

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

RECOMMENDED DECISION

Before

Christopher P. Pell
Deputy Chief Administrative Law Judge

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I. INTRODUCTION

This decision recommends that the Pennsylvania Public Utility Commission (Commission) approve the Joint Petition for Partial Settlement filed in the above-captioned proceeding in its entirety without modification because it is in the public interest.

This decision also recommends that the Commission find that several of Westover's apartment complexes are subject to the Gas and Hazardous Liquids Pipelines Act, 58 P.S. §§ 801.101–801.1101 (Act 127), and that the following Westover systems are “master meter systems” as defined by 49 C.F.R. § 191.3:

- a. Carlisle Park Apartments;
- b. County Manor Apartments;
- c. Fox Run Apartments;
- d. Gladstone Towers Apartments;
- e. Hillcrest Apartments;
- f. Jamestown Village;
- g. Lansdowne Towers;
- h. Main Line Berwyn;
- i. Mill Creek I;
- j. Mill Creek II;
- k. Norriton East;
- l. Oak Forest;
- m. Paoli Place North – Buildings A-K;
- n. Paoli Place South – Buildings E-H;
- o. Park Court;
- p. Valley Stream, and
- q. Woodland Plaza.

Lastly, this decision recommends that the Commission sustain I&E's Complaint and find that Westover failed to file Act 127 registrations for the aforementioned apartment complexes. However, in accordance with the Joint Petition for Partial Settlement, I recommend that the Commission not impose a civil penalty for failing to register its systems under Act 127.

II. HISTORY OF THE PROCEEDING

On December 13, 2021, Westover Property Management Company, L.P. d/b/a Westover Companies (Westover) filed a Petition for Declaratory Order pursuant to 66 Pa.C.S. § 331(f) and 52 Pa. Code § 5.42 (Petition) to resolve an actual case and controversy regarding whether Westover is subject to Act 127. Westover requested that the Commission declare that it is not subject to Act 127.

On January 3, 2022, the Bureau of Investigation and Enforcement (I&E) filed its Answer of the Bureau of Investigation and Enforcement in Opposition to the Petition for Declaratory Order of Westover Property Management Company, L.P. d/b/a Westover Companies. I&E requested that the Commission deny the Company's Petition, deem Westover to be a pipeline operator subject to Act 127, and direct Westover to immediately comply with all applicable laws and regulations related to pipeline safety.

Separately on January 3, 2022, I&E filed a Formal Complaint against Westover Property Management Company, L.P. d/b/a Westover Companies alleging violations of Act 127, and Part 192 of the Federal pipeline safety regulations, 49 C.F.R. §§ 192.1–192.1015. Specifically, I&E alleged that Westover is a “pipeline operator” as the term is defined under Act 127 in that it “owns or operates equipment or facilities in this Commonwealth for the transportation of gas . . . by pipeline or pipeline facility regulated under Federal pipeline safety laws.”¹ Moreover, Westover, as a pipeline operator, is subject to the power and authority of the Commission pursuant to Section 501(b) of Act 127 which requires pipeline operators to comply with the Act and the terms and conditions of the orders issued under the Act.² I&E explained that, of the 34 residential apartment complexes that Westover owns and/or maintains in Pennsylvania, 17 contain jurisdictional master meter systems. I&E further explained that at each of these 17 apartment complexes, Westover purchases and receives gas from a natural gas distribution company (NGDC), specifically PECO Gas and UGI Utilities, Inc. The gas flows via pipeline to the NGDC-owed meter located at a Westover apartment complex. After the outlet of

¹ 52 P.S. § 801.102.

² 52 P.S. § 801.501(b).

the NGDC master meter, the gas flows in pipelines that are wholly owned and/or operated by Westover, where the gas is then distributed to the tenants in the apartment complex. Westover then charges its tenants for the gas either through a metered charge or rent. I&E asserted that an immediate threat to public safety exists with each and every day that Westover fails to submit to the Commission's jurisdiction and implement the pertinent pipeline safety rules at its apartment complexes. In addition to requesting that a \$200,000 civil penalty be assessed against Westover for the violations noted in the Complaint, I&E requested that:

- [Westover] be directed to report all regulated intrastate distribution pipeline miles for pipelines in operation during the 2012, 2013, 2014, 2015, 2016, 2017, 2018, and 2019 calendar years;
- [Westover] be directed to pay an assessment that will be generated by the Commission's Bureau of Administration based on the reported regulated intrastate distribution pipeline miles for pipelines that were in operation during the 2012, 2013, 2014, 2015, 2016, 2017, 2018, and 2019 calendar years;
- [Westover] be directed to fully comply with all applicable sections of Part 192 of the Federal pipeline safety regulations and Act 127 now and on a going-forward basis;
- [Westover] be directed to cooperate with I&E Safety Division during all inspections, including the coordination of such inspections, access to all physical facilities, and unfettered access to all documents, maps, and procedures; and
- That the Commission grant such further relief as deemed just and reasonable.^[3]

The Complaint was docketed at C-2022-3030251.

On January 25, 2022, Westover filed an Answer and New Matter to I&E's Complaint. In the Answer, Westover denied that it operates any master meter systems in Pennsylvania. As New Matter, Westover maintained that the Commission should initiate a rulemaking proceeding to give notice to and obtain input from stakeholders on the implementation of Act 127.

³ Complaint at 15-16.

On May 16, 2022, Westover filed its Amended Petition of Westover Companies for Declaratory Order.

By Order entered on August 25, 2022, the Commission ordered that pursuant to 52 Pa. Code § 5.81, Westover's Petition for Declaratory Order is consolidated with the Complaint proceeding at Docket No. C-2022-3030251, and that the matter be assigned to the Office of Administrative Law Judge (OALJ) for resolution of the disputed material facts and legal issues in the ongoing controversy at Docket No. C-2022-3030251, and issuance of a recommended decision.

By Initial Call-In Telephonic Prehearing Conference Notice dated August 29, 2022, an Initial Call-In Telephonic Prehearing Conference was scheduled for October 5, 2022, and the matters at Docket Nos. P-2021-3030002 and C-2022-3030251 were assigned to me.

On October 6, 2022, I issued Prehearing Order #1, establishing the litigation schedule for this proceeding.

On October 7, 2022, I issued Prehearing Order #2, granting Westover's Petition for Protective Order filed on Mach 9, 2022.

On October 25, 2022, I issued my Interim Order Addressing Motions to Compel Filed by Westover Property Management Company, L.P. and the Bureau of Investigation and Enforcement.

On October 28, 2022, Westover filed its Petition of Westover Property Management Company, L.P. D/B/A Westover Companies for Review and Answer to Material Questions and for Immediate Stay of Proceeding.

On November 8, 2022, I issued my Interim Order Granting the Motion of the Bureau of Investigation and Enforcement to Compel Entry for Inspection.

By Order entered November 22, 2022, the Commission Ordered that the Petition for Interlocutory Review and Answer to Material Questions and for Immediate Stay of Proceeding filed on October 28, 2022, by Westover not be answered, and that the matter be returned to me.

On December 5, 2022, I issued my Interim Order Granting Westover's Petition for Leave to Withdraw the Motion of Westover Property Management Company, L.P. D/B/A Westover Companies for an Extension of Time to Answer Some of the Interrogatories Propounded by the Bureau of Investigation and Enforcement, Set I.

On January 18, 2023, I issued my Interim Order Granting in Part and Denying in Part the Motion to Compel Filed by Westover Property Management Company, L.P.

On February 10, 2023, Westover filed its Motion for Summary Judgment by Westover Property Management Company L.P. D/B/A Westover Companies.

On March 2, 2023, I&E filed its Answer in Opposition of the Bureau of Investigation and Enforcement to the Motion for Summary Judgment of Westover Property Management Company, L.P., d/b/a Westover Companies.

On April 18, 2023, I issued my Interim Order Denying the Motion for Summary Judgment Filed by Westover Property Management Company, L.P.

The parties submitted testimony pursuant to the litigation scheduled established in Prehearing Order #1.⁴

⁴ Counsel for I&E contacted me on March 16, 2023, to advise that the parties were engaged in settlement discussions. As a result of the on-going settlement discussions, the parties requested to change the due date for the submission of Rebuttal Testimony from April 7, 2023 to April 17, 2023. I granted the parties' request via email.

During a conference call on April 28, 2023, the parties informed me that they had reached a settlement of I&E's Complaint but were unable to resolve Westover's Petition for Declaratory Order. It was determined during this conference call that the May 3-4, 2023, evidentiary hearings were no longer necessary. Following additional discussions, it was decided that the parties would brief the Act 127 jurisdictional issues in accordance with the briefing schedule set out in Prehearing Order #1, and that the parties would also file their proposed joint petition for settlement and statements in support addressing I&E's Complaint.

On May 4, 2023, the parties requested a modification to the briefing schedule as well as a waiver of the page limitations for briefs set out in 52 Pa. Code § 5.501(e). The parties requested: that Main Briefs with accompanying appendices, and the Joint Petition for Partial Settlement and accompanying Statements in Support, be due on July 3, 2023; that Reply Briefs be due on August 3, 2023; that the page limit for Main Briefs be extended to 80 pages; and that the page limit for Reply Briefs be extended to 40 pages. I advised the parties that their request to modify the briefing schedule was granted and that I would take their request to modify the page limitations into consideration.

On May 15, 2023, I issued a Briefing Order to the parties. In the Briefing Order, I granted the parties' request to modify page limitations.

On June 13, 2023, the parties filed their Joint Petition for Partial Settlement with associated documents, including their Joint Stipulation of Facts and their respective Statements in Support.

On July 3, 2023, the parties filed their respective Main Briefs.

On August 3, 2023, the parties filed their respective Reply Briefs.

On October 18, 2023, I issued my Interim Order Granting the Joint Stipulation for Admission of Evidence.

III. FINDINGS OF FACT⁵

1. The Commission's Bureau of Investigation and Enforcement is the bureau established to take enforcement action against public utilities and other entities subject to the Commission's jurisdiction. 66 Pa.C.S. § 308.2(a)(11); *see also Implementation of Act 129 of 2008; Organization of Bureaus and Offices*, Docket No. M-2008-2071852 (Final Procedural Order entered Aug. 11, 2011) (delegating authority to initiate proceedings that are prosecutory in nature to I&E).

2. Westover Property Management Company, L.P. d/b/a/ Westover Companies, with a business address of 550 American Avenue, Suite 1, King of Prussia, PA 19406, is a property management company that operates apartment complexes and commercial properties in Pennsylvania.

3. The local natural gas distribution companies which provide natural gas service to Westover's apartment complexes, as identified below, are PECO Energy Company ("PECO") and UGI Corporation ("UGI").

Black Hawk Apartments

4. Black Hawk Apartments consists of 14 separate residential buildings which house a total of 202 units and/or individual apartments.

5. Gas service is delivered from PECO to Westover at a meter located outside each apartment building.

⁵ The Parties stipulated to Findings of Fact which I have adopted and presented here as findings of fact 1 through 113. The Settling Parties Joint Stipulation of Facts is attached to the Joint Petition for Partial Settlement at Attachment A. I will note that the Settling Parties stipulated to the admission of certain pleadings including all related attachments and exhibits with their Finding of Fact #3. Additionally, the Settling Parties stipulated to the admission of their respective testimonies, including all attachments and exhibits, with their Finding of Fact #4. By Interim Order Granting Joint Stipulation for Admission of Evidence dated October 18, 2023, the identified pleadings and testimonies were admitted into the record. Accordingly, the Settling Parties' Stipulated Findings of Fact 3 and 4 are not reprinted here.

6. The gas facilities at Black Hawk Apartments are located within and are limited to the apartment complex. Westover's gas facilities consist of exterior and interior piping.

7. The gas facilities service a central boiler and hot water heater, which uses the gas purchased by Westover; heat and hot water is distributed to building occupants. Westover does not distribute gas to building occupants at this apartment complex.

8. The building occupants use electricity for cooking.

9. Westover purchases the gas from PECO and then charges the building occupants for the gas through rents.

Carlisle Park Apartments

10. Carlisle Park Apartments consists of one office building and 26 separate residential buildings which house a total of 208 units and/or individual apartments.

11. Gas is delivered by UGI to Westover at one rotary meter located on the property. The gas is then delivered to each apartment building through underground and exterior gas piping. The gas pipe continues into each building and branches out to each apartment unit.

12. The gas facilities at Carlisle Park are located within and are limited to the apartment complex, noting that one residential building is accessible by crossing a public roadway located within the apartment complex, and thus the gas facilities traverse under the public roadway via underground piping to that residential building. Westover's gas facilities consist of underground, exterior, and interior piping.

13. The gas service is used by the building occupants for heating and cooking.

14. Westover purchases the gas from UGI and then charges the building occupants for the gas through rents.

Concord Court Apartments

15. Concord Court Apartments consists of seven residential buildings which house a total of 84 units and/or individual apartments.

16. Gas service is delivered from PECO to Westover at a meter located outside each apartment building.

17. The gas facilities at Concord Court Apartments are located within and are limited to the apartment complex. Westover's gas facilities consist of exterior and interior piping.

18. The gas facilities service a central boiler and hot water heater, which uses the gas purchased by Westover. Westover distributes heat and hot water to building occupants. Westover does not distribute gas to building occupants at this apartment complex.

19. Building occupants use electricity for cooking.

20. Westover purchases the gas from PECO and then charges the building occupants for the gas through rents. Specifically, building occupants are billed based on the square footage of the building occupant's unit and/or square footage of the building occupant's unit and the number of the persons residing in the unit.

Country Manor Apartments

21. Country Manor Apartments is comprised of nine residential buildings, seven of which are comprised of two buildings, resulting in a total of 16 buildings. Some of the buildings have 26 units, while others have 12 units, resulting in a total of 200 units and/or individual apartments.

22. PECO delivers gas to Westover at meters located in the basements of the buildings or on the exterior of the buildings.

23. The gas facilities at Country Manor Apartments are located within and limited to the apartment complex. Westover's gas facilities consist primarily of interior piping; the only exterior piping is between the outside gas meter and the exterior wall of the building.

24. The gas facilities service a central boiler and hot water heater, which uses some of the gas and distributes heat and hot water to the building occupants. Some gas is distributed to the building occupants' individual units for cooking.

25. The building occupants all share several laundry rooms that have gas-operated dryers that the building occupant must pay to use.

26. Westover purchases the gas from PECO and then charges the building occupants for the gas through rents.

Fox Run Apartments

27. Fox Run consists of six residential buildings, which house a total of 196 units and/or individual apartments, and a barn.

28. PECO delivers gas to Westover at meters located on the exterior of each apartment building. Westover uses some of the gas to produce hot water, and distributes the rest to building occupants. The gas is piped to a Westover-owned sub-meter at each unit.

29. The gas facilities at Fox Run Apartments are located within and are limited to the apartment complex. Westover's gas facilities are primarily located inside the buildings; the only exterior piping is between the outside gas meters and the exterior wall of the building.

30. Building occupants use gas to produce heat, which is controlled by the building occupant at each unit.

31. Westover purchases the gas from PECO. Building occupants are billed for the gas they use based upon an actual reading from the sub-meter; building occupants are billed for the gas that Westover uses through rent.

Gladstone Towers Apartments

32. Gladstone Towers consists of two residential buildings which houses a total of 121 units and/or individual apartments.

33. PECO delivers gas to two meters located outside of Building AB, which provides gas service to both buildings, Building AB and Building CD.

34. The gas is piped to Building CD through underground and exterior piping.

35. The gas is then piped inside each building to a Westover-owned sub-meter.

36. The gas facilities at Gladstone Tower Apartments are located within and are limited to the apartment complex. Westover's gas facilities consist of underground, exterior, and interior piping, and sub-meters.

37. At each building, Westover uses some of the gas to produce hot water, which is distributed to building occupants. The remainder of the gas is distributed to each unit for heating, cooking, and running dryers.

38. Westover purchases the gas from PECO and bills the building occupants for the gas they use based upon actual meter readings from the sub-meter. Westover bills the building occupants for the gas it uses through rents.

Hillcrest Apartments

39. Hillcrest Apartments consists of seven separate residential buildings, which house a total of 84 units and/or individual apartments.

40. PECO delivers gas to one rotary meter which provides gas service to the entire apartment complex.

41. The gas is piped through underground and exterior piping to each building. The gas is then piped through interior piping to each unit in the apartment building to service a gas-run furnace.

42. The gas facilities at Hillcrest which distribute gas to the building occupants are located within and are limited to the apartment complex, and Westover's gas facilities consist of underground, exterior, and interior piping.

43. Westover purchases the gas from PECO and then charges the building occupants for the gas through rents.

Jamestown Village

44. Jamestown Village Apartments consists of 23 residential buildings which house a total of 253 units and/or individual apartments.

45. PECO delivers gas to multiple meters located outside each apartment building. The gas is then piped from exterior piping to interior piping which connects to a sub-meter in each unit's mechanical space.

46. The gas facilities at Jamestown Village which distribute gas to the building occupants are limited to the apartment complex, and Westover's gas facilities consist of exterior piping, interior piping, and sub-meters.

47. Westover purchases the gas from PECO and bills the tenant based upon an actual meter reading from the sub-meter.

Lansdale Village

48. Lansdale Village Apartments consists of three residential buildings which house a total of 41 units and/or individual apartments.

49. PECO delivers gas to a single meter on the exterior of one residential building. Westover's gas facilities service a central boiler in one building, which uses the gas purchased by Westover; heat and hot water is distributed to all three buildings for use by the building occupants. Building occupants use electricity for cooking.

50. The gas facilities at Lansdale Apartments are located within and are limited to the apartment complex. Westover does not distribute gas to building occupants at this apartment complex. Westover's gas facilities consist primarily of interior piping; the only exterior piping is between the outside gas meter and the exterior wall of the building.

51. Westover purchases the gas from PECO, and then bills the resident based upon an allocated basis related to the square footage of the unit and the number of persons residing in the unit.

Lansdowne Towers

52. Lansdowne Towers consists of five residential buildings which house a total of 231 units and/or individual apartments.

53. PECO delivers gas to a single meter outside Building B. The gas is then piped through underground and exterior piping to the other buildings in the apartment complex. Westover uses some of the gas to produce hot water, which is distributed to building occupants. The remainder of the gas is distributed through interior piping to a sub-meter installed in each unit. The gas is used by building occupants for heating and coin-operated dryers.

54. The gas facilities at Lansdowne Towers Apartments are located within and are limited to the apartment complex, and Westover's gas facilities consist of underground piping, exterior piping, interior piping, and sub-meters.

55. Westover purchases the gas from PECO and bills building occupants for the gas they use based upon an actual meter reading from the sub-meter for the unit's usage. Westover bills building occupants through rents for the gas it uses to produce hot water.

Main Line Berwyn

56. Main Line Berwyn Apartments consists of one office building and three residential buildings which house a total of 180 units and/or individual apartments.

57. PECO delivers gas to a single meter located at Building A. The gas is then piped through underground and exterior piping to the other buildings, where it is then piped through interior piping to a sub-meter.

58. The gas facilities at Main Line Berwyn Apartments are located within and are limited to the apartment complex, and Westover's gas facilities consist of underground piping, exterior piping, interior piping, and sub-meters.

59. Building occupants use the gas for heating and cooking. Westover uses the gas to produce hot water, which is distributed to building occupants.

60. Westover purchases the gas from PECO and bills building occupants, for gas used by the building occupants, based upon an actual meter reading from the sub-meter for the unit's usage. Westover bills building occupants through rents for the gas it uses to produce hot water.

Mill Creek I

61. Mill Creek I consists of one office and six separate residential buildings which house a total of 174 units and/or individual apartments.

62. PECO delivers gas to a single rotary meter located on the property. The gas is then piped through underground and exterior piping to each building, where it is then piped through interior piping to a central boiler and to each unit in the apartment buildings.

63. The gas facilities at Mill Creek I are located within and are limited to the apartment complex, and Westover's gas facilities consist of underground, exterior, and interior piping.

64. Westover uses some of the gas (to produce heat and hot water, which is distributed to the building occupants) and building occupants use the remainder of the gas for cooking.

65. Westover purchases the gas from PECO and then charges the building occupants for the gas through rents.

Mill Creek II

66. Mill Creek II consists of three separate residential buildings which house a total of 68 units and/or individual apartments.

67. PECO delivers gas to a meter located inside a mechanical room at each building.

68. The gas facilities at Mill Creek II are located within and are limited to the apartment complex, and Westover's gas facilities consist entirely of interior piping.

69. Westover uses some of the gas (to produce heat and hot water, which is distributed to the building occupants) and building occupants use the remainder of the gas for cooking.

70. Westover purchases the gas from PECO and then charges the building occupants for the gas through rents.

Norriton East

71. Norriton East Apartments consists of one residential building which houses a total of 68 units and/or individual apartments.

72. PECO delivers gas to one rotary meter on the exterior of the building. The gas is then piped through exterior piping into the building and to an external emergency generator. The gas services a central boiler through interior piping.

73. The gas facilities at Norriton East are located within and limited to the apartment complex. Westover's gas facilities primarily consist of interior piping; the only exterior piping is (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 about 10 yards away from the building.

74. Westover uses some of the gas (to produce heat and hot water, which is distributed to the building occupants) and building occupants use the remainder of the gas for cooking and coin-operated dryers.

75. Westover purchases the gas from PECO and then charges the building occupants for the gas through rents.

Oak Forest

76. Oak Forest Apartments consist of seven separate residential buildings which house a total of 143 units and/or individual apartments.

77. UGI delivers gas to one meter at the property. The gas is then piped through underground and exterior piping to the other residential buildings, and then through interior piping.

78. The gas facilities at Oak Forest are located within and limited to the apartment complex, and Westover's gas facilities consist of underground, exterior, and interior piping.

79. Westover uses some of the gas (to produce heat and hot water, which is distributed to building occupants) and building occupants use the remainder of the gas for cooking.

80. Westover purchases the gas from UGI and then charges the building occupants for the gas through rents.

Paoli Place

81. Paoli Place consists of three separate apartment complexes: Paoli Place North located at 27 East Central Ave.; Paoli Place South located at 55 South Valley Road; and Paoli Place South Valley Townhomes located at 50 South Valley Road.

82. Paoli Place North consists of 18 residential buildings which house a total of 204 units and/or individual apartments.

83. At Paoli Place North, Buildings A-K, PECO delivers gas to a meter located inside each residential building and is then piped through interior piping to a sub-meter located inside the building occupant's mechanical closet located outside the building occupant's unit/accessible from the building occupant's back porch area.

84. The gas facilities at Paoli Place North, Buildings A-K, are located within and are limited to the apartment complex, and Westover's gas facilities consist of interior piping and sub-meters.

85. Westover uses some of the gas (to produce hot water, which is distributed to the building occupants) and building occupants use the remainder of the gas for cooking and heating.

86. Westover purchases the gas from PECO and bills building occupants for the gas they use based upon an actual meter reading from the sub-meter for the unit's usage. Westover bills building occupants through rents for the gas it uses to produce hot water.

87. At Paoli Place North, Buildings L-R, PECO delivers gas to multiple meters located outside of each residential building. These meters provide gas service to the individual units.

88. The gas facilities at Paoli Place North, Buildings L-R are located within and are limited to the apartment complex.

89. Building occupants use gas for heat and hot water and use electricity for cooking.

90. PECO bills the building occupants based upon an actual meter reading. Westover does not purchase gas at this apartment complex.

91. At Paoli Place South, Buildings A-D, PECO delivers gas to a meter located outside each of the residential buildings. Westover uses some of the gas. The remainder is piped through exterior piping to interior piping and ends at a sub-meter.

92. The gas facilities at Paoli Place South, Buildings A-D are located within and limited to the apartment complex. Westover's gas facilities primarily consist of interior piping and interior sub-meters; the only external piping is between the outside gas meters and the exterior wall of the building.

93. Westover uses some of the gas (to produce heat and hot water, which is distributed to the building occupants) and building occupants use the remainder of the gas for cooking.

94. Westover purchases the gas from PECO and bills the building occupants through rents for the gas it uses to produce hot water and heat. PECO bills the building occupants based upon an actual meter reading for gas used for cooking.

95. At Paoli Place South, Buildings E-H, PECO delivers gas to a meter located outside one of the residential buildings.

96. The gas facilities at Paoli Place South, Buildings E-H, are located in and are limited to the apartment complex, and Westover's gas facilities consist of exterior, interior, and underground piping.

97. Westover uses some of the gas (to produce heat and hot water, which is distributed to building occupants) and building occupants use the remainder of the gas for cooking.

98. Westover purchases the gas from PECO and then charges the building occupants for the gas through rents.

Park Court

99. Park Court consists of four residential buildings which house a total of 66 units and/or individual apartments.

100. UGI delivers gas to meters located outside the buildings.⁶ The gas is then piped through underground and exterior piping to the other two residential buildings, and then through interior piping.

101. The gas facilities at Park Court Apartments are located within and are limited to the apartment complex, and Westover's gas facilities consist of underground, exterior, and interior piping.

102. Westover uses some of the gas (to produce hot water, which is distributed to building occupants) and building occupants use the remainder of the gas for cooking, heating, and coin-operated dryers.

103. Westover purchases the gas from UGI, and then bills the building occupant based upon an allocated basis related to the square footage of the unit.

Valley Stream

104. Valley Stream Apartments consists of one office, one maintenance building, and 22 residential buildings for a total of 242 units.

⁶ The Parties note that the gas facilities at Park Court were modified during the pendency of this matter. Prior to the modification, UGI delivered gas to a meter located outside of two of the four residential buildings. The gas was then piped through underground and exterior piping to the other two residential buildings.

105. PECO delivers gas to two meters located in the maintenance building. The gas is then piped through underground and exterior piping to each apartment building and is then distributed through interior piping.

106. The gas facilities at Valley Stream Apartments are located within and limited to the apartment complex, and Westover's gas facilities consist of underground, exterior, and interior piping.

107. Westover uses some of the gas (to produce hot water, which is distributed to building occupants) and building occupants use the remainder of the gas for cooking, heating, and dryers.

108. Westover purchases the gas from PECO and then charges the building occupants for the gas through rents.

Woodland Plaza

109. Woodland Plaza Apartments consists of 18 residential buildings and one office building, which house a total of 144 units and/or individual apartments.⁷

110. UGI delivers gas to a meter located outside each residential building. The gas is then piped through exterior piping to the building and then through interior piping to provide service to a central hot water heater and boiler system and to the individual units.

111. The gas facilities at Woodland Plaza Apartments are located within and are limited to the apartment complex. Westover's gas facilities primarily consist of interior piping; the only exterior piping is between the outside gas meter and the exterior wall of the building.

⁷ The Joint Petitioner's stipulate Finding of Fact indicated that "Woodland Plaza Apartments consists of seventeen (18) residential buildings..." However, Attachment B to the Joint Petition for Partial Settlement provides in the "Number of Buildings" column that there are 18 buildings and one office at this apartment complex.

112. Westover uses some of the gas (to produce heat and hot water, which is distributed to building occupants) and building occupants use the remainder of the gas for cooking.

113. Westover purchases the gas from UGI, and then bills the building occupant based upon an allocated basis related to the square footage of the unit.

Additional Findings of Fact

114. On or about November 2020, I&E initiated an investigation into whether Westover operates master meter systems at its apartment complexes and is a pipeline operator subject to Act 127.⁸

115. I&E became aware of Westover's potential master meter systems after responding to a natural gas leak and service outage at one of their apartment complexes, Jamestown Village Apartments, in May 2018.⁹

116. On or about December 2, 2020, I&E's Pipeline Safety personnel conducted a virtual TEAMS meeting with Westover representatives due to restrictions in place in response to the COVID-19 pandemic.¹⁰

117. Pipeline Safety personnel scheduled this virtual meeting to explain Act 127 and Part 192 of the federal regulations and to explain the Commission's jurisdiction over master meter systems.¹¹

⁸ I&E Statement No. 1, pgs. 4-5.

⁹ *Id.* at 4.

¹⁰ *Id.* at 5

¹¹ *Id.*

118. At the conclusion of the meeting, Pipeline Safety personnel requested that Westover provide certain documents and records, including an Operations, Maintenance, & Emergencies (O&M) Plan.¹²

119. Westover did not provide the requested documentation or respond to Pipeline Safety's several attempts to contact Westover. Accordingly, I&E issued a Non-Compliance Letter (NC-77-20) on February 3, 2021.¹³

120. Westover did not respond to NC-77-20, which resulted in I&E issuing a second Non-Compliance Letter (NC-08-21) on March 30, 2021.¹⁴

121. Westover did not respond to NC-08-21.¹⁵

122. Pipeline Safety referred the investigation to I&E Enforcement due to Westover's non-responsiveness and non-compliance with applicable state and federal regulations.¹⁶

123. On June 2, 2021, I&E Enforcement issued a Warning Letter to Westover.¹⁷

124. On or about June 28, 2021, Westover filed an Act 127 Pennsylvania Pipeline Operator Annual Registration Form (Act 127 Registration), Docket No. A-2021-3027219, only listing Jamestown Village.¹⁸

¹² *Id.*

¹³ I&E Statement No. 1, pg. 5; I&E Exhibit 2.

¹⁴ I&E Statement No. 1, pgs. 5-6; I&E Exhibit 3.

¹⁵ I&E Statement No. 1, pg. 6; Westover Statement No. 2, pg. 15.

¹⁶ I&E Statement No. 1, pg. 6.

¹⁷ I&E Statement No. 1, pg. 6; I&E Exhibit 5.

¹⁸ I&E Statement No. 1, pg. 7; Westover Exhibit AS-11.

125. On July 28, 2021, I&E Enforcement issued a Clarification Letter to Westover acknowledging the June 28, 2021, Act 127 registration but noting that Westover failed to include on the registration form all apartment complexes where Westover operated a master meter system.¹⁹

126. On or about August 6, 2021, Westover filed a second Act 127 Pennsylvania Pipeline Operator Annual Registration Form, Docket No. A-2021-3028141, which included a list of 11 apartment complexes and one commercial property.²⁰

127. By letter dated August 19, 2021, Westover requested the cancellation of the Act 127 registration at Docket No. A-2021-3027219.²¹

128. The Act 127 registration at Docket No. A-2021-3027219 was canceled by Secretarial Letter dated August 30, 2021.²²

129. On August 23, 2021, Alexander Stefanelli, Westover's Chief Financial Officer, issued a letter to I&E stating that Westover fully acknowledges the Commission's jurisdiction over certain facilities owned and operated by Westover, and that Westover intends to comply with Pipeline Safety's three items to comply with all federal and state regulations applicable to a master meter operator.²³

¹⁹ I&E Statement No. 1, pg. 7; I&E Exhibit 6.

²⁰ Westover Exhibit AS-14.

²¹ Westover Exhibit AS-12; Westover Exhibit AS-13.

²² Westover Exhibit AS-12; Westover Exhibit AS-13.

²³ I&E Statement No. 1, pg. 7; I&E Exhibit 7.

130. On or about August 24, 2021, Pipeline Safety inspectors met with representatives from Westover, during which Westover’s representatives indicated that Westover had hired Oaktree Group LLC and Entech Engineering.²⁴

131. On or about September 7, 2021, Westover filed an amended Act 127 Registration at Docket No. A-2021-3028141 to make a correction on the listed miles of gas pipelines.²⁵

132. On November 3, 2021, Mr. Stefanelli advised I&E that it believes that its facilities are not jurisdictional and that it had retained counsel.²⁶

133. On November 4, 2021, Westover’s counsel served a letter to I&E disputing the Commission’s jurisdiction over the natural gas systems that Westover operates.²⁷

134. On November 22, 2021, I&E Enforcement responded to Westover’s letter to explain the Commission’s jurisdiction over master meter systems.²⁸

135. In January 2022, Westover discovered a document on the Commission’s website entitled “Act 127 of 2011 – The Gas and Hazardous Liquids Pipeline Act Frequently Asked Questions,” dated February 2014.²⁹

136. The Frequently Asked Questions document provides guidance regarding what is and what is not considered a “pipeline operator” under Act 127.³⁰

²⁴ I&E Statement No. 1, pg. 8.

²⁵ Westover Exhibit AS-15.

²⁶ I&E Statement No. 1, pg. 9; I&E Exhibit 8.

²⁷ I&E Statement No. 1, pg. 9; I&E Exhibit 9.

²⁸ I&E Exhibit 10.

²⁹ Westover Statement No. 2, pg. 11.

³⁰ *Id.*; Westover Exhibit AS-3.

137. On or about February 22, 2022, under protest, Westover filed the Act 127 Registration for 2022.³¹

138. On or about September 23, 2022, Westover paid an annual assessment fee of \$1,278.00.³²

139. As part of its investigation, I&E issued a total of three Non-Compliance Letters to Westover: NC-77-20 dated February 3, 2021; NC-08-21 dated March 30, 2021; and NC-12-22 dated June 29, 2022.³³

140. I&E Fixed Utility Valuation Engineer-3, Scott Orr, visited all but one of the apartment complexes owned or operated by Westover which were the focus of I&E's investigation.³⁴

141. Mr. Orr observed corrosion on multiple parts of Westover's pipeline facilities.³⁵

IV. LEGAL STANDARD/BURDEN OF PROOF

A. Settlement

The Commission has the power, and the duty, to enforce the requirements of the Public Utility Code.³⁶ Pursuant to Act 129 of 2008, the Commission was reorganized, and the

³¹ Westover Exhibit AS-16.

³² Westover Statement No. 2, pg. 22.

³³ I&E Exhibits 2, 3, and 4.

³⁴ I&E Statement No. 1, pg. 13.

³⁵ *See generally* I&E Statement No. 1, pgs. 23, 26-64; I&E Exhibits 12, 20-57.

³⁶ 66 Pa.C.S. § 501(a).

Commission created I&E.³⁷ In the *I&E Implementation Order*, the Commission moved responsibility for all prosecutory functions to I&E. The Commission stated that I&E would serve as the prosecutory bureau in matters brought before the Commission’s Administrative Law Judges (ALJs). The *I&E Implementation Order* stated that the prohibition against comingling of functions set forth in 66 Pa.C.S. § 308.2(b) applied to all I&E employees who are engaged in prosecutory functions. In the *I&E Implementation Order*, the Commission delegated its authority to enforce gas safety laws and regulations to I&E.

As set forth above, Westover filed its Petition requesting that the Commission declare that it is not subject to Act 127. Following Westover’s Petition, I&E filed a Complaint against Westover alleging violations of Act 127, and Part 192 of the Federal pipeline safety regulations, 49 C.F.R. §§ 192.1-192.1015. Specifically, I&E alleged that Westover is a “pipeline operator” as the term is defined under Act 127 in that it “owns or operates equipment or facilities in this Commonwealth for the transportation of gas . . . by pipeline or pipeline facility regulated under Federal pipeline safety laws,” and that as a pipeline operator, Westover is subject to the power and authority of the Commission pursuant to Section 501(b) of Act 127 which requires pipeline operators to comply with the Act and the terms and conditions of the orders issued under the Act. After extensive discovery and prior to any evidentiary hearings, I&E and Westover reached a partial settlement in these consolidated matters.

Commission policy promotes settlements.³⁸ Settlements lessen the time and expense the parties must expend litigating a case and at the same time conserve precious administrative hearing resources. The Commission has indicated that settlement results are often preferable to those achieved at the conclusion of a fully litigated proceeding.³⁹

³⁷ *Implementation of Act 129 of 2008; Organization of Bureaus and Offices*, Docket No. M-2008-2071852 (Final Procedural Order entered Aug. 11, 2011) (*I&E Implementation Order*).

³⁸ 52 Pa. Code § 5.231.

³⁹ 52 Pa. Code § 69.401.

In order to accept a settlement, the Commission must first determine that the proposed terms and conditions are in the public interest.⁴⁰

B. Declaratory Orders

Section 331(f) of the Code, 66 Pa.C.S. § 331(f), and Commission regulations at 52 Pa. Code § 5.42, provide that the Commission may issue a Declaratory Order to terminate a controversy or to remove uncertainty. Section 331(f) of the Code states: “Declaratory Orders - The commission, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty.”⁴¹ Section 5.42 of the Commission’s regulations states in part:

Petitions for declaratory orders.

(a) Petitions for the issuance of a declaratory order to terminate a controversy or remove uncertainty must:

- (1) State clearly and concisely the controversy or uncertainty which is the subject of the petition.
- (2) Cite the statutory provision or other authority involved.
- (3) Include a complete statement of the facts and grounds prompting the petition.
- (4) Include a full disclosure of the interest of the petitioner.^[42]

A declaratory judgment is a means to declare rights, status, and other legal relations⁴³ and “is to be liberally applied to afford relief from uncertainty and insecurity.”⁴⁴ But a “declaratory judgment must not be employed to determine rights in anticipation of events which

⁴⁰ *Pa. Pub. Util. Comm’n v. York Water Co.*, Docket No. R-00049165, (Order entered Oct. 4, 2004); *Pa. Pub. Util. Comm’n v. C.S. Water and Sewer Assoc.*, 74 Pa.P.U.C. 767 (1991).

⁴¹ 66 Pa.C.S. § 331(f).

⁴² 52 Pa. Code § 5.42.

⁴³ See 42 Pa.C.S. §§ 7532, 7533.

⁴⁴ *Twp. of Derry v. Pa. Dep’t of Lab. & Indus.*, 932 A.2d 56, 59 (Pa. 2007) (citing 42 Pa.C.S. § 7541(a)).

may never occur or for consideration of moot cases or as a medium for the rendition of an advisory opinion which may prove to be purely academic.”⁴⁵

Westover filed its Petition pursuant to 66 Pa.C.S. § 331(f) and 52 Pa. Code § 5.42. Under these provisions, the issuance of a declaratory order is subject to the Commission’s sound discretion and is employed to resolve actual controversies or remove uncertainty.⁴⁶ Declaratory orders carry the same effect as other Commission Orders and are appealable to the Commonwealth Court as final adjudications.⁴⁷

Section 332(a) of the Code provides that the party seeking relief from the Commission has the “burden of proof” which is a duty to establish a fact by a “preponderance of the evidence.”⁴⁸ The term “preponderance of the evidence” means that one party has presented evidence which is more convincing, by even the smallest amount, than the evidence presented by the other party.⁴⁹

Westover’s Petition pertains specifically to the Gas and Hazardous Liquids Pipelines Act, 58 P.S. § 801.101–801.1101 (Act 127), which provides the Commission with general administrative authority to supervise and regulate pipeline operators within the Commonwealth consistent with Federal pipeline safety laws.⁵⁰ Regarding general powers of the Commission, Act 127 further explains the Commission’s authority as follows:

[t]he commission may adopt regulations, consistent with the Federal pipeline safety laws, as may be necessary or proper in the exercise of its powers and perform its duties under this act.

⁴⁵ *Gulnac v. S. Butler Cnty. Sch. Dist.*, 587 A.2d 699, 701 (Pa. 1991).

⁴⁶ *Application of the City of Chester*, Docket No. A-2012-2298192 (Opinion and Order entered Aug. 21, 2014).

⁴⁷ *Prof’l Paramedical Servs., Inc. v. Pa. Pub. Util. Comm’n*, 525 A.2d 1274 (Pa. Cmwlth. 1987).

⁴⁸ 66 Pa.C.S. § 332(a)

⁴⁹ *Se-Ling Hosiery v. Margulies*, 70 A.2d 854 (Pa. 1950).

⁵⁰ 58 P.S. § 801.501.

The regulations shall not be inconsistent with or greater or more stringent than the minimum standards and regulations adopted under the Federal pipeline safety law.^[51]

Act 127 further provides, in pertinent part, that the commission shall have the duty “[t]o enforce the Federal pipeline safety laws and, after notice and opportunity for a hearing, impose civil penalties and fines and take other appropriate enforcement action.”⁵²

Westover disputes that any of its systems are “master meter systems” as defined by Federal pipeline safety law. Federal Pipeline Safety Laws define a “master meter system” as follows:

Master Meter System means 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.^[53]

Additionally, Federal Pipeline Safety Laws define “pipeline” or “pipeline system” as “all parts of those physical facilities through which gas moves in transportation, including, but not limited to, pipe, valves, and other appurtenance attached to pipe, compressor units, metering stations, regulator stations, delivery stations, holders, and fabricated assemblies.”⁵⁴

Lastly, Federal Pipeline Safety Laws define “transportation of gas” as “the gathering, transmission, or distribution of gas by pipeline, or the storage of gas in or affecting

⁵¹ 58 P.S. § 801.501.

⁵² 58 P.S. § 801.501(a)(7).

⁵³ 49 C.F.R. § 191.3.

⁵⁴ *Id.*

interstate or foreign commerce.”⁵⁵

Westover’s Petition for Declaratory Order will be reviewed in light of the aforementioned provisions.

C. Formal Complaints

The Public Utility Code, 66 Pa.C.S. § 332(a), places the burden of proof upon the proponent of a rule or order. Because I&E is the Complainant in this proceeding, I&E bears the burden of proof.⁵⁶ The term "burden of proof" means a duty to establish a fact by a preponderance of the evidence.⁵⁷ The term "preponderance of the evidence" means that one party has presented evidence which is more convincing, by even the smallest degree, than the evidence presented by the other party. To establish a sufficient case and satisfy the burden of proof, a complainant must show that the respondent is responsible or accountable for the problem described in the complaint.⁵⁸

I&E filed a Complaint alleging that Westover is a “pipeline operator” which is defined under Act 127 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.^[59]

⁵⁵ *Id.*

⁵⁶ 66 Pa.C.S. § 332(a).

⁵⁷ *Se-Ling Hosiery v. Margulies*, 70 A.2d 854 (Pa. 1950).

⁵⁸ *Feinstein v. Phila. Suburban Water Co.*, 50 Pa.P.U.C. 300 (1986).

⁵⁹ 52 P.S. § 801.102.

I&E further averred in its Complaint that Westover, as a pipeline operator, is subject to the power and authority of the Commission pursuant to Section 501(b) of Act 127 which requires pipeline operators to comply with the Act and the terms and conditions of the orders issued under the Act.⁶⁰

Therefore, since I&E seeks an order from the Commission determining Westover is subject to Act 127, I&E is charged with the burden of proof in this matter.

V. TERMS OF THE PARTIAL SETTLEMENT

On behalf of the parties, I&E filed a Joint Petition for Partial Settlement on June 13, 2023. The Petition is 13 pages in length, includes the terms of the Partial Settlement and includes 6 attachments attached as Attachment A through Attachment F. Attachment A is the Parties' Joint Stipulation of Facts. Attachment B is the Parties' Joint Chart of Apartment Complexes. Attachment C is the Parties' Joint Proposed Conclusions of Law. Attachment D is the Parties' Joint Proposed Ordering Paragraphs. Attachment E is I&E's Statement in Support of the Partial Settlement. Attachment F is Westover's Statement in Support of the Partial Settlement.

The principal terms and conditions of the Partial Settlement, contained in Sections III, IV, and V of the Joint Petition for Partial Settlement beginning at Section III (the original headings and numbering is maintained here for ease of reference), provide that:

III. DELINEATION OF THE ISSUES

6. The Parties agree to submit the questions of law identified below (the "Litigated Issues") to the ALJ:
 - A. Whether Act 127 applies to the owner or operator of an apartment complex which owns or operates natural gas facilities located downstream from a natural gas distribution company ("NGDC")?

⁶⁰ 52 P.S. § 801.501(b).

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

1. Are Westover’s gas facilities limited to the apartment complex?
2. Does Westover purchase gas for resale through a distribution system and supply it to the ultimate consumer?
3. Who is the ultimate consumer of the gas service at the apartment complexes identified in the Joint Stipulation of Facts?
4. Does a natural gas system that is exclusively or primarily comprised of interior piping satisfy the definition of a “master meter system”?
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”?
6. At which properties (if any) does Westover distribute gas “in or affecting interstate or foreign commerce”?

7. The Parties agree that the following issues shall be resolved as follows:

A. Issues in the Complaint

1. Westover is not a pipeline operator, pursuant to Act 127, with respect to the gas systems at the following apartment complexes:
 - a. Paoli Place (South Valley Townhomes); and
 - b. Willow Run.
2. Westover should not be ordered to pay a civil penalty due to (a) Westover’s reliance on the “Act 127 of 2011 – The Gas and Hazardous Liquids Pipeline Act Frequently Asked Questions” document posted on the Commission’s website; (b) the specific, unique facts and circumstances presented in this matter; (c) I&E modifying its litigation position to no longer seek a civil penalty in this proceeding; and (d) Westover voluntarily agreeing to implement and follow the terms outlined below in Section IV beginning on October 1, 2023, even in the absence of a Commission Order approving the Partial Settlement by that date.

B. Issues in the Petition

1. Westover's Act 127 Registration is null and void *ab initio*, in its entirety, if Act 127 does not apply to an apartment complex which owns or operates natural gas facilities downstream from an NGDC.
2. In the alternative, Westover's Act 127 Registration is null and void *ab initio* as to any system (or any portion of a system) that does not satisfy the definition of a "master meter system" in 49 CFR § 191.3.

IV. PARTIES' ACTIONS PENDING A FINAL, UNAPPEALABLE DECISION ON THE LITIGATED ISSUES

8. Beginning on October 1, 2023, and continuing until a Commission or court Order regarding the Litigated Issues becomes final and unappealable, Westover agrees to the following:
 - A. Westover will have at least one employee complete Operator Qualification training and Westover will also provide I&E with the name of the trained employee and evidence of the completed training. Westover also agrees to hire, retain, or contract with at least one (1) third-party contractor or consultant who has received Operator Qualification training by others. Westover's employee and hired, retained, or contracted entity should be capable of assisting with safe operations in addition to advising on procedures for leak and failure response(s), and should also be able to respond to any gas-related incident or leak at any of Westover's apartment complexes.
 1. Westover agrees to, within forty-five (45) days of October 1, 2023, complete the following:
 - ii. Confirm and/or keep records which confirm that the Westover employee and the third-party contractor or consultant are qualified;
 - iii. Provide I&E with a list of other third-party contractors or consultants available to Westover in the event that its designated Operator Qualified employee or third-party

- contractor or consultant leaves employment or is otherwise unavailable;
 - iv. Identify the tasks the employee and third-party contractor or consultant are qualified to complete; and
 - v. Provide training or opportunities for training, as appropriate, for the employee to maintain his/her qualification status.
 - 2. At each apartment complex or commercial property involved in this litigation, Westover will post the contact information for the OQ certified employee and contractor in the office.
- B. If any individual detects the odor of gas or reasonably suspects a natural gas leak at any of the apartment complexes identified in the attached Joint Stipulation of Facts, Westover shall promptly report the odor of gas and/or suspected natural gas leak to the NGDC, and I&E's Pipeline Safety Division ("Pipeline Safety").
 - 1. Notifications to Pipeline Safety should not impede or delay any onsite safety efforts.
 - 2. If the odor of gas or suspected leak is located indoors, Westover shall also immediately report the odor of gas and/or suspected natural gas leak to the local fire company and take immediate action to evacuate all persons from the building.
 - 3. If the NGDC determines that the leak is on Westover's facilities indoors, Westover, with the assistance of emergency responders, will promptly evacuate the building (if it was not previously evacuated) and contact the Operator Qualified individual/company/employee described in Paragraph 8(A) for repair. Westover shall not permit tenants or others to reenter the building until such time as the necessary repairs have been made and clearance has been given by the fire company (if the fire company is on-site), the NGDC, or an appropriate government official.
- C. Westover agrees to create and distribute educational materials to the tenants of the apartment complexes identified in the Joint Stipulation of Facts once a year, and as part of its welcome packet, and to post the educational materials in any community laundry room

where natural gas is used. The topics of these materials will include but are not limited to the following:

1. General notification that gas facilities are on the property;
 2. How to recognize and respond to the odor of gas; and
 3. How to receive additional information/who to contact.
- D. With respect to the apartment complexes identified in the attached Joint Stipulation of Facts, Westover agrees to continue its efforts to work with the local NGDCs to move the meters, regulators, and over-pressure protection devices from inside an apartment complex building to outside the building, while protecting these devices.
- E. Westover agrees to identify above-ground valve(s) used in an emergency, identify the location of the valve(s), and learn how to properly operate the valve(s). In the event Westover determines that the aforementioned valve(s) is inoperable, Westover shall endeavor to make the appropriate corrective action(s) to render the valve operable.
- F. Westover agrees to provide documentation evidencing that it is a member of the Pennsylvania One Call System.
9. Until a Commission or court Order regarding the Litigated Issues becomes final and unappealable, I&E agrees to the following:
- A. I&E will not file another complaint alleging that any of the following is a pipeline operator, as that term is defined in Act 127: (a) Westover, (b) the owner of any of the apartment complexes identified in the incorporated Joint Stipulation of Facts, (c) the owner or operator of any commercial property identified on Westover's Act 127 Registration for 2022, or (d) the owner/operator of any apartment complex acquired by an affiliate of Westover within three years of the date of entry of the ALJ's Recommended Decision or Initial Decision approving this Partial Settlement, without modification.

**V. PARTIES' ACTIONS AFTER A FINAL,
UNAPPEALABLE DECISION IS RENDERED ON THE
LITIGATED ISSUES**

10. If a final, unappealable Commission or court order on the Litigated Issues determines that: (i) Act 127 does not apply to the owner or operator of an apartment complex which owns or operates natural gas facilities located downstream from a NGDC, or (ii) none of the apartment complexes identified on the attached Joint Stipulation of Facts is a “master meter system” as defined in 49 CFR § 191.3, then Westover’s obligations under Paragraph 8 of this Partial Settlement shall cease immediately and Westover shall have no obligation to comply with the requirements of Act 127 or the federal pipeline safety laws with regard to the apartment complexes identified in the attached Joint Stipulation of Facts.

11. If a final, unappealable Commission or court order on the Litigated Issues determines that: (i) Act 127 applies to the owner or operator of an apartment complex which owns or operates natural gas facilities located downstream from a NGDC, and (ii) at least one of the apartment complexes identified on the attached Joint Stipulation of Facts is a “master meter system” as defined in 49 CFR § 191.3, then Westover agrees to the following for those systems that are found to be “master meter systems”:
 - A. Within sixty (60) days of the date that the Commission’s or court’s decision on the Litigated Issues becomes final and unappealable, Westover agrees to provide its implementation plan to become compliant with Part 192 and Act 127 to Pipeline Safety for review.
 - B. Westover and Pipeline Safety will meet and discuss the implementation plan proposed by Westover and will endeavor to reach an agreement on a reasonable time-frame, not to exceed four (4) years, for Westover to become compliant.
 - C. Within one hundred twenty (120) days of the date that the Commission’s or court’s Order on the Litigated Issues becomes final and unappealable, Westover agrees to provide its procedural manual for operations, maintenance, and emergencies to Pipeline Safety for review.

- D. Beginning on the date that the Commission's or court's Order on the Litigated Issues becomes final and unappealable, and for subsequent years, Westover agrees to submit reports to the Commission, pursuant to 58 P.S. § 801.503(d), as an Act 127 pipeline operator on an annual basis.
 - E. Beginning on the date that the Commission's or court's Order on the Litigated Issues becomes final and unappealable, and for subsequent years, Westover agrees to file and pay annual assessments to the Commission, pursuant to 58 P.S. § 801.503(b).
 - F. If Westover timely submits the compliance filings described in Paragraph 11(A)-(C), the Complaint in this matter shall be closed. The closure of this matter shall not impinge upon I&E's ability to file a complaint in the event Westover fails to meet the obligations and deadlines outlined in the compliance filings or for any other violation(s) of Act 127 or Part 192.
12. After the Commission's or court's Order on the Litigated Issues becomes final and unappealable, I&E shall apply the guidance from the Commission's decision when deciding whether to file a complaint against Westover or any affiliate of Westover regarding any apartment complex or commercial property that is not identified in the attached Joint Stipulation. In the event that I&E files a complaint against Westover or any affiliate of Westover regarding any apartment complex or commercial property that is not identified in the attached Joint Stipulation, the Parties reserve the right to assert all claims and defenses in that litigation.
13. Within thirty (30) days of the date that the Commission's or court's decision on the Litigated Issues becomes final and unappealable, Westover agrees to provide a list of any apartment complexes or commercial properties acquired by Westover and/or its affiliates after November 1, 2020.

VI. CONDITIONS OF THE PARTIAL SETTLEMENT

The Joint Petitioners note that this Partial Settlement Agreement reflects their compromise and settlement of disputed claims and question of material facts. Its constituent

provisions shall not be construed as or deemed to be evidence of an admission of guilt or liability.

The Parties jointly assert that approval of this Partial Settlement is in the public interest and is fully consistent with the Commission's Policy Statement for evaluating litigated and settled proceedings involving violations of the Code and Commission regulations.⁶¹ The Parties maintain that the Commission will serve the public interest by adopting this Partial Settlement.

Additionally, the Parties assert that this Partial Settlement avoids the time and expense of evidentiary hearings in this matter before the Commission as well as the limitation of disputed issues. The Parties recognize that by resolving the issues identified in this Settlement and negating the need for evidentiary hearings they will conserve their own resources and costs, as well as the Commission's, in a manner that does not jeopardize the resolution of the disputed issues that remain. The Parties further recognize that their positions and claims are disputed and, given the inherent unpredictability of the outcome of a contested proceeding, the Parties recognize the benefits of amicably resolving the identified disputed issues and question of material facts through this Partial Settlement.

Lastly, the Parties maintain that the facts agreed to in the Joint Stipulation are sufficient to find that the Partial Settlement is in the public interest. Moreover, the Parties agree that the benefits and obligations of this Partial Settlement shall be binding upon the successors and assigns of the Parties to this Partial Settlement.

VII. DISCUSSION OF THE PARTIAL SETTLEMENT

A. I&E's Position

After the submission of written direct testimony and acknowledging the potential extended timeframe for a final decision to be issued in this matter, I&E and Westover began

⁶¹ 52 Pa. Code § 69.1201.

discussing settlement to amicably resolve the factual portion of the instant matter to streamline the process and for the implementation of important safety measures during the pendency of the ultimate legal issues presented. I&E Statement in Support at 3.

I&E notes that pursuant to the Commission's policy of encouraging settlements that are reasonable and in the public interest, the Parties held a series of settlement discussions. These discussions culminated in this Partial Settlement which establishes a record with a Joint Stipulation of Facts, outlines the legal issues, and establishes a list of safety measures to be implemented by Westover during the pendency of this matter. I&E Statement in Support at 3-4.

I&E maintains that this Partial Settlement results from the compromises of the Parties. Additionally, I&E recognizes that, given the inherent unpredictability of the outcome of a fully contested proceeding, the benefits to amicably resolving the disputed facts through settlement outweigh the risks and expenditures of litigation. I&E submits that the Partial Settlement constitutes a reasonable compromise of the issues presented and is in the public interest. As such, I&E respectfully requests that the Commission approve the Partial Settlement without modification. I&E Statement in Support at 4.

B. Westover's Position

Westover asserts that the Partial Settlement is in the public interest for several reasons: (1) it contains a Joint Stipulation of Facts (Stipulation) describing the configuration of each system in this litigation; (2) it limits the issues in the case, resolving some issues and clearly delineating those that the Commission is being asked to resolve; (3) it will ultimately result in Commission resolution of uncertainty surrounding material legal questions, with statewide implications, regarding apartment complex owner and operator compliance with the requirements of Act 127; (4) it contains an agreement regarding the Joint Petitioners' conduct pending a final, unappealable decision on the Litigated Issues; (5) it also contains an agreement regarding the Joint Petitioners' conduct after the Commission or an appellate court issues a final, unappealable decision in this case; and (6) it contains conditions that are standard in settlement agreements submitted to the Commission. Westover Statement in Support at 3.

In its Complaint, I&E alleged that Westover’s systems are subject to Act 127 because they are “master meter systems” as that term is defined in 49 C.F.R. § 191.3.⁶² Westover notes that, to resolve this issue, the Commission must consider, in detail, the configuration of the gas system at eighteen apartment complexes, some of which have different configurations in different parts of the complex. Westover explains that there is virtually no dispute between the Joint Petitioners about the facts at each system. Consequently, the Partial Settlement includes a Stipulation, together with a chart, that describes the configuration of the system at each apartment complex.⁶³ In addition, the Joint Petitioners have agreed that certain testimony and exhibits, as well as certain pleadings and exhibits, should be admitted into the record.⁶⁴ Westover Statement in Support at 3-4.

Westover maintains that the Stipulation eases the process of introducing testimony, pleadings, and their associated exhibits into the record. The Stipulation allowed the ALJ to cancel the evidentiary hearing, which was scheduled to take two days, saving the Joint Petitioners and the Commission significant expenses. This result is in the public interest. Westover Statement in Support at 4.

Westover further maintains that the Stipulation is in the public interest because it limits the need for the ALJ and the Commission to resolve disputed issues of material fact. Instead, the ALJ and the Commission can focus on resolving the Litigated Issues by applying the law to the stipulated facts at each system. This is in the public interest because it facilitates the decision-making process and allows this case to be brought to a conclusion more quickly than would otherwise be the case. It also mitigates the risk of an appeal based on a question of fact. Westover Statement in Support at 4.

⁶² Complaint ¶ 7.

⁶³ Partial Settlement ¶ 2, Attachments A and B.

⁶⁴ Stipulation ¶¶ 3, 4.

Westover further asserts that the Partial Settlement is in the public interest because it significantly limits the issues in this proceeding, which reduces litigation expenses for the Joint Petitioners and promotes administrative economy for the Commission. This case raises important legal questions of first impression, which are preserved for the Commission’s decision in the Litigated Issues.⁶⁵ In the Partial Settlement, the Joint Petitioners resolve or waive all other issues raised by the Petition and the Complaint – allowing the Commission to focus on the Litigated Issues. Westover Statement in Support at 4-5.

The issues that would not be litigated include whether Westover’s systems at Willow Run and Paoli Place (South Valley Townhomes) are subject to Commission regulation pursuant to Act 127. At both Willow Run and Paoli Place (South Valley Townhomes), the NGDC transfers gas directly to building occupants, who pay the NGDC for the gas. Westover notes that these systems fail to meet the definition of a master meter system, which requires that a pipeline operator purchase gas from the NGDC and resell and supply that gas to building occupants, who pay the pipeline operator for the gas. 49 C.F.R. § 191.3. The Joint Petitioners agree that Westover is not a pipeline operator pursuant to Act 127 with respect to these systems.⁶⁶ Paragraph 7.A.1. of the Partial Settlement is in the public interest because these systems clearly are not master meter systems as defined in federal law. Therefore, the Commission lacks authority to regulate these systems – even if Act 127 gives the Commission authority to regulate apartment complexes downstream from an NGDC. Westover maintains that it would be a waste of administrative resources for the Joint Petitioners to submit this issue to the ALJ and the Commission for a decision. Westover Statement in Support at 5-6.

Additionally, because the Joint Petitioners agree that the Commission should not order Westover to pay a civil penalty, the Joint Petitioners’ briefs will not need to address the ten factors in the Commission’s statement of policy concerning the factors and standards for evaluating litigated and settled proceedings involving violations of the Public Utility Code and

⁶⁵ Partial Settlement ¶ 6.

⁶⁶ Partial Settlement ¶ 7.A.1.

Commission regulations.⁶⁷ Westover notes that this could be a considerable savings in legal fees. Additionally, the ALJ and the Commissioners will not need to address the issue of whether Westover should pay a civil penalty and, if so, how much of a penalty it should pay. Westover asserts that this result will promote administrative economy. Westover Statement in Support at 6.

Moreover, because the Joint Petitioners have agreed that Westover should not be ordered to pay a civil penalty, and have asked the Commission to address only specific questions of law, the ALJ and the Commission need not address I&E's allegation that Westover violated certain provisions in Act 127 and the Federal pipeline safety laws, as it is currently uncertain whether Westover is even subject to Act 127.⁶⁸ The Partial Settlement saves the Joint Petitioners and the Commission a considerable amount of time and money by waiving this issue. Westover Statement in Support at 6-7.

Westover maintains that the Partial Settlement is in the public interest because it essentially waives all the issues in the Complaint and allows the ALJ and the Commission to focus on the critical issues of first impression that were raised in Westover's Petition – questions concerning the scope of the Commission's authority to regulate gas facilities owned/operated by entities that are not public utilities. It is in the public interest for these issues to be resolved. By waiving other issues, the ALJ and the Commissioners can focus on these critical legal questions and resolve them expeditiously. Westover Statement in Support at 7.

Normally, a settlement in a Commission proceeding is not binding on the settling parties until the settlement is approved by the Commission. Westover asserts that one of the primary reasons why the Partial Settlement is in the public interest is that the Joint Petitioners agree to certain rules of conduct before the Commission or an appellate court renders a final, unappealable decision in this matter.⁶⁹ Westover agrees to implement certain safety measures at

⁶⁷ 52 Pa. Code § 69.1201.

⁶⁸ Complaint ¶ 45.

⁶⁹ Partial Settlement Section IV.

its systems beginning October 1, 2023.⁷⁰ These measures, while not necessarily required by the law, promote public safety. As such, Westover maintains they are in the public interest. In turn, I&E agrees that, until a final unappealable order is rendered on the Litigated Issues, it will not file another complaint alleging that anyone named at paragraph 9 of the Partial Settlement is a pipeline operator pursuant to Act 127. Westover asserts that this provision is in the public interest because it prevents further litigation between the Joint Petitioners, or related parties, that essentially raise the same issues raised in this case. This provision saves the Joint Petitioners money in litigation expenses and promotes administrative economy for the Commission. Westover Statement in Support at 7-8.

The Partial Settlement is also in the public interest because it contains a plan for bringing Westover into compliance with the law in the event that a final, unappealable Commission or appellate court order determines that (i) Act 127 applies to the owner/operator of an apartment complex with natural gas facilities downstream from an NGDC, and (ii) at least one Westover system is a master meter system as defined in 49 C.F.R. § 191.3.⁷¹ Westover maintains that the Commission should encourage compliance with the law rather than simply imposing civil penalties on someone who violates the law. Westover Statement in Support at 8-9.

Westover does not believe that it is subject to Commission regulation pursuant to Act 127. Nevertheless, Westover submits that it is in the public interest that an orderly process be in place for bringing Westover into compliance with the law, in the event that the Commission or an appellate court issues an unfavorable final, unappealable order. In the Partial Settlement, the Joint Petitioners identify the steps that Westover will need to complete to comply with the law and agree to timeframes for completing those steps. Westover Statement in Support at 9.

The Partial Settlement is also in the public interest because it seeks to avoid future litigation between the Joint Petitioners regarding similar issues at other Westover owned or

⁷⁰ Partial Settlement ¶ 8.

⁷¹ Partial Settlement ¶ 11.

operated apartment complexes or commercial properties.⁷² The Joint Petitioners expect that a final, unappealable order on the Litigated Issues will resolve many outstanding questions about the Commission’s authority to regulate apartment complexes downstream from an NGDC pursuant to Act 127. I&E agrees to apply the guidance from that final, unappealable order in the future, when deciding whether to file a complaint against Westover (or any affiliate of Westover) regarding any apartment complex or commercial property not involved in this litigation. Westover asserts that it would not be in the public interest for the Joint Petitioners to pursue the Litigated Issues to a final, unappealable order in this case, only to turn around and begin litigating the same issues again at a different property. Westover Statement in Support at 9.

C. Recommendation

In the present case, there are two contested filings. Westover filed a Petition for Declaratory Order requesting that the Commission find that it is not subject to the requirements of Act 127. I&E filed an Answer to Westover’s Petition asking the Commission to deny that Petition, deem Westover to be a pipeline operator subject to Act 127, and direct Westover to immediately comply with applicable laws and regulations related to pipeline safety.

I&E subsequently filed a Formal Complaint against Westover alleging violations of Act 127 because, it asserted, Westover is a “pipeline operator” as defined under Act 127, and that as a pipeline operator, it is subject to the power and authority of the Commission pursuant to Section 501(b) of Act 127 which requires pipeline operators to comply with the Act and the terms and conditions of the orders issued under the Act. Not surprising in light of its Petition, Westover filed an Answer and New Matter denying that it operates any master meter systems in Pennsylvania.

Following extensive discovery and several rounds of testimony, the Parties reached a Partial Settlement in these consolidated matters. Normally, a settlement, partial or whole, resolves either a portion or the entirety of a contested matter. However, a threshold issue in these contested matters is whether Westover is subject to Act 127. With the exception of two

⁷² *Id.* ¶ 12.

complexes named in the Partial Settlement, Paoli Place (South Valley Townhomes) and Willow Run, where the parties agree Westover is not a pipeline operator, the parties still disagree as to whether Westover is subject to Act 127 for the remainder of the properties named in the Complaint. Aside from the two identified properties, the stipulated facts, and I&E's agreement to no longer seek a civil penalty for Westover's alleged violations of Act 127, the Partial Settlement resolves more of the procedural issues than the substantive issues. However, the presentation of the stipulated facts is a significant step towards resolution of these matters.

More importantly, the Parties agreed that Westover will implement several important safety measures by October 1, 2023, which will be in place during the pendency of this proceeding. Additionally, in the event that the Commission ultimately finds that Westover's apartment complexes are subject to Act 127, they will already have taken a significant step towards coming into compliance with the Act. Lastly, regardless of the ultimate outcome of this matter, the additional safety measures will benefit the tenants of Westover's properties. Clearly, these additional safety measures are in the public interest.

Additionally, approving and adopting the Joint Petition for Partial Settlement is in the public interest because accepting the Partial Settlement, wherein the parties resolved the factual portion of these consolidated matters and delineated the issues to be addressed, will avoid the substantial time and expense involved in further litigating the proceeding. Avoiding additional expenses serves the interests of I&E, Westover, and the general public.

Accordingly, I find that accepting the Joint Petition for Partial Settlement is in the public interest and recommend that the Joint Petition for Partial Settlement be accepted without modification.

VIII. LITIGATED ISSUES

A. Whether Act 127 Applies to the Owner or Operator of an Apartment Complex Which Owns or Operates Natural Gas Facilities Located Downstream From a Natural Gas Distribution Company.

1. I&E's Position

I&E notes that Act 127 was enacted on December 22, 2011, with an effective date 60 days later.⁷³ Section 801.302 (Adoption of Federal pipeline safety laws) provides that the safety standards and regulations for pipeline operators will be pursuant to 49 C.F.R. Subtitle B, Ch. 1 Subch. D (relating to pipeline safety).⁷⁴ Act 127 further provides that the Commission will have the administrative authority to supervise and regulate pipeline operators within the Commonwealth consistent with the Federal pipeline safety laws, and allows the Commission to adopt regulations which may be necessary or proper to exercise this duty.⁷⁵ I&E Main Brief at 13.

Prior to the enactment of Act 127, the Pipeline and Hazardous Materials Safety Administration (PHMSA) enforced the Federal pipeline safety laws and regulations on master meter systems in Pennsylvania.⁷⁶ Thus, after Act 127 was enacted, the Commission, through the I&E Pipeline Safety Division which serves as an agent of PHMSA certified to regulate intrastate pipeline facilities for safety purposes pursuant to 49 U.S.C. § 60105, is authorized to enforce the Federal pipeline safety laws and regulations on master meter systems distributing gas in Pennsylvania.⁷⁷ Act 127's express adoption of the Federal pipeline safety laws and regulations

⁷³ House Bill 344, P.L. 586, Act 2011-127.

⁷⁴ 58 P.S. § 801.302(a).

⁷⁵ 58 P.S. § 801.501.

⁷⁶ See Department of Transportation, Pipeline and Hazardous Materials Safety Administration, Office of Pipeline Safety letter dated March 6, 1998, to Mr. Ernie Nepa of Governor Sproul Associates (attached as I&E Exhibit 3 to I&E's Brief in Opposition to Petition for Review and Answer to Material Questions and for Immediate Stay of Proceeding).

⁷⁷ I&E Statement No. 1-R, pg. 6.

at 58 P.S. § 801.302 clearly and unambiguously include the pipeline safety regulation of master meter systems. I&E Main Brief at 14.

Moreover, I&E maintains that the plain language of Section 191.3 clearly articulates that master meter systems can be found at apartment complexes. Specifically, Section 191.3 provides “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.”⁷⁸ A finding that master meter systems exist in a definable area, such as an apartment complex, is further supported by a 2002 report issued by the Secretary of Transportation and various PHMSA interpretations. Specifically, prior to the enactment of Act 127, the Secretary of Transportation submitted a report to Congress detailing how master meter systems include those distribution systems which purchase natural gas and resell such gas to consumers in connection with rental, leasing, or management of real property.⁷⁹ The Report continues to state that master meter systems exist at a variety of locations, including apartment complexes.⁸⁰ Moreover, more recently than 2002, PHMSA has issued interpretations finding an apartment complex,⁸¹ a housing development,⁸² and a mall complex⁸³ to be master meter systems. Thus, Act 127 applies to apartment complexes which own or operate natural gas facilities. I&E Main Brief at 14-15.

To the extent that Westover argues that such a finding would have a detrimental impact on an undefined number of apartment complex owners and/or landlords and attempt to

⁷⁸ 49 C.F.R. § 191.3.

⁷⁹ *See Assessment of the Need for an Improved Inspection Program for Master Meter Systems*, Report of the Secretary of Transportation to Congress, prepared pursuant to Section 108 of Public Law 100-561, January 2002 (attached as Attachment E to I&E’s Answer in Opposition to Westover’s Petition for Declaratory Order) (hereinafter “Report”).

⁸⁰ *Id.*

⁸¹ PHMSA Letter of Interpretation to Indiana Utility Regulatory Commission, PI-11-0014 (March 27, 2012) and (August 27, 2012) (attached as Attachment D to I&E’s Answer in Opposition to Westover’s Petition for Declaratory Order).

⁸² PHMSA Letter of Interpretation to Montana Public Service Commission, PI-01-0113 (June 25, 2001) (attached as I&E Exhibit 4 to I&E’s Answer in Opposition to Westover’s Amended Petition).

⁸³ PHMSA Letter of Interpretation to Minnesota Department of Public Safety, PI-16-0012 (December 6, 2016) (attached as I&E Exhibit 6 to I&E’s Answer in Opposition to Westover’s Amended Petition).

make related policy arguments, I&E counters that such arguments are without merit. Notwithstanding the plain language of the regulation and the history thereof, the impact of regulatory oversight over apartment complexes which operate master meter systems is substantial. While Westover may cite to an undefined number of apartment complex owners, there are thousands more tenants, people, and families who are impacted and whose safety is at risk. I&E Main Brief at 15.

Westover is one landlord/apartment complex owner. Simply looking at the approximately 22 apartments (noting that Paoli Place and Mill Creek are separated into more than one apartment complex) which are discussed in depth in this matter and do not include the entirety of Westover's apartment complexes, there are, at a minimum, 3,072 people who are and will continue to be at risk until this matter is resolved.⁸⁴ I&E notes that this is a minimal estimate because the individual apartments at the various apartment complexes could be housing one person, two people, or more. The potential impact on apartment complex owners/operators is not lost on I&E. However, I&E asserts that the bigger picture showcases the deleterious effect that a catastrophic event could have on thousands of Pennsylvania renters who are blindly unaware of the possible unsafe conditions lurking within their rental home/apartment. This risk to the public far outweighs any argument by Westover to decry the inconvenience to the landlords of such critical safety oversight. I&E Main Brief at 15.

In response to Westover's argument regarding statutory interpretation and an alleged conflict with the Pennsylvania Uniform Construction Code,⁸⁵ I&E argues that Westover takes the wrong approach as the focus is not based upon the General Assembly's intent, but rather whether the Federal law, as adopted in Pennsylvania under Act 127, preempts any other state or local regulation, such as the Pennsylvania Uniform Construction Code. I&E Reply Brief at 2.

⁸⁴ Partial Settlement, Chart of Apartment Complexes, Attachment B; *see also* Partial Settlement, Joint Stipulation of Facts, Attachment A.

⁸⁵ 35 Pa.C.S. § 7210.301.

The United States’ Constitution’s Supremacy Clause provides that “the Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”⁸⁶ This language is the foundation for the doctrine of federal preemption, under which federal law supersedes conflicting state laws.⁸⁷ Congress may pre-empt a state law through federal legislation. It may do so through express language in a statute. But even where a statute does not refer expressly to pre-emption, Congress may implicitly pre-empt a state law, rule, or other state action.⁸⁸ I&E Reply Brief at 3.

Congress may take such preemption action either through “field” pre-emption or “conflict” pre-emption. As to the former, Congress may have intended “to foreclose any state regulation in the area,” irrespective of whether state law is consistent or inconsistent with “federal standards.”⁸⁹ In such situations, Congress has forbidden the State to take action in the field that the federal statute pre-empts. By contrast, conflict pre-emption exists where “compliance with both state and federal law is impossible,” or where “the state law ‘stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.’”⁹⁰ I&E avers that in either situation, federal law must prevail. I&E Reply Brief at 3.

In this matter, prior to the enactment of Act 127, PHMSA was charged with the enforcement of the federal pipeline safety regulations, which included the regulation of master meter systems.⁹¹ Indeed, the purpose of the Pipeline Safety Act is to “provide adequate

⁸⁶ U.S. Const. art. VI, cl. 2.

⁸⁷ *Murphy v. Nat’l Collegiate Athletic Ass’n*, 138 S. Ct. 1461, 1479 (2018); *Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 108 (1992).

⁸⁸ *See Sprietsma v. Mercury Marine*, 537 U.S. 51, 64 (2002). The presence of a preemption clause in a federal statute does not preclude the possibility of implied preemption. *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 881–82 (2000) (holding that a federal regulatory scheme impliedly preempted state common law claims involving automobile safety, even though a preemption clause in the relevant statute did not expressly encompass those claims).

⁸⁹ *Arizona v. U.S.*, 567 U.S. 387, 401 (2012).

⁹⁰ *California v. ARC America Corp.*, 490 U.S. 93, 100, 101 (1989).

⁹¹ *See* Department of Transportation, Pipeline and Hazardous Materials Safety Administration, Office of Pipeline Safety letter dated March 6, 1998 to Mr. Ernie Nepa of Governor Sproul Associates (attached as

protection against risks to life and property posed by pipeline transportation and pipeline facilities” by empowering the Secretary of the Department of Transportation to “prescribe minimum safety standards for pipeline transportation and for pipeline facilities.”⁹² These minimum federal safety standards apply to both interstate and intrastate pipeline facilities; however, the Secretary of the Department of Transportation “may not prescribe or enforce safety standards and practices for an intrastate pipeline facility or intrastate pipeline transportation to the extent that the safety standards and practices are regulated by a [s]tate authority . . . that submits to the Secretary annually a certification for the facilities and transportation.”⁹³ Thus, prior to the enactment of Act 127, PHMSA retained jurisdiction over master meter systems in Pennsylvania, and Congress made its preemptive intent explicit in the federal Pipeline Safety Act through the inclusion of an express preemption provision over conflicting state law. I&E Reply Brief at 3-4.

I&E next questions whether the Pennsylvania Uniform Construction Code is the type of law Congress intended to preempt.⁹⁴ The Federal Pipeline Safety Act sets the minimum *safety* standards for pipeline transportation and for pipeline facilities,⁹⁵ and includes a variety of tasks and requirements for pipeline operators: preparation and implementation of written plans for inspection and maintenance of facilities;⁹⁶ take necessary corrective action if a facility is hazardous to life, property, or the environment;⁹⁷ annual and immediate reporting requirements for accidents and safety-related conditions such as corrosion;⁹⁸ mandating specifications for the

I&E Exhibit 3 to I&E’s Brief in Opposition to Petition for Review and Answer to Material Questions and for Immediate Stay of Proceeding).

⁹² 49 U.S.C. § 60102(a)(1)-(2).

⁹³ *Id.* § 60105(a).

⁹⁴ *Altria Group, Inc. v. Good*, 555 U.S. 70, 76 (2008) (even when there is an “express pre-emption clause, it does not immediately end the inquiry because the question of the substance and scope of Congress’ displacement of state law still remains.”).

⁹⁵ 49 U.S.C. § 60102(a)(2).

⁹⁶ *Id.* § 60108; *see generally* 49 CFR §§ 191, 192.

⁹⁷ 49 U.S.C. § 60112.

⁹⁸ *See generally* 49 C.F.R. § 191.

pipeline facilities materials, designs, welding, components, etc.;⁹⁹ and the minimum requirements for an individual to be qualified to perform covered tasks on a pipeline facility.¹⁰⁰ I&E Reply Brief at 4-5.

The International Fuel Gas Code, as adopted by the Pennsylvania Uniform Construction Code,¹⁰¹ applies to the installation of fuel-gas piping and includes piping system requirements such as design, materials, components, fabrication, assembly, installation, testing, inspection, operation, and maintenance.¹⁰² Thus, on its face, the International Fuel Gas Code appears to impose regulations relating to pipeline facilities that conflict with the Federal pipeline safety regulations. I&E avers that the Federal pipeline safety regulations preempt and override the International Fuel Gas Code of the Pennsylvania Uniform Construction Code as it relates to master meter systems. I&E Reply Brief at 5.

I&E recognizes that there are some situations where the International Fuel Gas Code does not conflict with the Federal regulations. For example, in the factual scenario where a Westover-owned sub-meter is located in the individual units of the apartment complex (Fox Run, Gladstone Towers, Jamestown Village, Lansdowne Towers, Main Line Berwyn, and Paoli Place-North), the Federal regulations would apply up to and including the sub-meter, and the piping past the sub-meter to the appliance(s) would fall under the International Fuel Gas Code.¹⁰³ In the factual scenario where the gas exclusively provides service to a central boiler/hot water system, the Federal regulations would apply to the gas facilities, and the facilities which transport hot water and/or heat would fall under the Pennsylvania Uniform Construction Code. I&E Reply Brief at 5-6.

⁹⁹ See generally 49 C.F.R. § 192.

¹⁰⁰ 49 C.F.R. §§ 192.801-192.809.

¹⁰¹ 35 Pa.C.S. § 7210.301.

¹⁰² 2018 International Fuel Gas Code §§ 101.2; 101.2.2.

¹⁰³ See generally 2018 International Fuel Gas Code § 202 (piping system defined as “the fuel piping, valves and fittings from the outlet of the point of delivery to the outlets of the appliance shutoff valves.” Point of delivery defined 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. . . .”).

On the other hand, the factual scenario where the International Fuel Gas Code conflicts with Federal law, and where preemption exists, is where Westover operates a master meter system that does not include a sub-meter, i.e., natural gas distribution system delivers gas to single meter on Westover's property, gas is piped (either through underground, exterior, or interior piping) to a either the tenants' individual unit for use (cooking, heating, dryers, etc.), a community laundry room, or a combination of tenants' individual units and a central hot water/boiler system. In this scenario, I&E argues that Federal law would preempt the International Fuel Gas Code because the Federal Pipeline Safety Act provides explicit regulation over the safety, installation, inspection, etc., of these facilities through its regulation of master meter systems. I&E Reply Brief at 6.

Notwithstanding Federal preemption, even if the Commission were to review the General Assembly's intent when enacting Act 127, reviewing the legislative journals are limited because the legislature did not limit Act 127 to just those Federal regulations which apply to Marcellus Shale. I&E argues that if the legislature wanted only to regulate or address Marcellus Shale concerns, then they would have limited the applicability of Act 127 to those regulations which would apply to Marcellus Shale. Instead, the Commonwealth of Pennsylvania, via the Commission, participates as a certified state in the pipeline safety program administered by the U.S. DOT's PHMSA, pursuant to the Federal Pipeline Safety Act.¹⁰⁴ Act 127 establishes the Commission's authority to regulate non-public utility gas and hazardous liquid pipeline operators and pipeline facilities within the Commonwealth and establishes the applicable safety standards as being those issued under Federal pipeline safety laws and implemented in PHMSA's regulations, including all subsequent amendments thereto.¹⁰⁵ Specifically, Act 127 adopted the Federal safety laws found in 49 C.F.R. Subtitle B Ch. I Subch. D.¹⁰⁶ Subchapter D encompasses Parts 190–199, which includes the definition of master meter system.¹⁰⁷ While Westover

¹⁰⁴ 49 U.S.C. § 60105(a).

¹⁰⁵ 58 P.S. §§ 801.302, 801.501.

¹⁰⁶ 58 P.S. § 801.302.

¹⁰⁷ 49 C.F.R. § 191.3.

attempts to argue that the sole focus of Act 127 was to address the unregulated pipelines carrying Marcellus Shale, Parts 190–199 encompass a larger field of regulation and applicability, i.e., natural gas, liquified gas, hazardous liquids, damage prevention, distribution systems, and transmission systems. I&E Reply Brief at 7.

The Commission’s regulations related to gas safety limit the minimum safety standards for all natural gas and hazardous liquid public utilities to those Federal pipeline safety laws found in 49 U.S.C. §§ 60101–60503 and as implemented at 49 C.F.R. Parts 191–193, 195 and 199, including all subsequent amendments thereto.¹⁰⁸ If the General Assembly intended for Act 127 to be limited or to exclude master meter systems, it would have expressly done so. I&E asserts that, while the legislative intent can be helpful, the actual language of the act/regulation/statute is the ultimate determining factor. I&E Reply Brief at 8.

2. Westover’s Position

In 1999, the Pennsylvania General Assembly adopted the Construction Code, which empowered the Department of Labor and Industry (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. Westover notes that Act 127 never explicitly acknowledged the pre-existing Construction Code, so it does not address the interplay between the two regulatory schemes. Westover Main Brief at 12-13.

Westover maintains that 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

¹⁰⁸ 52 Pa. Code § 59.33; *see also* 49 U.S.C. § 60104(c) “A State authority that has submitted a current certification under section 60105(a) of this title may adopt additional or more stringent safety standards for intrastate pipeline facilities and intrastate pipeline transportation only if those standards are compatible with the minimum standards prescribed under this chapter.”

other than fuel gas piping systems at buildings. Westover asserts that to resolve this ambiguity, the Commission must apply the rules of statutory construction. Westover Main Brief at 13.

Westover notes that one rule of statutory construction, 1 Pa.C.S. § 1933, calls for statutes to be read to avoid a conflict. Westover posits that 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, Westover argues that the Commission lacks authority to regulate any of the systems identified in the Stipulation. Westover Main Brief at 13.

Westover avers that a similar result will be achieved 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.¹⁰⁹ 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. Westover Main Brief at 13-14.

Westover further argues that the legislative history of Act 127, and a review of 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. Westover maintains that 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. Westover Main Brief at 14.

¹⁰⁹ 1 Pa.C.S. § 1933.

In response to I&E’s position 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, Westover asserts that I&E fails to acknowledge the existence of the Construction Code¹¹⁰ 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. Westover Reply Brief at 2.

1 Pa.C.S. § 1933 states:

[w]henever 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.

Westover argues that by 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. Westover Main Brief at 26; Westover Reply Brief at 3.

Westover further notes that I&E 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. Westover asserts that

¹¹⁰ 35 P.S. § 7210.101 *et seq.*

the Commission should reject I&E’s “regulatory gap” argument because it is legally incorrect. Before the passage of Act 127, fuel gas piping systems at buildings were regulated by L&I and municipalities. Westover insists that 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). Westover Reply Brief at 3.

For the aforementioned reasons, Westover maintains that 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.

3. Recommendation

Act 127 provides that “[t]he provisions of this act shall apply only to pipelines, pipeline operators or pipeline facilities regulated under Federal pipeline safety laws.”¹¹¹ Act 127 provides authority to the Commission to enforce Federal pipeline safety laws as they relate to non-public utility gas and hazardous liquids pipeline equipment and facilities within the Commonwealth of Pennsylvania. In particular regarding Commission authority, Act 127 provides, in pertinent part, that the commission shall have the duty “[t]o enforce the Federal pipeline safety laws and, after notice and opportunity for a hearing, impose civil penalties and fines and take other appropriate enforcement action.”¹¹²

Upon review of the arguments advanced by both parties, I agree with I&E that the plain language of the definition of master meter system in 49 C.F.R. § 191.3 provides that master meter systems can be found at apartment complexes. Additionally, I will note that the Secretary of Transportation submitted a report to Congress in 2002 that answered the question “[w]hat is a master meter system” in pertinent part, as follows:

¹¹¹ 58 P.S. § 801.103.

¹¹² 58 P.S. § 801.501(a) (7).

Master meter systems provide gas at a variety of different types of facilities. These include public housing projects, trailer parks, colleges and universities, campgrounds, apartment buildings and complexes, shopping malls, industrial parks, motels, golf courses, medical facilities, and churches. The category with the most gas master meter systems is *apartment buildings and complexes*, followed by trailer parks and public housing projects.^{113]}

While this is not controlling, it is certainly persuasive that Act 127 applies to the owner or operator of an apartment *building* or *complex* which owns or operates natural gas facilities located downstream from an NGDC.

Westover's arguments regarding statutory interpretation and what it identified as an ambiguity with Act 127, focused on a conflict between Act 127 and the Construction Code, is unpersuasive. While Westover argues that one rule of statutory construction is to read statutes to avoid conflict, I am persuaded by I&E's argument that Federal law, as adopted by Pennsylvania under Act 127, preempts any other state or local regulation. Additionally, the General Assembly adopted the Construction Code in 1999, and it enacted Act 127 in 2011. If the General Assembly was concerned about any ambiguity or conflict, it could have worded the terms of Act 127 in such a way as to avoid any ambiguity or conflict between Act 127 and the Construction Code. The General Assembly did not. Moreover, the rules of statutory construction provide that "[w]henver the provisions of two or more statutes enacted finally by different General Assemblies are irreconcilable, the statute latest in date of final enactment shall prevail."¹¹⁴ Pursuant to this provision, terms of Act 127 must prevail.

Westover's argument that the General Assembly adopted Act 127 to address a gap in the regulation of pipelines carrying Marcellus Shale gas from wells to markets across Pennsylvania is similarly unpersuasive. I agree with I&E that if the General Assembly wanted only to regulate or address Marcellus Shale concerns, then it would have limited the applicability

¹¹³ *Assessment of the Need for an Improved Inspection Program for Master Meter Systems, Report of the Secretary of Transportation to the Congress, prepared pursuant to Section 108 of Public Law 100-561, January 2002 at 5 (emphasis added).*

¹¹⁴ 1 Pa.C.S. § 1936.

of Act 127 to those regulations which would apply to Marcellus Shale. Instead, the General Assembly adopted Federal safety laws that go well beyond the scope of simply addressing Marcellus Shale concerns. The plain language of Act 127 does not support Westover's interpretation of the Act.

Accordingly, I recommend that the question presented by the parties, 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, be answered in the affirmative.

B. Whether the Natural Gas System at Any Apartment Complex Identified in the Joint Stipulation of Facts is a "master meter system" as defined in 49 C.F.R. § 191.3.

I&E maintains that Westover's apartment complexes which are the subject of this proceeding are master meter systems. To be a master meter system, the following elements must be met: 1.) The pipeline distribution system must be within, but not limited to a definable area, such as an apartment complex; 2.) The operator purchases gas from an outside source for resale; 3.) the Pipeline distribution system supplies the ultimate consumer; and 4.) the ultimate consumer purchases the gas either through a meter or by other means, such as rent. I&E Main Brief at 16-17.

I&E asserts that each of the apartment complexes owned or operated by Westover, which are the subject of this proceeding, is a master meter system because they each satisfy the definition set out in Section 191.3.¹¹⁵ I&E Main Brief at 18-36.

Regarding Paoli Place Apartments, I&E notes that, while the Joint Stipulation provides a building specific breakdown of Paoli Place-North and Paoli Place-South to showcase the difference in natural gas systems at each or a group of residential buildings, the definition of a master meter system does not include a separation or building specific breakdown of an apartment complex. As such, I&E avers that either a master meter system exists or does not

¹¹⁵ 49 C.F.R. § 191.3.

exist at the apartment complex. Moreover, I&E maintains that it would be unconscionable for the Commission to regulate only a portion or select number of residential buildings at an apartment complex while forgoing regulation and oversight at others. I&E further asserts that it would be challenging for apartment complex owners/operators to only be responsible for following the Federal and State pipeline safety laws at only a select number of buildings in an apartment complex. I&E Main Brief at 31.

For its part, Westover maintains that 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 C.F.R. § 191.3. Westover notes that Act 127 gives the Commission general administrative authority to supervise and regulate “pipeline operators” within the Commonwealth.¹¹⁶ Westover Main Brief at 32.

Westover avers that 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”),¹¹⁷ 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.

Westover Main Brief at 32-33.

¹¹⁶ 58 P.S. § 801.501(a).

¹¹⁷ Westover Exhibit AS-3.

Second, in determining whether any system is a master meter system, the definition of a master meter system contains several elements. Westover argues that each element of that definition must be satisfied for any system to be considered a “master meter system.” With respect to this case, Westover avers that the following elements of the definition are significant: 1.) The system must be within, but not limited to, a definable area, such as an apartment complex; 2.) Westover must be the operator of the system; 3.) Westover must purchase metered gas from an outside source for resale; 4.) Westover must supply the gas through its pipeline system to the ultimate consumer and 5.) The ultimate consumer must purchase the gas from Westover directly through a meter or by other means (such as by rents). Westover Main Brief at 33.

Westover maintains that none of its systems 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. Accordingly, Westover maintains that the Commission lacks authority to regulate any system pursuant to Act 127. Westover Main Brief at 33.

These arguments will be addressed in more detail below.

1. Are Westover’s Gas Facilities Limited to the Apartment Complex?

i. I&E’s Position

Pursuant to the Partial Settlement filed on June 13, 2023, the Parties entered into a Joint Stipulation of Fact which stated that the gas facilities at all of the apartment complexes, noting the nuance of Carlisle Park, are limited to the apartment complex. The apartment complex at Carlisle Park is a unique situation where one of the apartment buildings is accessible by crossing a public roadway. The single rotary meter which provides gas service to the entire apartment complex is located across the street from this singular building, and thus the gas facilities traverse under the public roadway via underground piping to this building. Noting that the single building is part of the Carlisle Park apartment complex, the Parties stipulated that the natural gas facilities at Carlisle Park are limited to a definable area, i.e., the apartment complex.

Accordingly, I&E acknowledges that Westover’s natural gas facilities are limited to the apartment complex. I&E Main Brief at 36-37.

Acknowledging that PHMSA has not specifically issued an interpretation of “within, but not limited to, a definable area, such as a mobile home park, housing project, or apartment complex,” the interpretations issued by PHMSA clearly provide guidance on how that element of the definition is applied. For example, PHMSA has issued interpretations finding an apartment complex,¹¹⁸ a housing development,¹¹⁹ and a mall complex¹²⁰ to be master meter systems. None of those interpretations included a review or analysis of whether the natural gas facilities were located outside of the definable area. I&E Reply Brief at 9.

I&E posits that all of the PHMSA interpretations letters should be persuasive and should be used as guidance in determining the fact pattern or patterns which meet the definition of a master meter system. The PHMSA interpretations are the only guidance in existence which look at real-world situations and apply the definition. I&E Reply Brief at 9-10.

Notably, the January 2002 Report submitted by the Secretary of the Department of Transportation supports and bolsters the PHMSA interpretations. The Secretary of the Department of Transportation submitted a report to Congress detailing how master meter systems include those distribution systems which purchase natural gas and resell such gas to consumers in connection with rental, leasing, or management of real property.¹²¹ The Report continues to state that master meter systems exist at a variety of locations, including apartment

¹¹⁸ PHMSA Letter of Interpretation to Indiana Utility Regulatory Commission, PI-11-0014 (March 27, 2012) and (August 27, 2012) (attached as Attachment D to I&E’s Answer in Opposition to Westover’s Petition for Declaratory Order).

¹¹⁹ PHMSA Letter of Interpretation to Montana Public Service Commission, PI-01-0113 (June 25, 2001) (attached as I&E Exhibit 4 to I&E’s Answer in Opposition to Westover’s Amended Petition).

¹²⁰ PHMSA Letter of Interpretation to Minnesota Department of Public Safety, PI-16-0012 (December 6, 2016) (attached as I&E Exhibit 6 to I&E’s Answer in Opposition to Westover’s Amended Petition).

¹²¹ *See Assessment of the Need for an Improved Inspection Program for Master Meter Systems*, Report of the Secretary of Transportation to Congress, prepared pursuant to Section 108 of Public Law 100-561, January 2002 (attached as Attachment E to I&E’s Answer in Opposition to Westover’s Petition for Declaratory Order) (hereinafter “Report”).

complexes, and that the category with the most master meter systems is apartment buildings and complexes.¹²² I&E Reply Brief at 10.

Additionally, the plain language and definitions of the words used are in stark contrast to Westover's argument. "Within" is also defined as "used as a function word to indicate enclosure or containment," or "to indicate situation or circumstance in the limits," which demonstrate that the pipeline system for distributing gas must be located in a definable area, such as an apartment complex.¹²³ Next, the phrase "within, but not limited to" is a common idiomatic expression included in contracts or statutes/regulations which means that the definition is applicable to the examples cited and other uncited examples which are similar in purpose. The placement of the commas and order of the words further exacerbates this common understanding: within, but not limited to, a definable area, such as a mobile home park, housing project, or apartment complex. Thus, the distribution system must be within a definable area, but is not limited to the examples provided. I&E Reply Brief at 10-11.

The definition of a master meter system under Act 127 requires the gas facilities to be located within a definable area, such as an apartment complex. I&E argues that this interpretation is consistent with the plain meaning of the words, the PHMSA interpretations, and the common knowledge of the application of the phrase. Moreover, even though the Frequently Asked Questions document cited by Westover is not controlling or binding legal precedent/guidance, I&E asserts that Westover's reliance on the document is misguided because Westover is not the ultimate consumer of the gas service on its property, its tenants are. Therefore, the gas facilities located within the apartment complex which are owned and operated by Westover are distribution lines, not service lines. I&E Reply Brief at 12.

¹²² *Id.*

¹²³ Merriam-Webster Dictionary, <https://www.merriam-webster.com/dictionary/within>.

ii. Westover's Position

Westover notes that, 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.¹²⁴ The parties to this proceeding agree that every system is located within and limited to the applicable apartment complex. Notwithstanding this agreement between the parties, Westover disputes that any of its systems meet the definition of a master meter system. Westover Main Brief at 36-37.

Westover notes that the first sentence in the definition of 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.” Westover maintains that none of its systems satisfies this part of the definition because each system is located entirely within the pertinent apartment complex. Westover Main Brief at 33-34.

Westover asserts that 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. Westover concludes that in order to be a “master meter system,” a gas system must be located partly within, and partly outside, the pertinent apartment complex. Westover Main Brief at 34; Westover Reply Brief at 18.

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.¹²⁵ Act 127 gives the Commission authority to apply Federal pipeline safety regulations. However, Westover argues that 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

¹²⁴ Westover Statement No. 1 p. 6; Westover's Motion for Summary Judgment Exhibit 2 p. 1 (Affidavit of Peter Quercetti).

¹²⁵ *Feingold v. Bell Tel. Co. of Pa.*, 383 A.2d 791 (Pa. 1977).

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. Westover Main Brief at 36.

Westover insists that I&E's interpretation of 49 C.F.R. § 191.3 fails to give effect to the phrase "but not limited to," maintaining that I&E's interpretation violates the rule of construction that effect must be given to every word in a statute or regulation.¹²⁶ Westover insists that I&E runs afoul of this rule 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. Westover Reply Brief at 17.

Referencing I&E's Answer to Westover's Motion for Summary Judgment in which I&E indicated that "PHMSA has issued interpretations finding an apartment complex, a housing development, and a mall complex to be master meter systems," Westover notes that 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."¹²⁷ Further, PHMSA interpretation letters are not subject to judicial review. Westover Main Brief at 35.

Additionally, Westover notes that 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 Brochure¹²⁸ states that Act 127 does not apply to master meter systems serving their own property¹²⁹ (*i.e.*, systems that are located within and limited to the

¹²⁶ *Leocal v. Ashcroft*, 543 U.S. 1, 12 (2004); *Habecker v. Nationwide Ins. Co.*, 445 A.2d 1222, 1226 (Pa. Super. 1982).

¹²⁷ Westover's Motion for Summary Judgment Exhibit 10 pp. 1-2.

¹²⁸ Westover Exhibit AS-3.

¹²⁹ 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).

owner/operator’s apartment complex), but Act 127 applies to master meter systems that provide service to property owned by third parties (*i.e.*, systems that are located within, but are not limited to, the owner/operator’s apartment complex).¹³⁰ Although unofficial statements and opinions by Commission personnel do not have the force and effect of law and are not binding on the Commission,¹³¹ Westover asserts that the Commission should not lightly disregard its own publication providing guidance to the regulated community for almost a decade. Westover Main Brief at 36; Reply Brief at 18.

Accordingly, Westover maintains that it has carried its burden of proof with regard to its Petition for Declaratory Order because it has demonstrated that no Westover system constitutes a “master meter system.”

iii. Conclusion

In order to be considered a “master meter system,” several elements set out in the definition must be met. First, the pipeline system must be within, but not limited to, a definable area, such as an apartment complex. Second, the operator must purchase gas from an outside source for resale. Third, the pipeline system supplies the ultimate consumer. Lastly, the ultimate consumer purchases the gas either directly through a meter or by other means, such as by rent.

As to the first sub-issue posed by the parties, the parties are in agreement that Westover’s gas facilities are limited to the apartment complex. However, the parties disagree as to the meaning of the language “within, but not limited to, a definable area” contained within the definition of “master meter system.” I&E maintains that this language means that the distribution system must be within a definable area, but that it is not limited to the examples provided. Westover maintains that this phrase means that, in order to meet the definition of “master meter system,” a gas system must be located partly within, and partly outside, of an apartment complex.

¹³⁰ 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).

¹³¹ 52 Pa. Code § 1.96.

Upon review of the record, I am not persuaded by Westover's arguments. First, and as previously noted, 49 C.F.R. § 191.3 provides that master meter systems can be found at apartment complexes. Also, and as previously noted, the Secretary of Transportation submitted a report to Congress in 2002 that answered the question "[w]hat is a master meter system" in pertinent part, to indicate that master meter systems provide gas at a variety of different types of facilities, including apartment *buildings* and complexes.¹³² Again, while this is not controlling, it is persuasive that Act 127 applies to apartment buildings as well as apartment complexes, meaning that a master meter system can exist within the confines of a single building. That the Secretary of Transportation identified a single apartment building as a place where a master meter system may exist is persuasive that a master meter system existing within the confines of one apartment building or definable area can satisfy the definition of a master meter system.

Additionally, and as pointed out by I&E, although PHMSA has not specifically addressed the meaning of "within, but not limited to, a definable area, such as a mobile home park, housing project, or apartment complex," PHMSA has issued an interpretation finding that an apartment complex can be a master meter system.¹³³ I agree with I&E that, since PHMSA interpretation letters are the sole source of guidance on these matters, they should have persuasive value on this issue. I also agree with I&E that the wording "within, but not limited to, a definable area such as . . . an apartment complex" means that the distribution system must be within a definable area but is not limited to the list of other examples provided in Section 191.3. Moreover, a plain reading of the definition leads me to conclude that Westover's systems meet the first element of the definition of a master meter system.

I am also not persuaded by Westover's argument that the Commission reading the definition of master meter system to mean that a "master meter system" must be "within and

¹³² *Assessment of the Need for an Improved Inspection Program for Master Meter Systems, Report of the Secretary of Transportation to the Congress, prepared pursuant to Section 108 of Public Law 100-561, January 2002 at 5.*

¹³³ PHMSA Letter of Interpretation to Indiana Utility Regulatory Commission, PI-11-0014 (March 27, 2012) and (August 27, 2012) (attached as Attachment D to I&E's Answer in Opposition to Westover's Petition for Declaratory Order).

limited to,” rather than “within, but not limited to” a definable area such as an apartment complex, constitutes rewriting the regulation. First, as previously noted, such a reading would be consistent with a plain reading of the definition of a master meter system. Second, Westover’s position is inconsistent with PHMSA’s interpretation concluding that an apartment complex can be a master meter system.

Moreover, I agree with I&E that Westover’s reliance on the language in the FAQ brochure is misguided. As discussed below, Westover is not the ultimate consumer of the gas service at several of its properties. As noted by I&E, the gas facilities located within these Westover apartment complexes are gas distribution lines rather than service lines.

2. Does Westover Purchase Gas for Resale Through a Distribution System and Supply it to the Ultimate Consumer?

i. I&E’s Position

It is important to note where the local NGDC’s facilities end and where Westover’s gas facilities begin. In reference to PECO, the gas piping past the first fitting after the outlet side of PECO’s meter is part of Westover’s gas facilities.¹³⁴ In reference to UGI, the gas piping past the first flange after the outlet side of UGI’s meter is part of Westover’s gas facilities.¹³⁵ Thus, all gas facilities past the first flange or first fitting after the outlet side of the meter are Westover’s facilities. I&E Main Brief at 37.

I&E notes that 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. Specifically, Westover purchases the gas for resale through rents in the following apartment complexes: Black Hawk, Carlisle Park, Country Manor, Hillcrest, Mill Creek I, Mill Creek II, Norriton East, Oak Forest, Paoli Place-South, and Valley Stream. Westover purchases the gas for resale through a cost allocation at the following apartment complexes: Concord Court, Lansdale Village, Park Court, and Woodland Plaza.

¹³⁴ I&E Statement No. 1-R, pg. 4.

¹³⁵ *Id.*

Westover purchases the gas for resale through both rents and an actual meter reading from a sub-meter at the following apartment complexes: Fox Run, Gladstone Towers, Lansdowne Towers, Main Line Berwyn, and Paoli Place- North. Lastly, Westover purchases the gas for resale through an actual meter reading from a sub-meter at Jamestown Village. I&E Main Brief at 39.

The gas at Westover apartment complexes is distributed in several ways. It is either distributed to a central heater/hot water system, to the tenants directly, or to a combination of a central heater/hot water system as well as to the tenants. Specifically, Westover distributes the gas to a central heater/hot water system, which in turn provides heat and/or hot water to the tenants, at Black Hawk, Concord Court, and Lansdale Village. Westover distributes the gas to both a central heater/hot water system and to the tenants directly at the following apartment complexes: Country Manor, Fox Run, Gladstone Towers, Jamestown Village, Lansdowne Towers, Main Line Berwyn, Mill Creek I, Mill Creek II, Norriton East, Oak Forest, Paoli Place-North, Paoli Place- South, Park Court, Valley Stream, and Woodland Plaza. Lastly, Westover distributes gas directly to the tenants at Carlisle Park and Hillcrest. I&E Main Brief at 39-40.

In support of its position that Westover purchases gas for resale through a distribution system and supplies it to the ultimate consumer, I&E notes that PHMSA has issued interpretations further evidencing that apartment complex owners or operators are responsible for natural gas distribution systems. “We consider the mains and service lines downstream from the LDC [local distribution company] master meter (whether or not there are multiple buildings being served by a single meter) to be a distribution system that is subject to the Federal pipeline safety regulations in 49 CFR [sic] Parts 191 and 192.”¹³⁶ “The gas distribution lines downstream from the master meter are a Master Meter system that is subject to the federal gas pipeline safety regulations in 49 CFR [sic] Parts 191 and 192.”¹³⁷ I&E Main Brief at 37.

¹³⁶ PHMSA Letter of Interpretation to Indiana Utility Regulatory Commission, PI-11-0014 (March 27, 2012) and (August 27, 2012) (finding that apartment complex is a master meter system).

¹³⁷ PHMSA Letter of Interpretation to Montana Public Service Commission, PI-01-0113 (June 25, 2001).

I&E contends that the facts surrounding Westover are similar to PHMSA’s interpretation in the Mall of America.¹³⁸ The Mall of America (“Mall”) is a large shopping mall in Minnesota which operates its own gas system.¹³⁹ Specifically, the Mall buys gas from the local distribution company and resells it to the Mall tenants using gas meter readings.¹⁴⁰ The Mall reads the meters of the tenants connected to the gas system and bills the customers for their gas usage.¹⁴¹ Accordingly, PHMSA determined that the Mall is a master meter system because it is engaged in the distribution of gas by transferring gas to the ultimate consumers (the Mall tenants) and sells the gas to the ultimate consumers (the Mall tenants).¹⁴² I&E Main Brief at 38.

Additionally, in PHMSA Interpretation PI-73-0112, PHMSA began its interpretation by noting and explaining a letter issued by the Office of Pipeline Safety in December 1970 which stated that municipal housing complexes and mobile home parks that are supplied gas through a master meter and in turn distribute the gas by their own mains and services lines to the tenants are master meter systems.¹⁴³ PHMSA continued to discuss the letter, noting that the letter explained that mains and service lines downstream of the master meter are considered distribution lines, and that the housing authority or mobile home park is a pipeline operator within the meaning of Part 192.¹⁴⁴ I&E Main Brief at 38.

I&E further notes that PHMSA has determined that a housing authority which distributes gas to its tenants but does not bill or receive payment from the tenants for gas service

¹³⁸ PHMSA Letter of Interpretation to Minnesota Department of Public Safety, PI-16-0012 (December 6, 2016).

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ PHMSA Letter of Interpretation to Public Service Commission of Utah, PI-73-0112 (June 18, 1973) (attached as I&E Exhibit 5 to I&E’s Answer in Opposition to Westover’s Amended Petition).

¹⁴⁴ *Id.*

specifically is still a master meter system.¹⁴⁵ In rendering this determination, PHMSA stated that the tenants are clearly paying rent for the privilege of occupying a housing unit and receiving utilities, which include gas.¹⁴⁶ PHMSA decided that the fact that the tenants are not being billed for gas service specifically and that subsidiaries for utility costs are received by the housing authority is not relevant to the master meter determination.¹⁴⁷ Thus, PHMSA determined that the housing authority was a master meter system subject to the pipeline safety regulations.¹⁴⁸ I&E Main Brief at 38-39.

I&E is not suggesting that a pipe which transports water, heat, or steam is subject to Act 127. Rather, I&E's position is that Act 127 applies to pipeline facilities which transport natural gas. Westover argues that the gas infrastructure configurations at Black Hawk, Concord Court, and Lansdale Village do not meet the definition of master meter system because the gas services a central boiler which produces heat and/or hot water that is distributed to the tenants. Westover cites two PHMSA interpretations which relate to college campuses to support this proposition. I&E Reply Brief at 12-13.

I&E acknowledges that some prior PHMSA interpretations suggest that a pipeline distribution system which services a central boiler/hot water system, by which a college in turn provides heat and/or hot water to the building occupants, is not a pipeline operator.¹⁴⁹ However, I&E argues that there is a stark difference between a college campus and an apartment complex. I&E Reply Brief at 13.

¹⁴⁵ PHMSA Letter of Interpretation to Montana Public Service Commission, PI-01-0113 (June 25, 2001).

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ PHMSA Letter of Interpretation to Rhode Island Division of Public Utilities & Carriers, PI-03-0101 (February 14, 2003) (attached in Appendix D in Main Brief).

In PHMSA interpretation PI-03-0101, a request was made related to whether Bryant College's gas system was a master meter system subject to federal regulation.¹⁵⁰ In rendering the interpretation, PHMSA stated that providing heat and hot water to campus buildings renders the college the consumer of the gas service, but specifically noted that if Bryant College provided gas to consumers, such as concessioners, tenants, or others, it is engaged in the distribution of gas.¹⁵¹ The distinction between providing heat and/or hot water to campus buildings and gas to consumers or tenants is routed in the functionality of a college campus. I&E Reply Brief at 13.

A college campus generally encompasses buildings which house an array of functions - classrooms, laboratories, libraries, a gymnasium, a cafeteria, a medical center, student housing, etc. The college campus is functional regardless of whether students are on campus and/or taking classes, and utilities are not included in housing costs. To the contrary, the amount of gas used at Westover's apartment complexes is determined by the tenants, i.e., the tenants control the temperature in their respective apartment/unit, the tenants use as much or as little hot water as needed/desired, and the tenants use the gas-operated dryers or cooking appliances as needed/desired. Moreover, the tenants of Westover's apartment complexes pay for the gas service, either indirectly through rents, directly through a sub-meter readings, or both. Accordingly, I&E asserts that the PHMSA interpretations related to college campuses are distinguishable from the facts related to apartment complexes. I&E Reply Brief at 13-14.

Thus, I&E asserts that the record is clear that Westover purchases gas from the local NGDC for resale to its tenants, and that it operates a natural gas distribution system when providing this gas service to its tenants. I&E Main Brief at 40.

ii. Westover's Position

Westover notes that several of its systems are not master meter systems, in whole or in part, because it does not purchase gas for resale through a distribution system and supply it

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

to the ultimate consumer. Westover further notes that one system is not a master meter system because Westover does not purchase gas at all. Instead, the building occupants buy gas directly from the NGDC. Westover Main Brief at 37.

Westover explains that at Paoli Place – North (Buildings L-R), 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. Building occupants are customers of the NGDC.¹⁵² Finally, building occupants purchase the gas from the NGDC (not Westover) through a meter.¹⁵³ Westover Main Brief at 38-39; Westover Reply Brief at 22.

Westover further explains that 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). Westover Reply Brief at 22.

Additionally, Westover notes that several systems are not a master meter system because Westover does not resell gas to building occupants. Instead, Westover consumes all of the gas that it purchases and distributes a different commodity, such as heat and/or hot water, to building occupants. Westover Main Brief at 39.

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. Westover

¹⁵² 52 Pa. Code § 59.1 (a gas “customer” is “[a] party supplied with gas service by a public utility”).

¹⁵³ Westover Statement 1 p. 44.

asserts that the Federal gas pipeline safety laws do not apply to pipelines that carry hot air or hot water.¹⁵⁴ Westover Main Brief at 39-40; Westover Reply Brief at 23.

Westover notes that 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 PHMSA, a system must supply gas to building occupants to meet the test of a master meter system. Referencing a PHMSA interpretation letter dated October 24, 1973 regarding a college's gas system, Westover notes that PHMSA stated:

[t]he 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.^[155]

Westover notes that PHMSA reaffirmed this conclusion thirty years later in an inquiry regarding Bryant College, where the College used the gas and provided heat and hot water to campus buildings:

¹⁵⁴ 49 C.F.R. §§ 191.1 (“Scope”), 192.1 (“What is the scope of this part?”).

¹⁵⁵ Westover Exhibit PQ-7.

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.^[156]

Westover Main Brief at 40-41; Westover Reply Brief at 25.

Recognizing that it previously indicated that PHMSA's interpretation letters are not binding on the Commission, Westover believes that, in this instance, they are persuasive and the Commission should adopt their reasoning. Westover argues that there is 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. Westover insists that Section 191.3 requires that a system operator resell and supply gas to ultimate consumers. Westover Main Brief at 41.

Westover further argues that there is a 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. Westover Main Brief at 41-42.

Lastly, Westover asserts that portions of some systems are not master meter systems because Westover consumes some of the gas to produce heat and/or hot water. At some apartment complexes, Westover explains that it 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

¹⁵⁶ Westover Exhibit PQ-6.

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. Westover Main Brief at 42-43.

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 argues that it 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.¹⁵⁷ Westover Main Brief at 43.

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, Westover argues that 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 and limited to the apartment complex. 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. Finally, 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 not “in or affecting interstate or foreign commerce.” Westover Main Brief at 43-44.

iii. Conclusion

Upon review of the record, it is evident that Westover does purchase gas for resale through a distribution system and supply it to the ultimate consumer, Westover’s tenants. I&E argues that all of Westover’s systems supply gas to the ultimate consumer, even those where the pipeline distribution system services a central boiler or hot water system. I&E acknowledges that a PHMSA interpretation suggested that such a system on a college campus was not a

¹⁵⁷ 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”).

pipeline operator but asserts that there is a difference between college campuses and apartment complexes. I&E bases this difference on the fact that a college campus is functional when classes are not in session while the amount of gas used at an apartment complex is determined by the tenants through temperature control, hot water usage, use of gas-operated dryers or cooking appliances as needed. However, I do not find I&E's argument to be persuasive here.

The definition of a master meter system specifically provides 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.”¹⁵⁸ The plain language of this definition specifically provides that gas is supplied to the ultimate consumer and the consumer pays for that gas usage through rents. In the majority of Westover's systems at issue in this proceeding, Westover supplies its tenants, the ultimate consumer, with gas for which they ultimately pay Westover. However, in some of Westover's systems, Westover does not supply any gas to the tenants. Instead, they use the gas internally and generate heat and hot water for the tenants. To conclude that in these instances Westover is supplying gas to the ultimate consumer would be contrary to the definition of a master meter system. Moreover, and as referenced by Westover, PHMSA issued two separate interpretation letters¹⁵⁹ where colleges consumed the gas and provided heat and hot water to campus buildings in which it determined that the colleges were not operating master meter systems because the colleges were the consumers of the gas.

Several of Westover's apartment complexes feature a hybrid of gas service in that Westover consumes some of the gas it purchases in order to provide heat and/or hot water, and Westover also distributes gas to building occupants for personal use, such as for heating or cooking. Regarding the portions of Westover's systems that involve facilities for the resale and supply of gas to building occupants, Westover argued that these systems fail to meet the definition of a master meter system because the portions of the systems that are used to resell and supply gas to building occupants are located within and limited to the apartment complex.

¹⁵⁸ 49 C.F.R. § 191.3.

¹⁵⁹ PHMSA Letter of Interpretation to Rhode Island Division of Public Utilities & Carriers, PI-03-0101 (February 14, 2003) (attached in Appendix D in Main Brief; also Westover Exhibit PQ-6); PHMSA Letter of Interpretation to James H. Collins (October 24, 1973)(Westover Exhibit PQ-7).

Westover further argues that these systems fail to meet the definition of a master meter system because the portions of these systems that are used to resell and supply gas to building occupants are located primarily or entirely within a single building. For reasons already stated, these arguments are not persuasive.

Westover lastly argues that these systems fail 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 not “in or affecting interstate or foreign commerce.” This argument is similarly unpersuasive and is discussed in more detail below.

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

i. I&E’s Position

I&E avers that Westover’s tenants are the ultimate consumers of the gas service. In support of its position, I&E notes that in PHMSA Interpretation PI-73-0112, PHMSA reviewed three master meter situations to determine which are jurisdictional following the change in definition of a “service line.”¹⁶⁰ In short, PHMSA stated that the definition of service line does not affect the status of a master meter system.¹⁶¹ Of importance, PHMSA provided the following analysis:

[Scenario] The gas leaves master meter, travels through the ground, serves a plant unit, then on to offices and various other plant units, warehouses, etc.

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

¹⁶⁰ PHMSA Letter of Interpretation to Public Service Commission of Utah, PI-73-0112 (June 18, 1973).

¹⁶¹ *Id.*

the company for use by another consumer or that the gas is being distributed by the company to any other person.

Here, all available information indicates that the gas is being used by the company employees for company purposes on company property. We are, therefore, unable to identify this as a master meter system subject to the regulations.^[162]

I&E Main Brief at 40-41.

In contrast to this scenario, I&E contends that Westover and/or its employees are not the ultimate consumers of the gas. Rather, their tenants are the ultimate consumers. There are three categories of consumption at Westover's apartment complexes: (1) Westover uses the gas for a central heater/hot water system which distributes heat or hot water to the tenants; (2) Westover uses some of the gas for a central heater/hot water system which distributes heat or hot water to the tenants, the tenants consume the remainder of the gas; and (3) Westover distributes the gas to the tenants for their sole usage. I&E maintains that none of the categories describe a scenario or situation where Westover consumes the gas for its own use/purpose. Rather, the gas is consumed for the exclusive benefit of, and use by, Westover's tenants. I&E Main Brief at 41.

I&E asserts that any attempt by Westover to argue that it is the ultimate consumer in the few situations where a central heater/hot water system consumes the gas is misguided. The tenants, not Westover, receive the ultimate benefit and use of the gas service, i.e., heat and/or hot water. While Westover may be responsible for the maintenance of the central heater/hot water system, the tenants are the ultimate users and consumers of the gas service, i.e., heat and/or hot water is distributed to the tenants for their usage. This is further evidenced by the fact that Westover charges the tenants for the gas service through rents, an allocation, or a sub-meter reading. Were Westover the ultimate consumer of the gas service and the sole beneficiary of the service, there would be no basis by which the tenants could be billed. Rent payments account for gas usage, not the heat or hot water byproducts of that usage. Tenants are billed for the gas service because they are the ultimate consumer of the gas. I&E Main Brief at 41-42.

¹⁶² *Id.*

I&E asserts that this reasoning is bolstered by PHMSA interpretations. As discussed previously, PHMSA issued an interpretation relating to the Mall of America.¹⁶³ The Mall reads the meters of the tenants connected to the gas system and bills the customers for their gas usage.¹⁶⁴ PHMSA determined that the Mall is a master meter system because it is engaged in the distribution of gas by transferring gas to the ultimate consumers (the Mall tenants) and sells the gas to the ultimate consumers (the Mall tenants).¹⁶⁵ I&E Main Brief at 42.

Additionally, PHMSA issued an interpretation on February 6, 2020 which I&E argues reinforced the determination rendered in the Mall of America.¹⁶⁶ In the matter involving Cal Farley’s Boys Ranch, PHMSA cited to a prior case¹⁶⁷ when it stated that “if the entity 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 customers even though they may not be individually metered.”¹⁶⁸ I&E concludes that the tenants of Westover’s apartment complexes are the ultimate consumers. I&E Main Brief at 42.

ii. Westover’s Position

Westover asserts that to determine the meaning of the term “ultimate consumer,” as used in 49 C.F.R. § 191.3, one must examine the definition of a master meter system. The last sentence of this definition provides 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[.]” Section 191.3 does not define the term “ultimate consumer.” This is the only

¹⁶³ PHMSA Letter of Interpretation to Minnesota Department of Public Safety, PI-16-0012 (December 6, 2016).

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ PHMSA Letter of Interpretation to Cal Farley’s Boys Ranch, PI-19-0002 (February 6, 2020) (attached in Appendix D to I&E Main Brief).

¹⁶⁷ PHMSA Letter of Interpretation to Rhode Island Division of Public Utilities & Carriers, PI-03-0101 (February 14, 2003) (attached in Appendix D).

¹⁶⁸ PHMSA Letter of Interpretation to Cal Farley’s Boys Ranch, PI-19-0002 (February 6, 2020).

time the term “ultimate consumer” is used in 49 C.F.R. § 191.3. Westover Main Brief at 44; Westover Reply Brief at 27.

Statutes and regulations are to be read with reference to the context in which they appear.¹⁶⁹ Westover maintains that when the term “ultimate consumer” is read in the context of Section 191.3 as a whole, the meaning of the term becomes plain. Westover Main Brief at 44.

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. The “ultimate consumer,” therefore, is the party to whom the system operator resells and supplies gas (they are the customers of the system operator).¹⁷⁰ This interpretation is also consistent with the common and approved usage of the term¹⁷¹ “ultimate” as “last in a progression or series”¹⁷² (*i.e.*, the “ultimate consumer” is the last gas consumer in a series of gas consumers). Westover Main Brief at 44-45.

Westover asserts that where it 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. Westover Reply Brief at 28.

Westover explains that 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

¹⁶⁹ *A.S. v. Pa. State Police*, 143 A.3d 896 (Pa. Super. 2016).

¹⁷⁰ 49 C.F.R. § 192.3 (defining a “customer meter” as “the meter that measures the transfer of gas from an operator to a consumer.”).

¹⁷¹ Words and phrases shall be construed according to their common and approved usage. 1 Pa.C.S. § 1903.

¹⁷² Merriam-Webster’s On-Line Dictionary: <https://www.merriam-webster.com/dictionary/ultimate> .

for the gas. At these systems, Westover is the customer of the NGDC.¹⁷³ To the extent that Westover resells and supplies gas to building occupants, the building occupants are the “ultimate consumers.” Westover Main Brief at 45; Westover Reply Brief at 28.

Westover maintains that at some systems, 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. Instead, the NGDC supplies gas directly to building occupants and building occupants pay the NGDC through a meter. At this system, building tenants are simply customers of the NGDC.¹⁷⁴ Westover Main Brief at 45.

Westover further maintains that 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. Westover Main Brief at 45.

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 “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 and supply the gas (through a distribution pipeline system) to the “ultimate consumer.” I&E’s argument is also inconsistent with the definition of a gas customer. As previously noted, Westover is a gas customer of the NGDC.¹⁷⁵ Building occupants’ payment to Westover, reimbursing it for the costs it incurs as a gas customer, does

¹⁷³ 52 Pa. Code § 59.1 (defining a gas “customer” as “[a] party supplied with gas service by a public utility.”).

¹⁷⁴ 52 Pa. Code § 59.1.

¹⁷⁵ *Id.*

not deprive Westover of its status as a gas customer, nor does it transform building occupants into gas customers of Westover. Westover Main Brief at 45-46.

iii. Conclusion

I&E asserts that Westover’s tenants are the ultimate consumers of gas service, regardless of whether Westover consumes all gas and provides heat and hot water to tenants, Westover uses some gas for a central heater/and or hot water system which distributes heat and/or hot water to tenants and provide the remainder of the gas to tenants, or Westover distributes gas to tenants for their sole usage. I&E argues that in each of these scenarios, the gas is consumed for the exclusive benefit of and use by Westover tenants. I do not agree with I&E in this instance.

The last sentence of the definition of master meter system specifically provides that “[t]he gas distribution pipeline system supplies the ultimate consumer who either purchase the gas directly through a meter or by other means, such as by rents.” I agree with Westover that a plain reading of the definition requires that gas be distributed through the pipeline system to the ultimate consumer. If Westover consumes all of the gas to provide heat and/or hot water, then pursuant to the definition of a master meter system, Westover is the ultimate consumer of the gas. If Westover is the ultimate consumer of the gas and consumes all of the gas at an apartment complex, then by definition, that Westover system is not a master meter system. This approach is consistent with a PHMSA interpretation letter issued in 2020:

[i]n previous interpretations, PHMSA has stated that an entity would not meet the definition of a master meter system if it were only “using gas delivered through its pipeline to provide heat or hot water to its buildings.” In that instance, the entity would be the consumer of the gas. PHMSA went on to say that if the entity provides gas to consumers, such as concessionaires, tenants, or other, it is engaged in the distribution of gas, and the persons to whom it is providing gas would be considered customers even though they may not be individually metered.^[176]

¹⁷⁶ PHMSA Letter of Interpretation to Cal Farley’s Boys Ranch, PI-19-0002 (February 6, 2020) (attached in Appendix D to I&E Main Brief).

However, and in accordance with this PHMSA interpretation letter, for those Westover systems where Westover consumes some of the gas to provide heat and/or hot water but provides the remainder of gas to building occupants, then the building occupants are ultimate consumers of the gas they use, satisfying the “ultimate consumer” element of the definition of master meter system.

Acknowledging that Paoli Place Apartments presents a mixed scenario where Paoli Place North - Buildings A-K and Paoli Place South, Buildings E-H supply gas to the ultimate consumer, and Paoli Place North, Buildings L-R and Paoli Place South, Buildings A-D, where Westover is the ultimate consumer of gas, I do not agree with I&E’s all or nothing approach to Paoli Place apartments. I&E argues that it would be unconscionable for the Commission to regulate only a portion or select number of residential buildings while not regulating the rest. However, to regulate all four of these building groups would be an overextension of Commission authority, since doing so would result in Westover being regulated for systems where it is the ultimate consumer. Instead, and in accordance with the aforementioned PHMSA letter, for those systems at Paoli Place Apartments where Westover provides gas to consumers, the occupants in this instance, Westover is engaged in the distribution of gas and may be subject to Act 127 for those complexes.

Accordingly, upon review of the record, Westover purchases gas for resale through a distribution system and supplies it to an ultimate consumer, the tenant, at the following apartment complexes:

- Carlisle Park Apartments (gas used for heating and cooking);¹⁷⁷
- Country Manor Apartments (some gas distributed to building occupants for cooking);¹⁷⁸
- Fox Run Apartments (occupants use gas for heat);¹⁷⁹

¹⁷⁷ Finding of facts 11 and 13.

¹⁷⁸ Finding of fact 24.

¹⁷⁹ Finding of fact 30.

- Gladstone Towers Apartments (gas distributed to each unit for heating, cooking, and running dryers);¹⁸⁰
- Hillcrest Apartments (gas piped to each unit to service a gas-run furnace);¹⁸¹
- Jamestown Village (piped to a submeter in each unit);¹⁸²
- Lansdowne Towers (gas used by building occupants for heating and coin-operated dryers);¹⁸³
- Main Line Berwyn (building occupants use gas for heating and cooking);¹⁸⁴
- Mill Creek I (building occupants use gas for cooking);¹⁸⁵
- Mill Creek II (building occupants use gas for cooking);¹⁸⁶
- Norriton East (building occupants use gas for cooking and coin-operated dryers);¹⁸⁷
- Oak Forrest (building occupants use gas for cooking);¹⁸⁸
- Paoli Place North, Buildings A-K (building occupants use gas for cooking, heating, or hot water);¹⁸⁹
- Paoli Place South, Buildings E-H (building occupants use gas for cooking);¹⁹⁰
- Park Court (building occupants use gas for cooking, heating, and coin-operated dryers);¹⁹¹
- Valley Stream (building occupants use gas for cooking, heating, and dryers);¹⁹² and
- Woodland Plaza (building occupants use gas for cooking).¹⁹³

¹⁸⁰ Finding of fact 37.

¹⁸¹ Finding of fact 41.

¹⁸² Finding of fact 45.

¹⁸³ Finding of fact 53.

¹⁸⁴ Finding of fact 59.

¹⁸⁵ Finding of fact 64.

¹⁸⁶ Finding of fact 69.

¹⁸⁷ Finding of fact 74.

¹⁸⁸ Finding of fact 79.

¹⁸⁹ Finding of fact 85.

¹⁹⁰ Finding of fact 97.

¹⁹¹ Finding of fact 102

¹⁹² Finding of Fact 107.

¹⁹³ Finding of Fact 112.

With the exception of Jamestown Village, Lansdowne Towers, and Main Line Berwyn, Paoli Place North Buildings A-K, , Park Court, and Woodland Plaza, Westover bills the occupants at the above-referenced apartment complexes through rents.¹⁹⁴ At Jamestown Village, Lansdowne Towers, Main Line Berwyn, and Paoli Place North Buildings A-K, Westover bills the tenants based upon an actual meter reading from a sub-meter.¹⁹⁵ At Park Court and Woodland Plaza, Westover bills the building occupants based upon an allocated basis related to the square footage of the unit.¹⁹⁶

Westover does not purchase gas for resale or supply gas to tenants and is the ultimate consumer of gas at the following apartment complexes:

- Black Hawk Apartments;¹⁹⁷
- Concord Court Apartments;¹⁹⁸
- Lansdale Village;¹⁹⁹
- Paoli Place North, Buildings L-R;²⁰⁰ and
- Paoli Place South, Buildings A-D.²⁰¹

With the exception of Paoli Place North, Buildings L-R, at the other three apartment complexes, Westover consumes the gas and supplies the tenants with heat and hot water. At Paoli Place North, Buildings L-R, PECO bills the building occupants based upon an actual meter reading.²⁰²

¹⁹⁴ Findings of Fact 14, 26, 31, 38, 43, 65, 70, 75, 80, 98, 108,

¹⁹⁵ Finding of Fact 47, 55, 60, 86.

¹⁹⁶ Finding of Fact 103, 113.

¹⁹⁷ Finding of Fact 7.

¹⁹⁸ Finding of Fact 18.

¹⁹⁹ Finding of Fact 50.

²⁰⁰ Finding of Fact 90.

²⁰¹ Finding of Fact 94. Although Westover uses some gas to provide heat and hot water and is the ultimate consumer in that regard, PECO bills building occupants directly for the remainder of gas they use.

²⁰² Finding of Fact 90.

Westover does not purchase gas at this apartment complex. At Paoli Place South, Buildings A-D, PECO bills the building occupants for the gas that they consume based upon an actual meter reading for gas used for cooking.²⁰³

4. Does a Natural Gas System that is Exclusively or Primarily Comprised of Interior Piping Satisfy the Definition of “Master Meter System”?

i. I&E’s Position

I&E argues that a natural gas system that is exclusively or primarily comprised of interior piping satisfies the definition of “master meter system.” First, the definition of master meter system does not differentiate between interior and exterior piping.²⁰⁴ Second, the terms in the definition of master meter system also do not exclude or create an exception for interior piping. A “pipeline” is defined as follows:

A part of the physical facilities through which gas or hazardous liquids move in transportation, including a pipe valve and other appurtenance attached to the pipe, compressor unit, metering station, regulator station, delivery station, holder and fabricated assembly. The term only includes pipeline regulated by Federal pipeline safety laws. The term does not include a pipeline subject to the exclusive jurisdiction of the Federal Energy Regulatory Commission.^[205]

I&E Main Brief at 43.

The Pennsylvania definition is consistent with the Federal pipeline safety laws which define “pipeline” or “pipeline system” as “all parts of those physical facilities through which gas moves in transportation, including, but not limited to, pipe, valves, and other

²⁰³ Finding of Fact 94.

²⁰⁴ 49 C.F.R. § 191.3

²⁰⁵ 58 P.S. § 801.102.

appurtenance attached to pipe, compressor units, metering stations, regulator stations, delivery stations, holders, and fabricated assemblies.”²⁰⁶ A “pipeline facility” is defined as:

A new or existing pipeline, right-of-way and any equipment, facility or building used in the transportation of gas or hazardous liquids or in the treatment of gas or hazardous liquids during the course of transportation. The term does not include a pipeline facility subject to the exclusive jurisdiction of the Federal Energy Regulatory Commission.^[207]

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.^[208]

I&E Main Brief at 43.

The Pennsylvania definition is consistent with the federal pipeline safety laws which defines an “operator” as a person who engages in the transportation of gas.²⁰⁹ Notably, according to I&E, is that neither the definition of master meter system nor the definitions of the terms within the definition explicitly exclude interior piping. I&E Main Brief at 44.

While I&E recognizes that the definition of pipeline operator excludes an ultimate consumer who owns a service line on his real property, this exception does not apply to Westover. Westover is not the ultimate consumer of the gas service. Instead, I&E argues that the tenants are the beneficiaries of the gas service and pay for that benefit either through rents, an allocation, a sub-meter reading, or a combination of rents and sub-meter reading. The exception

²⁰⁶ 49 C.F.R. § 191.3.

²⁰⁷ 58 P.S. § 801.102.

²⁰⁸ *Id.*

²⁰⁹ 49 C.F.R. § 191.3.

carved out in the definition of a pipeline operator applies to the individual or business which consumes the gas service on his/her/its own property, i.e., homeowner consuming gas to heat home or business consuming gas to operate equipment. Westover is a landlord and operator/owner of apartment complexes, and thus the exception is not applicable. I&E Main Brief at 44.

While Westover may argue that piping which is entirely or primarily interior does not satisfy the definition of master meter system in light of the January 2002 Congressional Report,²¹⁰ I&E maintains that this position is difficult to enforce and the argument is misguided when the Report is reviewed in its entirety and in conjunction with more recent PHMSA interpretations. A decision which states that piping that is entirely or primarily interior is a subjective standard which would result in inconsistent interpretations and applicability. I&E questions how a regulatory entity would determine what is primarily interior. I&E further questioned whether the end result would change if the piping transitioned from interior piping in one building to either underground or exterior piping to another building. I&E asserts that such a subjective standard would be difficult to enforce and would provide inconsistent results. I&E Main Brief at 44-45.

The Congressional Report states that it is the Office of Pipeline Safety's policy to interpret master meter systems as applying to gas distribution systems serving multiple buildings in contrast to a system consisting entirely or primarily of interior piping located within a single building.²¹¹ Thus, the Report noted a distinction between a system which provides service to a single building versus multiple buildings. Additionally, the Report stated that those systems which consist entirely or primarily of interior piping located within a single building may be referred to as master meter systems by local utilities and utility regulators for rate purposes, and "by some state gas pipeline safety regulators for safety regulation purposes."²¹² I&E maintains

²¹⁰ See *Assessment of the Need for an Improved Inspection Program for Master Meter Systems*, Report of the Secretary of Transportation to Congress, prepared pursuant to Section 108 of Public Law 100-561, January 2002 (attached as Attachment E to I&E's Answer in Opposition to Westover's Petition for Declaratory Order) (hereinafter "Report").

²¹¹ *Id.*

²¹² *Id.*

that while the policy in 2002 may have been to exclude some master meters from federal regulations, the policy did not affect a state's ability to regulate those master meter systems for safety purposes. I&E Main Brief at 45.

Moreover, in the Mall of America PHMSA Interpretation which was issued in December 2016, PHMSA determined that the definition of master meter system does not prohibit regulation for non-buried gas pipelines.²¹³ It further stated that PHMSA does not regulate gas piping inside a building unless the interior piping is used by the gas pipeline operator to distribute gas.²¹⁴ Since the pipeline system in the Mall was used to distribute gas to the Mall tenants, the solely interior nature of the pipe did not change the determination that the Mall was engaged in the distribution of gas, and thus a master meter system.²¹⁵ Accordingly, the 2016 interpretation suggests a change in policy related to piping located entirely or primarily inside of a building. I&E Main Brief at 45-46.

I&E notes that in the present case, the gas facilities downstream from the local NGDC meter are Westover's facilities and are used by Westover as part of its distribution system. Westover is not merely a customer responsible for its own service, but rather it is distributing the gas through its own facilities to a third-party, i.e., the tenants, who have no responsibility or control in the maintenance of those gas facilities. I&E asserts that since Westover is a pipeline operator distributing gas to its tenants, whether the gas facilities are exclusively or primarily interior has no bearing on whether Westover is a master meter system. I&E further asserts that to render a decision to the contrary would result in a determination that Westover is a master meter system subject to the Commission's jurisdiction, but that the Commission's jurisdiction is rendered moot at apartment complexes where the piping is primarily or exclusively interior. In the alternative, such a decision would limit the Commission's jurisdiction over the master meter system to only those pipe facilities which are

²¹³ PHMSA Letter of Interpretation to Minnesota Department of Public Safety, PI-16-0012 (December 6, 2016).

²¹⁴ *Id.*

²¹⁵ *Id.*

underground or exterior. I&E maintains that both of these results would be in stark contrast to the definition of master meter system and the Mall of America PHMSA Interpretation. I&E Main Brief at 46.

I&E notes that Mr. Orr, in his testimony, explained that interior/indoor gas facilities are a major safety concern if not properly maintained and inspected.²¹⁶ While a gas leak outside is a safety concern in itself, a gas leak inside a home, building, basement, or apartment poses a higher risk because the gas has nowhere to go, allowing the gas to accumulate to an explosive level.²¹⁷ Accordingly, I&E asserts that the interior nature of gas facilities at an apartment complex has no bearing on whether the definition of a master meter system is met. I&E Main Brief at 46.

ii. Westover's Position

Westover argues that some systems are not master meter systems because the distribution system is exclusively or primarily comprised of interior piping within a single building.

Westover notes that prior to the adoption of 49 C.F.R. § 191.3, the Office of Pipeline Safety, which was 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.²¹⁸ This policy was continued after the adoption of 49 C.F.R. § 191.3.²¹⁹ Westover Main Brief at 46.

²¹⁶ I&E Statement No. 1, pgs. 23-26.

²¹⁷ I&E Statement No. 1, pg. 25; *see also generally* I&E Statement No. 1 and I&E Statement 1-R, pgs. 13-14.

²¹⁸ Westover Exhibit PQ-33, Attachment E, p. 5, n. 15.

²¹⁹ *Id.*, p. 5.

Westover explains that 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.^[220]

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.^[221]

Based on this, Westover argues that Section 191.3, as written, included an implicit exception for pipeline distribution systems comprised primarily or entirely of interior pipes in a single building. As such, an explicit exception was not necessary. Westover Main Brief at 46-47; Westover Reply Brief at 29.

On September 16, 1976, PHMSA issued interpretation letter PI-76-0114.²²²

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

²²⁰ *Id.*, p. 5, n. 15.

²²¹ *Id.* p. 6.

²²² Westover Exhibit PQ-11.

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.^[223]

Westover Main Brief at 47.

Westover believes that this reasoning is persuasive and should be adopted because it recognizes that interior pipes are not subjected to the same stresses from weather and other conditions as 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. Westover Reply Brief at 30.

Westover recognizes that 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.²²⁴ However, Westover 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. Westover asserts that the Office of Pipeline Safety properly concluded that 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. Westover believe this would be an 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. Westover Main Brief at 47-48.

²²³ *Id.*

²²⁴ *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).

Westover further argues that 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. Westover believes that 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. Westover Main Brief at 48.

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.²²⁵ As a result, Westover's system at this location is not subject to the effects of weather. Westover asserts that finding that this System is a master meter system would involve the Commission 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. Westover asserts that the General Assembly did not intend this result when it enacted Act 127. Westover Main Brief at 48-49.

Similarly, Westover argues that 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. 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. Westover believes that 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

²²⁵ Stipulation ¶¶ 69-70.

outside a building.²²⁶ Westover maintains that these regulations should not turn every apartment building using gas into a master meter system subject to Federal pipeline safety regulations. Westover Main Brief at 49.

Westover notes that 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 ten yards from the building. Westover again opines that 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. Westover Main Brief at 49-50.

Westover maintains that 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. Instead, 49 C.F.R. § 191.3 should be construed as written, including its implicit requirement that a master meter system have exterior or underground pipes connecting multiple buildings. Westover Reply Brief at 31.

iii. Conclusion

I will note that there is nothing in the definitions of master meter system, pipeline, pipeline facility, or pipeline operator that can be construed to indicate that the existence of only interior piping negates a determination that a system constitutes a master meter system.

Westover urges the Commission to adhere to a statement made by the Secretary of Transportation in the 2002 report to Congress regarding the Office of Pipeline Safety’s interpretation as to what constitutes a master meter system. In that report, the Secretary of Transportation indicated that the Office of Pipeline Safety’s policy was that the term master

²²⁶ 52 Pa. Code § 59.18(a).

meter system applies only to gas distribution systems serving multiple buildings, and that it does not apply to gas distribution systems consisting entirely or primarily of interior piping located within a single building.²²⁷ However, it is important to also note that the Secretary of Transportation further advised that “[s]uch systems, however, may be referred to as master meter systems by local utilities and utility regulators for rate purposes, as well as by some state gas pipeline safety regulators for safety regulation purposes.”²²⁸ Therefore, and as noted by I&E, while the policy in 2002 may have been to exclude some master meter systems from Federal regulation, this policy did not affect a state’s ability to regulate those master meter systems for safety purposes.

Moreover, both Westover and I&E note that PHMSA has since issued interpretation letters where it has moved away from its stance that Section 191.3 implicitly excludes systems that are primarily or exclusively comprised of interior piping within a single building. In a 2020 letter to the Michigan Public Service Commission, referencing the prior interpretation letter regarding the Mall of America, PHMSA advised that “[a]s the Mall of America interpretation stated, gas pipelines inside buildings may be regulated where the gas piping is being used by the gas pipeline operator to transport gas to several businesses who are the ultimate consumers of the gas.”²²⁹ Regardless of this acknowledged change in interpretation, Westover urges that the better approach is the prior approach, that gas systems that are primarily or exclusively comprised of interior piping within a single building are not master meter systems. However, this interpretation would ignore PHMSA’s evolved approach to identifying master meter systems.

Accordingly, I agree with I&E that a natural gas system that is exclusively or primarily comprised of interior piping satisfies the definition of a master meter system.

²²⁷ *Assessment of the Need for an Improved Inspection Program for Master Meter Systems, Report of the Secretary of Transportation to the Congress, prepared pursuant to Section 108 of Public Law 100-561, January 2002 at 5.* (attached as Attachment E to I&E’s Answer in Opposition to Westover’s Petition for Declaratory Order)

²²⁸ *Id.* at 6.

²²⁹ PHMSA Letter of Interpretation to Michigan Public Service Commission dated September 21, 2020 (attached to Westover’s Amended Petition as Appendix 8).

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”?

i. I&E’s Position

I&E notes that six of the apartment complexes identified in the Joint Stipulation have Westover-owned sub-meters installed in the unit or the unit’s mechanical closet.²³⁰ The apartment complexes are Fox Run, Gladstone Towers, Jamestown Village, Lansdowne Towers, Main Line Berwyn, and Paoli Place- North.²³¹ I&E argues that the existence of a sub-meter at an apartment complex which is not owned by the local gas distribution company is dispositive of a master meter system. According to I&E, the existence of a sub-meter is resounding proof that the apartment complex owner/operator is responsible for the distribution of the gas and is purchasing the gas for resale. Westover, or its third-party contractor, acts as a distribution company when it transports the gas to the tenant, records the amount of gas used by the tenant, and then bills the tenant for the gas used. I&E concludes that this control and/or ownership satisfies the definition of a master meter system: (1) pipeline distribution system within, but not limited to a definable area, such as an apartment complex; (2) operator purchases gas from outside source for resale; (3) pipeline distribution system supplies the ultimate consumer; and (4) ultimate consumer purchases the gas either through a meter or by other means, such as rent. Accordingly, the existence of a sub-meter owned by the apartment complex is dispositive of a master meter system. I&E Main Brief at 47.

ii. Westover’s Position

Westover disagrees that the presence of a sub-meter owned by the apartment complex is dispositive of a master meter system. According to Westover, one element of the test

²³⁰ See generally Joint Petition for Partial Settlement, Joint Stipulation of Facts, Attachment A; Joint Petition for Partial Settlement, Chart of Apartment Complexes, Attachment B.

²³¹ See generally Joint Petition for Partial Settlement, Joint Stipulation of Facts, Attachment A; Joint Petition for Partial Settlement, Chart of Apartment Complexes, Attachment B.

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.”²³² 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. Moreover, Westover asserts that this single piece of evidence should not be dispositive because other facts must be considered, such as the possibility that the sub-meter was installed long ago, is no longer being used but has not been removed. Westover Main Brief at 50; Westover Reply Brief at 32.

More importantly, 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, and as previously asserted by Westover, a system is not a “master meter system” if it is located within and 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. Westover Main Brief at 50, Westover Reply Brief at 32.

Lastly, Westover contends 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. Westover argues that 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. Westover Reply Brief at 33.

iii. Conclusion

There are several elements that must be met for a system to be considered a master meter system. There must be a pipeline distribution system within, but not limited to a

²³² 49 C.F.R. § 191.3.

definable area, such as an apartment complex. The operator must purchase gas from an outside source for resale. The pipeline distribution system supplies the ultimate consumer. Lastly, the ultimate consumer purchases the gas either through a meter or by other means, such as rent. Although I will address Westover’s interstate commerce argument next, based on my previous conclusions, I find that the existence of an apartment complex owned and actively used sub-meter, where the apartment complex actively supplies the ultimate consumer who either purchases gas directly through a meter or other means, such as rents, is dispositive of a master meter system.

6. At Which Properties (if any) Does Westover Distribute Gas “in or Affecting Interstate or Foreign Commerce”?

i. I&E’s Position

I&E maintains that all of Westover’s apartment complexes distribute gas “in or affecting interstate or foreign commerce.” I&E notes that the Commerce clause of the U.S. Constitution²³³ is the authority underlying the Federal Pipeline Safety Act (PSA). Congress may mandate Federal regulation for the use of the channels of interstate commerce, the instrumentalities or and persons or things in interstate commerce, and any activity that has a substantial effect on interstate commerce.²³⁴ With regard to the third category, Congress is empowered to regulate purely local activities that are part of an economic “class of activities” that have a substantial effect on interstate commerce.²³⁵ Regulation is squarely within Congress’ commerce power when production of a commodity meant for home consumption has a substantial effect on supply and demand in the national market for that commodity.²³⁶ The transportation of gas by pipeline has a substantial effect on interstate commerce. I&E Main Brief at 47-48.

²³³ U.S. Const. Art. I, § 8, cl. 3.

²³⁴ *Gonzales v. Raich*, 545 U.S. 1, 16-17 (2005).

²³⁵ *Id.* at 17, (citing *Perez v. U.S.*, 402 U.S. 146, 151 (1971)); *Wickard v. Filburn*, 317 U.S. 111, 128-129 (1942).

²³⁶ *Delta Smelt Consol. Cases v. Salazar*, 663 F. Supp. 2d 922, 937, (E.D. Cal. 2009) (citing *Gonzales v. Raich*, 545 U.S. 1 (2005)).

The PSA defines “intrastate gas pipeline facility” as a “gas pipeline facility and transportation of gas within a State not subject to the jurisdiction of the [Federal Energy Regulatory] Commission pursuant to the Natural Gas Act, 15 U.S.C. §§ 717, *et seq.*”²³⁷ Notably, the Natural Gas Act limits the jurisdiction of the Federal Energy Regulatory Commission (FERC) to the transportation and sale of natural gas in interstate and foreign commerce and not merely affecting interstate or foreign commerce, as is the case under the PSA.²³⁸ PHMSA has likewise determined that even though the transportation of gas may entirely be within one State, every element of a gas gathering, transmission, and distribution line is moving gas that is either in or affects interstate commerce.²³⁹ Accordingly, I&E maintains that pipeline safety jurisdiction is not limited only to interstate pipelines. I&E Main Brief at 48.

The minimum Federal pipeline safety standards apply broadly to both interstate and intrastate pipelines through the PSA.²⁴⁰ Congress originally enacted the PSA in 1968 “to provide adequate protection against risks to life and property posed by pipeline transportation and pipeline facilities by improving the regulatory and enforcement authority of the Secretary of Transportation.”²⁴¹ The legislative history of PSA further exemplifies the notion that the transportation of gas applies to intrastate pipeline systems distributing natural gas as the Congressional report provided:

[t]he term “transportation of gas” is defined as the gathering, transmission or distribution of gas by pipeline or its storage in or affecting interstate or foreign commerce. With exception as to gathering in certain circumstances, this means all aspects of the transportation of gas from the well head to the consumer. As testified by Secretary Boyd:

²³⁷ 49 U.S.C. § 60101(a)(9).

²³⁸ *See* 15 U.S.C. § 717(a); 49 U.S.C. § 60101(a)(8)(A)(ii).

²³⁹ PHMSA Interpretation PI-71-036 (March 16, 1971) (attached as Attachment C to I&E’s Answer in Opposition to Westover’s Petition for Declaratory Order).

²⁴⁰ 49 U.S.C. §§ 60101-60143.

²⁴¹ Pipeline Safety Act, Pub. L. 90–481, 82 Stat. 720 (Aug. 12, 1968), currently codified at 49 U.S.C. § 60102(a)(1).

‘There is no question but what every element of a gas gathering, transmission, and distribution line is moving gas which is either in or affects interstate commerce. * * * (p. 35).

I don’t think that it even requires any elasticity of the commerce clause of the Constitution to define 99 44/100 percent of this activity as being clearly within the commerce clause. (p. 36).’^[242]

I&E Main Brief at 49.

Accordingly, the Federal pipeline safety laws define “interstate or foreign commerce,” in pertinent part, as:

(A) related to gas, means commerce - -

- (i) between a place in a State and a place outside that State; or
- (ii) that affects any commerce described in subclause (A)(i) of this clause.”^[243]

I&E Main Brief at 49.

The Pennsylvania General Assembly adopted the Federal pipeline safety laws and regulations, as well as all amendments thereto, as the safety standards for non-public utility pipeline operators in Pennsylvania by enacting Act 127.²⁴⁴ Additionally, the Pennsylvania General Assembly authorized the Commission to supervise and regulate pipeline operators within Pennsylvania consistent with (but not more stringent than) Federal pipeline safety laws.²⁴⁵

I&E Main Brief at 50.

²⁴² H.R. Rep. No. 90-1390, at 18 (May 15, 1968) (attached as I&E Exhibit 1 to I&E’s Formal Complaint).

²⁴³ 49 U.S.C. § 60101(a)(8)(A)(i)-(ii).

²⁴⁴ See 58 P.S. § 801.302.

²⁴⁵ 58 P.S. § 801.501.

As it relates to Westover, I&E asserts that the regulation of intrastate master meter systems fits squarely within the purview of Section 191.3 of the federal pipeline safety regulations.²⁴⁶ Intrastate gas master meter systems have for decades been subject to pipeline safety regulation either through PHMSA or an authorized State. Since Act 127 became effective, the Commission has enforced violations of Act 127 on pipeline operators operating master meter systems in Pennsylvania.²⁴⁷ Even though the operation of the gas facility may be entirely within Pennsylvania, I&E argues that every element of gas gathering, transmission, and distribution line is moving gas, which is either in or affecting interstate commerce. I&E Main Brief at 50.

I&E maintains that Westover erroneously argues that the amount of gas used and purchased at any of its apartment complexes is so small that it does not affect interstate or foreign commerce. This argument is inconsistent with legal precedent. The Supreme Court has determined that intrastate activities that “have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions” are within Congress’ power to regulate.²⁴⁸ In *Wickard v. Filburn*, 317 U.S. 111 (1942), the Supreme Court upheld the application of the Agricultural Adjustment Act of 1938 to the production and consumption of homegrown wheat. In rendering its decision, the Supreme Court stated:

[e]ven if appellee’s activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce, and this irrespective of whether such effect is what might at some earlier time have been defined as “direct” or “indirect.”²⁴⁹

I&E Reply Brief at 14-15.

²⁴⁶ 49 C.F.R. § 191.3.

²⁴⁷ *See Pa. Pub. Util. Comm’n v. Brookhaven MHP Mgmt., LLC*, Docket No. C-2017-2613983 (Opinion and Order entered Aug. 23, 2018).

²⁴⁸ *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937).

²⁴⁹ 317 U.S. at 125.

The Supreme Court determined that “appellee’s own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of Federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial.”²⁵⁰ The purpose of the Agricultural Adjustment Act was to regulate the market price and volume of wheat, and appellee’s practice of growing wheat for his own consumption/use clearly affected the wheat market and prices, i.e., home-grown wheat competed with wheat in commerce and appellee’s consumption is not reflected in the market.²⁵¹ Thus, the Supreme Court found that one individual’s wheat farm had a substantial economic effect on interstate commerce. I&E Reply Brief at 15.

I&E asserts that Westover’s distribution of gas to its tenants does increase the amount of gas purchased and sold, and thus affects interstate commerce and the natural gas market. The amount of gas used at the various Westover-owned/operated apartment complexes is dependent upon the tenants. The number of tenants in the apartment complex and the tenant’s consumption of the gas dictates how much gas is used and sold, i.e., the amount of gas used by one tenant will differ from the amount of gas used by ten tenants, not to mention the variables relating to the characteristics of the tenant (individual v. family), the season (summer v. winter), and the preferences of the tenant (hot shower v. cold shower; cooking at home v. eating out/take-out). Moreover, the amount of gas used at an apartment complex is arguably more than the amount of gas used by a single-family home. Accordingly, I&E concludes that Westover’s distribution of natural gas affects interstate commerce, regardless of the *de minimis* nature or Westover’s claim that it uses a “small” amount of gas. I&E Reply Brief at 15-16.

ii. Westover’s Position

Westover argues that no Westover system is a master meter system because no Westover system distributes gas “in or affecting interstate or foreign commerce.” Westover notes that the first sentence of the definition of a master meter system states that a master meter

²⁵⁰ 317 U.S. at 127-128.

²⁵¹ *Id.* at 111 (1942).

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.” Westover maintains that 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. Westover Main Brief at 51.

The definition of an “operator” is: “a person who engages in the transportation of gas.”²⁵² 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.”²⁵³ Westover Main Brief at 51.

Westover argues that it is not engaged in the gathering, transmission or storage of gas at any system. Westover further argues that at some apartment complexes, Westover is not engaged in the distribution of gas. For instance, 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. Also, 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 avers that it 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.” Westover Main Brief at 51.

At the remaining systems identified in the Stipulation, Westover admits that it distributes gas to building occupants. However, Westover questions whether its 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,” Westover argues that the

²⁵² 49 C.F.R. § 191.3.

²⁵³ *Id.*

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.” 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.²⁵⁴ More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established.²⁵⁵ Westover Main Brief at 51-52.

Westover argues that there is no evidence in the record to support that any Westover system transports gas “in or affecting interstate or foreign commerce.” Westover avers that the only evidence of record demonstrates that no system transports gas “in or affecting interstate or foreign commerce.” The preponderance of the evidence introduced in this case demonstrates that no system distributes gas “in or affecting interstate or foreign commerce.” Westover Main Brief at 52.

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. An NGDC is an intrastate gas pipeline facility pursuant to 49 U.S.C. § 60101(a)(9).²⁵⁶ As a result, Westover’s purchase of gas from an NGDC is a transaction in intrastate commerce. Westover Main Brief at 52.

To the extent that Westover distributes gas to building occupants, it distributes gas to them in Pennsylvania. As previously noted, 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.²⁵⁷ Those maps demonstrate that no Westover system crosses a state line.

²⁵⁴ 66 Pa.C.S. § 332(b); *Lyft v. Pa. Pub. Util. Comm’n*, 145 A.3d 1235, 1240 (Pa. Cmwlth. 2016).

²⁵⁵ *Norfolk & W. Ry. Co. v. Pa. Pub. Util. Comm’n*, 413 A.2d 1037 (Pa. 1980).

²⁵⁶ 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 15 U.S.C. § 717.

²⁵⁷ 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).

Accordingly, Westover avers that the Commission should find that, to the extent that Westover distributes gas, Westover distributes the gas within Pennsylvania and delivers it to a point in Pennsylvania. Westover Main Brief at 53.

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.²⁵⁸ As previously discussed, 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. Westover Main Brief at 53.

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.²⁵⁹ Also, 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.²⁶⁰ Westover Main Brief at 53-54.

Lastly, Westover explains that 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 or UGI.²⁶¹ According to UGI’s 2022 annual report filed with the Commission,²⁶² UGI had more than 633,000 metered residential customers, and more

²⁵⁸ 49 U.S.C. § 60101(a)(8).

²⁵⁹ Westover Statement No. 1 p. 17.

²⁶⁰ Westover Statement 1 pp. 17, 19, 21, 23, 25-26, 28, 30, 32, 34, 36, 38, 40, 42, 44, 48-49; Westover Statement 1-R p. 16.

²⁶¹ Stipulation ¶ 5.

²⁶² UGI Gas’s Annual Report to the Commission for 2022, page 42.

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.²⁶³ Westover avers that 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. The largest system that purchases gas from PECO is Jamestown Village, which has 253 units.²⁶⁴ 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. Westover Main Brief at 54.

iii. Conclusion

As noted by Westover, at each of Westover's complexes identified in the Joint Stipulation, with the exception of Paoli Place – North (Buildings L-R), an NGDC delivers gas to Westover on its property, located in Pennsylvania. Additionally, for those complexes where Westover supplies gas to the ultimate consumer, that also takes place within Pennsylvania. While I understand Westover's argument that Westover's purchases of the gas and distribution of gas to customers, all of which takes place in Pennsylvania, does not affect interstate commerce, I am not persuaded by it.

First, PHMSA issued a letter of interpretation addressing this issue. The letter was in response to an inquiry concerning the applicability of the Pipeline Safety Act concerning a line approximately ten miles long and crossing various public and private rights-of-way and

²⁶³ Partial Settlement, Attachment B.

²⁶⁴ *Id.*

supplying only one customer, a public utility owned generating station.²⁶⁵ In the letter, Acting Director of Pipeline Safety advised as follows:

It is our view, based on the legislative history of the Act, that even though the operation may be entirely within one state there is no question but that every element of a gas gathering, transmission and distribution line is moving gas, which is either in or affects interstate commerce.^[266]

As previously noted, while this is not controlling, it is certainly persuasive.

In addition to PHMSA guidance, and as noted by I&E, it is significant and persuasive that the Commission is already regulating master meter systems located entirely within the state of Pennsylvania. In *Pennsylvania Public Utility Commission v. Brookhaven MHP Management LLC*, Docket No. C-2017-2613983 (Opinion and Order entered Aug. 23, 2018)(*Brookhaven*), the Commission approved a settlement between I&E and the Respondents. In the case, I&E filed a Complaint alleging that the Respondents failed to file an Initial Registration Form in 2012 to register with the Commission as pipeline operators and failed to file Pennsylvania Pipeline Operator Annual Registration Forms to report total intrastate regulated transmission, distribution, and gathering pipeline miles for the transportation of gas and hazardous liquids during the 2012, 2013, 2014, and 2015 calendar years, as required by the Pipeline Act. I&E further alleged that the Respondents failed to pay assessments to the Commission for the 2015-2016 and 2016-2017 fiscal years because they did not report their total regulated distribution pipeline miles that were in operation during the 2014 and 2015 calendar years.

While I recognize that *Brookhaven* resulted in a settlement, what is of significance for the purposes of this matter is the physical location of the Respondents and their facilities. Each of the Respondents in *Brookhaven* operated mobile home parks located entirely within York County, Pennsylvania. Although each of these mobile home parks and their pipelines were

²⁶⁵ PHMSA Letter of Interpretation to Mr. J.J. Lambdin, Professional Engineer, dated March 16, 1971 (attached to I&E's Answer in Opposition to Westover's Petition for Declaratory Order as Attachment C).

²⁶⁶ *Id.*

located entirely within Pennsylvania, the Commission approved the terms of the Settlement. If the Commission believed that these mobile home parks were not subject to Act 127 because they did not affect interstate commerce, it is unlikely that the Commission would have approved the settlement.

As in *Brookhaven*, Westover's facilities are located entirely within Pennsylvania. In light of *Brookhaven* as well as the aforementioned PHMSA interpretation letter, I agree with I&E that even though the operation of Westover's gas facilities may occur entirely within Pennsylvania, every element of gas gathering, transmission, and distribution line is moving gas which is either in or affecting interstate commerce.

C. Recommendation

Based on my consideration of the parties' arguments and the conclusions I reached on the issues raised by the parties, I recommend that the Commission find that Westover is a pipeline operator as that term is defined by 52 P.S. § 801.102, and that the following Westover systems are master meter systems as defined by 49 C.F.R. § 191.3, and are subject to Act 127:

- a. Carlisle Park Apartments;
- b. County Manor Apartments;
- c. Fox Run Apartments;
- d. Gladstone Towers Apartments;
- e. Hillcrest Apartments;
- f. Jamestown Village;
- g. Lansdowne Towers;
- h. Main Line Berwyn;
- i. Mill Creek I;
- j. Mill Creek II;
- k. Norriton East;
- l. Oak Forest;
- m. Paoli Place North, Buildings A-K;
- n. Paoli Place South, Buildings E-H;
- o. Park Court;
- p. Valley Stream, and
- q. Woodland Plaza.

Additionally, I recommend that the Commission find that Westover is not a pipeline operator as that term is defined by 52 P.S. § 801.102, and that the following Westover systems are not master meter systems as defined by 49 C.F.R. § 191.3, and as such, not subject to Act 127:

- a. Paoli Place – South Valley Townhomes;
- b. Willow Run;
- c. Black Hawk Apartments;
- d. Concord Court Apartments;
- e. Lansdale Village;
- f. Paoli Place North, Buildings L-R; and
- g. Paoli Place South, Buildings A-D.

Since I am recommending that the Commission find that several Westover apartment complexes are master meter systems as defined by 49 C.F.R. § 191.3, and that they are subject to Act 127, I also recommend that the Commission sustain I&E’s Complaint as it relates to these apartment complexes. However, upon review of the record in this matter, I agree with I&E that no penalty should be assessed against Westover for not filing Act 127 registrations for the aforementioned apartment complexes, excluding Jamestown Village, since Westover did file registrations for that apartment complex, in part because of its reliance on the “Frequently Asked Questions” document on the Commission’s website regarding Act 127. Moreover, I don’t believe that Westover questioning, in good faith, the Commission’s authority to regulate any of its gas systems under Act 127 warrants imposition of a fine. That good faith is evidenced by the safety measures Westover agreed to implement pending a final outcome of these matters. Accordingly, I also recommend that the Commission not impose a civil penalty against Westover.

IX. CONCLUSIONS OF LAW

1. The Commission has jurisdiction to decide the instant Petition for Declaratory Order and Complaint. 66 Pa.C.S. §§ 701 and 331(f).

2. The Pennsylvania Public Utility Commission has jurisdiction over the subject matter of and the parties to this proceeding. 58 P.S. § 801.501(a).

3. The Commission, through the Commission’s Bureau of Investigation and Enforcement Pipeline Safety Division, serves as an agent of the Federal Pipeline and Hazardous Materials Safety Administration and is certified to regulate intrastate pipeline facilities for safety purposes. 49 U.S.C. § 60105.

4. Pennsylvania has adopted the Federal pipeline safety laws as implemented in 49 C.F.R. Subtitle B, Chapter I, Subchapter D as the safety standards and regulations for pipeline operators in Pennsylvania. 58 P.S. § 801.302.

5. The Commission is authorized and obligated to supervise and regulate pipeline operators within this Commonwealth consistent with Federal pipeline safety laws. 58 P.S. § 801.501(a).

6. The Commission is authorized to enforce Federal pipeline safety laws and, after notice and opportunity for a hearing, impose civil penalties and take other appropriate enforcement action. 58 P.S. § 801.501(a)(7).

7. The Commission may, in its discretion, issue a declaratory order to terminate a controversy or remove uncertainty. 66 Pa.C.S. § 331(f).

8. The party seeking a rule or order from the Commission has the burden of proof in that proceeding. 66 Pa.C.S. § 332(a).

9. The term “preponderance of the evidence” means that one party has presented evidence which is more convincing, by even the smallest amount, than the evidence presented by the other party. *Se-Ling Hosiery v. Margulies*, 70 A.2d 854 (Pa. 1950).

10. Westover Property Management Company, L.P. d/b/a Westover Companies, as the party who filed a Petition for Declaratory Order and an Amended Petition for Declaratory Order, holds the burden of proof to show that Westover is not subject to the Gas and Hazardous Liquids Pipelines Act, 58 P.S. §§ 801.101–801.1101. 66 Pa.C.S. § 332(a).

11. The Bureau of Investigation and Enforcement, as the party who filed the Formal Complaint, holds the burden of proof to show that Westover owns or operates master meter systems at its apartment complexes in Pennsylvania, and thus is a pipeline operator subject to the Gas and Hazardous Liquids Pipelines Act, 58 P.S. §§ 801.101–801.1101 and Part 192 of the Federal pipeline safety regulations, 49 C.F.R. §§ 191.1-192.1015. 66 Pa.C.S. § 332(a).

12. Commission policy promotes settlements. 52 Pa. Code § 5.231.

13. The Commission has indicated that settlement results are often preferable to those achieved at the conclusion of a fully litigated proceeding. 52 Pa. Code § 69.401.

14. In order to accept a settlement, the Commission must first determine that the proposed terms and conditions are in the public interest. *Pa. Pub. Util. Comm'n v. York Water Co.*, Docket No. R-00049165, (Order entered Oct. 4, 2004); *Pa. Pub. Util. Comm'n v. C S Water and Sewer Assoc.*, 74 Pa.P.U.C. 767 (1991).

15. The Commission has a Statement of Policy listing the factors and standards for determining whether a civil penalty is appropriate. 52 Pa. Code § 69.1201.

16. The Partial Settlement is consistent with the Statement of Policy at 52 Pa. Code § 69.1201.

17. The Partial Settlement and its proposed terms and conclusions are in the public interest.

18. Federal Pipeline Safety Law 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.” 49 C.F.R. § 191.3.

19. Westover Property Management Company, L.P. d/b/a Westover Companies operates “master meter systems” as that term is defined by Federal Pipeline Safety Law. 49 C.F.R. § 191.3.

20. The Gas and Hazardous Liquids Pipeline Act 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. 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.

21. Westover Property Management Company, L.P. d/b/a Westover Companies is a “pipeline operator” as that term is defined in the Gas and Hazardous Liquids Pipeline Act. 58 P.S. § 801.102.

22. Westover Property Management Company, L.P. d/b/a Westover Companies, as a pipeline operator, is subject to the power and authority of this Commission pursuant to Section 501(b) of Act 127 which requires pipeline operators to comply with the Act and the terms and conditions of the orders issued under the Act. 58 P.S. § 801.501(b).

23. That the gas distribution systems at the following apartment complexes of Westover Property Management Company, L.P. d/b/a Westover Companies satisfy the definition of master meter system:

- a. Carlisle Park Apartments;
- b. County Manor Apartments;
- c. Fox Run Apartments;
- d. Gladstone Towers Apartments;
- e. Hillcrest Apartments;
- f. Jamestown Village;
- g. Lansdowne Towers;
- h. Main Line Berwyn;
- i. Mill Creek I;

- j. Mill Creek II;
- k. Norriton East;
- l. Oak Forest;
- m. Paoli Place North, Buildings A-K;
- n. Paoli Place South, Buildings E-H;
- o. Park Court;
- p. Valley Stream, and
- q. Woodland Plaza.

49 C.F.R. § 191.3.

24. That the gas distribution systems at the following apartment complexes of Westover Property Management Company, L.P. d/b/av Westover Companies do not satisfy the definition of master meter system:

- a. Paoli Place – South Valley Townhomes;
- b. Willow Run;
- c. Black Hawk Apartments;
- d. Concord Court Apartments;
- e. Lansdale Village;
- f. Paoli Place North, Buildings L-R;
- g. Paoli Place South, Buildings A-D.

49 C.F.R. § 191.3.

X. ORDER

THEREFORE,

IT IS RECOMMENDED:

1. That the Joint Petition for Partial Settlement, including attachments, be admitted into the record of this proceeding.

2. That the Joint Petition for Partial Settlement be approved in its entirety without modification.

3. That if a final unappealable Commission or court order on the litigated issues determines that: (i) Act 127 does not apply to the owner or operator of an apartment complex which owns or operates natural gas facilities located downstream from an NGDC, or (i) none of the apartment complexes identified on the Joint Stipulation of Facts is a “master meter system” as defined in 49 C.F.R. § 191.3, then Westover’s obligations under Paragraph 8 of the Partial Settlement shall cease immediately and Westover shall have no obligation to comply with the requirements of Act 127 or the Federal pipeline safety laws with regard to the apartment complexes identified in the attached Joint Stipulation of Facts.

4. That the Commission determine the following apartment complexes of Westover Property Management Company, L.P. d/b/a Westover Companies are master meter systems:

- a. Carlisle Park Apartments;
- b. County Manor Apartments;
- c. Fox Run Apartments;
- d. Gladstone Towers Apartments;
- e. Hillcrest Apartments;
- f. Jamestown Village;
- g. Lansdowne Towers;
- h. Main Line Berwyn;
- i. Mill Creek I;
- j. Mill Creek II;
- k. Norriton East;
- l. Oak Forest;
- m. Paoli Place North, Buildings A-K;
- n. Paoli Place South, Buildings E-H;
- o. Park Court;
- p. Valley Stream, and

q. Woodland Plaza.

5. That the Commission determine the following apartment complexes of Westover Property Management Company, L.P. d/b/a Westover Companies are not master meter systems:

- a. Paoli Place – South Valley Townhomes;
- b. Willow Run;
- c. Black Hawk Apartments;
- d. Concord Court Apartments;
- e. Lansdale Village;
- f. Paoli Place North, Buildings L-R; and
- g. Paoli Place South, Buildings A-D.

6. That Westover Property Management Company, L.P. d/b/a Westover Companies not be ordered to pay a civil penalty in this matter.

7. That for the gas systems determined to be master meter systems, within sixty (60) days of the date of a final Commission Order, Westover Property Management Company, L.P. d/b/a Westover Companies be directed to draft and provide its implementation plan to become compliant with Part 192 and Act 127 to the Commission's Bureau of Investigation and Enforcement Pipeline Safety for review.

8. That for the gas systems determined to be master meter systems, Westover Property Management Company, L.P. d/b/a Westover Companies and the Commission's Bureau of Investigation and Enforcement Pipeline Safety Section be directed to meet and discuss the implementation plan to reach an agreement on a reasonable timeframe, not to exceed four (4) years from the date of a final order in this matter, for Westover to become compliant with Part 192 and Act 12..

9. That for the gas systems determined to be master meter systems, within one hundred twenty (120) days of this Order, Westover Property Management Company, L.P. d/b/a Westover Companies be directed to provide its procedural manual for operations,

maintenance, and emergencies to the Commission's Bureau of Investigation and Enforcement Pipeline Safety Section for review.

10. That, within thirty (30) days of a final Order in this matter, Westover Property Management Company, L.P. d/b/a Westover Companies be directed to provide a list of all apartment complexes or commercial properties acquired by Westover Property Management Company, L.P. d/b/a Westover Companies and/or its affiliates after November 1, 2020.

11. That for the gas systems determined to be master meter systems, Westover Property Management Company, L.P. d/b/a Westover Companies be directed to submit timely reports to the Commission pursuant to Section 801.503(d), 58 P.S. § 801.503(d), as an Act 127 pipeline operator on an annual basis.

12. That for the gas systems determined to be master meter systems, Westover Property Management Company, L.P. d/b/a Westover Companies be directed to timely file and pay annual assessments pursuant to Section 801.503(b), 58 P.S. § 801.503(b).

13. That the matter at Docket No. P-2021-3030002 be marked closed.

14. That upon the Commission receiving written notice from Westover Property Management Company, L.P. d/b/a Westover Companies that the compliance filings outlined in Ordering Paragraphs 7–9 were timely filed, the Formal Complaint at Docket No. C-2022-3030251 be deemed satisfied and marked closed.

Date: October 31, 2023

/s/
Christopher P. Pell
Deputy Chief Administrative Law Judge