July 3, 2023

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VIA E-FILING

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street
Harrisburg, PA 17120

Re: Pennsylvania Public Utility Commission, Bureau of Investigation and Enforcement v. Westover Property Management Company, L.P.; Docket Nos. C-2022-3030251 and P-2021-3030002

Main Brief of Westover Property Management Company, L.P. d/b/a Westover Companies

Dear Secretary Chiavetta:

Enclosed for filing with the Pennsylvania Public Utility Commission please find the Main Brief of Westover Property Management Company, L.P. d/b/a Westover Companies. Copies have been served as shown on the enclosed certificate of service.

Please contact me if you have any question or concern. Thank you for your attention to this matter.

Sincerely,

COZEN O'CONNOR

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DPZ/kmg
Enclosures
cc: Deputy Chief Administrative Law Judge Christopher P. Pell
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Per Certificate of Service
Alexander Stefanelli, CFO, Westover Companies
Peter Quercetti, Vice President of Operations Management, Westover Companies

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Pennsylvania Public Utility Commission, Bureau of Investigation and Enforcement	:	
v.	:	Docket Nos. C-2022-3030251 P-2021-3030002
Westover Property Management Company, L.P. d/b/a Westover Companies	:	

CERTIFICATE OF SERVICE

I hereby certify that I have this 3rd day of July, 2023 served the foregoing **Main Brief of Westover Property Management Company, L.P. d/b/a Westover Companies**, 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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BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Administrative Law Judge
Christopher P. Pell

Pennsylvania Public Utility Commission,	:	
Bureau of Investigation and Enforcement	:	
	:	Docket Nos. C-2022-3030251
v.	:	P-2021-3030002
	:	
Westover Property Management Company, L.P.	:	

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AND NOW COMES Westover Property Management Company, L.P., d/b/a Westover Companies ("Westover") to submit this Main Brief pursuant to 52 Pa. Code §§ 5.501 and 5.502, and the Briefing Order issued in this matter on May 15, 2023, by Deputy Chief Administrative Law Judge Christopher P. Pell (the "ALJ"). On June 13, 2023, Westover and the Bureau of Investigation and Enforcement ("I&E") of the Pennsylvania Public Utility Commission ("Commission")[1] filed a Joint Petition for Partial Settlement (the "Partial Settlement") of these matters. The Partial Settlement includes a Joint Stipulation of Facts ("Stipulation"). Partial Settlement, Attachment A.

In the Partial Settlement, the Joint Petitioners agreed to ask the ALJ and the Commission to answer several specific legal questions (the "Litigated Issues"). All other issues in these proceedings have either been resolved or waived in the Partial Settlement. Westover's Statement in Support of the Partial Settlement contends that the Partial Settlement is in the public interest and should be approved without modification. In this Main Brief, Westover will address the Litigated Issues.

For the reasons discussed below, Westover respectfully requests that the ALJ recommend, and that the Commission:

(1) dismiss the Complaint filed by I&E at Docket No. C-2022-3030251; and

(2) grant Westover's Petition for Declaratory Order (as amended, the "Petition") at Docket No. P-2021-3030002, and declare that the Pennsylvania Gas and Hazardous Liquids Pipelines Act, 58 P.S. §§ 801.101 *et seq.* ("Act 127") does not give the Commission authority to regulate the gas facilities at any of the apartment complexes operated by Westover, and identified in the Stipulation (the "Systems").

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[1] Westover and I&E are collectively referred to as the "Joint Petitioners" or the "Parties."

I. PROCEDURAL HISTORY

Westover filed its Petition for Declaratory Order ("Original Petition") on December 13, 2021. The Original Petition explained that Westover owns/operates a number of apartment complexes and commercial properties in Pennsylvania, including some that have gas facilities. The Original Petition asked the Commission to declare that Act 127 did not give the Commission authority to regulate any of the gas facilities owned/operated by Westover in Pennsylvania. Consequently, the Original Petition asked the Commission to find that the Act 127 Registration forms filed by Westover were null and void *ab initio.*

On January 3, 2022, I&E filed an Answer in Opposition to the Original Petition. I&E asked the Commission to deny the Original Petition, deem Westover a "pipeline operator" as defined in Act 127, and direct Westover to comply immediately with all applicable laws and regulations related to pipeline safety.

Also on January 3, 2022, I&E filed its Complaint against Westover, alleging that Westover violated certain provisions of Act 127 and the Federal pipeline safety regulations, 49 CFR Part 192. Among other things, I&E asked the Commission to order Westover to: comply with Act 127 and Part 192 "now and on a going-forward basis" and order Westover to pay a civil penalty of $200,000.

Westover filed its Answer and New Matter on January 25, 2022. Westover alleged that Act 127 does not give the Commission authority to regulate any of the gas facilities owned/operated by Westover, in part, because none of those Systems are "master meter systems" as defined in the Federal pipeline safety regulations. I&E filed its Reply to New Matter on February 14, 2022.

On May 16, 2022, Westover filed its Amended Petition for Declaratory Order ("the Amended Petition"). The Amended Petition included additional facts about the gas facilities at the apartment complexes named in the Complaint and on Westover's Act 127 Registration forms. The Amended Petition asked that the Commission declare that Act 127 did not give the Commission authority to regulate any of those gas facilities. The Amended Petition again asked that the Commission declare that Westover's Act 127 Registration forms were null and void *ab initio*. On June 6, 2022, I&E filed its Answer in Opposition to the Amended Petition. I&E again asked the Commission to deem Westover a "pipeline operator" as defined in Act 127 and to direct Westover to comply immediately with all applicable laws and regulations related to pipeline safety. In the alternative, I&E asked the Commission to defer outstanding issues of material fact to the Complaint.

In an Opinion and Order entered on August 25, 2022, the Commission consolidated the Petition with the Complaint. The Commission concluded that the Parties disputed material facts. As a result, the Commission assigned the consolidated cases to the Office of Administrative Law Judge for evidentiary proceedings and a recommended decision.

A telephonic prehearing conference was held on October 5, 2022. On October 28, 2022, Westover submitted a Petition for Review and Answer to Material Questions and for Immediate Stay of Proceeding ("Petition for Interlocutory Review"). The Petition for Interlocutory Review asked the Commission to answer the following material questions:

> 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 for Interlocutory Review p. 1.

On November 7, 2022, Westover filed a Brief in Support of its Petition for Interlocutory Review. Also on November 7, 2022, I&E filed a Brief in Opposition to the Petition for Interlocutory Review. I&E's Brief asked the Commission to answer the following Material Question: "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?" On November 9, 2022, Westover requested an opportunity to file a brief responding to the Material Question stated in I&E's Brief.

In an Opinion and Order dated November 22, 2022, the Commission denied Westover's request for an opportunity to file a brief responding to the Material Question in I&E's Brief. The Commission also declined to answer the material questions stated in Westover's Petition for Interlocutory Review or I&E's Brief in Opposition to the Petition for Interlocutory Review, finding that material facts remained in dispute.

Following extensive discovery and the submission of direct and rebuttal testimony, the Parties held an off-the-record conference call with the ALJ on April 28, 2022. They advised the ALJ that they had reached a partial settlement in principle, which included the submission of the Stipulation. Based on the Partial Settlement and Stipulation, the Parties asked the ALJ to cancel the evidentiary hearings scheduled for May 3 and 4, 2023. The ALJ granted this request.

On May 15, 2023, the ALJ issued his Briefing Order, directing the Parties to file their Main Briefs on July 3, 2023 and their Reply Briefs on August 3, 2023.

II. STATEMENT OF THE CASE

Westover is a property management company that operates apartment complexes and commercial properties (such as office buildings) in Pennsylvania. Stipulation ¶ 2. As of January 1, 2023, Westover operated approximately 48 apartment complexes and nine commercial

properties in Pennsylvania. Westover Statement 1 p. 2. At some of these properties, natural gas is used to heat units in the buildings, to produce hot water, and/or to cook.

This case, however, only involves the gas facilities at certain Westover-operated apartment complexes. These apartment complexes are identified in the Stipulation as follows:[2]

Black Hawk Apartments

Carlisle Park Apartments

Concord Court Apartments

Country Manor Apartments

Fox Run Apartments

Gladstone Towers Apartments

Hillcrest Apartments

Jamestown Village Apartments

Lansdale Village Apartments

Lansdowne Towers Apartments

Main Line Berwyn Apartments

Mill Creek Village I Apartments

Mill Creek Village II Apartments

Norriton East Apartments

Oak Forest Apartments

Paoli Place Apartments – North (Buildings A-K)

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[2] In the Partial Settlement, the Joint Petitioners agreed that Westover is not a pipeline operator, pursuant to Act 127, with respect to Paoli Place – South Valley Townhomes and Willow Run. Partial Settlement ¶ 7.A.1. Consequently, this Brief will not discuss the gas facilities at those apartment complexes.

Paoli Place Apartments – North (Buildings L-R)

Paoli Place Apartments – South (Buildings A-D)

Paoli Place Apartments – South (Buildings E-H)

Park Court Apartments

Valley Stream Apartments

Woodland Plaza Apartments

The facts at each of these Systems are outlined in detail in the Stipulation, and will not be repeated here. As will be discussed further in the Argument Section of this Brief, the Systems at these apartment complexes are similar in some respects. For example, the System at each apartment complex is located entirely within the complex. Stipulation ¶¶ 8, 14, 19, 25, 31, 38, 44, 48, 52, 56, 60, 65, 70, 75, 80, 86, 90, 94, 98, 103, 108, and 113. *See also*, Westover Exhibits PQ-3, 5 and 7. None of the Systems serves customers outside of the properties that Westover manages. Westover Statement No. 1 p. 6; Westover's Motion for Summary Judgment Exhibit 2 p. 1 (Affidavit of Peter Quercetti).

In addition, at each Westover System, the NGDC delivers the gas to a point or points within Westover's apartment complexes in Pennsylvania and the gas is used on the grounds of that apartment complex in Pennsylvania, without the gas ever crossing a state line. Stipulation ¶¶ 7, 13, 18, 24, 30, 35, 42, 47, 51, 55, 59, 64, 69, 74, 79, 85, 92, 93, 97, 102, 107, 112; **Westover Exhibits PQ-**2, 4, 8, 9, 10, 12, 13, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 31, 32, 34, 35, 37 (**CONFIDENTIAL**); Westover's Motion for Summary Judgement Exhibits 3, 5, 6 and 9 (**CONFIDENTIAL**). Finally, at each apartment complex except one, Westover: (a) receives gas from the relevant NGDC and (b) uses the gas in its own central boiler at the complex and/or distributes it to building occupants. Stipulation ¶¶ 7-9, 13-15, 18-20, 24-26, 30, 35, 39, 42-43, 47,

51, 55, 59, 61, 64, 66, 69, 71, 74, 76, 79, 81, 85, 87, 89, 91-93, 95, 97, 99, 102, 104, 107, 109, 111, 112, 114.

The Systems are different in many respects, however. At one System (Paoli Place – North (Buildings L-R)), Westover does not purchase gas from the NGDC; building occupants purchase gas directly from the NGDC. Stipulation ¶ 92. At some others (Black Hawk, Concord Place and Lansdale Village), Westover consumes all of the gas it purchases from the NGDC; Westover does not distribute any gas to building occupants. Stipulation, ¶¶ 9, 20, 52. At the remaining Systems identified in the Stipulation, Westover resells some or all of the gas to building occupants and supplies that gas to them. Stipulation ¶¶ 13, 26, 30, 39, 43, 48, 55, 61, 66, 71, 76, 81, 87, 95, 99, 104, 109, 114.

Due to the variety of fact patterns at the different apartment complexes, this Brief will discuss the facts of each System below, when analyzing whether the Commission has authority to regulate the Systems.

III. LEGAL STANDARDS

I&E's Complaint is governed by 66 Pa. C.S. § 701. Westover's Petition is governed by 66 Pa. C.S. § 331(f) and 52 Pa. Code § 5.42. The issuance of a declaratory order is subject to the Commission's sound discretion and is employed to resolve actual controversies or remove uncertainty. *Application of the City of Chester for the approval of the alteration of six (6) at-grade crossings where the city streets cross, at grade, the track of Consolidated Rail Corporation in the City of Chester, Delaware County*, Docket No. A-2012-2298192 (Order entered Aug. 21, 2014) at 5. Declaratory orders carry the same effect as other Commission orders and are appealable to the Commonwealth Court of Pennsylvania as final adjudications. *Professional Paramedical Services, Inc. v. Pa. Pub. Util. Comm'n*, 525 A.2d 1274 (Pa. Cmwlth. 1987).

Normally, on a Petition for Declaratory Order, the Commission accepts as true the facts alleged in the Petition. This case, however, is a contested proceeding that was referred to the Office of Administrative Law Judge for adjudication and the preparation of a recommended decision.

The proponent of a rule or order bears the burden of proof pursuant to Section 332(a) of the Pennsylvania Public Utility Code ("Code"). 66 Pa. C.S. § 332(a). Consequently, Westover bears the burden of proof on its Petition and I&E bears the burden of proof on its Complaint.

The "burden of proof" is composed of two distinct burdens: the burden of production and the burden of persuasion. *Hurley v. Hurley*, 754 A.2d 1283, 1285-1286 (Pa. Super. 2000). The burden of production, also called the burden of producing evidence or the burden of coming forward with evidence, determines which party must come forward with evidence to support a particular proposition. This burden may shift between the parties during the course of a proceeding. If the party with the burden of production fails to introduce sufficient evidence, the opposing party is entitled to receive a favorable ruling. Once the party with the initial burden of production introduces sufficient evidence to make out a *prima facie* case, the burden of production shifts to the opposing party. If the opposing party introduces evidence sufficient to balance the evidence introduced by the party having the initial burden of production, the burden then shifts back to the party who had the initial burden to introduce more evidence favorable to its position. The burden of production goes to the legal sufficiency of a party's case.

Having passed the test of legal sufficiency, the party with the burden of proof must then bear the burden of persuasion to be entitled to a verdict in its favor. "[T]he burden of persuasion never leaves the party on whom it is originally cast, but the burden of production may shift during

the course of the proceedings." *Riedel v. County of Allegheny*, 633 A.2d 1325, 1329 n. 11 (Pa. Cmwlth. 1993).

To establish a sufficient case and satisfy its burden of proof, the party with the burden of proof must show, by a preponderance of the evidence, that it is entitled to the relief it is seeking. *Samuel J. Lansberry, Inc. v. Pa. Pub. Util. Comm'n*, 578 A.2d 600, 602 (Pa. Cmwlth. 1990), *allocatur denied*, 602 A.2d 863 (Pa. 1992). In other words, that party's evidence must be more convincing, by even the smallest amount, than that presented by the other party. *Se-Ling Hosiery, Inc. v. Margulies*, 70 A.2d 854, 856 (Pa. 1950). Additionally, the Commission's decision must be supported by substantial evidence in the record. More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. *Norfolk & Western Ry. Co. v. Pa. Pub. Util. Comm'n*, 413 A.2d 1037, 1047 (Pa. 1980).

IV. STATEMENT OF THE QUESTIONS

In the Partial Settlement, the Parties agreed to litigate the following issues:[3]

A. Whether Act 127 applies to the owner or operator of an apartment complex which owns or operates natural gas facilities located downstream from an NGDC?

Suggested Answer: No. Before Act 127 was enacted, the construction, operation and maintenance of fuel gas piping systems at buildings (including apartment buildings) was regulated by the Department of Labor and Industry ("L&I") and municipalities pursuant to the Pennsylvania Construction Code Act (the "Construction Code"). Act 127 did not take regulatory authority away

[3] I&E's Rebuttal Testimony and the Partial Settlement modified the relief I&E is seeking in this proceeding. I&E no longer asks the Commission to impose a civil penalty on Westover. I&E Statement 1-R p. 10. The Partial Settlement also states that the Parties agree that a civil penalty should not be imposed on Westover. Partial Settlement ¶ 7.A.2. The Partial Settlement asks the ALJ and the Commission to resolve certain legal questions (essentially limited to the threshold issue of whether the Commission has authority to regulate the Systems). I&E has essentially waived the allegation that Westover violated specific provisions of Act 127 and/or the Federal pipeline safety laws. Therefore, this Brief will not address that issue.

from L&I and municipalities and give it to the Commission. Instead, Act 127 filled a regulatory gap affecting pipelines carrying Marcellus Shale gas across the Commonwealth.

B. Whether the natural gas system at any apartment complex identified in the Stipulation is a "master meter system" as defined in 49 CFR § 191.3?

Suggested Answer: No. In order to be a "master meter system," a natural gas system must satisfy all the elements of a "master meter system" as defined in 49 CFR § 191.3. No System satisfies all elements of that definition.

1. Are Westover's gas facilities within and limited to the apartment complex?

Suggested Answer: Yes. No Westover System is a "master meter system" because no System is "within, but not limited to" the apartment complex.

2. Does Westover purchase gas for resale through a distribution system and supply it to the ultimate consumer?

Suggested Answer: The System at Paoli Place - North (Buildings L-R) is not a "master meter system" because Westover does not purchase any gas; building occupants are customers of the NGDC. In addition, the Systems at Black Hawk, Concord Court and Lansdale Village are not "master meter systems" because Westover does not resell and supply the gas to anyone; Westover is a customer of the NGDC. Westover consumes the gas and distributes heat and/or hot water to building occupants. The Federal gas pipeline safety laws do not apply to pipelines that carry hot air or hot water. Finally, at some Systems, Westover purchases gas and resells and supplies some but not all of it to building occupants. To the extent that Westover consumes the gas, these Systems are not "master meter systems" because Westover does not resell the gas and supply it to the ultimate consumer. To the extent that Westover resells and supplies the gas to the ultimate consumer, these Systems are not "master meter systems" for reasons discussed elsewhere in this Main Brief (*e.g.,* those portions of Westover's Systems are within and

limited to the apartment complex, are entirely or primarily within a single building, and/or do not engage in or affect interstate or foreign commerce).

3. Who is the ultimate consumer of the gas service at the apartment complexes identified in the Stipulation?

Suggested Answer: The "ultimate consumer" of gas, as that term is used in 49 CFR § 191.3, is the party (if any) that purchases and receives gas from the operator of the gas system. At some Westover Systems, the building occupant is the "ultimate consumer" of some or all of the gas purchased by Westover. At other Westover Systems, there is no "ultimate consumer" because Westover does not purchase gas or because Westover does not resell and supply gas to anyone.

4. Does a natural gas system that is exclusively or primarily comprised of interior piping satisfy the definition of a "master meter system"?

Suggested Answer: No. Congress did not intend to regulate gas distribution systems inside a single building in the same way that interstate transmission lines are regulated; the interior lines are not subject to the same weather or other natural conditions as are exterior or underground lines. Moreover, holding that a gas distribution system inside a single building is a "master meter system" would be inconsistent with holding that a system located "within and limited to" an apartment complex is not a "master meter system." Finally, when the General Assembly enacted Act 127, it did not intend to transfer regulatory authority over interior fuel gas piping systems from L&I and municipalities to the Commission. The Systems at Country Manor, Fox Run, Mill Creek Village II, Norriton East, Paoli Place – South (Buildings A-D) and Woodland Plaza are not "master meter systems" because these Systems are exclusively or primarily comprised of interior piping.

5. Under what circumstances does a natural gas system which includes a sub-meter owned by the apartment complex satisfy the definition of a "master meter system?"

Suggested Answer: The presence or absence of a landlord-owned sub-meter does not determine whether any System is a "master meter system." A System is only a "master meter system" if it satisfies every element of the definition of a "master meter system," including but not limited to the requirement that the building occupant pays for the gas through a meter, rent, or other method.

6. At which properties (if any) does Westover distribute gas "in or affecting interstate or foreign commerce?"

Suggested Answer: None. No Westover System is a "master meter system" because Westover does not distribute gas "in or affecting interstate or foreign commerce" at any apartment complex.

V. SUMMARY OF ARGUMENT

A. The Commission Should Exercise its Discretion to Issue a Declaratory Order in these Proceedings

There is no doubt that I&E and Westover continue to disagree as to whether Act 127 empowers the Commission to regulate the Systems. The Commission should resolve that dispute by addressing the Litigated Issues.

B. The Commission Should Find that Act 127 Does Not Give the Commission Authority to Regulate the Owner/Operator of a Gas System at an Apartment Building or Complex Downstream from an NGDC

In 1999, the General Assembly adopted the Construction Code, which empowered L&I and municipalities to regulate the construction, operation and maintenance of fuel gas piping systems at buildings – including apartment buildings. In 2011, the General Assembly enacted Act 127, which gave the Commission authority to regulate gas and hazardous liquids pipelines. Act

127 never explicitly acknowledges the pre-existing Construction Code, so it does not address the interplay between the two regulatory schemes.

Act 127 is ambiguous because it is capable of more than one interpretation: (1) Act 127 gave the Commission authority to regulate all gas and hazardous liquids pipelines, including fuel gas piping systems at buildings, thereby taking regulatory authority away from L&I and municipalities and giving it to the Commission, or (2) Act 127 gave the Commission authority to regulate gas gathering, transmission, and distribution pipelines other than fuel gas piping systems at buildings. To resolve this ambiguity, the Commission must apply the rules of statutory construction.

One rule of statutory construction, 1 Pa. C.S. § 1933, calls for statutes to be read to avoid a conflict. One way to avoid a conflict between the Construction Code and Act 127 is to read the two statutes as applying to different pipelines. The Construction Code can be read as applying to fuel gas pipeline systems at buildings, whereas Act 127 can be read as applying to other gas gathering, transmission, and distribution pipelines. The Construction Code gives L&I and municipalities authority to regulate fuel gas piping systems from the point of delivery to the outlet of the appliance shutoff valves. As a result, L&I and municipalities have authority to regulate the entirety of the Systems. Under this construction of Act 127, the Commission lacks authority to regulate any of the Systems identified.in the Stipulation.

A similar result obtains if Act 127 and the Construction Code are both read as applying to fuel gas piping systems at buildings. If there is an irreconcilable conflict between the two statutes, the Construction Code controls because it is a special provision whereas Act 127 is a general provision. 1 Pa. C.S. § 1933. As a result, the Commission regulates natural gas and hazardous

liquids gathering, transmission, distribution and storage facilities, but an exception to this rule is that L&I and municipalities regulate fuel gas piping systems at buildings.

Additionally, the legislative history of Act 127, and contemporaneous newspaper articles discussing the objectives of Act 127, demonstrate that Act 127 was intended to address a gap in the regulation of pipelines carrying Marcellus Shale gas from wells to markets across Pennsylvania. Act 127 was not intended to address fuel gas pipeline systems at buildings, which were already regulated by L&I and municipalities. Consequently, Act 127 should not be construed as applying to fuel gas pipeline systems at buildings.

C. The Commission Should Find that Act 127 Does Not Apply to Any of the Systems Because No System Satisfies the Definition of a "Master Meter System" in 49 CFR § 191.3

The Federal pipeline safety laws include a lengthy, complicated definition of a "master meter system." 49 CFR § 191.3. In order for the Commission to find that *any* Westover System is a "master meter system," it must find that each element of that definition is satisfied with regard to *that particular* System. Westover has demonstrated, by a preponderance of the evidence, that no System meets every element of the definition of a "master meter system."

1. No Westover System Is a "Master Meter System" Because No System is "Within, but Not Limited to" the Apartment Complex

A "master meter system" is a pipeline system for distributing gas "within, <u>but not limited</u> to" a definable area, such as an apartment complex. 49 CFR § 191.3 (emphasis added). That is, a system must be located partly inside, and partly outside, the pertinent apartment complex. No Westover Systems satisfies this element of the definition of a "master meter system." Every Westover System is within <u>and</u> limited to the definable area of the apartment complex; each System is located entirely within the pertinent apartment complex and does not serve any customers outside the boundaries of the apartment complex.

Since Act 127 expressly adopts federal regulations, the Commission must give effect to every word in the regulations. Additionally, as a creature of the Legislature, the Commission has only the authority given to it explicitly or implicitly by the Legislature. That authority does not include rewriting federal regulations.

Interpretation letters of the Federal Pipeline and Hazardous Materials Safety Administration ("PHMSA"), may be considered by the Commission, but are not controlling on the Commission. PHMSA has not specifically addressed the meaning of the "within but not limited to" portion of the definition of a "master meter system." Even if PHMSA had interpreted Section 191.3 to mean that a "master meter system" must be within and limited to a definable area, that interpretation would not be binding on the Commission because an administrative agency's interpretation of a statute or regulation is not entitled to deference where it is plainly erroneous or inconsistent with the applicable regulation.

Westover's interpretation of Section 191.3 is consistent with a brochure that the Commission has circulated since 2014 answering frequently asked questions about Act 127. Although unofficial statements and opinions by Commission personnel are not binding on the Commission, the Commission should not lightly disregard its own publication that has provided guidance to the regulated community for almost a decade.

2. Several Systems Are Not "Master Meter Systems" (in Whole or in Part) Because Westover Does Not Purchase Gas for Resale Through a Distribution System and Supply it to the Ultimate Consumer

The definition of a "master meter system" views natural gas as a commodity that is purchased by the system operator, who subsequently sells that same commodity to someone else. The customer must pay the system operator for the gas, but the system operator must do more than bill the customer for the commodity; the system operator must actually supply the commodity to the customer through the gas distribution pipeline system.

One Westover System does not meet the definition of a "master meter system" (in whole) because Westover does not purchase gas at all; building occupants buy gas from the NGDC, who supplies the gas directly to them. At this apartment complex, building occupants are customers of the NGDC.

Several additional Westover Systems do not meet the definition of a "master meter system" (in whole) because Westover buys the gas and consumes it in Westover's central boiler to produce heat and/or hot water. Westover is a customer of the NGDC at these Systems. Westover distributes heat and hot water – not gas – to building occupants. The Federal gas pipeline safety laws do not apply to pipelines that only carry hot air or hot water. The dangers presented by these substances are different than the dangers presented by gas. There is no reason to apply the gas pipeline safety laws to pipelines that do not carry gas.

Finally, some Westover Systems do not meet the definition of a "master meter system" (in part) because Westover consumes some of the gas that it purchases from the NGDC. For the reasons discussed above, to the extent that Westover consumes the gas it purchases, rather than reselling and supplying that gas to building occupants, these Systems are not "master meter systems." To the extent that these Systems resell and supply some gas to building occupants, these Systems are not "master meter systems" for reasons discussed elsewhere in this Main Brief. For example, the portions of these Systems that are used to resell and supply gas to building occupants are located within and limited to the definable area of the apartment complex, or are located entirely or primarily within a single building.

3. Who is the "Ultimate Consumer" of the Gas Service at the Apartment Complexes Identified in the Stipulation?

The definition of a "master meter system" requires that the system operator resell and supply gas, through a gas distribution pipeline system, to the "ultimate consumer." 49 CFR

§ 191.3. The "ultimate consumer" therefore is the party to whom the operator resells and supplies gas.

At every System except one, the NGDC supplies gas to Westover through a meter or meters, and Westover pays the NGDC for the gas. To this extent, Westover is the customer of the NGDC. To the extent that Westover resells and supplies gas to building occupants, the building occupants are the "ultimate consumers" (they are the gas customers of the system operator).

At some Systems, there is no "ultimate consumer." For example, there is no "ultimate consumer" for the System at which Westover does not buy gas from the NGDC. At this System, building occupants are simply customers of the NGDC. Similarly, for those Systems at which Westover consumes all of the gas it purchases from the NGDC, there is no "ultimate consumer" (Westover cannot be the "ultimate consumer" because Westover cannot resell and supply gas to itself). The lack of any "ultimate consumers" at these Systems is further proof that these Systems fail to meet the test of a "master meter system."

4. Some Systems are Not "Master Meter Systems" Because the Distribution System is Exclusively or Primarily Comprised of Interior Piping Within a Single Building

Section 191.3 does not explicitly require that a system have underground or exterior piping serving multiple buildings to be a "master meter system." Nevertheless, PHMSA and its predecessor agencies originally took the position that such a requirement is implicit in the definition. They believed that a pipeline system for distributing gas within <u>but not limited</u> to an apartment complex contemplates a system that connects multiple buildings (which would necessitate exterior and/or underground piping). In addition, they believed that Congress did not intend to regulate distribution systems in the absence of a significant amount of external piping serving more than one building.

Over the years, PHMSA has apparently drifted away from this view. The Commission should reject PHMSA's broader interpretation of Section 191.3. When the General Assembly enacted Act 127 without modifying the Construction Code, the General Assembly implicitly recognized that a different regulatory scheme was appropriate for interior gas pipelines as compared to gas pipelines with significant amounts of exterior and/or underground piping.

Additionally, PHMSA's broader definition of a "master meter system" is inconsistent with the requirement that a "master meter system" be within, but not limited, to an apartment complex. In this case, every System that is exclusively or primarily comprised of interior piping inside a single building is located within and limited to the apartment complex. It would be absurd and unreasonable to hold that a system that is exclusively or primarily comprised of interior piping can be a "master meter system," even though it is within and limited to an apartment complex.

Finally, Commission regulations generally require that meters be located outside a building. It would be absurd and unreasonable to hold that the whole panoply of Federal pipeline safety laws applies to an apartment building simply because of a few feet of pipe between an outside meter and the exterior wall of an apartment building.

5. The Presence or Absence of a Sub-Meter Owned by the Apartment Complex Does Not Determine Whether Any Westover System is a "Master Meter System"

The presence or absence of a Westover-owned sub-meter does not determine whether any System is a "master meter system." Instead, it is just one of many factors to be considered in determining whether any System satisfies the test of a "master meter system." This is because the definition of a "master meter system" has multiple elements, each of which must be satisfied for any gas system to be considered a "master meter system."

One element of the test of a "master meter system" is that the gas distribution pipeline system supplies gas to the ultimate consumer, who either purchases the gas directly through a

meter or by other means, such as by rents. The presence or absence of a sub-meter owned by the apartment complex, by itself, is not sufficient to determine whether this element of the test is satisfied. For example, this element of the test could be satisfied, despite the absence of a sub-meter owned by the apartment complex, if the system operator supplies gas to the ultimate consumer, who purchases the gas through rents. To determine if a gas system is a "master meter system," the Commission must do much more than just determine whether a sub-meter owned by the apartment complex is present at the site.

6. No Westover System is a "Master Meter System" Because No System Distributes Gas "In or Affecting Interstate or Foreign Commerce"

One element of the test of a "master meter system" is that the "operator purchases metered gas from an outside source for resale through a gas distribution pipeline system." For the Commission to find that any System is a "master meter system," it must find that Westover is the "operator" of that System.

An operator is defined as "a person who engages in the transportation of gas," and the "transportation of gas" is defined as "the gathering, transmission, or distribution of gas by pipeline, or the storage of gas, in or affecting interstate or foreign commerce." Since this is an element of the definition of a "master meter system," the Commission cannot find that any particular System is a "master meter system" unless it finds, by a preponderance of the evidence, that the System in fact gathers, transmits, distributes, or stores gas in or affecting interstate or foreign commerce. The Commission's finding on this point must be supported by substantial evidence in the record.

There is absolutely no evidence of record to show that Westover's Systems engage in or affect interstate or foreign commerce. To the contrary, the preponderance of the evidence shows that no Westover System engages in or affects interstate or foreign commerce.

Several Westover Systems do not meet this element of the test of a "master meter system" because Westover is not engaged in the gathering, transmission, distribution or storage of gas at these Systems. At these Systems: (a) the NGDC sells gas directly to building occupants, or (b) Westover consumes all of the gas it purchases (Westover does not distribute gas to any third parties).

With respect to each of the remaining Systems identified in the Stipulation, the evidence of record shows: Westover purchases gas from a Commission-regulated NGDC (a transaction in intrastate commerce), the NGDC delivers gas to a point on Westover's property in Pennsylvania, and Westover either consumes that gas in Pennsylvania or distributes it to points on its property in Pennsylvania without the gas crossing a state line. Westover therefore does not gather, transmit, distribute or store gas in interstate commerce.

Westover does not gather, transmit, distribute or store gas that "affects" interstate commerce. Westover's distribution of gas to building occupants does not increase the amount of gas purchased and sold. Additionally, Westover's purchase of gas from the NGDC, and resale of the gas to building occupants, is well downstream of any transaction in interstate or foreign commerce. The amount of gas purchased and resold at any particular System is so small that it does not "affect" any of the upstream transactions. For all of the above reasons, the ALJ should recommend, and the Commission should find, that no Westover System is a "master meter system" as that term is defined in 49 CFR § 191.3.

VI. ARGUMENT

A. The Commission Should Exercise its Discretion to Issue a Declaratory Order in these Proceedings

Section 331(f) of the Code and Section 5.42 of the Commission's regulations provide that the Commission has discretion to issue a declaratory order to terminate a controversy or remove

uncertainty. *Re Duquesne Light Co.*, 1986 Pa. PUC LEXIS 54 at 7 (1986). Clearly, a controversy exists between Westover and I&E regarding the Commission's authority to regulate Westover's Systems pursuant to Act 127. I&E has investigated Westover since November, 2020 for allegedly violating Act 127. I&E Statement 1 p. 4. I&E has asserted that Westover is in violation of Act 127 and Federal pipeline safety laws since at least February 3, 2021. I&E's Complaint ¶ 33. Although Westover has taken some of the actions requested by I&E, it has in good faith disputed the Commission's authority to regulate the Systems. Westover Statement 2 p. 13.

In December 2021, Westover filed its Original Petition, asking the Commission to resolve the issue of whether Westover must comply with Act 127. In response, I&E filed an Answer in Opposition asking the Commission to direct Westover to comply with Act 127 and the Federal pipeline safety laws. In January 2022, I&E filed a Complaint against Westover, alleging that Westover violated Act 127. Westover responded, in part, by denying that the Commission has authority to regulate it as a "pipeline operator" pursuant to Act 127. In May, 2022, Westover amended its Petition, and I&E again filed an Answer in Opposition. Finally, in the Partial Settlement, Westover and I&E asked the Commission to resolve the Litigated Issues.

There can be no doubt that a controversy continues to exist between I&E and Westover, and uncertainty continues to exist, regarding the Commission's authority to regulate Westover's Systems pursuant to Act 127. The Commission should exercise its discretion to resolve that controversy at this time. The Commission should also recognize that the issues presented in this proceeding are capable of repetition because countless other apartment complex owners and operators – as well as universities, colleges, medical centers and shopping centers – throughout Pennsylvania are in the same factual situations.

B. The Commission Should Find that Act 127 Does Not Give the Commission Authority to Regulate the Owner/Operator of a Gas System at an Apartment Building or Complex Downstream from an NGDC

Act 127 gives the Commission general administrative authority to supervise and regulate "pipeline operators" within the Commonwealth. 58 P.S. § 801.501(a). A "pipeline operator" is defined as:

> 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"). I&E contends that Westover is a "pipeline operator" pursuant to Act 127 because Westover is the operator of a "master meter system" as that term is defined in the Federal pipeline safety laws. I&E Complaint p. 4.[4] As explained in Section VI.C. below, no System satisfies every element of that definition.

Nevertheless, Westover respectfully submits that the Commission need not interpret the Federal pipeline safety laws to resolve these proceedings. The Commission should find that, in enacting Act 127, the General Assembly did not intend to take regulatory authority away from L&I and municipalities – which previously had authority to regulate the construction, operation and maintenance of fuel gas pipeline systems at buildings – and instead give that regulatory authority to the Commission.

"When the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit." 1 Pa. C.S. § 1921. In *A.S. v. Pa. State*

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[4] The Commission has adopted certain federal pipeline safety laws and regulations as the minimum safety standards for all natural gas and hazardous liquid public utilities, 52 Pa. Code § 59.33(b), but no System in this case is a public utility as defined in the Code. Consequently, Section 59.33(b) does not give the Commission authority to regulate any of the Systems.

Police, 636 Pa. 403, 419, 143 A.3d 896, 905-906 (Pa. 2016), the Supreme Court of Pennsylvania stated:

> In construing and giving effect to the text, "we should not interpret statutory words in isolation, but must read them with reference to the context in which they appear." *Roethlein v. Portnoff Law Assoc*., 81 A.3d 816, 822 (Pa. 2013), *citing Mishoe v. Erie Ins. Co*., 824 A.2d 1153, 1155 (Pa. 2003). *Accord Commonwealth v. Office of Open Records*, 103 A.3d 1276, 1285 (Pa. 2014) (party's argument that statutory language is ambiguous "depends upon improperly viewing it in isolation;" when language is properly read together and in conjunction with rest of statute, legislative intent is plain).

An act is ambiguous when it is susceptible to more than one reasonable interpretation. *Adams Outdoor Advertising, L.P. v. Zoning Hearing Bd. of Smithfield Twp.*, 909 A.2d 469, 483 (Pa. Cmwlth. 2006). When Act 127 is viewed in the context of related pre-existing statutes, Act 127 is ambiguous because it is susceptible to more than one reasonable interpretation.

In 1999, the Pennsylvania General Assembly enacted the Construction Code, codified at 35 P.S. § 7210.101 *et seq*., which provided for a Uniform Construction Code in Pennsylvania. The Construction Code applies to the construction, alteration, equipment, and maintenance of every building or structure occurring on or after April 9, 2004. 34 Pa. Code § 403.1(a)(1). One purpose of the Construction Code was combat the multiplicity of construction codes in the Commonwealth by adopting a single Uniform Construction Code, 35 P.S. § 7210.101(a)(2) and (3), which would preempt all other construction standards provided by statute, local ordinance, or regulation promulgated by a state or local agency. 35 PS. § 7210.104(d).

Significantly, the Construction Code required L&I to promulgate regulations adopting the International Fuel Gas Code ("IFGC") "as the standard for the installation of piping, equipment and accessories in this Commonwealth." 35 Pa. C.S. § 7210.301(b). *See also* 34 Pa. Code

§ 403.21(a)(4) (adopting the International Fuel Gas Code of 2018 (the "IFGC 2018")[5] as part of the Uniform Commercial Code). The IFGC applies to the installation of fuel gas[6] piping systems and fuel gas appliances. IFGC 2018 § 101.2. The IFGC's coverage for piping systems extends from the point of delivery to the outlet of the appliance shutoff valves. Piping system requirements include design, materials, components, fabrication, assembly, installation, testing, inspection, operation and maintenance. IFGC 2018 § 101.2.2.

The Construction Code created a comprehensive scheme regulating the construction, operation and maintenance of fuel gas piping systems at buildings, including apartment buildings. *Battiste v. Borough of East McKeesport,* 94 A.3d 418, 422 (Pa. Cmwlth. 2014). This regulatory scheme is enforced by L&I and municipalities – not the Commission. 35 P.S. § 7210.501.

In 2011, the General Assembly enacted Act 127, which regulates gas and hazardous liquids pipelines. Act 127 never explicitly discusses fuel gas piping systems within buildings. Act 127, however, repeatedly states that it only applies to pipeline operators or pipeline facilities regulated under Federal pipeline safety laws. *See, e.g.,* 58 P.S. §§ 801.102 (definitions of "pipeline" and "pipeline operator") and 801.103 ("Applicability").

The Federal pipeline safety laws include regulations promulgated under 49 U.S.C. Chapter 601. 58 P.S. § 801.501. These regulations establish extensive requirements for: materials for pipelines, design of pipeline components, welding of steel in pipelines, general construction requirements for transmission lines and mains, requirements for corrosion control, operations, maintenance, qualification of pipeline personnel, and gas distribution pipeline integrity management. 49 CFR Part 192.

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[5] The International Fuel Gas Code of 2018 can be found at: https://codes.iccsafe.org/content/IFGC2018 .

[6] "Fuel gas" is defined in IFGC 2018 § 202 as: "A natural gas, manufactured gas, liquified petroleum gas or mixtures of these gases."

PHMSA, which promulgates and implements federal gas pipeline safety regulations, has construed its regulations defining a "master meter system" as applying to a gas distribution system inside an apartment building, under certain circumstances. *See, e.g.,* PHMSA Interpretation Letter dated September 21, 2020 (attached to the Amended Petition as Appendix 8) and PHMSA Interpretation Letter PI-16-0012 (attached to I&E's Answer in Opposition to the Amended Petition at Exhibit 6).

The question therefore arises: When the General Assembly enacted Act 127, did it intend that Act 127 would apply to fuel gas piping systems within buildings? Act 127 does not acknowledge the pre-existing regulatory scheme created by the Construction Code regulating fuel gas piping systems at buildings. Consequently, Act 127 does not address the interplay between the two regulatory schemes.

Westover respectfully submits that Act 127 is ambiguous because it is susceptible to two reasonable interpretations: (1) L&I and municipalities would continue to regulate fuel gas piping systems within buildings pursuant to the Construction Code, whereas the Commission would regulate other gas and hazardous liquids gathering, transmission, distribution and storage facilities pursuant to Act 127, or (2) Act 127 effectively transferred the regulatory authority of L&I and municipalities over fuel gas pipeline systems within buildings to the Commission, which would regulate those pipelines by applying Federal gas pipeline safety laws.

Given the ambiguity in Act 127, the Commission may resort to the rules of statutory construction. 1 Pa. C.S. § 1901. One rule of statutory construction is 1 Pa. C.S. § 1932, which states that statutes relating to the same persons or things are to be read *in pari materia*. To the extent that the Construction Code and Act 127 pertain to gas distribution pipelines, those statutes relate to the same persons or things.

1 Pa. C.S. § 1933 states:

> Whenever a general provision in a statute shall be in conflict with a special provision in the same or another statute, the two shall be construed, if possible, so that effect may be given to both. If the conflict between the two provisions is irreconcilable, the special provisions shall prevail and shall be construed as an exception to the general provision, unless the general provision shall be enacted later and it shall be the manifest intention of the General Assembly that such general provision shall prevail.

Act 127 and the Construction Code can be construed so that effect can be given to both. The Construction Code can be read as applying to fuel gas piping systems at buildings, whereas Act 127 can be read as applying to other gas and hazardous liquids gathering, transmission, or distribution pipelines and storage facilities. This result would be consistent with the purpose of the Construction Code Act, which was to establish a single code for the construction of buildings throughout the Commonwealth, rather than requiring building owners and developers to comply with a multiplicity of codes (which may not be consistent).

As discussed above, the Construction Code, through the IFGC, covers fuel gas piping systems from the point of delivery to the outlet of the appliance shutoff valves. IFGC 2018 § 101.2.2. The IFGC 2018 § 202 defines "point of delivery," in pertinent part, as:

> For natural gas systems, the point of delivery is the outlet of the service meter assembly or the outlet of the service regulator or service shutoff valve where a meter is not provided. Where a valve is provided at the outlet of the service meter assembly, such valve shall be considered to be downstream of the point of delivery.

Significantly for this case, the Construction Code is enforced by L&I and municipalities, whereas Act 127 is enforced by the Commission. The IFGC gives L&I and municipalities authority to regulate the entirety of Westover's Systems, from the point that Westover takes the gas from the NGDC to the point that Westover uses the gas or delivers it to building occupants. Consequently, the ALJ should recommend, and the Commission should find, that the Commission lacks authority to regulate any portion of the Systems pursuant to Act 127.

If Act 127 is read as applying to fuel gas piping systems at buildings, Act 127 conflicts with the Construction Code because the two statutes give different agencies regulatory authority over the same gas pipes. Act 127 was enacted later in time but, as discussed above, the General Assembly did not manifest an intention that Act 127 would prevail over the Construction Code.

Pursuant to Section 1933, the conflict between the Construction Code and Act 127 should be resolved in favor of the special legislation. In this case, the special legislation is the Construction Code (including the IFGC), which governs the construction, operation and maintenance of fuel gas piping systems at buildings. In contrast, Act 127 governs the construction, operation and maintenance of a broad array of gas and hazardous liquids gathering, transmission, distribution, and storage facilities. Consequently, the ALJ should recommend, and the Commission should find, that Act 127 did not take regulatory authority away from L&I and municipalities and give it to the Commission. Instead, Act 127 established the general rule that the Commission has authority to regulate gas and hazardous liquids gathering, transmission, distribution and storage facilities – but an exception to this rule is that fuel gas piping systems at buildings will continue to be regulated by L&I and municipalities.

This conclusion is reinforced by other rules of statutory construction. "The object of all interpretation and construction of statutes is to ascertain and effectuate the intention of the General Assembly." 1 Pa. C.S. § 1921(a). The General Assembly's intention may be ascertained by considering, among other things:

(1) The occasion and necessity for the statute.

(2) The circumstances under which it was enacted.

(3) The mischief to be remedied.

(4) The object to be attained.

(5) The former law, if any, including other statutes upon the same or similar subjects.

(6) The consequences of a particular interpretation.

(7) The contemporaneous legislative history.

(8) Legislative and administrative interpretations of such statute.

1 Pa. C.S. § 1921(c).

The legislative history of Act 127 clearly explains the occasion and necessity for the statute, the circumstances under which it was enacted, the mischief to be remedied and the object to be attained. **Westover Exhibit AS-1** is an excerpt from the Senate Journal of December 13, 2011. On pages 1340-1341, Senators Baker and Dinniman discuss the purpose of H.B. 344, which became Act 127. They explain that the bill was a reaction to the construction of numerous Marcellus Shale pipelines in Pennsylvania. The bill was intended to address gaps in the regulation of gas lines carrying Marcellus Shale gas from the well to markets all over the Commonwealth. There is no indication that the bill was intended to regulate fuel gas piping systems in buildings (which were already subject to regulation pursuant to the Construction Code).

Senator Baker referred to a series of articles in the *Philadelphia Inquirer* that discuss the problems that would be addressed by H.B. 344. That series of articles can be found at **Westover Exhibit AS-2**.[7] These articles demonstrate that the purpose of Act 127 was to address unregulated

[7] Battle Lines: A Four-Part Series:

"Powerful Pipes, Weak Oversight – Pa.'s shale boom has spurred miles of pipeline construction, often with no saftey rules," *Philadelphia Inquirer* (December 11, 2011);

"Similar Pipes, Different Rules – U.S. safety rules govern many pipelines, but none cover those going from wells in rural areas," *Philadelphia Inquirer* (December 12, 2011);

"'Us vs. Them' in Pa. Gaslands – Pa. looks set to strip cities and towns of the power to restrict wells and pipelines," *Philadelphia Inquirer* (December 13, 2011); and

"Aging Pipes, Deadly Hazards – Miles of leak-prone, cast-iron gas lines run beneath Pa. streets. Slow repair and replacement rates can be deadly," *Philadelphia Inquirer* (December 18, 2011).

pipelines carrying Marcellus Shale gas – not regulated fuel gas piping systems at buildings. For example, these articles state:

> In Pennsylvania's shale fields, where the giant Marcellus strike has unleashed a furious surge of development, many natural gas pipelines today get less safety regulation than in any other state in America, an Inquirer review shows.
>
> Hundreds of miles of high-pressure pipelines already have been installed in the shale fields with no government safety checks – no construction standards, no inspections and no monitoring.
>
> "No one – and absolutely no one – is looking," said Deborah Goldberg, a lawyer with Earthjustice, a nonprofit law firm focusing on the environment.
>
> Belatedly, the state's elected officials and regulators are trying to catch up. The legislature is poised to give the state Public Utility Commission authority to enforce federal safety rules in the shale regions, as in other gas-producing states.

Westover Exhibit AS-2, pp. 1-2 of 62. *See also* page 30:

> In Pennsylvania, regulators were caught unprepared for the massive rollout of pipeline construction. Everywhere but Alaska and Pennsylvania, the perennially short-staffed PHMSA relies on state agencies to inspect gathering lines in gas-well fields.
>
> Even before the Marcellus pipeline construction began in earnest, PHMSA had been imploring the Pennsylvania Public Utility Commission to take on that role, said Paul Metro, who oversees gas regulation for the PUC.
>
> But the agency was slow to respond. Former commissioners said it just [was not] on their radar.
>
> Starting in 2010, the PUC began holding hearings on what regulation should look like. The Commission, industry, and legislators hashed out a rough consensus: Pennsylvania, like other states, would begin to enforce the federal rules.

See also **Westover Exhibit AS-2,** p. 31 of 62:

> The Pennsylvania House and Senate each passed versions of a pipeline regulation bill earlier this year. The two versions are similar, and a reconciled version is expected to become law soon.
>
> The legislation will likely include a provision for a state registry for all gathering lines – but still no safety rules in rural areas.

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, 794 (Pa. 1977). Prior to the enactment of Act 127, the Commission lacked authority to regulate pipeline safety for fuel gas piping systems within buildings, such as apartment buildings, universities, colleges, health care facilities or commercial retail centers. Instead, the construction, operation and maintenance of those piping systems was regulated by L&I and municipalities pursuant to the Construction Code.

Act 127 could have given the Commission explicit authority to regulate fuel gas piping systems within buildings, but it did not. If the General Assembly had intended to expand the Commission's regulatory authority dramatically, by allowing it to regulate hundreds, if not thousands, of apartment buildings, colleges, universities, health care facilities, commercial retail centers and other buildings that contain fuel gas piping systems, it would have said so explicitly. Similarly, if the General Assembly had intended to transfer the regulatory authority of L&I and municipalities to the Commission, the Legislature would have said so explicitly. Finally, if the General Assembly had intended to replace the Construction Code with the Federal pipeline safety laws as the regulatory scheme governing fuel gas piping systems at buildings, the General Assembly would have said so explicitly. The General Assembly's failure to explicitly advise either regulators or the regulated community of such dramatic changes indicates that the General Assembly did not intend to make Act 127 apply to fuel gas piping systems at buildings – including apartment buildings.

Additionally, Act 127 requires that registered pipeline operators pay an annual assessment to the Commission "based on intrastate regulated transmission, regulated distribution and regulated onshore gathering pipeline miles." 58 P.S. § 801.501(b). Westover respectfully submits

that this provision indicates that the General Assembly intended to assess pipeline operators for transporting gas considerable distances from a well to market, not for distributing gas at an apartment building.

Act 127 gave the Commission authority to promulgate regulations implementing Act 127, 58 P.S. § 801.501(a), but the Commission, after over a decade, has not yet done so. The Commission has issued three orders implementing Act 127. *Act 127 of 2011 – The Gas and Hazardous Liquids Pipeline Act; Assessment of Pipeline Operators*, Docket No. M-2012-2282031 (Final Implementation Order entered February 17, 2012), *Act 127 of 2011 – The Gas and Hazardous Liquids Pipeline Act; Assessment of Pipeline Operators – Jurisdiction over Class 1 Transmission*, Docket No. M-2012-2282031 (Final Order entered June 7, 2012), and *Act 127 of 2011 – The Gas and Hazardous Liquids Pipeline Act; Assessment of Pipeline Operators – Jurisdiction over Class 1 Gas Gathering Lines and Certain LNG Facilities; Assessment of Pipeline Operators,* Docket No. M-2012-2282031 (Implementation Order entered December 8, 2022, Order on Reconsideration entered Mar. 16, 2023). These orders demonstrate that Act 127 was intended to address the issues resulting from the Marcellus Shale boom (*e.g.*, by giving the Commission authority to regulate Marcellus Shale transmission pipelines and pipeline facilities in Class 1 locations). There is nothing in these orders to suggest that the Commission reads Act 127 as applying the Federal pipeline safety laws to fuel gas piping systems at a building.

For all of the above reasons, the ALJ should recommend, and the Commission should find, that Act 127 does not give the Commission authority to regulate fuel gas piping systems at an apartment building. Instead, the Construction Code continues to empower L&I and municipalities to regulate such piping systems.

C. The Commission Should Find that Act 127 Does Not Apply to Any of the Systems Because No System Satisfies the Definition of a "Master Meter System" in 49 CFR § 191.3

As stated above, Act 127 gives the Commission general administrative authority to supervise and regulate "pipeline operators" within the Commonwealth. 58 P.S. § 801.501(a). A "pipeline operator" is defined as:

> 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").

The "Federal pipeline safety laws" are defined as:

> 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.

Finally, regulations promulgated by the U.S. Department of Transportation's PHMSA to implement 49 U.S.C. Ch. 601 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.

Two points are significant at the outset. First, each System must be considered separately to determine whether that System is a "master meter system." In 2014, the Commission issued a document entitled "Act 127 of 2011 – The Gas and Hazardous Liquids Pipeline Act Frequently

Asked Questions" (the "Frequently Asked Questions Brochure"), **Westover Exhibit AS-3**, which remains on the Commission's website. That document states at page 3 (emphasis in original):

> 8. WHAT IF MY ENTITY HAS PORTIONS THAT ARE COVERED UNDER ACT 127 AND PORTIONS THAT ARE NOT?
>
> If a person operates multiple facilities, some of which are subject to Act 127 and some of which are not, the person is a pipeline operator only with regard to the facilities subject to Act 127.

Second, in determining whether any System is a "master meter system," the definition of a "master meter system" contains several elements. *Each element* of that definition must be satisfied for any System to be considered a "master meter system." With respect to this case, the following elements of the definition are significant:

- The System must be within, but not limited to, a definable area, such as an apartment complex.
- Westover must be the operator of the System.
- Westover must purchase metered gas from an outside source for resale.
- Westover must supply the gas through its pipeline system to the ultimate consumer.
- The ultimate consumer must purchase the gas from Westover directly through a meter or by other means (such as by rents).

For the reasons set forth below, no Westover System satisfies every element of the definition of a "master meter system." Consequently, no System is regulated under the Federal pipeline safety laws and Westover is not a "pipeline operator" pursuant to Act 127. Consequently, the Commission lacks authority to regulate any System pursuant to Act 127.

1. No Westover System Is a "Master Meter System" Because No System is "Within, but Not Limited to" the Apartment Complex

The first sentence in the definition of a "master meter system" states, in part, that a "master meter system" is "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." No System satisfies this part of the definition; each System is located entirely within the pertinent apartment complex.

Under both federal and Pennsylvania law, a statute or regulation must be construed to give effect to every word. *Leocal v. Ashcroft,* 543 U.S. 1, 12 (2004); *Habecker v. Nationwide Ins. Co.,* 445 A.2d 1222, 1226 (Pa. Super. 1982). The Commission therefore must give effect to every word in the definition of a "master meter system" – including the phrase "within, but not limited to, a definable area, such as . . . an apartment complex."

Similarly, under both federal and Pennsylvania law, non-technical terms, such as "within," "but" and "limited," should be given their ordinary meanings. *Richards v. United States,* 369 U.S. 1, 9 (1962); 1 Pa. C.S. § 1903(a). According to the Merriam-Webster Online Dictionary:

- "within" has multiple meanings, including "being inside: enclosed;"[8]
- "limited" has multiple meanings, including "confined within limits: restricted;"[9] and
- "but" has multiple meanings, including "on the contrary; on the other hand: notwithstanding" (this definition applies where "but" is used to connect coordinate elements).[10]

Applying these definitions to Section 191.3's definition of a "master meter system," the phrase "within, but not limited to, a definable area, such as . . . an apartment complex" means that, to be a "master meter system," a gas system must be located inside the apartment complex. On the other hand, the system cannot be confined within or restricted to the apartment complex. In other words, to be a "master meter system," a gas system must be located partly within, and partly outside, the pertinent apartment complex.

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[8] https://www.merriam-webster.com/dictionary/within
[9] https://www.merriam-webster.com/dictionary/limited https://www.merriam-webster.com/dictionary/limited
[10] https://www.merriam-webster.com/dictionary/but

I&E contends that the definition of a "master meter system" requires that a System's gas facilities be located entirely within a definable area (*i.e.,* within the apartment complex). I&E's Answer to Westover's Motion for Summary Judgment ¶ 84. In support of its position, I&E stated:

> … while PHMSA interpretations have not specifically addressed the phrase "within but not limited to, a definable area, such as a mobile home park, housing project or apartment complex," PHMSA interpretations can provide guidance on what has previously been determined to be a master meter system. For example, PHMSA has issued interpretations finding an apartment complex, a housing development, and a mall complex to be master meter systems.

Id., at ¶ 88 (notes omitted).

The Commission may consider PHMSA interpretation letters, but those letters do not establish precedent binding on the Commission. PHMSA's own disclaimer states: "Interpretations are not generally applicable, do not create legally-enforceable rights or obligations, and are provided to help the specific requestor understand how to comply with the regulation." Westover's Motion for Summary Judgment Exhibit 10 pp. 1 and 2. Additionally, PHMSA interpretation letters are not subject to judicial review.

In this instance, the Commission should not find PHMSA's interpretation letters persuasive. First, as I&E notes, PHMSA has not specifically addressed the critical portion of the regulation. Second, even if PHMSA had interpreted Section 191.3 to mean that a "master meter system" must be "within and limited to" a definable area such as an apartment complex, rather than "within, but not limited to" a definable area, such as an apartment complex, that interpretation is clearly erroneous. An administrative agency's interpretation of a statute or regulation is not entitled to deference where it is plainly erroneous and inconsistent with the applicable regulation. *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945); *Dauphin County Industrial Development Auth. v. Pa. Pub. Util. Comm'n*, 123 A.3d 1124, 1133 (Pa. Cmwlth. 2015).

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, supra*. Act 127 gives the Commission authority to apply federal pipeline safety regulations, but reading Section 191.3 to mean that a "master meter system" must be "within and limited to" a definable area such as an apartment complex, rather than "within, but not limited to" a definable area such as an apartment complex, is not *applying* the regulation; it is *rewriting* the regulation. The Commission lacks authority to rewrite a federal regulation.

Significantly, the Commission has long provided guidance to the regulated community that is consistent with Westover's interpretation of Section 191.3. The Frequently Asked Questions Brochure, **Westover Exhibit AS-3**, states that Act 127 does not apply to master meter systems serving their own property[11] (*i.e.*, systems that are located within and limited to the owner/operator's apartment complex), but Act 127 applies to master meter systems that provide service to property owned by third parties[12] (*i.e.*, systems that are located within, but are not limited to, the owner/operator's apartment complex). Although unofficial statements and opinions by Commission personnel do not have the force and effect of law and are not binding on the Commission, 52 Pa. Code § 1.96, the Commission should not lightly disregard its own publication providing guidance to the regulated community for almost a decade.

With respect to the Systems identified in the Stipulation, no System provides gas service to any customer on property outside the apartment complexes operated by Westover. Westover Statement No. 1 p. 6; Westover's Motion for Summary Judgment Exhibit 2 p. 1 (Affidavit of Peter

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[11] Answer to Question 7 "What is Not Considered a Pipeline Operator Under Act 127?" (ultimate consumers who own service lines on their real property (including master meter systems serving their own property) are not pipeline operators under Act 127).

[12] Answer to Question 6 "What is Considered a Pipeline Operator Under Act 127?" (a master meter system that provides service to property owned by third parties is considered a pipeline operator under Act 127).

Quercetti). The parties to this proceeding agree that every System is located within <u>and</u> limited to the applicable apartment complex. Stipulation ¶¶ 8, 14, 19, 25, 31, 38, 44, 48, 52, 56, 60, 65, 70, 75, 80, 86, 90, 94, 98, 103, 108, and 113. *See also* **Westover Exhibits PQ**-3, 5 and 7.

The only System where there is any hint of a factual dispute is Carlisle Park, where a gas pipe is located under a public road that runs through the apartment complex. Stipulation ¶ 14. In his Rebuttal Testimony, Peter Quercetti attached a map showing the approximate location of this pipe, **Westover Exhibit PQ-34 (CONFIDENTIAL)**. This map shows that the gas line in question is located on the same parcel of land as the rest of the apartment complex and is located within the perimeter of the apartment complex. This pipe does not provide gas service to anyone outside the Carlisle Park apartment complex; it merely connects two buildings in the complex separated by a public roadway. Approximately sixty feet of pipe underneath a roadway located within the boundaries of the apartment complex should not result in the entire Carlisle Park System being considered a "master meter system." Westover Statement 1-R pp. 9-10.

For all of the reasons set forth above, the ALJ should recommend, and the Commission should find, that no System is a "master meter system" because no System meets the requirement that the system be "within, but not limited to" the definable area of the apartment complex.

2. Several Systems are Not "Master Meter Systems" (in Whole or in Part) Because Westover Does Not Purchase Gas for Resale Through a Distribution System and Supply It to the Ultimate Consumer

a. One System Is Not a "Master Meter System" Because Westover Does Not Purchase Gas At All; Building Occupants Buy Gas Directly from the NGDC

As stated above, Section 191.3 defines a "master meter system" as follows (emphasis added):

> … 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[.]

Based on the italicized language, three elements of the test for a master meter system are:

- The system operator (Westover) must purchase metered gas from an outside source for resale.
- Westover must supply the gas through its pipeline system to the ultimate consumer.
- The ultimate consumer must purchase the gas from Westover.

The federal regulation explicitly states that the operator must purchase the gas for resale, and the operator must supply that gas through the gas distribution pipeline system to the ultimate consumer. In other words, the regulation views natural gas as a commodity that is purchased by the system operator, who subsequently sells that same commodity to someone else (a traditional "purchase for resale"[13]). The customer must pay the system operator for the gas, but the system operator must do more than simply bill the customer for the commodity; the system operator must actually supply the commodity to the customer through the gas distribution pipeline system.

The System at Paoli Place – North (Buildings L-R) does not meet any of these three elements of the test of a "master meter system." At this apartment complex, Westover does not purchase gas at all. Westover therefore does not purchase gas for resale. Moreover, Westover does not supply gas to any third parties. Instead, the NGDC delivers gas directly to building occupants at meters located outside each building. Stipulation ¶¶ 89, 92. Building occupants are customers of the NGDC. 52 Pa. Code § 59.1 (a gas "customer" is "[a] party supplied with gas

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[13] *See. e.g.,* 13 Pa. C.S. § 2706 ("Resale by seller including contract for resale") (a contract for resale involves the resale of the goods concerned in the original sale – not a different commodity).

service by a public utility"). Finally, building occupants purchase the gas from the NGDC (not Westover) through a meter. Stipulation ¶¶ 90-92; Westover Statement 1 p. 44.

For all of the above reasons, the ALJ should recommend, and the Commission should find, that the System at Paoli Place – North (Buildings L-R) is not a "master meter system."

b. Several Systems Are Not "Master Meter Systems" Because Westover Does Not Resell Gas to Building Occupants; Westover Consumes All the Gas it Purchases and Distributes a Different Commodity (Heat and/or Hot Water) to Building Occupants

At Black Hawk, Concord Court and Lansdale Village, Westover purchases gas from the NGDC and burns all of that gas in its own central boiler to produce heat and/or hot water. Westover does not supply gas through a distribution pipeline system to building occupants at these complexes. Instead, Westover supplies heat and/or hot water to building occupants. Building occupants pay Westover for the gas that Westover consumes. Stipulation ¶¶ 9, 11, 20, 22, 51, 52.

The Systems at Black Hawk, Concord Court and Lansdale Village do not satisfy the following elements of the definition of a "master meter system:"

- Westover must purchase metered gas from an outside source for resale.
- Westover must supply the gas through its pipeline system to the ultimate consumer.

First, Westover does not purchase gas to resell it. Instead, Westover purchases gas to consume it in Westover's own central boiler. Stipulation ¶¶ 9, 20, 51. Westover is simply a customer of the NGDC. 52 Pa. Code § 59.1 (a gas "customer" is "[a] party supplied with gas service by a public utility").

Second, at these apartment complexes, Westover does not resell the gas commodity and supply it to any third parties. Westover's gas facilities only connect the NGDC's meter to Westover's central boiler. This connection is akin to a customer service line; it is not a "pipeline

system."[14] Westover's own central boiler consumes all of the gas that Westover purchases. Westover then supplies heat and/or hot water to building occupants through its pipeline system. Stipulation ¶¶ 9, 20, 51 and 52. The Federal gas pipeline safety laws do not apply to pipelines that carry hot air or hot water. 49 CFR §§ 191.1 ("Scope") and 192.1 ("What is the scope of this part?").

The PHMSA has held that there is a difference between supplying gas to building occupants and supplying heat and/or hot water to building occupants. According to the PHMSA, a system must supply gas to building occupants to meet the test of a "master meter system." In an interpretation letter dated October 24, 1973, the PHMSA responded to an inquiry regarding a college's gas system. PHMSA stated:

> The gas system as described raises the jurisdictional question of whether the pipelines on the college campus constitute a master meter system subject to the Federal gas pipeline safety regulations or whether the college is the ultimate customer and therefore the lines in the college are not subject to the regulations. In order to assist you in making this determination, *if the college owned gas system consumes the gas and provides another type of service such as heat or air conditioning, to the individual buildings, then the college is not engaged in the distribution of gas. In this instance the college would be the ultimate consumer, and the Federal pipeline safety standards would only apply to mains and service lines upstream of the meter.*
>
> *If the college owned gas system provides gas to consumers* such as concessionaires, tenants, or others, *it is engaged in the distribution of gas*, and the persons to whom it is providing gas would be considered the customers even though they may not be individually metered. In this situation the pipelines downstream of the master meter used to distribute the gas to these ultimate consumers would be considered mains and service lines subject to the Federal pipeline safety standards.

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[14] 49 CFR § 191.3 defines a "pipeline system" as all physical facilities through which gas moves in transportation. The "transportation of gas" is defined as "the gathering, transmission, or distribution of gas by pipeline or the storage of gas, in or affecting interstate or foreign commerce. *Id.* Westover's pipe connecting the NGDC's meter to Westover's own central boiler is not a gathering, transmission or distribution system, nor does it store gas. Finally, as explained in Section VI.C.6., these complexes are not engaged in, and do not affect, interstate or foreign commerce.

Westover Exhibit PQ-7 (emphasis added).

Thirty years later, in PI-03-0101, the PHMSA reaffirmed this conclusion. **Westover Exhibit PQ-6**. In that interpretation letter, the PHMSA responded to an inquiry regarding the campus gas distribution system operated by Bryant College. Bryant College contended that it was not a "master meter system" because it did not resell the required commodity – gas. Instead, the College used the gas and provided heat and hot water to campus buildings. PHMSA opined that Bryant College's gas system:

> . . . does not appear to meet the definition of Master Meter System because it is using the gas delivered through its pipeline system to provide heat and hot water to campus buildings. In this instance the college would be the consumer of the gas.
>
> However, if the Bryant College gas system provides gas to consumers, such as concessionaires, tenants, or others, it is engaged in the distribution of gas, and the persons to whom it is providing gas would be considered the customers even though they may not be individually metered.

Westover Exhibit PQ-6.

As discussed above, PHMSA's interpretation letters are not binding on the Commission. In this instance, however, they are persuasive and the ALJ and the Commission should adopt their reasoning. There is obviously a difference between (1) buying a commodity and then reselling and supplying that same commodity to a subsequent purchaser, as compared to (2) buying a commodity, using that commodity to produce a different commodity, and selling and supplying that different commodity to a subsequent purchaser. Section 191.3 clearly requires that a system operator resell and supply gas to ultimate consumers.

Additionally, there is an obvious difference between supplying gas through a pipeline system and supplying heat and/or hot water through a pipeline system. There is no reason to require pipelines distributing heat and/or hot water to comply with the regulations ensuring the

safety of gas pipelines. The dangers presented by pipelines carrying these different commodities merit different regulatory schemes.

In its Answer to Westover's Amended Petition, ¶ 27, I&E argued that, since building occupants pay for the gas that Westover burns in its central boiler, building occupants are the ultimate consumers of the gas. As will be discussed further in Section VI.C.3, below, this argument is inconsistent with the concept of an "ultimate consumer" in Section 191.3. It is also inconsistent with Section 191.3's explicit requirement that, to meet the test of a "master meter system," the system operator must resell gas <u>and supply it</u> through a distribution pipeline system to the purchaser. At these apartment complexes, Westover does not supply gas to building occupants; Westover consumes the gas commodity and supplies a different commodity to building occupants. The fact that building occupants pay Westover for the gas that Westover consumes in its central boiler does not make up for the fact that several other elements of the test of a "master meter system" are not satisfied at these complexes.

For all of the above reasons, the ALJ should recommend, and the Commission should find, that the Systems at Black Hawk, Concord Court and Lansdale Village are not "master meter systems."

c. Portions of Some Systems Are Not "Master Meter Systems" Because Westover Consumes Some of the Gas to Produce Heat and/or Hot Water; the Remaining Portions of these Systems are Not "Master Meter Systems" for Reasons Discussed Elsewhere in this Brief

At some apartment complexes, Westover consumes some of the gas that it purchases to produce heat and/or hot water, and distributes the remainder to building occupants, who consume it for heat, hot water, and/or cooking. This is the fact pattern at Country Manor, Fox Run, Gladstone Towers, Lansdowne Towers, Mill Creek Village I, Mill Creek Village II, Norriton East, Oak Forest, Paoli Place – North (Buildings A-K), Paoli Place – South (Buildings A - D), Paoli

Place – South (Buildings E – H), Park Court, Valley Stream, and Woodland Plaza. Stipulation ¶¶ 26, 30, 39, 55, 66, 71, 76, 81, 87, 93, 95, 99, 104, 109, 114.

As discussed above, the definition of a "master meter system" requires that the operator purchase gas for resale and supply the gas through a distribution pipeline system to the ultimate consumer. To the extent that Westover purchases gas to consume in its central boiler, and supplies heat and/or hot water (rather than gas) to building occupants, Westover does not satisfy the definition of a "master meter system." The Commission therefore does not have authority to regulate those portions of Westover's System (and Westover has no obligation to pay annual assessments to the Commission, pursuant to Act 127, on pipes that are used to distribute heat and hot water to building occupants[15]).

With respect to the remaining portions of the Systems identified above – the portions that involve facilities for the resale and supply of gas to building occupants – the Commission lacks authority to regulate those portions of the Systems for reasons discussed elsewhere in this brief. For example, every such System fails to meet the definition of a "master meter system" because the portions of the System that are used to resell and supply gas to building occupants are located within <u>and</u> limited to the apartment complex. *See,* Section VI.C.1, above. In addition, every such System fails to meet the definition of a "master meter system" because the portions of the System that are used to resell and supply gas to building occupants are located primarily or entirely within a single building. *See* Section VI.C.4 below. Finally, every such System fails to meet the definition of a "master meter system" because the potions of the System that are used to resell and

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[15] 58 P.S. § 801.503(b)(1) (registered pipeline operators are to pay an annual assessment "based on intrastate regulated transmission, regulated distribution and regulated onshore gathering pipeline miles").

supply gas to building occupants are not "in or affecting interstate or foreign commerce." *See* Section VI.C.6 below.

For all of the above reasons, the ALJ should recommend, and the Commission should find, that no System is a "master meter system" to the extent that Westover consumes the gas it purchases, rather than reselling and supplying it to building occupants. The Commission therefore does not have authority to regulate those portions of the System that are not used to supply gas to building occupants.

3. Who is the "Ultimate Consumer" of the Gas Service at the Apartment Complexes Identified in the Stipulation?

As stated above, the last sentence of the definition of a "master meter system" provides: "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[.]" (Emphasis added). Section 191.3 does not define the term "ultimate consumer." In fact, this is the only time the term "ultimate consumer" is used in 49 CFR § 191.3.

Statutes and regulations are to be read with reference to the context in which they appear. *A.S. v. Pa. State Police*, *supra,* 636 Pa. at 419, 143 A.3d at 905-906. When the term "ultimate consumer" is read in the context of Section 191.3 as a whole, the meaning of the term becomes plain.

As discussed above, the test of a "master meter system" requires that there be a system operator who purchases gas from an outside source for resale. This operator must supply the gas through a gas distribution pipeline system to the "ultimate consumer," who pays the system operator for the gas. *See* Section VI.C.2, above. The "ultimate consumer," therefore, is the party to whom the system operator resells and supplies gas (they are the customers of the system operator). *Cf.*, 49 CFR § 192.3 (defining a "customer meter" as "the meter that measures the

transfer of gas from an operator to a consumer.”). This interpretation is also consistent with the common and approved usage of the term[16] “ultimate” as “last in a progression or series”[17] (*i.e.*, the “ultimate consumer” is the last gas consumer in a series of gas consumers).

At every System except Paoli Place North (Buildings L-R), the NGDC supplies gas to Westover through a meter or meters, and Westover pays the NGDC for the gas. At these Systems, Westover is the customer of the NGDC. 52 Pa. Code § 59.1 (defining a gas “customer” as “[a] party supplied with gas service by a public utility.”). To the extent that Westover resells and supplies gas to building occupants, the building occupants are the “ultimate consumers.”

At some Systems, however, there is no “ultimate consumer” (which further indicates that these systems fail to meet the test of a “master meter system”). For example, at Paoli Place North (Buildings L-R), there is no “ultimate consumer” because Westover does not purchase gas at all; the NGDC supplies gas directly to building occupants and building occupants pay the NGDC through a meter. *See* Section VI.C.2.a above. At this System, building tenants are simply customers of the NGDC. 52 Pa. Code § 59.1.

Similarly, there is no “ultimate consumer” at Black Hawk, Concord Court and Lansdale Village. At these apartment complexes, Westover is a consumer of gas from the NGDC, but Westover uses all the gas in its central boiler and distributes heat and/or hot water; Westover does not resell and supply gas to building occupants. Building occupants merely reimburse Westover for the costs that Westover incurs to purchase gas from the NGDC.

In its Answer to Westover’s Amended Petition, ¶ 27, I&E argued that, since building occupants reimburse Westover for the gas that it burns in its central boiler, building occupants are

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[16] Words and phrases shall be construed according to their common and approved usage. 1 Pa. C.S. § 1903.
[17] Merriam-Webster’s On-Line Dictionary: https://www.merriam-webster.com/dictionary/ultimate .

"ultimate consumers" as that term is used in Section 191.3. This argument is inconsistent with Section 191.3's explicit requirement that, to meet the test of a "master meter system," the system operator must resell gas <u>and supply the gas</u> (through a distribution pipeline system) to the "ultimate consumer." I&E's argument is also inconsistent with the definition of a gas customer. As discussed above, Westover is clearly a gas customer of the NGDC. 52 Pa. Code § 59.1. Building occupants' payment to Westover, reimbursing it for the costs it incurs as a gas customer, does not deprive Westover of its status as a gas customer, nor does it transform building occupants into gas customers of Westover.

For all of the above reasons, the ALJ should recommend, and the Commission should find, that the "ultimate consumer" of gas, as that term is used in 49 CFR § 191.3, is the party (if any) who pays for and receives gas from a system operator. The lack of an "ultimate customer" is one indication that a System is not a "master meter system."

4. Some Systems Are Not "Master Meter Systems" Because the Distribution System is Exclusively or Primarily Comprised of Interior Piping Within a Single Building

Prior to the adoption of 49 CFR § 191.3, the Office of Pipeline Safety ("OPS") (the predecessor of PHMSA) did not construe the Federal pipeline safety laws as applying to gas systems that are primarily or exclusively comprised of pipelines inside a single building. **Westover Exhibit PQ-33**, Attachment E, p. 5, n. 15. This policy was continued after the adoption of 49 CFR § 191.3. *Id.*, p. 5.

One rationale for this policy was:

> Even though the present definition of "master meter system" does not refer specifically to the existence of exterior piping serving multiple buildings, the reference to a 'pipeline system for distributing gas within … a mobile home park, housing project, or apartment complex' must involve the distribution of gas through exterior or underground pipelines to more than one building. The phrase regarding exterior piping serving multiple buildings was not considered essential since the

> use of exterior or underground pipelines to distribute gas to more than one building is implicit in the language of the definition.

Id., p. 5, n. 15. Another rationale for this policy was that gas systems consisting entirely or primarily of interior piping located within a single building:

> … do not resemble the kinds of distribution systems to which Congress intended the Natural Gas Pipeline Safety Act to apply because of the absence of any significant amount of underground or external piping serving more than one building.

Id. p. 6.[18]

On September 16, 1976, PHMSA issued interpretation letter PI-76-0114. **Westover Exhibit PQ-11**. There, PHMSA was asked whether the piping downstream from a meter constitutes a "master meter system" if "none of the piping is exposed or underground." PHMSA opined:

> A system which involves interior piping only (*i.e.,* underground or exterior pipelines are not used to distribute gas) is not a master meter system subject to 49 CFR Part 192. The legislative history of the Natural Gas Pipeline Safety Act of 1968, under which 49 CFR Part 192 is issued, indicates that in authorizing the safety regulation of the distribution of gas by pipelines, Congress had in mind those distribution systems which are primarily located outside. Thus, interior piping is only subject to regulation when it is included in an operator's system which is otherwise located outside.

More recently, PHMSA has seemingly drifted away from the view that Section 191.3 implicitly excludes systems that are primarily or exclusively comprised of interior piping within a single building. *See, e.g*., PHMSA Interpretation Letter dated September 21, 2020 (attached to the Amended Petition as Appendix 8) and PHMSA Interpretation Letter PI-16-0012 (attached to I&E's Answer in Opposition to the Amended Petition at Exhibit 6).

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[18] Similarly, when the General Assembly enacted Act 127 without modifying the Construction Code, the General Assembly implicitly recognized that a different regulatory scheme was appropriate for interior gas pipelines as compared to gas pipelines with significant amounts of exterior and/or underground piping.

Westover respectfully submits that the better view is that gas systems that are primarily or exclusively comprised of interior piping within a single building are not "master meter systems." As OPS properly concluded, there is no reason to apply the full panoply of federal pipeline safety laws and regulations – which apply to interstate transmission pipelines – to pipes inside a single building. That would be a classic example of over-regulation because that regulatory scheme goes well beyond what is necessary to ensure public safety with regard to pipes inside a building.[19]

Additionally, this result is consistent with Section 191.3's explicit requirement that "master meter systems" be "within but not limited to" the apartment complex. It is difficult to imagine a gas system that is primarily or exclusively comprised of piping inside a single building, but not located within and limited to the apartment complex. In this case, every System that is primarily or exclusively comprised of interior piping is also located within and limited to the definable area of the apartment complex. It would be absurd and unreasonable to hold that a System that is exclusively or primarily comprised of interior piping can be a master meter system, even though it is within and limited to an apartment complex.

At Mill Creek Village II, the NGDC delivers gas at a meter in a mechanical room inside each building. All of Westover's gas piping is inside a building at this apartment complex. Stipulation ¶¶ 69-70. As a result, Westover's System at this location is not subject to the effects of weather. Finding that this System is a "master meter system" would involve the Commission

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[19] This result would be consistent with the law in several of Pennsylvania's neighboring states. Ohio specifically defines a master meter system, in pertinent part, as excluding "a pipeline within a manufactured home, mobile home, or a building." Ohio Administrative Code Rule 4901:1-16-01(I). Similarly, Maryland defines a gas master meter operator, in pertinent part, as "a person that owns or operates a pipeline system, *other than piping within a building*." Maryland Code, Public Utilities § 1-101(n) (emphasis added). New Jersey defines a master meter system, in pertinent part, as "any *underground gas pipeline system* operated by a residential or commercial customer of a New Jersey gas utility which is utilized for the distribution of gas to ultimate consumers within, but not limited to, a definable area, such as a mobile home park, a housing project or an apartment complex, where the operator purchases metered gas from a public utility for resale through the operator's distribution system which is beyond the control of the utility." N.J. Admin. Code § 14:6-6.2 (emphasis added).

in regulating the construction and maintenance of buildings, which is beyond the Commission's expertise, and would displace state and local regulators who have experience and expertise in this field. As discussed in Section VI.B. above, the General Assembly did not intend this result when it enacted Act 127.

Similarly, the Commission should find that the Systems at Country Manor, Fox Run, Paoli South (Buildings A-D) and Woodland Plaza are not "master meter systems." At each of these complexes, the vast majority of the System is located inside a single building. Stipulation ¶¶ 24-25, 30-31, 93-94, 112-113. In fact, at each of these complexes, the gas meter is located outside each apartment building and the only exterior piping is located between the meter and the exterior wall of the apartment building. Stipulation ¶ 25, 31, 94, 113. The Federal gas pipeline safety laws and regulations, which apply to interstate transmission pipelines, should not apply to all of the gas pipes inside a building simply because a few feet of pipe is located between the exterior wall of the building and the NGDC's gas meter. Commission regulations generally require meters to be located outside a building. 52 Pa. Code § 59.18(a). These regulations should not turn every apartment building using gas into a "master meter system" subject to federal pipeline safety regulations.

The only difference between these Systems, and the System at Norriton East, is that Norriton East has a gas generator located behind the building to ensure that residents do not lose power. At this apartment complex, the only exterior piping is located (a) between the outside gas meter and the exterior wall of the building, and (b) between the exterior wall of the building and an emergency generator located about 10 yards from the building. Stipulation ¶ 75. Again, the Federal gas pipeline safety laws and regulations, which apply to interstate transmission pipelines,

should not apply to all of the gas pipes inside a building simply because of a few feet of pipe located outside the exterior wall of the building.

For all of the above reasons, the ALJ should recommend, and the Commission should find, that the gas systems at Mill Creek Village II, Country Manor, Fox Run, Norriton East, Paoli South (Buildings A-D) and Woodland Plaza are not "master meter systems."

5. The Presence or Absence of a Sub-Meter Owned by the Apartment Complex Does Not Determine Whether Any Westover System is a "Master Meter System"

One element of the test of a "master meter system" is: "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). The presence of a sub-meter owned by the apartment complex may be evidence that this element of the test is satisfied (*e.g.,* if the system operator uses those sub-meters to bill building occupants for the gas they use), but the absence of a sub-meter owned by the apartment complex does not necessarily mean that this element of the test is not satisfied.

More importantly, as stated repeatedly above, the definition of a "master meter system" has multiple elements, each of which must be satisfied for any gas system to be considered a "master meter system." For example, a system is not a "master meter system" if it is located within <u>and</u> limited to the apartment complex – regardless of whether the system includes a sub-meter owned by the apartment complex. As a result, the presence or absence of a Westover-owned sub-meter does not determine whether any System is a "master meter system." Instead, it is just one of many factors to be considered in determining whether that System satisfies all the elements of the test of a "master meter system."

6. No Westover System Is a "Master Meter System" Because No System Distributes Gas "In or Affecting Interstate or Foreign Commerce"

The first sentence of the definition of a "master meter system" states that a "master meter system" is "a pipeline system for distributing gas . . . , where the operator purchases metered gas from an outside source for resale through a gas distribution pipeline system." Therefore, for the Commission to find that any Westover System is a "master meter system," the Commission must find that Westover is the "operator" of that System.

The definition of an "operator" is: "a person who engages in the transportation of gas." 49 CFR § 191.3. The "transportation of gas," in turn, is defined as: "the gathering, transmission, or distribution of gas by pipeline, or the storage of gas, in or affecting interstate or foreign commerce." 49 CFR § 191.3 (emphasis added).

Westover is not engaged in the gathering, transmission or storage of gas at any System. Moreover, at some apartment complexes, Westover is not engaged in the distribution of gas:

- at Paoli Place - North (Buildings L-R), Westover does not purchase gas, nor does Westover resell or supply gas to building occupants; building occupants purchase gas directly from the NGDC; and
- at Black Hawk, Concord Court and Lansdale Village, Westover purchases gas, but does not resell or supply gas to building occupants; Westover consumes all the gas it buys and distributes heat and/or hot water to building occupants.

With regard to these four Systems, Westover is not engaged in the "transportation of gas" because it is not engaged in the gathering, transmission, or distribution of gas by pipeline, nor is it engaged in the storage of gas. Consequently, Westover is not an "operator" at these apartment complexes and the Systems at these apartment complexes are not "master meter systems."

At the remaining Systems identified in the Stipulation, Westover distributes gas to building occupants. The question is whether Westover's distribution of gas is "in or affecting interstate or foreign commerce" at any of these Systems. Since this is an element of the regulation's definition

of a "master meter system," the Commission cannot find that any particular System is a "master meter system" unless it finds (by a preponderance of the evidence) that the System in fact distributes gas "in or affecting interstate or foreign commerce."[20] The Commission cannot simply assume that this element of the test of a "master meter system" is satisfied at any System. The Commission's decision must be supported by substantial evidence in the record. 66 Pa. C.S. § 332(b); *Lyft v. Pa. Pub. Util. Comm'n*, 145 A.3d 1235, 1240 (Pa. Cmwlth. 2016). More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. *Norfolk & Western Ry. Co.*, *supra.*

In this case, there is no evidence whatsoever that any System transports gas "in or affecting interstate or foreign commerce." The only evidence of record (discussed below) demonstrates that no System transports gas "in or affecting interstate or foreign commerce." Therefore, the preponderance of the evidence introduced in this case demonstrates that no System distributes gas "in or affecting interstate or foreign commerce."

At every apartment complex identified in the Stipulation (other than Paoli Place - North (Buildings L-R)), an NGDC delivers gas to Westover on its property in Pennsylvania. Stipulation ¶¶ 7, 13, 18, 24, 30, 35, 42, 47, 51, 55, 59, 64, 69, 74, 79, 85, 89, 93, 97, 102, 107, 112. An NGDC is an intrastate gas pipeline facility pursuant to 49 U.S.C. § 60101(a)(9).[21] As a result, Westover's purchase of gas from an NGDC is a transaction in intrastate commerce.

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[20] If all gas systems, by definition, transport gas "in or affecting interstate or foreign commerce," there would have been no need for Section 191.3 to include that phrase in the definition of the "transportation of gas;" that language would have been mere surplusage. In construing statutes and regulations, of course, a court is to give effect to every word rather than reading words as mere surplusage. *See, e.g., Leocal,, supra*; *Habecker, supra*. Consequently, the Commission cannot assume that all gas systems transport gas "in or affecting interstate or foreign commerce." Instead, the Commission must make a factual determination that a particular gas system transports gas "in or affecting interstate or foreign commerce" before concluding that the system is a "master meter system."

[21] 49 U.S.C. § 60101(a)(9) defines an "intrastate gas pipeline facility" as a gas pipeline facility and gas transportation within a state that is not subject to regulation by the Federal Energy Regulatory Commission ("FERC") pursuant to

To the extent that Westover distributes gas to building occupants, it distributes gas to them in Pennsylvania. As stated above, all of Westover's gas facilities are located entirely within its apartment complexes. A map of each Westover System was introduced into the record in this case. **Westover Exhibits PQ-**2, 4, 8, 9, 10, 12, 13, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28 29, 31, 32, 34, 35, 37 (all of which are **CONFIDENTIAL**); Westover's Motion for Summary Judgment Exhibits 3, 5, 6 and 9 (all of which are **CONFIDENTIAL**). Those maps demonstrate that no Westover System crosses a state line. The Commission should therefore find that, to the extent that Westover distributes gas, Westover distributes the gas within Pennsylvania and delivers it to a point in Pennsylvania.

With respect to gas, federal law defines "interstate or foreign commerce" as commerce "(i) between a place in a State and a place outside that State; or (ii) that affects any commerce" between a place in a State and a place outside that State. 49 U.S.C. § 60101(a)(8). As discussed above, Westover's purchases of the gas in Pennsylvania and distribution of gas to customers in Pennsylvania does not involve commerce between a place in a State and a place outside that State.

Moreover, Westover's distribution of gas to building occupants does not "affect" interstate or foreign commerce. Westover's distribution of gas to building occupants does not increase the amount of gas purchased and sold; Westover purchases only the amount of gas that the building occupants would have purchased if they would have bought gas directly from the NGDC. Westover Statement No. 1 p. 17.

Each System's purchase of gas from the NGDC, and resale of the gas to building occupants, is well downstream of any transaction in interstate or foreign commerce. Westover Statement 1

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15 U.S.C. § 717. NGDCs are regulated by the Commission, rather than by FERC, pursuant to the Hinshaw Amendment, 15 U.S.C. § 717(c).

pp. 17, 19, 21, 23, 25, 26, 28, 30, 32, 34, 36, 38, 40, 42, 44, 48 and 49; Westover Statement 1-R p. 16.

Moreover, each System's purchase and resale of gas involves such a small amount of gas that it does not "affect" any of those upstream transactions. Each System purchases gas from either PECO Energy Company ("PECO") or UGI Corporation ("UGI"). Stipulation ¶ 5. According to UGI's 2022 annual report filed with the Commission,[22] UGI had more than 633,000 metered residential customers, and more than 711,000 total metered customers, as of December 31, 2022. The largest System that purchases gas from UGI is Carlisle Park, which has 208 residential units. Partial Settlement, Attachment B. This is such a tiny fraction of UGI's gas customers (0.032% of UGI's metered residential customers and 0.029% of all UGI's metered customers) that it does not "affect" UGI's upstream purchases of gas in interstate or foreign commerce. Similarly, according to PECO's 2022 annual report filed with the Commission, PECO had more than 487,000 metered residential customers, and more than 534,000 total metered customers, as of December 31, 2022.[23] The largest System that purchases gas from PECO is Jamestown Village, which has 253 units. Partial Settlement, Attachment B. This is such a tiny fraction of PECO's gas customers (0.052% of PECO's metered residential customers and 0.047% of all PECO's metered gas customers) that it does not "affect" PECO's upstream purchases of gas in interstate or foreign commerce. Westover respectfully submits that no System purchases enough gas from UGI or PECO to "affect" the upstream purchases of gas in interstate or foreign commerce.

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[22] UGI Gas's Annual Report to the Commission for 2022, page 42. The Commission may take official notice of this public document on file with the Commission pursuant to 52 Pa. Code §§ 5.406 and 5.408.

[23] PECO Gas's Annual Report to the Commission for 2022, page 50. The Commission may take official notice of this public document on file with the Commission pursuant to 52 Pa. Code §§ 5.406 and 5.408.

For all of the above reasons, Westover respectfully requests that the ALJ recommend, and the Commission find, that no Westover System is a "master meter system" because no System distributes gas "in or affecting interstate or foreign commerce."

7. Summary

The following chart summarizes why each Westover System does not satisfy the definition of a "master meter system" in 49 CFR § 191.3:

Apartment complex	**The System is within, and limited to, the apartment complex**	**The System does not distribute gas in or affecting interstate or foreign commerce**	**Westover does not purchase gas and resell it to building occupants; building occupants buy gas directly from the NGDC**	**Westover purchases gas, but does not resell it to building occupants; Westover consumes the gas in order to distribute heat and/or hot water to building occupants**	**The System is entirely or primarily comprised of interior piping inside a single building**
Black Hawk	X	X		X	
Carlisle Park	X	X			
Concord Court	X	X		X	
Country Manor	X	X			X
Fox Run	X	X			X
Gladstone Towers	X	X			
Hillcrest	X	X			
Jamestown Village	X	X			
Lansdale Village	X	X		X	
Lansdowne Towers	X	X			
Main Line Berwyn	X	X			

Apartment complex	The System is within, and limited to, the apartment complex	The System does not distribute gas in or affecting interstate or foreign commerce	Westover does not purchase gas and resell it to building occupants; building occupants buy gas directly from the NGDC	Westover purchases gas, but does not resell it to building occupants; Westover consumes the gas in order to distribute heat and/or hot water to building occupants	The System is entirely or primarily comprised of interior piping inside a single building
Mill Creek Village I	X	X			
Mill Creek Village II	X	X			X
Norriton East	X	X			X
Oak Forest	X	X			
Paoli Place North Buildings A-K	X	X			
Paoli Place North Buildings L-R	X	X	X		
Paoli Place South Buildings A-D	X	X			X
Paoli Place South Buildings E-H	X	X			
Park Court	X	X			
Valley Stream	X	X			
Woodland Plaza	X	X			X

An "X" in any one column of the above chart is a proper basis for finding that the Westover-operated apartment complex is not subject to Commission jurisdiction under Act 127.

VII. CONCLUSION

WHEREFORE, for all of the reasons discussed above, Westover respectfully requests that the ALJ recommend, and the Commission:

(1) dismiss the Complaint filed by I&E at Docket No. C-2022-3030251, and

(2) grant Westover's Petition at Docket No. P-2021-3030002 and declare that Act 127 does not give the Commission authority to regulate the gas facilities at any of Westover's Systems identified in the Stipulation.

Respectfully submitted,

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Date: July 3, 2023

APPENDIX A
PROPOSED FINDINGS OF FACT
CONCERNING THE LITIGATED ISSUES

Case or Controversy

1. I&E began its investigation into Westover and the gas facilities at its apartment complexes in November 2020. I&E Statement 1 p. 4.

2. I&E has asserted that Westover is in violation of Act 127 and Federal pipeline safety laws since at least February 3, 2021. I&E's Complaint ¶ 33.

3. Although Westover has taken some of the actions requested by I&E, it has in good faith questioned the Commission's authority to regulate its gas systems. Westover Statement 2 p. 13.

The Systems

4. With respect to the Systems identified in the Stipulation, every System is located within <u>and</u> limited to the applicable apartment complex. Stipulation ¶¶ 8, 14, 19, 25, 31, 38, 44, 48, 52, 56, 60, 65, 70, 75, 80, 86, 90, 94, 98, 103, 108, and 113. *See also*, Westover's Motion for Summary Judgment, Exhibits 4-8; **Westover Exhibits PQ**-3, 5, 7.

5. With respect to the Systems identified in the Stipulation, no System provides gas service to any customer on property outside the apartment complexes operated by Westover. Westover Statement No. 1 p. 6; Westover's Motion for Summary Judgment Exhibit 2 p. 1 (Affidavit of Peter Quercetti).

6. At Carlisle Park, approximately 60' of gas pipe is located under a public road located within the boundaries of the apartment complex. Stipulation ¶ 14. This pipe is located on the same parcel of land as the rest of the apartment complex and is located within the perimeter of

the apartment complex. The pipe does not provide gas service to anyone outside the Carlisle Park apartment complex. **Westover Exhibit PQ-34**, Westover Statement 1-R pp. 9-10.

7. At each System identified in the Stipulation, a Commission-regulated NGDC delivers the gas to a point or points in Pennsylvania at Westover's complexes and Westover either uses the gas in Pennsylvania or distributes it to points in Pennsylvania without the gas crossing a state line. **Westover Exhibits PQ**-2, 4, 8, 9, 10, 12, 13, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28 29, 31, 32, 34, 35, 37 (**CONFIDENTIAL**); Westover's Motion for Summary Judgement Exhibits 3, 5, 6 and 9 (**CONFIDENTIAL**).

8. Westover's distribution of gas to building occupants does not increase the amount of gas purchased and sold; Westover only purchases the amount of gas that the building occupants would have purchased if they would have bought gas directly from the NGDC. Westover Statement No. 1 p. 17.

9. Each System purchases gas from either PECO Energy Company ("PECO") or UGI Corporation ("UGI"). Stipulation ¶ 5. According to UGI's 2022 annual report filed with the Commission, at page 42, UGI had more than 633,000 metered residential customers, and more than 711,000 total metered customers, as of December 31, 2022. The largest System that purchases gas from UGI is Carlisle Park, which has only 208 residential units. Partial Settlement, Attachment B. According to PECO's 2022 annual report filed with the Commission, at page 50, PECO had more than 487,000 metered residential customers, and more than 534,000 total metered customers, as of December 31, 2022. The largest System that purchases gas from PECO is Jamestown Village, which has 253 units. Partial Settlement, Attachment B.

Commission Guidance Regarding Act 127

10. In 2014, the Commission issued a document entitled "Act 127 of 2011 – The Gas and Hazardous Liquids Pipeline Act Frequently Asked Questions," **Westover Exhibit AS-3**, which remains on the Commission's website at https://www.puc.pa.gov/NaturalGas/pdf/Act127/12_Act127_FAQs.pdf That document states:

- Question 6 "What is Considered a Pipeline Operator Under Act 127?" (a master meter system that provides service to property owned by third parties is considered a pipeline operator under Act 127).

- Question 7 "What is Not Considered a Pipeline Operator Under Act 127?" (ultimate consumers who own service lines on their real property (including master meter systems serving their own property) are not pipeline operators under Act 127).

- Question 8 "What if my entity has portions that are covered under Act 127 and portions that are not?" (if a person operates multiple facilities, some of which are subject to Act 127 and some of which are not, the person is a pipeline operator only with regard to the facilities subject to Act 127).

APPENDIX B
PROPOSED CONCLUSIONS OF LAW
CONCERNING THE LITIGATED ISSUES

Legal Standards

1. The proponent of a rule or order bears the burden of proof. 66 Pa. C.S. § 332(a)

2. Westover has the burden of proof with regard to its Petition for Declaratory Judgment. I&E has the burden of proof with regard to its Complaint.

3. The "burden of proof" is composed of two distinct burdens: the burden of production and the burden of persuasion. *Hurley v. Hurley*, 754 A.2d 1283, 1285-1286 (Pa. Super. 2000). The burden of production may shift during the proceeding; the burden of persuasion never leaves the party with the burden of proof. *Riedel v. County of Allegheny*, 633 A.2d 1325, 1329 n. 11 (Pa. Cmwlth. 1993).

4. To establish a sufficient case and satisfy its burden of proof, the party with the burden of proof must show, by a preponderance of the evidence, that it is entitled to the relief it is seeking. *Samuel J. Lansberry, Inc. v. Pa. Pub. Util. Comm'n*, 578 A.2d 600 (Pa. Cmwlth. 1990), *allocatur denied*, 602 A.2d 863 (Pa. 1992). In other words, that party must submit evidence that is more convincing, by even the smallest amount, than that presented by any opposing party. *Se-Ling Hosiery, Inc. v. Margulies*, 364 Pa. 45, 70 A.2d 854 (1950).

5. The Commission's decision must be supported by substantial evidence in the record. More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. *Norfolk & Western Ry. Co. v. Pa. Pub. Util. Comm'n*, 413 A.2d 1037, 1047 (Pa. 1980).

Declaratory Order

6. The Commission has discretion to issue a declaratory order to terminate a controversy or remove uncertainty. *Re Duquesne Light Co.*, 1986 Pa. PUC LEXIS 54 at 7 (1986).

7. The Commission should exercise its discretion to issue a declaratory order in this case to terminate a controversy or remove uncertainty.

Act 127

8. Act 127 gives the Commission general administrative authority to supervise and regulate "pipeline operators" within the Commonwealth. 58 P.S. § 801.501(a). A "pipeline operator" is:

> 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").

9. The "Federal pipeline safety laws" are:

> 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.

58 P.S. § 801.102.

10. "When the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit." 1 Pa. C.S. § 1921.

11. An act is ambiguous when it is susceptible to more than one reasonable interpretation. *Adams Outdoor Advertising, L.P. v. Zoning Hearing Bd. of Smithfield Twp.*, 909 A.2d 469, 483 (Pa. Cmwlth. 2006).

12. Act 127 is ambiguous because it is susceptible to two reasonable interpretations: (1) L&I and municipalities would continue to regulate fuel gas piping systems within buildings pursuant to the Construction Code and the Commission would regulate other gas and hazardous liquids gathering, transmission, distribution and storage facilities pursuant to Act 127, or (2) Act 127 effectively transferred the regulatory authority of L&I and municipalities over fuel gas piping systems within buildings to the Commission, which would apply the Federal pipeline safety laws to those fuel gas piping systems.

13. 1 Pa. C.S. § 1933 states:

> Whenever a general provision in a statute shall be in conflict with a special provision in the same or another statute, the two shall be construed, if possible, so that effect may be given to both. If the conflict between the two provisions is irreconcilable, the special provisions shall prevail and shall be construed as an exception to the general provision, unless the general provision shall be enacted later and it shall be the manifest intention of the General Assembly that such general provision shall prevail.

14. The Uniform Construction Code and Act 127 can be construed to give effect to bot, by construing the Uniform Construction Code as applying to fuel gas piping systems at buildings and construing Act 127 as applying to other gas and hazardous liquids gathering, transmission, or distribution pipelines.

15. If the Uniform Construction Code and Act 127 both apply to fuel gas piping systems at a building, they irreconcilably conflict because they are administered and enforced by different regulatory agencies. In that case, the Uniform Construction Code should prevail as an exception to the general rule that the Commission regulates gas distribution pipelines.

16. "The object of all interpretation and construction of statutes is to ascertain and effectuate the intention of the General Assembly." 1 Pa. C.S. § 1921(a). The General Assembly's intention may be ascertained by considering, among other things: the occasion and necessity for

the statute, the circumstances under which it was enacted, the object to be attained, and the contemporaneous legislative history.

17. The General Assembly enacted Act 127 to address a gap in the regulation of gas lines carrying Marcellus Shale gas from the well to markets in the Commonwealth, not to address the regulation of gas fuel systems in apartment buildings that receive gas from Commission-regulation NGDCs.

"Master Meter Systems"

18. A "master meter system" is defined 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.

19. Under both federal and Pennsylvania law, a statute or regulation must be construed to give effect to every word. *Leocal v. Ashcroft,* 543 U.S. 1, 12 (2004); *Habecker v. Nationwide Ins. Co.,* 445 A.2d 1222, 1226 (Pa. Super. 1982).

20. The Commission may consider PHMSA interpretation letters, but by their own terms, those letters do not establish precedent binding on the Commission. Westover's Motion for Summary Judgment, Exhibit 10 pp. 1 and 2.

21. 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, 794 (Pa. 1977).

22. To satisfy the definition of a “master meter system,” a system must be within, <u>but not limited to</u>, a definable area such as an apartment complex. 49 CFR § 191.3.

23. All Westover Systems identified in the Stipulation are within <u>and</u> limited to a definable area such as an apartment complex. Therefore, they are not master meter systems.

24. To satisfy the definition of a “master meter system,” the system operator must purchase gas for resale and supply that gas through the gas distribution system to the ultimate consumer, who pays the system operator for the gas. 49 CFR § 191.3.

25. The System at Paoli Place – North (Buildings L-R) is not a “master meter system” because the building occupants are customers of the NGDC. 52 Pa. Code § 59.1.

26. The Federal pipeline safety laws do not apply to pipelines that carry hot air or hot water, rather than gas. 49 CFR §§ 191.1 (“Scope”); 192.1 (“What is the scope of this part?).

27. To the extent that Westover consumes gas, and supplies heat and/or hot water to building occupants, Westover is just a customer of the NGDC rather than a system operator. 52 Pa. Code § 59.1; 49 CFR § 191.3. Therefore, Westover does not satisfy the definition of a “master meter system” and the Commission does not have authority to regulate those portions of Westover’s Systems.

28. The “ultimate consumer” is the party (if any) to whom the operator resells and supplies gas. 49 CFR § 191.3.

29. To find that any system is a “master meter system,” the Commission must find, by a preponderance of the evidence, that the system is engaged in the gathering, transmission, distribution or storage of gas “in or affecting interstate or foreign commerce.” 49 CFR § 191.3.

30. With respect to gas, federal law defines "interstate or foreign commerce" as commerce "(i) between a place in a State and a place outside that State; or (ii) that affects any commerce" between a place in a State and a place outside that State. 49 U.S.C. § 60101(a)(8).

31. All of Westover's gas facilities are engaged in intrastate commerce.

32. Westover's distribution of gas to building occupants on its own property does not "affect" interstate or foreign commerce.

33. No Westover System satisfies every element of the definition of a "master meter system." Consequently, no System is regulated under the Federal pipeline safety laws and Westover is not a "pipeline operator" subject to the regulatory authority of the Commission pursuant to Act 127.

APPENDIX C
PROPOSED ORDERING PARAGRAPHS
CONCERNING THE LITIGATED ISSUES

1. That I&E's Complaint is dismissed;

2. That Westover's Petition (as amended) is granted and the Commission declares that the Pennsylvania Gas and Hazardous Liquids Pipelines Act, 58 P.S. § 801.101 *et seq.* does not give the Commission authority to regulate the gas facilities at any of Westover's Systems that are identified in the Stipulation.