

7. Westover is not a Commission-regulated public utility. Its business address is: 550 American Avenue, Suite 1, King of Prussia, PA 19406.

8. Westover's counsel in this matter are:

David P. Zambito, Esq. (PA ID # 80017)  
Jonathan P. Nase, Esq. (PA ID # 44003)  
Cozen O'Connor  
17 North Second Street, Suite 1410  
Harrisburg, PA 17101  
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9. I&E serves as the Commission's prosecutory bureau for the purposes of representing the public interest in ratemaking and service matters, and enforcing compliance with the Pennsylvania Public Utility Code ("Code") and Commission Regulations and Orders. *Implementation of Act 129 of 2008; Organization of Bureaus and Offices*, Docket No. M-2008-2071852 (Order entered Aug. 11, 2011).

## **III. FACTS**

10. As stated previously, Westover owns several apartment complexes in Pennsylvania. In each complex, Westover purchases gas at a point in Pennsylvania from an NGDC and distributes it to the tenants in the complex, charging them for the gas through a meter or rents. The gas, once purchased by Westover, is transported entirely within Pennsylvania to end-users located in Pennsylvania.

11. All of Westover's Facilities are located on Westover's property. All of Westover's natural gas customers rent their premises from Westover.

12. Attached as **Appendices 5 through 15 (CONFIDENTIAL)** are maps and other information regarding the Westover Facilities.

#### **IV. LEGAL STANDARDS**

13. Section 331(f) of the Code, 66 Pa. C.S. § 331(f), and the Commission's regulations at 52 Pa. Code § 5.42 provide that the Commission may issue a declaratory order to terminate an actual controversy or to remove uncertainty. *Re Duquesne Light Co.*, 61 Pa. P.U.C. 507 (1986). For purposes of a petition for declaratory order, the Commission assumes the facts as alleged are true and issues a decision on the issues accordingly.

14. Considering that I&E is threatening to file a complaint against Westover in the near future, Westover files this Petition to resolve this case or controversy.

#### **V. ARGUMENT IN SUPPORT OF DECLARATORY ORDER**

15. As an agency created by the General Assembly, the Commission has only the powers given to it by the General Assembly, either explicitly or implicitly. *Feingold v. Bell Tel. Co. of Pa.*, 383 A.2d 791 (Pa. 1977). The question presented is whether the Commission has statutory jurisdiction to regulate the Westover Facilities under Act 127.

16. Commission regulations at 52 Pa. Code § 59.33 state that the Commission adopts, as the minimum safety standards for all natural gas and hazardous liquid public utilities, the safety standards found in 49 U.S.C. §§ 60101-60503 and 49 CFR Parts 191-193, 195 and 199. In its November 22, 2021 letter, I&E concedes that Westover is not a public utility. **Appendix 4** at 1. Therefore, the Commission does not have jurisdiction to regulate the Westover Facilities pursuant to 52 Pa. Code § 59.33.

17. For the reasons that follow, it is respectfully submitted that the Commission also lacks authority to regulate the Westover Facilities pursuant to Act 127.

18. In 2011, the General Assembly enacted Act 127 in response to the growth of Marcellus Shale in Pennsylvania. In pertinent part, Section 501(a) of Act 127, 58 P.S. § 801.501(a), gives the Commission the general administrative authority to supervise and regulate “pipeline operators” within this Commonwealth who are subject to Federal pipeline safety laws. The General Assembly also empowered the Commission to adopt regulations, consistent with the Federal pipeline safety laws, but the Commission -- after a decade -- has not yet promulgated regulations implementing Act 127 or specifically defining its interpretation of the limits of its powers under Act 127.<sup>2</sup>

19. Act 127 gives the Commission authority only to regulate the Westover Facilities if Westover is a “pipeline operator,” which is defined as:

"Pipeline operator." A person that owns or operates equipment or facilities in this Commonwealth for the transportation of gas or hazardous liquids by pipeline or pipeline facility *regulated under Federal pipeline safety laws*. The term does not include a public utility or an ultimate consumer who owns a service line on his real property.

58 P.S. § 801.102 (“Definitions”) (emphasis added).<sup>3</sup>

20. The definition of “pipeline” in Act 127 reiterates that Act 127 pertains only to pipelines regulated by Federal pipeline safety laws.<sup>4</sup>

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<sup>2</sup> Under the Pennsylvania regulatory review process, interested parties would have had an opportunity to provide comments on the appropriate implementation of Act 127 and binding norms on all similarly-situated entities could have been developed. Moreover, the Pennsylvania General Assembly would have had an opportunity to review the Commission regulations and assess consistency with the legislative intent of Act 127. *See* Pa. Regulatory Review Act, 71 P.S. §§ 745.1 - 745.15; *see also* Pa. Commonwealth Documents Law, 45 P.S. §§ 1102 - 1208. Without clear binding norms, the risk of selective and discriminatory prosecution is greatly increased.

<sup>3</sup> The Supreme Court of Pennsylvania has held that, “if the General Assembly defines words that are used in a statute, those definitions are binding.” *Pa. Associated Builders & Contractors, Inc. v. Dep’t of Gen. Servs.*, 932 A.2d 1271, 1278 (Pa. 2007); *see also Lower Swatara Twp. v. Pa. Labor Relations Bd.*, 208 A.3d 521 (Pa. Cmwlth. 2019).

<sup>4</sup> 58 P.S. § 801.102 (emphasis added) defines a pipeline as:



21. Act 127 defines “Federal pipeline safety laws” as:

“Federal pipeline safety laws.” The provisions of 49 U.S.C. Ch. 601 (relating to safety), the Hazardous Liquid Pipeline Safety Act of 1979 (Public Law 96-129, 93 Stat. 989), the Pipeline Safety Improvement Act of 2002 (Public Law 107-355, 116 Stat. 2985) and the regulations promulgated under the acts.

*Id.*

22. I&E contends that Westover is a “pipeline operator” as defined in Act 127 because Westover owns or operates a “master meter system” as defined by the Federal pipeline safety laws.

The Federal pipeline safety laws define a “master meter system” as:

... a pipeline system for distributing gas within, but not limited to, a definable area, such as a mobile home park, housing project, or apartment complex, *where the operator purchases metered gas from an outside source for resale through a gas distribution pipeline system.* The gas distribution pipeline system supplies the ultimate consumer who either purchases the gas directly through a meter or by other means, such as by rents[.]

49 CFR § 191.3 (emphasis added).

23. The Federal pipeline safety laws define an “operator” as “a person who engages in the transportation of gas.” *Id.*

24. The Federal pipeline safety laws further define “transportation of gas” as “the gathering, transmission, or distribution of gas by pipeline, or the storage of gas, *in or affecting interstate or foreign commerce.*” *Id.* (emphasis added).

25. Westover does not gather, transmit or store gas. Therefore, Westover’s distribution of gas by pipeline must be in or must affect interstate or foreign commerce in order for Westover to be engaged in the “transportation of gas.” If Westover is not engaged in the transportation of gas, it is not an “operator” as defined by the Federal pipeline safety laws.

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A part of the physical facilities through which gas or hazardous liquids move in transportation, including a pipe valve and other appurtenance attached to the pipe, compressor unit, metering station, regulator station, delivery station, holder and fabricated assembly. *The term only includes pipeline regulated by Federal pipeline safety laws.* The term does not include a pipeline subject to the exclusive jurisdiction of the Federal Energy Regulatory Commission.

26. The Westover Facilities do not distribute gas by pipeline in or affecting interstate or foreign commerce.

a. Westover purchases gas in Pennsylvania from an NGDC. NGDCs are regulated by the Commission rather than by FERC pursuant to the Hinshaw Amendment, 15 U.S.C. § 717(c). Consequently, Westover's purchase of the gas is in intrastate commerce because an NGDC is considered to be an intrastate gas pipeline facility pursuant to the Federal pipeline safety laws. 49 U.S.C. § 60101(a)(9) (defining an "intrastate gas pipeline facility" as a gas pipeline facility and gas transportation within a state that is not subject to FERC pursuant to 15 U.S.C. § 717).

b. Westover then transports the gas a short distance, entirely within Pennsylvania and on Westover's own property, and sells it to tenants located in Pennsylvania on Westover's property.

c. From beginning to end, Westover's purchase, transportation, and sale of the gas is entirely intrastate commerce.

27. Since Westover does not transport gas in or affecting interstate or foreign commerce, Westover is not engaged in the "transportation of gas" as defined in the Federal pipeline safety laws. Therefore, Westover is not an "operator" as defined in the Federal pipeline safety laws, and its Facilities are not "master meter systems" as defined in the Federal pipeline safety laws.

28. Westover is not a "pipeline operator" as defined in Act 127 because it does not own or operate equipment or facilities that are regulated under the Federal pipeline safety laws. The Commission therefore lacks authority to regulate Westover pursuant to Act 127.

29. There is also no federal jurisdiction over Westover under the negative implications of the Commerce Clause of the United States Constitution, also known as the Dormant Commerce Clause. The Natural Gas Act, including 15 U.S.C. § 717, was intended to fill a regulatory gap and define the nature of federal jurisdiction over interstate and intrastate commerce. *Pub. Utils. Comm'n of State of Cal. v. FERC*, 900 F.2d 269, 275 (D.C. Cir. 1990). This was a reaction to the United States Supreme Court's *ad hoc* and case-by-case definitions of federal jurisdiction over the gas industry under Dormant Commerce Clause cases. The field of federal jurisdiction under the Natural Gas Act is roughly the same as that determined by the Supreme Court in these Dormant Commerce Clause cases; however, the statute intended to make the lines between state and federal jurisdiction clearer. *Fed. Power Comm'n v. E. Ohio Gas Co.*, 338 U.S. 464, 467 (1950).

30. When assessing what constitutes an undue burden on interstate commerce under the Dormant Commerce Clause, courts engage in a balancing test and consider “legitimate state interests” against any burden on interstate commerce that such state-level regulation imposes. *See Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375 (1983). Further, the United States Supreme Court has stated that “the regulation of utilities is one of the most important of the functions traditionally associated with the police power of the State.” *Id.* at 377. Here, while the analysis under the Natural Gas Act already excludes natural gas systems similar to Westover's (as discussed above), any purported balancing test under the Dormant Commerce Clause would yield the same result because the tenuous connection to interstate commerce by Westover means that any unintended burden on interstate commerce would be minimal. Because Westover engages entirely in intrastate commerce, the Commonwealth has a greater interest than the federal government in regulating its purely intrastate commerce, which outweighs the minimal

effect on interstate commerce even where the Pennsylvania General Assembly has knowingly chosen not to regulate.

31. The Pennsylvania General Assembly, in enacting Act 127, could have expressly included intrastate natural gas systems, such as Westover's, within the Commission's enforcement jurisdiction – but it did not.<sup>5</sup> Instead, the General Assembly limited the Commission's enforcement jurisdiction to pipeline operators who are subject to Federal pipeline safety laws. Westover is not such an entity because Westover is not engaged in the “transportation of gas” as defined in the Federal pipeline safety laws.

32. The U.S. Department of Transportation's Pipeline and Hazardous Materials Safety Administration has issued several letters interpreting the definition of “master meter system” in 49 CFR § 191.3. **Appendix 16.** None of those letters addresses the question of whether the operator of the master meter system was engaged in the gathering, transmission, or distribution of gas “in or affecting interstate or foreign commerce.” As a result, they are of limited usefulness in addressing Westover's situation. In any event, those non-legal opinion letters merely reflect the agency's current application of the regulations to the specific facts presented by the person requesting the clarification; they do not create legally-enforceable rights or obligations. They certainly do not constitute precedent binding on the Commission or upon Pennsylvania's appellate courts in interpreting the specific language of Act 127.

33. Construing 49 CFR § 191.3 as applying to landlords such as Westover would effectively give the PUC jurisdiction over every landlord in Pennsylvania that operates a natural gas master meter system to provide gas to its tenants. There are likely hundreds, perhaps thousands, of such systems. If the General Assembly intended to effect such a dramatic change in

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<sup>5</sup> See *Feingold, supra* (regarding limitations on Commission powers).

law and public policy, by giving the Commission authority to regulate these entities under Act 127, it would have said so explicitly. The fact that it did not do so reflects the General Assembly's intent that these entities would not be regulated by the Commission.

34. I&E's November 22, 2021 letter, at p. 2 ¶ 1, argues that Westover is subject to Commission jurisdiction because the Commission has long been certificated by the Secretary of the U.S. Department of Transportation to enforce the Federal pipeline safety laws. *See* I&E's November 22, 2021 letter, at p. 2 ¶ 3 ("Intrastate gas master meter systems have for decades been subject to pipeline safety regulation either through PHMSA or an authorized State."). This argument undermines, rather than supports, I&E's position because it concludes that the Commission's jurisdiction over Westover does not stem from Act 127 at all, but instead preceded Act 127.

35. I&E's November 22, 2021 correspondence fails to explain how Westover is engaged in the "transportation of gas" as defined in the Federal pipeline safety laws. If Westover is not engaged in the "transportation of gas" as so defined, it is not an "operator" of a "master meter system."<sup>6</sup>

## **VI. CONCLUSION**

WHEREFORE, for the foregoing reasons, Westover Property Management Company, L.P. d/b/a Westover Companies ("Westover") respectfully requests that the Commission declare that:

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<sup>6</sup> In addition, as authority for the Commission's jurisdiction over Westover, I&E's November 22, 2021 correspondence cites a case (*Pa. Pub. Util. Comm'n, Bureau of Investigation and Enforcement v. Brookhaven MHP Management LLC, et al.*, Docket No. C-2017-2613983 (Order entered Aug. 23, 2018)) in which the Commission approved a settlement. That case is inapposite because the parties did not contest the Commission's jurisdiction and the Commission did not explicitly address its jurisdiction

(a) the Westover Facilities are not subject to the Gas and Hazardous Liquids Pipelines Act, 58 P.S. § 801.101 *et seq.*; and,

(b) Westover's registration with the Commission as an Act 127 pipeline operator is null and void.

Respectfully submitted,



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David P. Zambito, Esq. (PA ID # 80017)  
Jonathan P. Nase, Esq. (PA ID # 44003)  
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17 North Second Street, Suite 1410  
Harrisburg, PA 17101  
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Date: December 13, 2021

**VERIFICATION**

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

Date: 12/13/2021

Alex Stefanelli