

**PENNSYLVANIA
PUBLIC UTILITY COMMISSION
Harrisburg, PA 17120**

Commissioners Present:

Gladys Brown Dutrieuille, Chairman
Stephen M. DeFrank, Vice Chairman
Ralph V. Yanora
Kathryn L. Zerfuss
John F. Coleman, Jr.

Pennsylvania Public Utility Commission,
Bureau of Investigation and Enforcement

C-2022-3030251
P-2021-3030002

v.

Westover Property Management Company, L.P.

OPINION AND ORDER

BY THE COMMISSION:

Before the Pennsylvania Public Utility Commission (Commission) for consideration and disposition is the Petition of Westover Property Management Company, L.P. d/b/a Westover Companies for Review and Answer to Material Questions and for Immediate Stay of Proceeding (Petition) filed on October 28, 2022, by Westover Property Management Company, L.P. d/b/a Westover Companies (Westover or Petitioner). On November 7, 2022, Westover filed its Brief in Support of the Petition. Also, on November 7, 2022, the Commission's Bureau of Investigation and Enforcement (I&E) filed its Brief in Opposition to the Petition.

The Petitioner seeks the Commission’s interlocutory review and answer in the negative to the Material Questions, as follows:

1. Do Westover’s apartment complexes meet the definition of a “master meter system” in 49 CFR § 191.3 where: Westover takes delivery of the natural gas from a state-regulated natural gas distribution company (“NGDC”) on the grounds of the apartment complex in Pennsylvania, consumes some of the gas, and resells the remainder exclusively to tenants in the apartment complex in Pennsylvania?

2. Does the Gas and Hazardous Liquids Pipelines Act (“Act 127”) apply to Westover’s apartment complexes, considering the facts in question #1?

Petition. at 1. In addition, the Petition, brought pursuant to Section 5.302(a) of Commission Regulations, seeks an “immediate stay of proceeding.” *Id.*; 52 Pa. Code § 5.302(a).

Upon review, based upon the reasons discussed more fully *infra.*, we conclude that under Section 5.302(a), the Petitioner fails to state compelling reasons for interlocutory review. Therefore, we shall decline to answer the material questions, and deny the request for stay.

I. History of the Proceeding

This is a consolidated proceeding, which consists of Westover’s Amended Petition for Declaratory Order¹ seeking a Commission order to resolve whether Westover is subject to the Gas and Hazardous Liquids Pipelines Act, 58 P.S. § 801.101 et seq.

¹ Petition of Westover Property Management Company, L.P. d/b/a Westover Companies for a Declaratory Order Regarding Applicability of the Gas and Hazardous Pipeline Act, filed on December 13, 2021, as amended, May 13, 2022. (Declaratory Order proceeding).

(Act 127), and the Complaint proceeding subsequently initiated by I&E on January 3, 2022, alleging that Westover is in violation of Act 127.²

In the Declaratory Order proceeding, Westover amended its original petition to include factual details concerning Westover’s natural gas pipeline facilities, which Westover alleged support Westover’s claim that it is not a pipeline operator subject to Commission jurisdiction. In the Complaint proceeding, I&E alleges that the I&E Safety Division responded to reports of a natural gas leak and service outage occurring at one of Westover’s apartment complexes. Upon ensuring the safety of gas utility service of the residents of the apartment complex, the I&E Safety Division shifted the focus of its investigation to examine whether the pipeline facilities operated by Westover constitute “master meter systems” as defined in 49 CFR § 191.3 and are therefore subject to Commission regulation through Act 127. *See generally, Petition of Westover Property Management Company, L.P. d/b/a Westover Companies for a Declaratory Order Regarding Applicability of the Gas and Hazardous Pipeline Act*, at Docket Nos. P-2021-3030002 and C-2022-3030251 (Order entered August 25, 2022) (*Order re: Declaratory Order*).

In ruling on Westover’s Amended Petition for Declaratory Order, the Commission did not grant Westover’s request for a ruling whether Westover is subject to Commission jurisdiction under Act 127. Rather, the Commission consolidated Westover’s Declaratory Order proceeding with the I&E Complaint proceeding for discovery and hearing process for resolution of the questions of disputed facts and

² With its Answer to Westover’s original Petition, filed January 3, 2022, I&E concurrently filed a Formal Complaint against Westover at Docket No. C-2022-3030251 alleging violations of Act 127 and Part 192 of the Federal pipeline safety regulations, 49 CFR §§ 192.1-192.1015 (Complaint proceeding).

whether the Commission retains jurisdiction over Westover under Act 127. The Commission stated:

It is clear from the allegations in the Amended Petition and I&E's answer thereto, that material facts are in dispute as to the physical makeup of each of Westover's systems, including whether or not the tenants are the ultimate consumers of gas, whether the tenants pay for the gas in rents or directly to the NGDC, and whether any given system is wholly contained within a single building or complex. Since I&E has already filed a Formal Complaint against Westover alleging, inter alia, violations of Act 127, these material fact issues, as well as the various legal issues raised in the Amended Petition should be resolved in the Formal Complaint proceeding at Docket No. C-2022-3030251.

Order Re: Petition for Declaratory Order at 7. The Commission ordered:

That the matter be assigned to the Office of Administrative Law Judge *for resolution of the disputed material facts and legal issues in the ongoing controversy at Docket No. C-2022-3030251, and issuance of a recommended decision.*

Id. at Ordering para. No. 2. (*emphasis added*).

Following the Commission's *Order re: Declaratory Order* in August 2022, the consolidated proceeding was returned to the presiding officer at the Complaint proceeding docket, Deputy Chief Administrative Law Judge, Christopher J. Pell (DCALJ Pell).

The Parties have been actively engaged in discovery involving interrogatories and inspection requests at the Complaint proceeding docket since Westover filed its Answer and New Matter on January 25, 2022.

On October 25, 2022, DCALJ Pell issued an order addressing competing motions to compel discovery. *Interim Order Addressing Motions to Compel Filed by Westover Property Management L.P. and the Bureau of Investigation and Enforcement* (Order entered October 25, 2022) (*DCALJ's Interim Order*). The *DCALJ's Interim Order* directed Westover to comply with I&E's request for Interrogatories by November 14, 2022.

On October 28, Westover filed the present Petition seeking interlocutory review and answer to material Questions and seeking a stay of proceeding.

As previously noted, on November 7, 2022, Westover filed its Brief in Support of and I&E filed its Brief in Opposition to the Petition.³

On November 9, 2022, Westover filed a Petition of Westover Property Management Company, L.P d/b/a Westover Companies for Leave to File a Brief Response to the Bureau of Investigation and Enforcement's Material Question, and for Expedited Ruling on this Petition.⁴

³ In its Brief, I&E offered a counter statement of the material question and requested that the Commission answer I&E's Material Question in the affirmative.

⁴ For the reasons stated *infra.*, we shall decline to answer Westover's Material Questions and therefore shall not address I&E's counter statement of the Material Question. Therefore, Westover's request for leave to reply to I&E's counter statement of the Material Questions is deemed moot.

III. Discussion

A. Legal Standards

As a preliminary matter, we note that any issue we do not specifically delineate shall be deemed to have been duly considered and denied without further discussion. The Commission is not required to consider expressly or at length each contention or argument raised by the parties. *Consolidated Rail Corp. v. Pa. PUC*, 625 A.2d 741 (Pa. Cmwlth. 1993); *also see, generally, University of Pennsylvania v. Pa. PUC*, 485 A.2d 1217 (Pa. Cmwlth. 1984).

Generally, Petitions for Interlocutory Review are not favored, as the preferred approach is to permit proceedings to move forward in the normal course to provide all parties, the presiding officer, and the Commission with a full opportunity to develop the record, brief issues, and present arguments at each stage. *Re: Philadelphia Gas Works Universal Service and Energy Conservation Plan*, Docket No. M-00072021 (Order entered October 23, 2009) at 3. The Commission's Regulations provide:

§ 5.301. Interlocutory review generally.

(a) The Commission will not permit interlocutory review of rulings made by a presiding officer during the course of proceedings, except as permitted by the act and as specified in this subchapter.

52 Pa. Code Section 5.301.

However, during a proceeding and pursuant to the provisions of 52 Pa. Code § 5.302, a party may seek interlocutory review and answer to a material question which has arisen or is likely to arise. Section 5.302 provides:

5.302. Petition for interlocutory Commission review and answer to a material question.⁵

(a) During the course of a proceeding, a party may file a timely petition directed to the Commission requesting review and answer to a material question which has arisen or is likely to arise. The petition must be in writing with copies served on all parties and the presiding officer and state, in not more than three pages, the question to be answered and the compelling reasons why interlocutory review will prevent substantial prejudice or expedite the conduct of the proceeding.

52 Pa. Code Section 5.302 (a).

Under case law construing Section 5.302(a), the “compelling reasons” for interlocutory review are the reasons establishing that such review is *necessary* to either prevent substantial prejudice or to expedite the conduct of the proceeding. In other words, a petition under Section 5.302(a) must allege compelling reasons why any alleged prejudice flowing therefrom could not be rectified during the normal Commission review process. *Joint Application of Bell Atlantic Corp. and GTE Corp.*, Docket No. A-310200F0002, *et al.* (Order entered June 14, 1999); *Pa. PUC v. Frontier Communications of Pa. Inc.*, Docket No. R-00984411 (Order entered February 11, 1999); *In re: Knights Limousine Service, Inc.*, 59 Pa. P.U.C. 538 (1985).

⁵ We note that because Westover challenges the directive of the *DCALJ*'s *Interim Order* to comply with I&E's discovery request, Westover seeks interlocutory review of discovery matters, which should be raised if at all, pursuant to the procedures under 52 Pa. Code Section 5.304 (pertaining to interlocutory review of discovery matters). The fact that Westover's basis for challenging discovery is Commission *jurisdiction* of Westover does not remove the Petition from the category of “discovery matters,” particularly where discovery is ongoing because the Commission has determined there are material facts in dispute which go to the issue of jurisdiction. However, because we conclude, *infra.*, there is no compelling reason for review, the failure to follow the Section 5.304 procedures is moot.

In reviewing Section 5.302(a) petitions, the Commission has stated that it does not routinely grant interlocutory review except upon a showing by the petitioner of extraordinary circumstances or compelling reasons. Such a showing may be made by a petitioner by establishing that, without such interlocutory review, some harm would result which would not be reparable through normal avenues, that the relief sought should be granted now, rather than later, and that granting interlocutory review would prevent substantial prejudice or expedite the proceeding. *Pa. PUC v. Philadelphia Gas Works*, Docket Nos. P-2009-2097639 and R-2009-2139884 (Order entered April 15, 2010). The Commission has also found that expenditure of resources in producing discovery does not constitute substantial prejudice and is not a compelling reason for review. *Saucon Creek Associates, Inc. v. Borough of Hellertown*, 69 Pa. P.U.C. 467, Docket No. C-00882119 (Order entered April 28, 1989) (*Saucon Creek*).

Based on the Commission's determination whether interlocutory review is necessary to either prevent the alleged substantial prejudice or expedite the proceedings, the Commission will then grant relief, if any, under 52 Pa. Code § 5.303 (a), which provides:

§ 5.303. Commission action on petition for interlocutory review and answer.

(a) Within 30 days of receipt of the petition, the Commission will, without permitting oral argument, do one of the following:

- (1) Continue, revoke or grant a stay of proceedings if necessary to protect the substantial rights of the parties.
- (2) Determine that the petition was improper and return the matter to the presiding officer.
- (3) Decline to answer the question.
- (4) Answer the question.

52 Pa Code Section 5.303 (a)(1)-(4).

Therefore, for a Section 5.302(a) petition for interlocutory review to be properly before the Commission for consideration, the pertinent consideration is whether the asserted reasons establish that interlocutory review is *necessary* under the circumstances. Based on the Commission’s determination whether interlocutory review is necessary to either prevent the alleged substantial prejudice or expedite the proceedings, the Commission will then either: (1) continue, revoke or grant a stay of the proceedings, if necessary; (2) determine that the petition was improper and return the matter to the presiding officer; (3) decline to answer the question; or (4) answer the question. 52 Pa. Code § 5.303(a)(1)-(4).

B. Position of the Parties

1. Westover’s Position in Support of Interlocutory Review

Westover asserts that the Commission should review and answer the Material Questions in the negative because by so doing, the Commission would resolve the question of Commission jurisdiction under Act 127. Westover asserts that if the Commission concludes it lacks jurisdiction over Westover under Act 127, the Complaint proceeding will be “expedited” because it will either conclude (for lack of jurisdiction) or be substantially more limited in scope. Westover further asserts that the Commission should answer the Material Questions, otherwise the parties and the Commission will be required to “devote substantial resources litigating these cases based on specific facts concerning each Westover apartment complex.” Finally, Westover asserts the Material Questions present purely legal issues involving no disputed facts. Westover Brief at 3.

Westover argues, *inter alia*, that as a matter of law, Westover’s gas systems are not “Master Meter Systems” as contemplated under pipeline safety laws, because Westover’s systems are located only within Westover’s apartment complexes and serve only customers within Westover’s apartment complexes. Further, Westover asserts that

Westover's gas systems do not meet the definition of "Master Meter Systems" because Westover does not distribute gas "in or affecting interstate commerce." Westover argues that the Commission should rule as a matter of law that Act 127 does not apply to the owner/operator of an apartment complex, where the complexes purchase gas from a Commission-regulated public utility and resells it to consumers. Westover Brief 4-12.

Finally, Westover argues that the Commission should immediately stay this proceeding pending disposition of the Petition. Westover avers that the relief of a stay of proceeding afforded under Commission Regulations at Section 5.303(a)(1) should be granted immediately, pending the Commission's consideration of the Petition. Westover avers that it satisfies the standard for stay pending review of the Section 5.302 Petition, as set forth in *Pa. PUC v. Process Gas Consumers Group*, 467 A.2d 805 (Pa. 1983) (*Process Gas*). Westover asserts that it will suffer "irreparable harm" because the DCALJ construed the Commission's *Order Re: Declaratory Order* as requiring the Parties to litigate the threshold jurisdictional question along with all other issues in the case. As a result, Westover avers it will suffer by being required to comply with extensive discovery of whether it complied with the pipeline safety laws, which Westover argues are inapplicable to Westover. Westover seeks a definitive ruling on jurisdiction, prior to proceeding with litigation. Westover Brief at 12-14

2. I&E's Position in Opposition to Interlocutory Review

I&E argues that the Commission should decline to answer Westover's Material Questions, as stated, since they are predicated upon a disputed material fact concerning whether Westover "consumes" the natural gas in its pipeline distribution facilities, which it purchases from regulated public utilities and then resells to the tenants at Westover's apartment complexes. I&E asserts that "whether Westover is the ultimate consumer of the gas" is one of the disputed issues currently subject to the on-going discovery process before DCALJ Pell. I&E asserts that the Parties should be permitted to

present evidence during the evidentiary hearing concerning Westover's alleged consumption of natural gas at its apartment complexes, for DCALJ Pell to render a determination in the disputed facts. I&E Brief at 9-10.

I&E argues that, rather than answer Westover's Material Questions, the Commission should answer I&E's counter statement of the Material Questions, that:

Do the Federal pipeline safety laws and regulations, as adopted by Act 127, include the regulation of intrastate natural gas master meter systems operated at apartment complexes?

Suggested answer: Yes.

Id. at 11. I&E asserts that its proposed Material Question is purely legal, removes the assumed facts which fatally flaw Westover's Material Questions and, if answered, would establish whether the Federal pipeline safety laws and regulations, as adopted by Act 127, apply to master meter systems located at apartment complexes in Pennsylvania. I&E asks that the Commission address this Material Question to resolve this threshold jurisdictional issue. I&E Brief at 11-14.

Finally, I&E opposes Westover's request to stay this proceeding pending disposition of the Petition, which would delay litigation and disposition of this important matter of public safety. I&E further argues that a stay would interfere with scheduled discovery including I&E inspections of Westover pipeline facilities, and Westover's responses to I&E's Set I Interrogatories, which are due on November 14, 2022. I&E Brief at 14-15.

3. Disposition of the Petition

Upon review, as discussed more fully, *infra.*, we find that Petitioner's stated reasons for review are not compelling. Therefore, we shall decline to answer the questions, consistent with Section 5.303(a)(3), and deny the request for stay.

As the Petitioner seeking interlocutory review under Section 5.302(a), Westover has the burden to establish compelling reasons for our review, before the Commission will determine what relief, if any, is warranted in the circumstances. As previously noted:

the "compelling reasons" for interlocutory review are the reasons establishing that such review is *necessary* to either prevent substantial prejudice or to expedite the conduct of the proceeding. In other words, a petition under Section 5.302(a) must allege compelling reasons why any alleged prejudice flowing therefrom could not be rectified during the normal Commission review process.

See, Joint Application of Bell Atlantic Corp. and GTE Corp., Docket No. A-310200F0002, *et al.* (Order entered June 14, 1999); *Pa. PUC v. Frontier Communications of Pa. Inc.*, Docket No. R-00984411 (Order entered February 11, 1999); *Knights Limousine*, 59 Pa. P.U.C. 538 (1985).

The Petitioner's allegation of "compelling reasons" for justifying interlocutory review, are stated as follows:

In this case, interlocutory review will expedite the conduct of the proceeding by resolving several potentially dispositive questions. If the Commission finds that Westover is not subject to Act 127, or does not own/operate a "master meter system," the Commission would lack jurisdiction over Westover's gas facilities... . Even if these cases are not concluded, this proceeding would be expedited because the

number of issues that the parties would be required to litigate could be substantially reduced... . Without a Commission order on the Material Questions, the parties and the Commission will need to devote substantial resources litigating these cases based on the specific facts concerning each Westover apartment complex. The Material Questions present purely legal issues involving no disputed material facts.

Westover Brief at 3 (citation and reference omitted).

In summary, Westover argues that the material questions pertaining to Commission jurisdiction over Westover will expedite the proceeding by either concluding them outright, for lack of jurisdiction, or otherwise substantially narrowing the scope of the litigation, and thereby avoid the expenditure of substantial resources in litigation of the issues. *Id.* By its Petition, Westover seeks to halt discovery pending the Commission's determination on the question of jurisdiction.

We note that Westover's current Petition reiterates the position Westover advocated in favor of its prior Petition for Declaratory Order. There, as here, Westover sought a Commission Order finding that the Commission lacks jurisdiction over Westover under Act 127. *See Order Re: Petition for Declaratory Order* at 7. The Commission expressly found that the question of jurisdiction turned on the disputed facts regarding Westover's facilities, and should be determined in the first instance by the DCALJ, following full discovery and litigation of the issues by the parties, ordering:

That the matter be assigned to the Office of Administrative Law Judge *for resolution of the disputed material facts and legal issues in the ongoing controversy at Docket No. C-2022-3030251, and issuance of a recommended decision.*

Id. at Ordering para. No. 2. (*emphasis added*).

Since the issuance of the Commission's *Order Re: Petition for Declaratory Order*, the parties have engaged in discovery, which is ongoing. We note that at this point, the DCALJ has yet to make any findings based upon the disputed facts. We also note that, contrary to the Petitioner's assertion, the Petitioner's Material Questions are predicated upon the very facts in dispute, *i.e.*, the facts regarding the ultimate consumer of gas at Westover's gas facilities which may establish whether the Commission retains jurisdiction over Westover under Act 127. *See* I&E Brief at 9-10.

As a petition for interlocutory review which challenges the Commission's jurisdiction during the discovery phase, disposition of Westover's Petition falls squarely under the Commission's prior ruling, *Saucon Creek*, 69 Pa. P.U.C. 467, Docket No. C-00882119 (Order entered April 28, 1989).

In *Saucon Creek*, the Commission declined to answer the proffered material question which sought an answer that the Commission lacked jurisdiction over the Borough of Hellertown's water service based on the Borough's assumed facts in the case. The Commission noted that the material question was predicated upon assumed facts which were actively disputed. The Commission considered and rejected the Borough's asserted "compelling reasons" for interlocutory review, which were set forth as follows:

Therefore, extensive discovery and hearings in this matter will be required if Saucon Creek is permitted to continue with this complaint. Accordingly, resources of Hellertown and this Commission will be devoted to determining the outcome of this complaint, if Saucon Creek is permitted to proceed. The expenditure of such resources constitutes substantial prejudice to Hellertown and to this Commission, and such prejudice cannot be cured by the Commission, at the conclusion of this proceeding, even if the [C]ommission then dismisses this proceeding for lack of jurisdiction.

Saucon Creek at 1989 Pa. PUC LEXIS 62, *5.

In rejecting the Borough's asserted "compelling reasons," the Commission held:

The question of jurisdiction turns on the facts of each case, and such facts can only be ascertained through the discovery and hearing process. The Administrative Law Judge can prevent abuse of the discovery and hearing process, and can and should initially rule on questions of jurisdiction, especially where, as here, jurisdictional facts are in dispute[.]

Id. Having concluded the Borough failed to assert any compelling reason for review, the Commission declined to answer the material question and returned the matter to the presiding ALJ for the discovery and hearing process. *Id.*

In the present case, Westover's Petition, like that in *Saucon Creek*, seeks a ruling on the issue of jurisdiction predicated upon jurisdictional facts which are in dispute, *i.e.*, the circumstances of Westover's gas facilities. As the Commission found in denying Westover's Petition for Declaratory Order, and I&E noted, the facts surrounding Westover's gas facilities and transactions with residents of the properties remain in dispute. Further, the "compelling reasons" asserted by Westover mirror those asserted and rejected in *Saucon Creek*, that a ruling on jurisdiction would conclude the proceeding and prevent the expenditure of resources to comply with discovery and hearing.

We find that the holding in *Saucon Creek* is squarely on point with our consideration of Westover's Petition. We conclude that Westover, like the Borough in *Saucon Creek*, predicates its material questions upon disputed facts and further fails to assert any compelling reasons for our review. Accordingly, we shall decline to answer the material questions, and further, as discussed below, shall deny the Petitioner's request for immediate stay of proceeding.

C. Request for Immediate Stay of Proceeding

The Petitioner titled its Petition to include a request for “immediate stay of proceeding.” Petition at 1. As a procedural matter, a request for “immediate stay of proceeding,” sought under Section 5.302, would be relief granted, if at all, pursuant to the Commission’s ultimate disposition of the interlocutory review petition, under 52 Pa. Code Section 5.303(a)(1), rather than *pending* disposition of the merits of the interlocutory petition. As the present Petition is interlocutory pursuant to Section 5.302, we have not considered the request for immediate stay pending disposition of the merits of the Petition. We note that the Petitioner could have sought an immediate stay of proceeding for “good cause” shown, pending disposition of the merits of Petition by motion under 52 Pa. Code § 1.15 (pertaining to extensions of time and continuances), but did not do so. In any event, for the same reasons we conclude there are no compelling reasons for review, we would also have concluded no “good cause” exists for stay pending disposition of the merits of the Petition.

Finally, we note that the Petitioner argues a stay is warranted under the standard set forth under *Pa. PUC v. Process Gas Consumers Group*, 467 A.2d 805 (Pa. 1983) (*Process Gas*). Westover Brief at 12-14. However, the *Process Gas* standard is applicable to a request for stay pending *appeal* and always involves a situation in which the merits of the dispute have been fully considered in an adversary setting and a final decree rendered. The present Petition is interlocutory, the proceeding remains in the discovery phase, and no final decree has been entered. Therefore, the Petitioner’s reliance on *Process Gas* is inapposite.

IV. Conclusion

Based on our review of the Petition, the positions of the Parties, and the applicable law, we find that Westover fails to state any compelling reason for review. Therefore, we shall decline to answer the Material Questions and deny the request for stay of proceeding; **THEREFORE,**

IT IS ORDERED:

1. That the Petition for Interlocutory Review and Answer to Material Questions and For Immediate Stay of Proceeding filed on October 28, 2022, by Westover Property Management Company, L.P. D/B/A Westover Companies in the above-captioned proceeding be, and hereby is, not answered.

2. That the Petition of Westover Property Management Company, L.P. d/b/a Westover Companies for Leave to File a Brief Response to the Bureau of Investigation and Enforcement's Material Question, and for Expedited Ruling on this Petition filed on November 9, 2022, is denied as moot.

3. That this matter be returned to the presiding officer, Deputy Chief Administrative Law Judge Christopher P. Pell, consistent with this Opinion and Order.

BY THE COMMISSION

A handwritten signature in black ink, appearing to read "Rosemary Chiavetta". The signature is fluid and cursive, with the first letter of each word being significantly larger and more stylized.

Rosemary Chiavetta
Secretary

(SEAL)

ORDER ADOPTED: November 22, 2022

ORDER ENTERED: November 22, 2022