COZEN O'CONNOR

August 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**

**Reply 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 Reply 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

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

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

**BEFORE THE**
**PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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| Pennsylvania Public Utility Commission, | : | |
| Bureau of Investigation and Enforcement | : | |
| | : | Docket Nos. C-2022-3030251 |
| v. | : | 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 August, 2023 served the foregoing **Reply 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).

## VIA E-MAIL AND FIRST CLASS MAIL

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**BEFORE THE**
**PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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**Administrative Law Judge**
**Christopher P. Pell**

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

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# REPLY BRIEF OF WESTOVER PROPERTY MANAGEMENT COMPANY, L.P D/B/A WESTOVER COMPANIES

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Date: August 3, 2023

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AND NOW COMES Westover[1] to submit this Reply Brief pursuant to 52 Pa. Code §§ 5.501 and 5.502, and the Briefing Order issued in this matter on May 15, 2023. Westover incorporates by reference its Main Brief, in its entirety.

For the reasons discussed below, Westover continues to respectfully request 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 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 the apartment complexes operated by Westover, and identified in the Stipulation.

## I. PROCEDURAL HISTORY

The only addition to the Procedural History, as set forth in Westover's Main Brief, is that Westover and I&E each filed their Main Briefs on July 3, 2023.

I&E's recitation of the Procedural History of this case includes a discussion of events preceding the filing of any pleadings with the Commission. This discussion suggests that Westover did not cooperate with I&E's investigation as fully as I&E desired. I&E Main Brief 1-3. This discussion is irrelevant for purposes of deciding the Litigated Issues.

I&E has withdrawn its request that the Commission impose a civil penalty on Westover. I&E Statement 1-R p. 10; Partial Settlement ¶ 7.A.2. Westover's cooperation with a Commission investigation is relevant for determining whether to impose a civil penalty, and, if so, the amount of that penalty, 52 Pa. Code § 69.1201(c)(7), but is irrelevant for determining the threshold issue of whether the Commission has authority to regulate Westover. Consequently, Westover will not

[1] Unless otherwise noted, all capitalized terms, abbreviations and acronyms have the same definitions as set forth in Westover's Main Brief.

provide a counter-statement to this portion of I&E's Procedural History. Westover asks the ALJ and the Commission to disregard this portion of I&E's Main Brief.

## II. STATEMENT OF THE CASE

Westover respectfully submits that a Statement of the Case in a brief should discuss the facts necessary for the tribunal to make a decision, but should not include argument. *Cf.*, Pa. R.A.P. 2117(b). The Statement of the Case in I&E's Main Brief engages in extensive argument. *See, e.g*, pp. 6-8. Much of this argument is irrelevant to the Litigated Issues that were preserved in the Partial Settlement. To the extent that I&E's argument is relevant, Westover will respond in the Summary of Argument and Argument sections of this Reply Brief.

## III. SUMMARY OF ARGUMENT

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

The Parties agree that the Commission should exercise its discretion to issue a declaratory order to resolve a case or controversy, or to reduce uncertainty, in these proceedings.

### 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

I&E's Main Brief argues that the plain language of Act 127 gives the Commission authority to regulate the owner/operator of a gas system at an apartment building or complex downstream from an NGDC. I&E, however, fails to acknowledge the existence of the Construction Code, 35 P.S. § 7210.101 *et seq*., which regulates fuel gas pipeline systems at buildings. When Act 127 is read in light of the preexisting Construction Code, the "plain language" of Act 127 becomes ambiguous because it is susceptible to more than one reasonable interpretation. The Commission may resort to the rules of statutory construction to resolve this ambiguity.

Applying 1 Pa. C.S. § 1933, the Commission should find that Act 127 did not give the Commission authority to regulate fuel gas pipeline systems at buildings, such as at Westover's apartment buildings located downstream from NGDCs. Instead, Act 127 gave the Commission authority to regulate gas and hazardous liquids gathering, transmission, distribution and storage facilities, except that fuel gas piping systems at buildings will continue to be regulated by L&I and municipalities.

I&E's Main Brief also contends that the Commission should construe Act 127 as giving the Commission authority to regulate owners/operators of gas pipeline systems at apartment complexes downstream from NGDCs to achieve the policy goal of promoting public safety. According to I&E, if the Commission does not regulate these gas systems, no one does. Such a gap in regulatory oversight would jeopardize public safety.

The Commission should reject I&E's "regulatory gap" argument, primarily because it is legally incorrect. Before the passage of Act 127, fuel gas piping systems at buildings were regulated by L&I and municipalities. When the General Assembly enacted Act 127, it did not intend to take regulatory authority away from these entities and give it to the Commission. Instead, the Legislature intended that L&I and municipalities would continue to regulate fuel gas piping systems at buildings (including apartment 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

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

According to I&E's Main Brief, pp. 16 and 47, one element of the test of a "master meter system" is that the pipeline distribution system must be within, but not limited to, a definable area such as an apartment complex. When I&E applies this element of the test, however, it inexplicably

ignores the critical language in the regulation and argues that Westover's Systems are "master meter systems" because they are "limited to the apartment complex."

The Commission must give effect to every word in 49 CFR § 191.3. The Commission should give effect to the phrase "within, but not limited to, a definable area such as an apartment complex" by finding that a "master meter system" must be located partly within, but also partly outside, the apartment complex. The plain language of the Federal regulation is that a "master meter system" is within but not limited to an apartment complex – not that the "master meter system" is within and limited to an apartment complex. The Parties agree that all of Westover's Systems are located within an apartment complex. The Commission should therefore find that all Westover Systems are not "master meter systems" as defined in 49 CFR § 191.3.

**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**

I&E's Main Brief uses a "broad brush" analysis, which lumps systems with different configurations together, producing incorrect results. The facts at each System must be closely analyzed.

For example, I&E's Main Brief discusses the System at Paoli Place – North, as though there is a single gas system at that apartment complex. The System at Paoli Place – North (Buildings L-R) (where tenants purchase gas directly from the NGDC) is very different from the System at Paoli Place – North (Buildings A-K) (where Westover purchases gas, consumes some of it, and distributes the remainder to building occupants). Consequently, these two Systems should be analyzed separately.

This detailed analysis is necessary because the Commission has advised the regulated community that, if a person operates multiple facilities, some of which are subject to Act 127 and

some of which are not, the person is considered a pipeline operator only with regard to the facilities subject to Act 127.

I&E seems confused about the Systems at Black Hawk, Concord Court and Lansdale Village. At these Systems, Westover purchases gas from the NGDC. Westover burns the gas in its own central boiler in order to produce heat and hot water. Westover then supplies the heat and hot water to building occupants through its pipeline distribution system. Westover does not supply gas to building occupants at these apartment complexes.

These three Systems fail to meet two elements of the test of a "master meter system:" the system operator does not purchase gas for resale and the system operator does not supply the gas through its pipeline system to another party. 49 CFR § 191.3 views natural gas as a commodity that is purchased by the system operator, who subsequently sells that same commodity to someone else. The system operator must supply this commodity to the customer through the gas distribution pipeline system. One distinguishing characteristic of a "master meter system" is that it involves the transfer of gas from the operator to other persons. At Black Hawk, Concord Court and Lansdale Village, Westover's pipes supply heat and hot water – not gas – to building occupants.

At some other Systems, Westover consumes some of the gas that it purchases, and resells and supplies the remainder to building occupants. I&E sees no distinction between these two parts of the Systems, in terms of whether they constitute a "master meter system." Westover, in contrast, contends that they should be analyzed separately.

For example, at Country Manor, Westover buys gas from the NGDC. Westover then burns some of the gas in Westover's central boiler to produce heat and hot water, and supplies that heat and hot water to building occupants. Westover transfers the remainder of the gas to building occupants, who use it for cooking.

The portion of Country Manor's System that is used to consume gas, and to supply heat and/or hot water to building occupants, should not be considered a "master meter system" for the reasons discussed above with regard to Black Hawk, Concord Court, and Lansdale Village. That is, with regard to this portion of the System, the operator does not purchase gas for resale and the operator does not supply the gas through its pipeline system to another party.

The portion of Country Manor's System that is used to transfer gas to building occupants for cooking (considered by itself) does not satisfy the test of a "master meter system" for other reasons (*e.g.*, it is located entirely within, and is limited to, the apartment complex; it does not distribute gas in or affecting interstate or foreign commerce; and it is entirely or primarily comprised of interior piping inside a single building).

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

To determine the meaning of the term "ultimate consumer," as used in 49 CFR § 191.3, one must examine the language of Section 191.3. I&E's Brief does not. Westover's Main Brief analyzed Section 191.3, demonstrating that the term "ultimate consumer" means the party (if any) to whom the system operator resells and supplies gas. If the system operator does not resell and supply gas to anyone, there is no "ultimate consumer" – and that system is not a "master meter system."

I&E's Main Brief argues that, even where building occupants are not supplied with gas, they are the "ultimate consumer" because they "receive the ultimate benefit and use of the gas service, *i.e.,* heat and/or hot water." I&E Main Brief p. 41. This interpretation is contrary to Section 191.3, which requires that the operator of a "master meter system" purchase gas for resale and supply that commodity to the "ultimate customer" through a gas distribution pipeline system.

Where Westover burns gas in its central boiler, and supplies heat and hot water to building occupants, Westover's "gas distribution pipeline system" ends at the point the gas is burned. The pipes that supply heat and/or hot water to a building occupant are not part of a "gas distribution pipeline system" and should not be regulated as though they carry natural gas.

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

I&E contends that the definition of a "master meter system" does not create an explicit exception for systems comprised exclusively or primarily of interior piping. Section 191.3, however, contains an implicit exception for systems comprised exclusively or primarily of interior pipes within a single building. The regulation's reference to a pipeline system for distributing gas within a mobile home park, housing project, or apartment complex means that a "master meter system" must involve exterior or underground piping between multiple buildings.

I&E contends that an exception for pipeline systems that are exclusively or primarily comprised of interior pipes in a single building would be subjective and difficult to administer. If Act 127 applies to gas systems at apartment complexes downstream from an NGDC, then the Commission must follow the Federal pipeline safety laws. Section 191.3 contains an implicit exception for pipeline systems that are exclusively or primarily comprised of interior pipes in a single building. The Commission must apply that regulation. The Commission frequently decides difficult questions. It can certainly determine whether a gas pipeline system at an apartment complex has exterior or underground pipes connecting multiple buildings.

### 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"

I&E contends that the existence of a landlord-owned sub-meter, in and of itself, determines that a System is a "master meter system." One element of the test of a "master meter system" is that "[t]he 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. The presence of a landlord-owned sub-meter is relevant evidence for determining whether a System satisfies this element of the test, but, by itself, should not be determinative. Other facts must be considered, such as: Is the landlord currently using the sub-meter to bill building occupants?

Additionally, the presence of a landlord-owned sub-meter is not relevant evidence for proving other elements of the test of a "master meter system." For example, contrary to I&E's assertion, this fact is not relevant evidence for determining whether a System is "within, but not limited to" the definable area of the apartment complex. Similarly, it is not relevant for determining whether a System is entirely or primarily comprised of interior pipes within a single building, or whether the System is engaged in or affects interstate or foreign commerce. Consequently, the existence of a landlord-owned sub-meter should not be dispositive evidence that any System is 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"

49 CFR § 191.3 establishes a test for determining whether a gas pipeline system is a "master meter system." One element of this test is that the *operator* purchases metered gas from an outside source for resale through a gas distribution pipeline system. The Federal pipeline safety laws define the operator of a "master meter system" as *someone who is engaged in the transportation of gas*, which, 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*. For the Commission to find that Westover is the operator of any System, the Commission must find that the System is engaged in the gathering, transmission, or distribution of gas by pipeline, or the storage of gas, in or affecting interstate or foreign commerce.

The initial question is the quantum of evidence necessary for the Commission to decide that Westover is the operator of a "master meter system." Westover contends that the Commission must make a decision based on the preponderance of the evidence, and that the Commission's decision must be supported by substantial evidence in the record.

I&E, in contrast, contends that no evidence is necessary for the Commission to find that every Westover System is engaged in or affects interstate or foreign commerce. I&E argues that every element of a gas gathering, transmission and distribution line is moving gas, which is either in or affects interstate or foreign commerce. In other words, according to I&E, as a matter of law, every gas pipeline system either engages in or affects interstate or foreign commerce.

The Commission ordered hearings to be held in this case to provide it with an adequate evidentiary record, and both Parties had a full opportunity to develop the record. The Commission's decision now should not be based on an assumption that all gas systems engage in or affect interstate or foreign commerce.

I&E introduced no evidence whatsoever to prove that Westover's Systems are engaged in or affect interstate or foreign commerce. The Commission should therefore find that I&E failed to establish a *prima facie* case that Westover is an operator of a "master meter system." I&E's Complaint therefore should be dismissed.

Westover, in contrast, introduced evidence demonstrating that it does not engage in the gathering, transmission, distribution or storage of gas at all at four Systems. For all of the other

Systems identified in the Stipulation, Westover introduced evidence demonstrating that each System is not engaged in, and does not affect, interstate or foreign commerce. Consequently, Westover established a *prima facie* case that it is not the operator of a "master meter system" because it is not engaged in the transportation of gas at any System. I&E did not rebut this *prima facia* case. Westover's Petition for Declaratory Order therefore should be granted.

## IV. ARGUMENT

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

The Parties agree that the Commission should exercise its discretion to issue a declaratory order to resolve a case or controversy, or to reduce uncertainty, in these proceedings. Westover Main Brief pp. 20-21; I&E Main Brief pp. 12-13. Consequently, Westover will not address this issue further in this Reply Brief.

### 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

I&E's Main Brief offers two primary arguments why the Commission should find that Act 127 gives the Commission authority to regulate the owner/operator of a gas system at an apartment building or complex downstream from an NGDC. First, I&E argues that the plain language of Act 127 gives the Commission such authority. Second, I&E argues that, if Act 127 does not give the Commission such authority, there is a "regulatory gap" exposing tenants to great danger.[2] Westover will respond to each argument in turn.

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[2] I&E also briefly contends that, although the Commission has not previously addressed the Litigated Issues in a contested proceeding, the Commission has previously taken actions suggesting that the Commission believes Act 127 gives it authority to regulate the owner/operator of a gas system at an apartment building or complex downstream from an NGDC. I&E Main Brief p. 6 n.23. As support for this statement, I&E cites several Commission decisions approving settlement agreements between I&E and mobile home parks resolving alleged violations of Act 127. It is well settled that the Commission's approval of a settlement agreement does not establish binding precedent. *See, e.g.,*

### 1. I&E's "Plain Language" Argument Fails to Acknowledge the Existence of the Construction Code

I&E's Main Brief contends that the plain language of Act 127 and 49 CFR § 191.3 give the Commission authority to regulate gas pipelines at apartment complexes downstream from NGDCs. I&E Main Brief pp. 13-14. I&E's Main Brief, however, improperly construes Act 127 in isolation. 1 Pa. C.S. § 1932 (statutes relating to the same persons or things are to be read *in pari materia)*; *A.S. v. Pa. State Police,* 636 Pa. 403, 419, 143 A.3d 896, 905-906 (Pa. 2016) (statutes are to be read in context, not in isolation). I&E's Main Brief fails to acknowledge the existence of the Construction Code, 35 P.S. § 7210.101 *et seq*., which regulates fuel gas pipeline systems at buildings.

In pertinent part, the Construction Code creates a comprehensive regulatory scheme for fuel gas pipeline systems at buildings. This regulatory scheme governs the operation and maintenance, as well as the construction, of fuel gas piping systems at buildings. Moreover, this regulatory scheme applies to the entirety of fuel gas piping systems, from the point of delivery to the outlet of the appliance shutoff valves. Finally, this regulatory scheme is enforced by L&I and municipalities. Westover Main Brief, pp. 23-24.

When Act 127 is read in light of the preexisting Construction Code, Act 127 is ambiguous because it is susceptible to more than one reasonable interpretation: (1) L&I and municipalities

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*Pa. Pub. Util. Comm'n v. Columbia Gas of Pa., Inc.,* Docket No. R-2022-3031211 *et al*. (Opinion and Order entered December 8, 2022) 107, citing *Pa. Pub. Util. Comm'n v. Columbia Gas of Pa., Inc.,* Docket No. R-2020-3018835 (Order on Reconsideration entered April 15, 2021) at 18. As additional support, I&E notes that the Commission has accepted the Act 127 Registration forms of several companies that claim to own/operate "master meter systems" at apartment complexes. In each instance, however, the Commission's only action was to send the registrant a letter acknowledging receipt of the Registration form. This action hardly constitutes a Commission determination that it has authority to regulate the owner/operator of a gas system at an apartment building or complex downstream from an NGDC. Consequently, the ALJ and the Commission should reject I&E's brief argument that prior Commission actions suggest that the Commission believes Act 127 gives it authority to regulate the owner/operator of a gas system at an apartment building or complex downstream from an NGDC.

would continue to regulate fuel gas pipeline 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. Westover's Main Brief p. 25.

To resolve this ambiguity, the Commission may resort to the rules of statutory construction. 1 Pa. C.S. § 1901. Consistent with 1 Pa. C.S. § 1933, the Commission should construe Act 127 and the Construction Code in such a way as to give effect to both. This can be done by finding that the Construction Code applies to fuel gas piping systems at buildings, whereas Act 127 applies to other gas and hazardous liquids gathering, transmission, or distribution pipelines and storage facilities. Westover's Main Brief p. 26. 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. 35 P.S. §§ 7210.101(a)(2) and (3).

If the Commission instead finds that the Construction Code and Act 127 irreconcilably conflict, it should resolve that conflict in favor of the special legislation, consistent with 1 Pa. C.S. § 1933. In this case, the special legislation is the Construction Code, which governs the construction, operation and maintenance of a limited class of pipelines (fuel gas pipeline systems at buildings), whereas Act 127 governs the construction, operation, and maintenance of a broad array of gas and hazardous liquids gathering, transmission, distribution and storage facilities. Under this interpretation, Act 127 established a 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.

Significantly, both approaches yield the same result: Act 127 did not give the Commission authority to regulate fuel gas pipeline systems at buildings, such as at Westover's apartment buildings located downstream from NGDCs. This result is consistent with the legislative history of Act 127, which demonstrates that Act 127 was intended to address gaps in the regulation of gas lines carrying Marcellus Shale gas from the well to markets all over the Commonwealth; Act 127 was not intended to address safety concerns at apartment complexes downstream from NGDCs. Westover's Main Brief pp. 28-30.

**2. There is No "Regulatory Gap;" Even if There is a "Regulatory Gap," The General Assembly – Not the Commission – Must Address It**

I&E contends that the Commission should construe Act 127 as giving the Commission authority to regulate the owner/operator of a gas pipeline system at apartment complexes downstream from NGDCs to achieve the policy goal of promoting public safety. According to I&E, if the Commission does not regulate these gas systems, no one does. Such a gap in regulatory oversight would jeopardize public safety. I&E Main Brief pp. 6-7.

The Commission should reject I&E's "regulatory gap" argument for at least three reasons. First, there is little evidentiary support for I&E's argument.[3] According to I&E, persons looking for an apartment most likely assume that the gas facilities at the apartment complex are safe because of the regulatory oversight of the Commission and the federal government. I&E Main Brief p. 7. There is no evidence in the record to support this statement. It is at least equally

[3] Westover specifically disputes I&E's characterization of Mr. Orr's testimony as "expert testimony." I&E Main Brief pp. 6, 46 and Proposed Findings of Fact 1. Mr. Orr was never identified as, or qualified to be, an expert witness. Mr. Orr was presented as a fact witness on behalf of I&E.

plausible that potential tenants believe the gas facilities at Westover's Systems are safe because of Westover's excellent safety record.

Westover has owned or operated gas facilities or equipment at apartment complexes and/or commercial properties in Pennsylvania since approximately 1965, but has never had a gas accident that caused property damage or personal injury. Westover Statement No. 1 p. 3; Westover Statement No. 1-R p. 28. Westover examines and maintains its Systems, Westover Statement No. 1-R pp. 26-27, and takes pro-active steps to ensure safety. Westover Statement No. 1-R p. 28. Westover contracts with vendors who have completed PHMSA's Operator Qualifications training. Westover Statement No. 1 p. 5; Westover Statement No. 1-R p. 18. Westover has demonstrated its ability to promptly and effectively repair gas leaks and resolve other issues as they arise. Westover Statement No. 1 pp. 4, 5; Westover Statement No. 1-R pp. 13-14. Westover has also made significant improvements to many of its Systems recently, and plans to continue to improve its Systems in the future. Westover Statement No. 1 pp. 21, 25, 27, 29, 31, 33, 35, 37, 38, 40, 50; Westover Statement No. 1-R pp. 18, 26, 27. Westover has an obvious interest in ensuring the safety of the properties that it manages and avoiding the liability that could come from a gas incident. Westover understands that maintaining safe gas facilities is good business and the right thing to do. Westover Statement No. 1-R p. 26.

Moreover, the record does not establish that Commission oversight necessarily ensures the safety of gas distribution systems.[4] I&E has authority to enforce federal pipeline safety laws with

[4] In this regard, it should be noted that the National Transportation Safety Board recently issued an investigative update regarding the natural gas-fueled explosion and fire that occurred at the R.M. Palmer Company in West Reading, Pennsylvania. That report indicates the explosion and fire occurred due to a leak from a UGI Corporation gas line. "The factory buildings had two natural gas pipeline meter sets regulated by the Pennsylvania Public Utility Commission." https://www.ntsb.gov/investigations/Pages/PLD23LR002.aspx

respect to public utilities, 52 Pa. Code § 59.33(b), yet NGDC meters and vents are located directly in front of operable windows at Westover apartment complexes – which I&E cites as a safety concern. Westover Statement No. 1-R pp. 7-8. I&E's Main Brief, at page 8, alleges that the bathtub curve is "one possible explanation for I&E's discovery of leaks during I&E's limited visits to the apartment complexes," but this curve applies to NGDCs as well as Westover, as demonstrated by the discovery of several gas leaks in NGDC facilities at Westover's apartment complexes. Westover Statement No. 1 pp. 52-53; Westover Statement No. 1-R p. 25. Finally, the NGDCs' facilities at Westover's apartment complexes are not in significantly better condition than Westover's facilities. Westover Statement No. 1-R p. 2-3; Westover Exhibit PQ-31 (**CONFIDENTIAL**).

Second, I&E's "regulatory gap" argument is incorrect as a matter of law. As discussed above, if the Commission finds that Act 127 does not give the Commission authority to regulate fuel gas pipeline systems at apartment buildings downstream from an NGDC, L&I and municipalities would continue to have authority to regulate those fuel gas pipeline systems.

Third, even if there would be a "regulatory gap," the Commission does not have authority to take the initiative to fill it. The General Assembly is the body with authority to decide how to address public safety issues at apartment complexes. The Commission is an agency created by the General Assembly, and 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 (1977). The Commission must construe Act 127 according to its terms, using the Rules of Statutory Construction and governing case law. The Commission cannot "interpret" Act 127 in such a way as to give itself authority that the General Assembly did not give it.

For all of the above reasons, Westover continues to request that the ALJ recommend, and the Commission 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.

### 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 Parties agree that 49 CFR § 191.3's definition of a "master meter system" contains multiple elements, each of which must be satisfied for the Commission to find that any particular Westover System is a "master meter system." Westover Main Brief p. 33; I&E Main Brief pp. 16-17. For the reasons set forth below, Westover continues to argue that the ALJ should recommend, and the Commission should find, that no Westover System satisfies each element of the test 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

On page 16 of its Main Brief, I&E acknowledges that one element of the test of a "master meter system" is "1. Pipeline distribution system within, but not limited to a definable area, such as an apartment complex." I&E's Main Brief p. 16. Similarly, on page 47, I&E's Brief acknowledges that Section 191.3 requires that a pipeline system be "within, but not limited to a definable area, such as an apartment complex."

On pages 36-37, however, I&E ignores the "but not limited to" language in Section 191.3. Instead, I&E contends that all of Westover's Systems are "master meter systems" because they "are limited to the apartment complex." I&E never explains why the Commission should read "but not limited to" out of the test of a "master meter system." I&E's Main Brief engages in no analysis of the language of Section 191.3; the single paragraph in I&E's Main Brief discussing

this element of the test of a "master meter system" is limited to a discussion of the agreed-to facts, particularly the facts regarding Carlisle Park.

In its Answer to Westover's Motion for Summary Judgment, I&E agreed with Westover that, based on the common and accepted definition of "within," a pipeline system for distributing gas "must be located in a definable area, such as an apartment complex." I&E Answer to Westover's Motion for Summary Judgment ¶ 92. But again, I&E failed to acknowledge that the regulation goes further and says that a "master meter system" must be "within, but not limited to," the apartment complex. I&E simply asserted that "Westover meets the definition of a 'master meter system' because its gas facilities are located entirely within a definable area, *i.e.*, the apartment complex." *Id.*, ¶ 84.

I&E's interpretation of 49 CFR § 191.3 fails to give effect to the phrase "but not limited to." This violates the rule of construction that effect must be given to every word in a statute or regulation. *Leocal v. Ashcroft,* 543 U.S. 1, 12 (2004); *Habecker v. Nationwide Ins. Co.*, 445 A.2d 1222, 1226 (Pa. Super. 1982). Westover's Main Brief, pp. 34-35, engaged in an extensive analysis of the regulation's language, demonstrating that the phrase "within, but not limited to" means that a pipeline system must be located partly within and partly outside the boundaries of the apartment complex in order to satisfy the test of a "master meter system." I&E stands the regulation on its head by interpreting the regulation to mean that a pipeline system must be "within and limited to" the apartment complex to be a "master meter system," whereas the plain language of the regulation requires that the pipeline system be "within but not limited to" the apartment complex.

In its Answer to Westover's Motion for Summary Judgment, at ¶ 88, I&E noted that PHMSA interpretation letters have never addressed the meaning of Section 191.3's requirement that a "master meter system" be "within, but not limited, to" a definable area of an apartment

complex. ¶ 88. Westover agrees with this statement; Westover's research has not located any PHMSA interpretation letters interpreting this phrase. PHMSA interpretation letters therefore provide no guidance to the Commission in resolving this issue.

I&E's Answer to Westover's Motion for Summary Judgment nonetheless noted that some PHMSA interpretation letters have concluded that apartment complexes can be "master meter systems." *Id.* This argument misses the mark. The facts of those other cases might have been different; the pipeline systems in those other cases might have been "within, but not limited to" the apartment complex. It is also possible that PHMSA inadvertently overlooked the "within, but not limited to" element of the test of a "master meter system" when issuing those Interpretation Letters. Since these PHMSA Interpretation Letters did not address this element of the test of a "master meter system," they provide no guidance to the Commission in resolving this issue.

The definition of a "master meter system" explicitly requires that the pipeline distribution system be "within, but not limited" to a definable area, such as an apartment complex. The Commission should give effect to these words and conclude that, to be a "master meter system," a pipeline system must be located partly inside and partly outside the boundaries of the apartment complex.

This conclusion is consistent with the guidance that the Commission has provided to the regulated community for almost ten years. The Commission's Frequently Asked Questions Brochure, answering common questions about Act 127, states that Act 127 does not apply to "master meter systems" serving their own property, but does apply to "master meter systems" that provide service to property owned by third parties. **Westover Exhibit AS-3**. I&E's Brief only mentions the Frequently Asked Questions Brochure in the Proposed Findings of Fact. I&E's Main

Brief therefore fails to explain why the Commission's guidance was incorrect. Westover respectfully submits that the Commission's guidance was correct and should be followed.

In disposing of Westover's Motion for Summary Judgment, the ALJ stated that he was not persuaded by Westover's argument in that motion, but provided no additional explanation. *Pa. Pub. Util. Comm'n v., Bur. of Invest. and Enforcem't. v. Westover Property Management Company, L.P.*, Docket Nos. C-2022-3030251 and P-2021-3030002, Interim Order Denying the Motion for Summary Judgment Filed by Westover Property Management Company, L.P. (ALJ Order issued April 18, 2023) p. 6. Considering Westover's argument in its Main Brief and this Reply Brief, and the lack of any substantive argument by I&E, Westover urges the ALJ to reconsider his conclusion.

The undisputed evidence demonstrates that all of the Systems operated by Westover are only located within, and only serve customers within, the boundaries of the apartment complexes managed by Westover. Consequently, I&E has failed to carry its burden of proof with regard to its Complaint because it has failed to demonstrate that any System satisfies the first element of the test of a "master meter system." Westover, in contrast, has carried its burden of proof with regard to its Petition for Declaratory Order because it has demonstrated that no System satisfies the first element of the test of a "master meter system." Consequently, Westover respectfully requests that the ALJ recommend, and the Commission approve, dismissing I&E's Complaint and granting Westover's Petition for Declaratory Order.

### 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

I&E's Main Brief contends at pages 38-39 (notes omitted):

> The facts surrounding Westover are similar to PHMSA's interpretation in the Mall of America…. Specifically, the Mall buys gas from the local distribution company and resells it to the Mall tenants using gas meter readings. . . .
>
> . . .
>
> Here, Westover purchases gas from the local NGDC, PECO or UGI, and resells the gas to its tenants, either through rents, an allocation, a sub-meter reading, or a combination of rents and sub-meter reading.

(referencing PHMSA Interpretation Letter PI-16-0012 (Dec. 6, 2020).

Several points need to be made in response to this argument. First, throughout its Main Brief, I&E cites PHMSA Interpretation Letters as authoritative, without ever addressing the precedential authority of these Interpretation Letters. *See, e.g.*, I&E Main Brief pp. 37-39, 40-41, 42, 45-46. PHMSA Interpretation Letters do not purport to, and do not, establish binding precedent controlling on the Commission. The Commission may consider those Interpretation Letters and follow them to the extent their reasoning is persuasive, but the Commission is not required to follow them – particularly where PHMSA's interpretations are plainly erroneous or inconsistent with applicable statutes or regulations. Westover Main Brief pp. 35-36.

Additionally, it should be noted that PHMSA Interpretation Letters are not based on a record fully developed in a litigated proceeding; they are based on the information provided by the person or entity requesting PHMSA's opinion and, in some cases, PHMSA's request for additional information. The person or entity requesting an Interpretation Letter may fail to raise a critical issue that would have been disclosed by a full trial. Not surprisingly, therefore, PHMSA's

Interpretation are carefully worded to include "wiggle room." For example, I&E's Main Brief cites an unnumbered PHMSA Interpretation Letter dated February 6, 2020, which concludes:

> Based on your response to PHMSA's question *it appears* the Cal Farley's Boys Ranch would be the consumer of gas since it does not provide gas to concessionaires or tenants. Rather, Cal Farley's Boys Ranch uses the gas to provide energy to the various buildings it owns. *Keep in mind that this response letter reflects the agency's current application of the regulations to the specific facts you presented. If your response to any of the questions PHMSA posed changes, then the regulatory status of the pipeline system for the Cal Farley's Boys Ranch may change.*

I&E's Main Brief, Appendix D p. 3 (emphasis added). Consequently, PHMSA Interpretation Letters should not be treated as controlling authority.

Second, I&E's Main Brief uses a "broad brush" analysis which lumps Systems with different configurations together, producing incorrect results. Contrary to I&E's statement that the facts at Westover's Systems are similar to those in the Mall of America Interpretation Letter, the fact pattern in that single Interpretation Letter cannot possibly capture the variety of fact patterns at Westover's several Systems.[5] In fact, the variety of fact patterns at Westover's several Systems forced Westover to file its Amended Petition in May, 2022. Amended Petition ¶¶ 7-8. Westover urges the ALJ and the Commission to closely analyze the facts at each Westover System and apply the law based on those specific facts.

For example, I&E treats Paoli Place - North as a single System, I&E Main Brief p. 39, although the gas pipeline systems are considerably different at Paoli Place – North (Buildings A-K) compared to Paoli Place – North (Buildings L-R). The different configurations at those Systems

[5] Nevertheless, I&E's Main Brief relies heavily on this single Interpretation Letter. I&E Main Brief pp. 15, 38, 42, 45, 46.

explain why they are discussed separately in the Stipulation. *Compare* Stipulation ¶¶ 85-88 and ¶¶ 89-92.

At Paoli Place – North (Buildings L-R), Westover does not purchase gas at all, nor does it resell and supply gas to building occupants. Instead, building occupants purchase gas directly from the NGDC. Stipulation ¶¶ 89-92. I&E's Main Brief is wrong in claiming that, at Paoli Place – North, "Westover purchases the gas for resale through both rents and an actual meter reading from a sub-meter." I&E Main Brief p. 39. I&E's conclusion is consequently flawed.

As demonstrated in Westover's Main Brief, pages 37-39, the System at Paoli Place – North (Buildings L – R) is not a "master meter system" because it does not meet several elements of the test of a "master meter system:"

- Westover does not purchase gas for resale,
- Westover does not supply gas through its pipeline distribution system to the ultimate consumer, and
- the ultimate consumer does not purchase gas from Westover.

Paoli Place – North (Buildings A-K) involves a very different fact pattern. At this apartment complex, Westover purchases gas, consumes some of it (to produce hot water, which is distributed to residents) and distributes the rest of the gas to building occupants (who use it for heating and cooking). A completely different analysis must be applied to this System. *See* Westover Main Brief pp. 42-44 and Section V.C.2.c in this Reply Brief.

Based on the significant factual differences in the pipeline systems at Paoli Place – North (Buildings L-R) and Paoli Place – North (Buildings A-K), Westover respectfully submits that these two Systems should be analyzed separately rather being analyzed jointly just because the Systems are found within a single apartment complex. Additionally, the Commission has advised the regulated community that if a person operates multiple facilities, some of which are subject to Act

127 and some of which are not, the person is considered a pipeline operator only with regard to the facilities subject to Act 127. Frequently Asked Questions Brochure, **Westover Exhibit AS-3**, p. 3. The Commission should analyze the facts at different facilities separately, in order to avoid finding that one facility is a "master meter system" because of a different configuration at another facility.

**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**

I&E appears confused about the Systems at Black Hawk, Concord Court, and Lansdale Village. At one point, I&E says that Westover purchases gas from the NGDC and resells the gas to tenants at these apartment complexes. Main Brief p. 39. At another point, I&E says that Westover distributes the gas to its own central boiler and then supplies heat and/or hot water (rather than gas) to tenants. *Id*. p. 40. Finally, I&E gives the vague statement that "the pipeline system supplies the ultimate consumer, *i.e.*, the tenants are supplied with heat and hot water." *Id*. pp. 18, 20, 25. This confusion results in a flawed analysis of these Systems.

The Systems at Black Hawk, Concord Court, and Lansdale Village are actually quite simple. Westover purchases gas from the NGDC and burns all of that gas in Westover's central boiler. The central boiler produces heat and/or hot water, which Westover distributes through pipes to building occupants. Westover does not supply gas to building occupants at these apartment complexes. Westover Main Brief p. 39.

The analysis of whether these Systems are "master meter systems" should start with an analysis of the language of Section 191.3. I&E's Main Brief, however, does not closely analyze the language of this regulation.

Westover's Main Brief offered the following interpretation of Section 191.3:

> 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"). 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.

Westover Main Brief p. 38 (note omitted).

Applying this analysis to the facts at these three apartment complexes, it is clear that none of these Systems meets the test of a "master meter system" because each System fails to meet two elements of the test for a "master meter system:" the system operator does not purchase gas from an outside source for resale and the operator does not supply the gas through its pipeline system to the ultimate consumer.[6] Westover Main Brief pp. 39-42.

I&E is trying to fit a square peg into a round hole to reach its desired conclusion. It characterizes Westover as "distributing" gas to its own central boiler. Westover's pipeline takes gas from the NGDC's meter to Westover's own central boiler. This can hardly be considered as the "distribution" of gas; "distribution" involves the transfer of gas to another party. *Cf.,* 49 CFR § 192.3 (defining a "distribution center" as "the initial point where gas enters piping used primarily *to deliver gas to customers* who purchase it for consumption, as opposed to customers who purchase it for resale") (emphasis added). If these three Systems "distribute" gas, then most

[6] *See also,* Section IV.C.3. of this Reply Brief, discussing I&E's argument that building occupants are the ultimate consumers of the gas, even where they do not receive it, because they receive the benefit of the heat and hot water produced by Westover's consumption of the gas. This argument overlooks the explicit terms of Section 191.3, which state that the operator must purchase gas for resale through a pipeline distribution system, which supplies the gas to the ultimate consumer.

residential gas customers operate a gas "distribution system" because their pipes also take gas from the NGDC's meter to the purchaser's own furnace to burn the gas to produce heat and/or hot water.

I&E further contends that the Systems at Black Hawk, Concord Court and Lansdale Village are similar to the gas system described in the Mall of America Interpretation Letter, in which the system operator bought gas and resold and supplied the gas to tenants. That assertion is incorrect. The Systems at these three apartment complexes are like the systems described in the PHMSA Interpretation Letters that I&E relies on in Section VI.C.3 of its Main Brief (regarding who is the ultimate consumer of gas service).

In the Cal Farley's Boys Ranch Interpretation Letter, (dated February 6, 2020), PHMSA stated: "To determine whether Cal Farley's Boys Ranch meets the definition of a master meter system, … we must determine if the pipeline facilities are delivering gas to the ultimate consumer who pays for the gas…." Since the Ranch used the gas, rather than supplying it to tenants, PHMSA concluded that the Ranch did not meet the test of a "master meter system." I&E Main Brief, Exhibit D, pp. 2-3 (emphasis added).

Similarly, in the Bryant College Interpretation Letter, PHMSA Interpretation Letter PI-03-0101 (Feb. 14, 2003) (which was cited in Westover's Brief, p. 41), PHMSA concluded that a pipeline was not a "master meter system" because the college used the gas, and then supplied heat and hot water (rather than gas) to campus buildings. I&E Main Brief, Exhibit D, p. 6.

Finally, at page 40 of its Main Brief, I&E quotes PHMSA Interpretation Letter PI-73-0112 (June 18, 1973), which supports Westover's position, not I&E's position. PHMSA stated (emphasis added):

> One of the characteristics of a master meter system that makes it subject to the regulations is a *transfer of gas from the operator (landlord) to other persons* who are the ultimate consumers of the gas. In the situation described, however, the

> person (company) taking delivery of gas through the "master" meter is using the gas for its own purposes, i.e., offices, plant, warehouses, etc. There is no indication that the gas is resold by the company for use by another consumer or that the gas is being distributed by the company to any other person.

At Black Hawk, Concord Court, and Lansdale Village, Westover does not transfer gas to other persons. These Systems fail to meet several elements of the test of a "master meter system." Westover Main Brief pp. 39-42. Consequently, the ALJ should recommend, and the Commission should find, that the Systems at these apartment complexes do not satisfy all the elements of a "master meter system."

**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**

I&E's Main Brief notes that, at some Systems, Westover consumes some of the gas that it purchases, and resells and supplies the remainder to building occupants. I&E sees no distinction between these two parts of the Systems, in terms of whether they constitute a "master meter system." I&E therefor contends that the entirety of these Systems should be regulated as "master meter systems." I&E's Main Brief, p. 40.

Westover offers a more nuanced analysis of these Systems. For example, consider the System at Country Manor. At this apartment complex, Westover buys gas from the NGDC. Westover burns some of the gas in its central boiler to produce heat and hot water, which is distributed to building occupants. Westover transfers the remainder of the gas to building occupants, who use it for cooking. Stipulation ¶ 24-26.

Westover submits that the entirety of this System is not a "master meter system because:

- the System is located entirely within, and is limited to, the apartment complex;
- the System does not distribute gas in or affecting interstate or foreign commerce; and
- the System is entirely or primarily comprised of interior piping inside a single building.

Westover Main Brief p. 55.

If the Commission disagrees with these arguments, Westover contends that the Commission should consider different portions of the Country Manor System separately, because different portions of the Country Manor System do not meet the test of a "master meter system" for different reasons. For the reasons discussed in Section IV.C.2.b above, the portion of the Country Manor System that is used to consume gas, and to distribute heat and/or hot water, is not a "master meter system," because this portion of the Country Manor System does not involve the transfer of gas to building occupants. The portion of Country Manor's System that is used to transfer gas to building occupants for cooking does not meet the test of a "master meter system" because this portion of the System (considered by itself): is located entirely within, and is limited to, the apartment complex; does not distribute gas in or affecting interstate or foreign commerce; and is entirely or primarily comprised of interior piping inside a single building. Westover Main Brief pp. 43-44.

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

To determine the meaning of the term "ultimate consumer," as used in 49 CFR § 191.3, one must examine Section 191.3. I&E's Main Brief does not.

Section 191.3 (emphasis added) defines 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[.]

Westover respectfully submits that the term "ultimate consumer" means the party (if any) to whom the system operator resells and supplies gas (*i.e.,* the gas customers of the system

operator). To the extent that Westover resells and supplies gas to building occupants, the building occupants are the "ultimate consumers." To the extent that Westover does not resell and supply gas to building occupants or anyone else, there is no "ultimate consumer" – and no "master meter system." Westover Main Brief pp. 44-45.

I&E's Main Brief argues that, even where building occupants are not supplied with gas, they are the "ultimate consumer" because they "receive the ultimate benefit and use of the gas service, *i.e.,* heat and/or hot water." I&E Main Brief p. 41. This is contrary to the language of Section 191.3, which requires that the operator of a "master meter system" purchase gas for resale and supply that gas to the ultimate customer through a gas distribution pipeline system. The regulation contemplates that, in a "master meter system," the gas distribution system supplies a specific commodity – gas – to the ultimate consumer.

Where Westover burns gas in its central boiler, and supplies heat and hot water to building occupants, Westover's "gas distribution pipeline system" ends at the point the gas is burned. The pipes that supply heat and/or hot water to a building occupant are not part of a "gas distribution pipeline system" and should not be regulated as though they carry natural gas. That would be the illogical consequence of I&E's position. The dangers of transporting heat and hot water through a pipe are obviously different from the dangers of transporting gas through a pipe. There is no reason these pipes should be regulated as though they carry gas.

Westover continues to submit that 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" at any System is one indication that the 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

I&E's Main Brief argues that the definition of a "master meter system" in 49 CFR § 191.3 does not create an explicit exception for systems comprised exclusively or primarily of interior piping. I&E Main Brief p. 43. I&E's analysis, however, is incomplete. 49 CFR § 191.3 contains an *implicit* exception for systems comprised exclusively or primarily of interior piping inside a single building.

Westover's position is based on a report of the United States Department of Transportation ("US DOT") that was initially introduced into the record by I&E. I&E Answer in Opposition to Westover's Petition for Declaratory Order, Attachment E, p. 5-6. This document explains that, even before the publication of the regulatory definition of a "master meter system," PHMSA and its predecessor agencies believed that a "master meter system" must contain exterior or underground pipes between multiple buildings. This is because systems comprised entirely or primarily of interior piping located in a single building "do not resemble the kinds of distribution systems to which Congress intended the Natural Gas Pipeline Safety Act to apply." **Westover Exhibit PQ-33** p. 6.

Following the publication of the regulation, PHMSA stated:

> 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. In other words, Section 191.3, as written, included an implicit exception for pipeline distribution systems comprised primarily or entirely of interior pipes in a single building. An explicit exception was not necessary.

This reasoning is persuasive and should be adopted by the ALJ and the Commission. It recognizes that interior pipes are not subjected to the same stresses from weather and other conditions as are exterior or underground pipes. It reflects Congress' belief that a different regulatory scheme should be applied to interior gas pipes; the same regulatory scheme that applies to interstate transmission lines is not necessary for gas pipelines located primarily or exclusively within a single building.[7]

I&E's Main Brief disagrees, arguing that an exception for pipeline systems that are exclusively or primarily comprised of interior pipes in a single building would be subjective and difficult to administer. I&E Main Brief p. 44. The ALJ and the Commission should reject this argument. Act 127 defines a "pipeline operator" 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*." 58 P.S. § 801.102 (emphasis added). The Commission is therefore bound by the terms of the Federal pipeline safety laws. If the Federal pipeline safety laws create an exception for systems that are exclusively or primarily comprised of interior pipes, the Commission must apply that exception. As a matter of law, the Commission lacks authority to regulate systems that are not regulated under the Federal pipeline safety laws.

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[7] As argued in Section IV.B. above, the Pennsylvania General Assembly reached the same result when it enacted Act 127 without amending the Construction Code; the General Assembly intended that the Construction Code would continue to apply to fuel gas pipeline systems at buildings, whereas Act 127 would apply to other gas and hazardous liquid gathering, transmission, distribution and storage facilities.

Moreover, I&E fails to establish that this element of the test would be more difficult to enforce than any other element of the test of a "master meter system." The Commission frequently decides difficult questions, such as whether any particular system is a "public utility" as defined in the Code. The Commission is certainly capable of determining whether a gas system at an apartment complex has exterior or underground pipes connecting multiple buildings.

Finally, I&E argues that interior gas facilities are a major safety concern if not properly maintained and inspected. I&E Main Brief p. 46. As argued in Section IV.B.2 above, the Commission should not use the policy objective of promoting public safety as an excuse to "interpret" Section 191.3 to give itself authority that the General Assembly did not give it. 49 CFR § 191.3 should be construed as written – including its implicit requirement that a "master meter system" have exterior or underground pipes connecting multiple buildings.

The Systems at Mill Creek Village II, Country Manor, Fox Run, Paoli Place - South (Buildings A-D), Woodland Plaza and Norriton East are exclusively or primarily comprised of interior pipes inside a single building. Westover has carried its burden of proving that these Systems do not meet the implicit requirement in Section 191.3 that a "master meter system" include exterior or underground pipes connecting multiple buildings. Consequently, the ALJ should recommend, and the Commission should find, that these Systems 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"**

I&E contends that "the existence of a sub-meter not owned by the Natural Gas Distribution Company is dispositive of a Master Meter System." I&E Main Brief p. 47. According to I&E, this single piece of evidence determines the outcome of this case with regard to six Systems.

Interestingly, I&E does not adopt the flip side of this argument – that the absence of a landlord-owned sub-meter dispositively proves that a pipeline system is not a "master meter system."

As argued in Westover's Main Brief, p. 50, the presence of a landlord-owned sub-meter may be evidence that the pipeline system satisfies the requirement that "[t]he 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. This single piece of evidence, however, should not be dispositive. Other facts need to be considered. For example, it is possible that the sub-meter was installed long ago, is no longer being used, but has not been removed.

In addition, this single fact does not address some of the other elements of the test of a "master meter system." Westover Main Brief, p. 50. For example, a system with a landlord-owned sub-meter might not be a "master meter system" because the system is exclusively or primarily comprised of interior pipes within a single building.

I&E contends that the presence of a landlord-owned sub-meter proves that the pipeline distribution system meets all the elements of the test of a "master meter system," including the requirement that the gas distribution system be "within, but not limited to" a definable area, such as an apartment complex.[8] I&E Main Brief p. 47. I&E does not explain why the presence of landlord-owned sub-meter proves this element of the test. It does not. In fact, the presence of a landlord-owned sub-meter is not relevant evidence concerning the location of all the pipeline system's facilities and customers. The presence of a landlord-owned sub-meter therefore does not

[8] In this Section of its Main Brief, in contrast to Section IV.C.1, I&E acknowledges that a "master meter system" must be "within, but not limited to" the definable area of the apartment complex.

demonstrate that the system is "within but not limited to" the definable area of an apartment complex.

Finally, Westover's Main Brief, pp. 51-55, and Section IV.C.6. of this Reply Brief, below, contend that, to find that any particular gas distribution system is a "master meter system," the Commission must make a factual finding that the system is engaged in or affects interstate or foreign commerce. The presence of a landlord-owned sub-meter is not relevant evidence for determining whether any system is engaged in or affects interstate or foreign commerce.

For all of the above reasons, and the reasons stated in Westover's Main Brief, p. 50, the ALJ should recommend, and the Commission should find, that the presence of a landlord-owned sub-meter is not dispositive for determining that any system is or is not 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"

I&E's Main Brief, pp. 47-48, discusses the scope of Congress' authority to regulate gas safety, including the safety of intrastate pipelines. This argument is irrelevant. Westover does not contend that the Federal pipeline safety laws violate the Commerce Clause.

Westover simply contends that 49 CFR § 191.3 establishes a test for determining whether a gas pipeline system is a "master meter system." This test contains several elements, and one of these elements is that "the operator purchases metered gas from an outside source for resale through a gas distribution pipeline system." 49 CFR 191.3. The operator of a "master meter system" is someone who is engaged in the transportation of gas, *id*., which 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*. (emphasis added). For the Commission to find that Westover is the "operator" at any of its Systems, the Commission must find that the System is engaged in

the gathering, transmission, or distribution of gas by pipeline, or the storage of gas, in or affecting interstate or foreign commerce.

The initial question is the quantum of evidence necessary for the Commission to decide that Westover is the operator of a "master meter system." Westover contends that the Commission must make a decision based on the preponderance of the evidence. Westover Main Brief pp. 51-52. This position is supported by well-established precedent requiring Commission decisions to 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). Substantial evidence is such relevant evidence that a reasonable mind might accept as adequate to support a conclusion. *Borough of E. McKeesport v. Special/Temporary Civil Serv. Comm'n,* 942 A.2d 274, 281 (Pa. Cmwlth. 2008). More is required than 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).

I&E, in contrast, contends that no evidence is necessary for the Commission to find that every Westover System is engaged in or affects interstate or foreign commerce. I&E argues that every element of a gas gathering, transmission and distribution line is moving gas, which is either in or affects interstate or foreign commerce. I&E Main Brief, p. 48. In other words, according to I&E, as a matter of law, every gas pipeline system either engages in or affects interstate or foreign commerce.

As authority for this proposition, I&E cites a PHMSA Interpretation Letter concerning a 10-mile long intrastate gas line supplying gas to a public utility-owned generating station. *Id.* (citing PHMSA Interpretation Letter PI-71-035). As discussed above, PHMSA Interpretation Letters are not binding on the Commission. This decision, in particular, is not binding because PHMSA concluded that: "The Natural Gas Pipeline Safety Act of 1968 … and the regulations

contained in 49 CFR, Part 191 and 192 *would appear to be applicable* to this facility." In the instant proceeding, the Commission cannot conclude that Westover *would appear to be* an operator of a "master meter system." The Commission must make a finding that Westover is or is not the operator of a "master meter system." It must have evidence to make that finding.

This case was tried before an ALJ to ensure that the Commission had an adequate evidentiary foundation for its decision. *Petition of Westover Property Management Company, L.P. d/b/a Westover Companies for a Declaratory Order Regarding the Applicability of the Gas and Hazardous Liquids Pipeline Act*, Docket Nos. P-2021-3030002 and C-2022-3030251 (Order entered August 25, 2022); *Pa. Pub. Util. Comm'n v., Bur. of Invest. and Enforcem't v. Westover Property Management Company, L.P.*, Docket Nos. C-2022-3030251 and P-2021-3030002 (Opinion and Order entered November 22, 2022). The Parties had a full opportunity to develop the record. The Commission's decision should not now be based on an assumption.

As additional authority for its position, I&E cites a Congressional report regarding the Federal Pipeline Safety Act, quoting the then-Secretary of US DOT as saying "99 44/100 percent" of gas transportation is within the commerce clause. I&E Main Brief p. 49. Even this authority does not support an assumption that 100% of gas pipeline systems engage in or affect interstate or foreign commerce. To the contrary, this authority acknowledges that a small minority of gas pipeline systems do not engage in or affect interstate or foreign commerce.

The Commission should not hold that, as a matter of law, all gas pipeline systems engage in or affect interstate or foreign commerce. Instead, the Commission should determine, based on the evidence in the record, whether each System engages in or affects interstate or foreign commerce.

This is particularly true where, as here, I&E filed a Complaint asking the Commission to impose a substantial civil penalty on an alleged "master meter system" operator.[9] I&E bears the burden of proving every element of its case. I&E should not be permitted to prove a critical element of its case – and substantial penalties should not be imposed on a respondent – based on an assumption.

I&E introduced no evidence whatsoever to prove that Westover's Systems are engaged in or affect interstate or foreign commerce. The Commission should therefore find that I&E failed to establish a *prima facie* case that Westover is an "operator" of a "master meter system" as those terms are defined in 49 CFR § 191.3. I&E's Complaint therefore should be dismissed.

With respect to Westover's Petition for Declaratory Order, Westover introduced evidence that it is not an "operator" with respect to Paoli Place – North (Buildings L-R) because Westover does not purchase gas or supply it to building occupants. At this apartment complex, building occupants purchase gas directly from the NGDC. Westover is not an "operator" at this System because it does not engage in the gathering, transmission, distribution or storage of gas at all. Westover Main Brief pp. 37-39, 51.

Westover also introduced evidence to show that, at Black Hawk, Concord Court and Lansdale Village, Westover purchases gas but consumes all of it. At these Systems, Westover is not an "operator" because it does not engage in the gathering, transmission, distribution or storage of gas at all. Westover distributes heat and hot water – not gas. Westover Main Brief pp. 39-42, 51.

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[9] Although I&E is no longer pursuing a civil penalty in this case, it could pursue civil penalties in future complaints filed against alleged "master meter systems."

For all of the other Systems identified in the Stipulation, Westover introduced evidence demonstrating that the System is not engaged in interstate commerce or foreign commerce because:

- Westover's Systems are located entirely in Pennsylvania;
- Westover's purchase of the gas in Pennsylvania, from a Commission-regulated NGDC, is a transaction in intrastate commerce;
- Westover's sale of the gas to building occupants at its complexes in Pennsylvania is a transaction in intrastate commerce; and
- Westover's transportation of gas from the NGDC's meter in Pennsylvania to building occupants in Pennsylvania is intrastate transportation.

Westover's Main Brief pp. 52-53 and sources cited therein.

Moreover, Westover introduced evidence demonstrating that its Systems do not "affect" interstate or foreign commerce because :

- Westover's purchase of gas does not increase the amount of gas purchased (Westover purchases the same amount of gas that would have been purchased if the NGDCs had sold the gas directly to building occupants);
- each System's purchase of gas from the NGDC, and resale of gas to building occupants, is well downstream of any transaction in interstate or foreign commerce;
- each System's purchase of gas from the NGDC, and resale of gas to building occupants, is too small to affect upstream purchases in interstate or foreign commerce.

Westover Main Brief pp. 53-54 and sources cited therein.

In short, Westover established a *prima facie* case that it is not the "operator" of a "master meter system" because it is not engaged in the transportation of gas at any System. Since I&E did not introduce any evidence whatsoever on this issue, it failed to rebut Westover's *prima facie* case. Westover's Petition for Declaratory Order therefore should be granted.

### 7. Summary

I&E's Main Brief has not provided any reason to change the following chart, which was contained in Westover's Main Brief, summarizing 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 | | | |
| Mill Creek Village I | X | X | | | |
| Mill Creek Village II | X | 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** |
|---|---|---|---|---|---|
| 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 a "master meter system" as defined in Section 191.3, and therefore is not subject to Commission jurisdiction under Act 127.

## V. CONCLUSION

WHEREFORE, for all of the reasons discussed above and in Westover's Main Brief, Westover continues to respectfully request 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.

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