November 20, 2023

VIA E-FILING

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Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street, 2 North – Filing Room
Harrisburg, PA 17120

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

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

Dear Secretary Chiavetta:

Enclosed for filing with the Pennsylvania Public Utility Commission are the Exceptions of Westover Property Management Company, L.P. d/b/a Westover Companies. Copies have been served as shown on the attached Certificate of Service.

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

Sincerely,

COZEN O'CONNOR

By: David P. Zambito

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

DPZ:kmg
Enclosures
cc: Director Hafner (*Office of Special Assistants*)
Honorable Christopher Pell
Athena DelVillar, Legal Assistant to ALJ Pell
Per Certificate of Service
Peter Quercetti, Vice President of Operations Management, Westover Companies
Alexander Stefanelli, CFO, Westover Companies

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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

CERTIFICATE OF SERVICE

I hereby certify that I have this 20th day of November, 2023 served the foregoing **Exceptions of Westover Property Management Company, L.P. d/b/a Westover Companies**, upon the parties, listed below, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a party).

VIA E-MAIL AND FIRST CLASS MAIL

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BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Administrative Law Judge
Christopher P. Pell

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

EXCEPTIONS OF WESTOVER PROPERTY MANAGEMENT COMPANY, L.P D/B/A WESTOVER COMPANIES

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Date: November 20, 2023

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AND NOW COMES Westover Property Management Company, L.P., d/b/a Westover Companies ("Westover"), pursuant to 52 Pa. Code § 5.533, to file these Exceptions to the Recommended Decision ("Recommended Decision" or "R.D.") issued by Deputy Chief Administrative Law Judge Christopher P. Pell (the "ALJ") on October 31, 2023. In the Recommended Decision, the ALJ considered a Joint Petition for Partial Settlement ("Settlement"), which settled some issues in these proceedings, but reserved other issues for litigation (the "Litigated Issues").

Westover respectfully requests that the Pennsylvania Public Utility Commission ("Commission") modify the Recommended Decision. The Recommended Decision recommended that the Commission approve the Settlement, without modification, but the proposed Ordering Paragraphs would modify the Settlement. Westover respectfully requests that the Commission approve the Settlement without modification and modify the proposed Ordering Paragraphs to be consistent with the Settlement.

With respect to the Litigated Issues, Westover respectfully requests that the Commission modify the Recommended Decision to find that none of the Westover gas systems involved in this litigation (the "Systems") satisfies all the elements of the test of a "master meter system." If the Commission does find that any Westover System is a "master meter system," Westover requests that the Commission modify the Recommended Decision by finding that the System is regulated by municipalities and the Pennsylvania Department of Labor and Industry ("L&I") pursuant to the Construction Code.

I. PROCEDURAL HISTORY

Westover filed its Petition for Declaratory Order ("Original Petition") on December 13, 2021. The Original Petition, which was assigned Docket No. P-2021-3030002, explained that Westover owns/operates a number of apartment complexes and commercial properties in

Pennsylvania, including some that have gas facilities. The Original Petition asked the Commission to declare that Act 127 did not give the Commission authority to regulate any of the gas facilities owned/operated by Westover in Pennsylvania. The Original Petition further asked the Commission to find that the Act 127 Registration forms filed by Westover were null and void *ab initio* because none of Westover's Systems are subject to Commission regulation.

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

Also on January 3, 2022, I&E filed its Complaint against Westover, which was assigned Docket No. C-2022-3030251. The Complaint alleged that Westover violated certain provisions of Act 127 and the Federal pipeline safety regulations, 49 CFR Part 192. Among other things, I&E asked the Commission to order Westover to: (a) comply with Act 127 and 49 CFR Part 192 "now and on a going-forward basis," and (b) pay a civil penalty of $200,000.

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

On May 16, 2022, Westover filed its Amended Petition for Declaratory Order ("the Amended Petition"). The Amended Petition included additional facts about Westover's Systems. The Amended Petition asked that the Commission declare that Act 127 did not give the Commission authority to regulate any of those Systems. The Amended Petition again asked that the Commission declare that Westover's Act 127 Registration forms were null and void *ab initio*.

On June 6, 2022, I&E filed its Answer in Opposition to the Amended Petition. I&E again asked the Commission to deem Westover a "pipeline operator" as defined in Act 127 and to direct Westover to comply immediately with all applicable laws and regulations related to pipeline safety. In the alternative, I&E asked the Commission to defer outstanding issues of material fact to the Complaint.

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

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

> 1. Do Westover's apartment complexes meet the definition of a "master meter system" in 49 CFR § 191.3 where: Westover takes delivery of the natural gas from a state-regulated natural gas distribution company ("NGDC") on the grounds of the apartment complex in Pennsylvania, consumes some of the gas, and resells the remainder exclusively to tenants in the apartment complex in Pennsylvania?
>
> 2. Does the Gas and Hazardous Liquids Pipelines Act ("Act 127") apply to Westover's apartment complexes, considering the facts in question #1?

Petition for Interlocutory Review p. 1.

On November 7, 2022, Westover filed a Brief in Support of its Petition for Interlocutory Review. Also on November 7, 2022, I&E filed a Brief in Opposition to the Petition for Interlocutory Review. I&E's Brief asked the Commission to answer the following Material Question: "Do the Federal Pipeline Safety Laws and Regulations, as adopted by Act 127, include the regulation of intrastate natural gas master meter systems operated at apartment complexes?"

On November 9, 2022, Westover requested an opportunity to file a brief responding to the Material Question stated in I&E's Brief.

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

Following extensive discovery and the submission of direct and rebuttal testimony, the Parties held a conference call with the ALJ on April 28, 2023. They advised the ALJ that they had reached a partial settlement in principle, which included the submission of a stipulation. The Parties explained that they had agreed to resolve certain issues, but agreed to litigate other issues. The Parties asked the ALJ to cancel the evidentiary hearings scheduled for May 3 and 4, 2023. The ALJ granted this request.

On May 15, 2023, the ALJ issued his Briefing Order. On June 13, 2023, the Bureau of Investigation and Enforcement ("I&E") filed a Joint Petition for Partial Settlement ("Settlement") on behalf of the Parties. Appendix A to the Settlement was a Joint Stipulation of Facts ("Stipulation"). Westover and I&E each filed a Main Brief on July 3, 2023 and a Reply Brief on August 3, 2023. The ALJ issued his Recommended Decision on October 31, 2023.

The Recommended Decision concluded that the Settlement was in the public interest and recommended that it be approved without modification. Recommended Decision ("R.D.") at 46. The Recommended Decision also recommended that the Commission find that Act 127 applies to the owner or operator of an apartment complex which owns or operates natural gas facilities located downstream from an NGDC. R.D. at 59.

The Recommended Decision found that, in order to be considered a "master meter system," a gas system must meet all of the following elements:

> 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.

R.D. at 66.

The Recommended Decision found that some of Westover's Systems are not "master meter systems" because Westover does not (a) purchase natural gas and/or (b) resell it to the ultimate consumer at those apartment complexes. R.D. at 86. The Recommended Decision, however, found that the remaining Systems are "master meter systems" as defined in the Federal pipeline safety laws and regulations. The Recommended Decision recommended that the Commission not impose a penalty on Westover, in part, because of Westover's reliance on a Commission publication entitled "Act 127 of 2011 – The Gas and Hazardous Liquids Pipeline Act Frequently Asked Questions" (the "Frequently Asked Questions Brochure"), which Westover interpreted as meaning that it was not a "pipeline operator" pursuant to Act 127. R.D. at 110.

II. EXCEPTIONS

A. EXCEPTION 1: THE RECOMMENDED DECISION APPROVED THE SETTLEMENT WITHOUT MODIFICATION, BUT THE ORDERING PARAGRAPHS MODIFY THE SETTLEMENT

On pages 32-38, the Recommended Decision discusses the terms of the Settlement. Among other things, I&E and Westover agreed that they would take certain actions "[b]eginning on October 1, 2023, and continuing until a Commission or court Order regarding the Litigated Issues becomes final and unappealable." R.D. at 34-36 (Section IV., Paragraphs 8, 9). These actions included certain safety measures that Westover would implement pending a final and unappealable Commission or court Order. For example, Westover agreed to have both an

employee and a contractor that has completed Operator Qualification training certification, and to follow certain procedures in the event a building occupant smells gas or reasonably suspects a gas leak. Among other things, I&E agreed not to file another Complaint against Westover until a final, unappealable Commission or court Order is entered in these proceedings. R.D. pp. 34-36.

I&E and Westover also agreed that they would take certain actions after "the Commission's or court's Order on the Litigated Issues becomes final and unappealable." R.D. at 37-38 (Section V, Paragraphs 10-13). For example, the parties agreed to steps and deadlines for Westover to come into compliance with the Federal pipeline safety laws if a final, unappealable Commission or court Order finds that at least one Westover System is subject to Act 127. R.D. p. 37

These provisions were a material part of the settlement agreement. For example, it was important to Westover that it not be required to comply with the Federal pipeline safety laws while it appealed an unfavorable Commission decision, in order to avoid the risk of spending a substantial amount of money to comply with those laws, only to have an appellate court find that the Federal pipeline safety laws do not apply to any Westover System.

After reviewing the terms of the Settlement, the Recommended Decision concluded that accepting the Settlement was in the public interest and recommended that the Commission approve the Settlement without modification. R.D. at 46. However, in Ordering Paragraphs 7-10, the Recommended Decision modified the Settlement. For example, Ordering Paragraph 7 (emphasis added) states:

> 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.

Paragraphs 8-10 similarly require Westover, or Westover together with I&E, to take certain actions within a specified period after the date of "this Order" (Ordering Paragraph 9) or a "final Order in this matter" (Ordering Paragraphs 8 and 10).

Ordering Paragraphs 7-10 are inconsistent with the portion of the Recommended Decision approving the Settlement without modification. The Commission should correct this inconsistency in the Recommended Decision. Westover submits that the inconsistency was inadvertent, rather than an intentional decision to modify the Settlement as submitted.

For all of the reasons set forth in Westover's Statement in Support of the Settlement (which is incorporated in these Exceptions as fully as if set forth herein), the Commission should find that the Settlement is in the public interest. Therefore, the Commission should adopt the Settlement without modification. The Commission should not jeopardize the Settlement by modifying the date that triggers certain requirements for Westover and/or I&E. The agreed-to triggering date was the date on which the Commission's Order, or a court's Order, becomes final and unappealable.

For all of the reasons set forth above, Westover respectfully requests that the Commission modify Ordering Paragraphs 7-10 of the Recommended Decision to be consistent with the Settlement.

B. EXCEPTION 2: THE RECOMMENDED DECISION ERRED IN FINDING THAT ACT 127 APPLIES TO GAS SYSTEMS AT APARTMENT COMPLEXES LOCATED DOWNSTREAM FROM A NATURAL GAS DISTRIBUTION COMPANY

I&E contends that Westover is a "master meter system" as defined in the Federal pipeline safety laws. Consequently, according to I&E, the Commission has authority to regulate Westover pursuant to Act 127. I&E Complaint ¶¶ 7, 27. In contrast, Westover contends that, if its Systems are "master meter systems," such that the Commission has authority to regulate them pursuant to Act 127, then Act 127 irreconcilably conflicts with the Construction Code, codified at 35 P.S. §§ 7210.101 *et seq*.

The Construction Code required L&I to promulgate regulations adopting the International Fuel Gas Code ("IFGC") "as the standard for the installation of piping, equipment and accessories in this Commonwealth." 35 Pa. C.S. § 7210.301(b). *See also* 34 Pa. Code § 403.21(a)(4) (adopting the IFGC of 2018 (the "IFGC 2018")[1] as part of the Uniform Construction Code). The IFGC's coverage for piping systems extends from the point of delivery to the outlet of the appliance shutoff valves. Piping system requirements include design, materials, components, fabrication, assembly, installation, testing, inspection, operation and maintenance. IFGC 2018 § 101.2.2. The Construction Code gives municipalities and L&I authority to regulate the construction, operation and maintenance of fuel gas piping systems at buildings (including apartment buildings). Westover M.B. at 22-25.

The Federal pipeline safety regulations similarly establish requirements for: pipe design (49 CFR Part 192 Subpart C); general construction requirements for transmission lines and mains (49 CFR Part 192 Subpart G); customer meters, service regulators and service lines (49 CFR Part

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

192 Subpart H); operations (49 CFR Part 192 Subpart L); maintenance (49 CFR Part 192 Subpart M); and qualification of pipeline personnel (49 CFR Part 192 Subpart N). Act 127 gives the Commission authority to regulate "pipeline operators."

If Act 127 applies to fuel gas piping systems at apartment complexes, it conflicts with the Construction Code. Both state statutes would regulate the same gas pipes and would give regulatory authority to different state agencies.

Westover submits that this conflict should be resolved by finding that the Construction Code prevails. The Construction Code contains the following preemption provision:

> Except as otherwise provided in this act, construction standards provided by any statute or local ordinance or regulation promulgated or adopted by a board, department, commission, agency of State government or agency of local government shall continue in effect only until the effective date of regulations promulgated under this act, at which time they shall be preempted by regulations promulgated under this act and deemed thereafter to be rescinded.

35 P.S. § 7210.104(d)(1). Interpreting this provision, the Pennsylvania Courts have held "[w]ith limited exceptions, the Uniform Construction Code preempts and rescinds construction standards established in any *Pennsylvania statute*, local ordinance or regulation." *Schuylkill Twp. v. Pa. Builders Ass'n,* 935 A.2d 575, 577 (Pa. Cmwlth. 2007), *aff'd* 607 Pa. 377, 7 A.3d 249 (Pa. 2010) (emphasis added).

No exception applies in this case. The Construction Code does not apply to "utility and miscellaneous use structures that are accessory to detached one-family dwellings," 35 P.S. 7210.104(b)(3), but there is no similar exception for utility facilities serving multi-family structures such as an apartment complex. Consequently, by its own terms, the Construction Code

prevails over Act 127, to the extent that both purport to regulate fuel gas pipelines at buildings, and the Commission lacks authority to regulate any Westover System.[2]

The rules of statutory construction lead to a similar conclusion. 1 Pa. C.S. § 1932 states that statutes relating to the same persons or things are to be read *in pari materia*. To the extent that the Construction Code and Act 127 pertain to fuel gas pipelines at buildings, those statutes relate to the same things.

1 Pa. C.S. § 1933 states:

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

In this case, the special legislation is the Construction Code, which only applies to a small fraction of gas distribution pipelines, whereas the general legislation is Act 127, which applies to the vast majority of gas and hazardous materials gathering, transmission and distribution pipelines.

If Westover's Systems are "master meter systems," such that the Commission has authority to regulate them pursuant to Act 127, then Act 127 irreconcilably conflicts with the Construction Code because the two statutes give different agencies regulatory authority over the same gas pipes. Act 127 was enacted later in time, but that statute does not manifest an intention that it will prevail over the Construction Code. To the contrary, the earlier statute manifests an intention to prevail.

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[2] Although Westover did not discuss this statutory provision in its briefs to the ALJ, Westover clearly raised the issue that the Construction Code conflicts with, and should prevail over, Act 127. Westover is merely making a new argument in support of its position on that issue, which is permissible. *Wert v. Dep't of Transp., Bur. of Driver Licensing,* 821 A.2d 182, 186 n.9 (Pa. Cmwlth. 2003) (holding that a litigant need not make identical arguments at each stage of his case; the issue must be preserved, but this does not mean every argument is written in stone at the initial stage of litigation); *Doe-Spun Inc. v. Morgan,* 502 A.2d 287 (Pa. Cmwlth. 1985) (permitting appellants to add an additional citation to their argument that they did not raise before the trial court because they raised the issue generally).

The Recommended Decision agreed with I&E that the Federal gas pipeline safety laws preempt the Construction Code. R.D. at 58. Consequently, the Recommended Decision found that Act 127 and the Construction Code do not conflict. Westover excepts to this finding.

No court of competent jurisdiction has held that the Construction Code is unconstitutional on preemption grounds. As an agency created by the General Assembly, the Commission has only the powers given to it by the General Assembly, either explicitly or implicitly. *Feingold v. Bell Tel. Co. of Pa*., 383 A.2d 791, 794 (Pa. 1977). The Commission does not have authority to find that a state law administered by another agency is unconstitutional on federal preemption grounds. That authority lies with the courts. Additionally, municipalities and L&I should not be divested of regulatory jurisdiction in a proceeding in which those entities were not given notice and an opportunity to be heard.[3]

The Recommended Decision also found that, if there is an irreconcilable conflict between the Construction Code and Act 127, Act 127 should prevail based on 1 Pa. C.S. § 1936 ("Irreconcilable statutes passed by different General Assemblies"). R.D. at 58. Westover excepts to this holding.

First, the Recommended Decision is contrary to the plain language of the preemption provision in the Construction Code. Second, the irreconcilable conflict between the Construction Code and Act 127 results from the fact that both statutes regulate fuel gas pipelines at buildings. The two statutes are therefore *in pari materia*, and the applicable rule of construction is 1 Pa. C.S. § 1933 ("Particular controls general"), rather than 1 Pa. C.S. § 1936.

[3] In any event, there is no federal preemption of a state statute. If the Commission finds that any Westover System is a "master meter system" under federal law, such that Act 127 applies to that System, then Act 127 irreconcilably conflicts with the Construction Code. The Construction Code (a state law) preempts Act 127 (another state law).

Westover respectfully submits that this result is consistent with the Legislature's intent when it enacted Act 127. 1 Pa. C.S. § 1921(a) ("The object of all interpretation and construction of statutes is to ascertain and effectuate the intention of the General Assembly.") As discussed in Westover's Main Brief at 28-31, Act 127 was enacted in response to the construction of numerous Marcellus Shale pipelines in Pennsylvania. The legislation was intended to address gaps in the regulation of gas lines carrying Marcellus Shale gas from the well to markets all over the Commonwealth. There is no indication that the bill was intended to regulate fuel gas piping systems at buildings (which were already subject to regulation pursuant to the Construction Code). Act 127 could have given the Commission explicit authority to regulate fuel gas piping systems at buildings, but it did not. If the General Assembly had intended to expand the Commission's regulatory authority dramatically, by allowing it to regulate hundreds, if not thousands, of apartment buildings, colleges, universities, health care facilities, commercial retail centers and other buildings that contain fuel gas piping systems, it would have said so explicitly. Similarly, if the General Assembly had intended to transfer the regulatory authority of L&I and municipalities to the Commission, the Legislature would have said so explicitly. Finally, if the General Assembly had intended to replace the Construction Code with the Federal pipeline safety laws as the regulatory scheme governing fuel gas piping systems at buildings, the General Assembly would have said so explicitly. The General Assembly's failure to explicitly advise either regulators or the regulated community of such dramatic changes indicates that the General Assembly did not intend to make Act 127 apply to fuel gas piping systems at buildings – including apartment buildings.[4]

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[4] Westover respectfully suggests that, to the extent that the Commission finds that there is an irreconcilable conflict between Act 127 and the Construction Code, the appropriate course of action -- before subjecting potentially thousands

For all of the above reasons, the Commission should modify the Recommended Decision by finding that, if any Westover System is a "master meter system," the System is regulated by municipalities and L&I pursuant to the Construction Code – not by the Commission pursuant to Act 127.

C. EXCEPTION 3: THE RECOMMENDED DECISION ERRED IN FINDING THAT SOME OF WESTOVER'S SYSTEMS ARE "MASTER METER SYSTEMS" AS DEFINED IN 49 CFR § 191.3

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

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

58 P.S. § 801.102 ("Definitions") (emphasis added).

The "Federal pipeline safety laws" are defined as:

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

Id.

I&E alleges that Westover's Systems are regulated under Federal pipeline safety laws because they are "master meter systems" as defined in 49 CFR § 191.3. I&E Complaint ¶ 30. Those regulations, which implement 49 U.S.C. Ch. 601, define a "master meter system" as:

> … a pipeline system for distributing gas within, but not limited to, a definable area, such as a mobile home park, housing project, or apartment complex, where the

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of Pennsylvania landlords to duplicative regulation – would be to seek legislative action to clarify the respective jurisdictions of the Commission, L&I, and municipalities.

> operator purchases metered gas from an outside source for resale through a gas distribution pipeline system. The gas distribution pipeline system supplies the ultimate consumer who either purchases the gas directly through a meter or by other means, such as by rents[.]

49 CFR § 191.3.

Based on this definition, the Recommended Decision stated:

> 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.) [t]he operator purchases gas from an outside source for resale; 3.) the [p]ipeline 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.

R.D. at 59.

These elements of the test of a "master meter system" form the basis for the Recommended Decision's resolution of the Litigated Issues posed by the Parties. Those issues are:

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 "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?"

This Brief will discuss each Litigated Issue in turn, although Westover does not except to the Recommended Decision's resolution of each issue.

In summary, Westover respectfully submits that no System satisfies every element of the definition of a "master meter system." Since no System is a "master meter system," as defined by the Federal pipeline safety laws and regulations, no System is a "pipeline operator" as defined in Act 127, and the Commission lacks authority to regulate any System.

1. ARE WESTOVER'S GAS FACILITIES LIMITED TO THE APARTMENT COMPLEX?

The first element of the test of a "master meter system" is that the pipeline system must be located "within, but not limited to, a definable area, such as a mobile home park, housing project, or apartment complex." 49 CFR § 191.3. This element of the test actually consists of two parts. The first requires that the gas system be located within, but not limited to, a definable area. The second attempts to explain what is meant by a "definable area." The Recommended Decision begins by discussing the second part, so this Brief also will discuss that part first.

a. WHAT IS A "DEFINABLE AREA?"

Section 191.3 gives three examples of a "definable area:" a mobile home park, a housing project and an apartment complex. 49 CFR § 191.3. The Recommended Decision found that an apartment complex can be a definable area. R.D. at 67. That finding is consistent with the explicit terms of the regulation. Consequently, Westover does except from that finding.

Westover, however, excepts to the Recommended Decision's finding that a single apartment building can be a "definable area."[5] R.D. at 58, 67. In reaching this conclusion, the Recommended Decision relies on a statement in a 2002 Report of the United States Secretary of Transportation (the "2002 Report") that the category with the most gas "master meter systems" is apartment buildings and complexes. Westover Exhibit PQ-33 at 5.

The Recommended Decision erred in concluding that a single apartment building can be a "definable area." The Recommended Decision overlooked an extended discussion of this point later on that same page of the referenced 2002 Report:

> [Office of Pipeline Safety] policy is that the term "master meter system" applies only to gas distribution systems serving multiple buildings. It does not

[5] Westover raised this issue below by arguing that a system comprised exclusively or primarily of interior piping in a single building is not a "master meter system." Westover M.B. at 46-50.

apply to gas distribution systems consisting entirely or primarily of interior piping located within a single building.[15] Such 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.

Master meter systems consisting entirely or primarily of interior piping located within a single building are excluded by the OPS from its definition because

> …such systems 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.

In essence, the OPS regards such systems in the same way it regards the piping at a large commercial building or industrial plant.

[15] See U.S. DOT, "RSPA Responses to NAPSR Resolutions," pp. 115-116 (Note: NAPSR is the National Association of Pipeline Safety Representatives), which states, in part, that

> 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.

This is a continuation of the policy adopted by the OPS prior to the publication of the regulatory definition of a master meter system. [See OPS Advisory Bulletin 73-10, October 1973, or the May 1973 letter from Joseph Caldwell, then Director of OPS, to Wayne Carlson, Public Service Commission of Utah.]

Westover Exhibit PQ-33.at 5 (note omitted).

The Recommended Decision was persuaded by PHMSA interpretation letters finding that a gas system at an apartment building or shopping mall was a "master meter systems." R.D. at 67. This was error, for several reasons. Most importantly, by their own terms, PHMSA's interpretation letters are "not generally applicable" and therefore should have no precedential value:

> The Pipeline and Hazardous Materials Safety Administration, Office of Pipeline Safety provides written clarifications of the Regulations (49 CFR Parts 190-199) in the form of interpretation letters. These letters reflect the agency's current application of the regulations to the specific facts presented by the person requesting the clarification. 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 regulations.

Interpretation letter dated September 21, 2020 (attached as Appendix 8 to the Amended Petition).

Second, 49 CFR § 191.3 has not changed since 2002. In fact, it has not been amended since it was added to Section 191.3 in 1984. 49 *Fed. Reg*. 18960 (May 3, 1984). There are no reported Federal court decisions interpreting the regulation after 2002. There is no reason why that federal regulation should be construed differently today than it was in 2002.[6] As a result, PHMSA's revised interpretation is entitled to little deference. *See, e.g, I.N.S. v. Cardozo-Fonseca*, 480 U.S. 421, 446 n.30 (1987) ("An additional reason for rejecting the [Immigration and Naturalization Service's] request for heightened deference to its position is the inconsistency of the positions the [Board of Immigration Appeals] has taken through the years. An agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is entitled to considerably less deference than a consistently held agency view."); *Dauphin Cty. Ind. Dev. Auth.*, 123 A.3d at 1135 ("An administrative agency may revise and correct its prior interpretation of a statute. However, it cannot expect that its later interpretation is entitled to very much deference"). Additionally, the reason for the change in PHMSA's position is unclear, further undermining the deference that should be given to PHMSA's interpretation. *See, e.g., Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 213 (2016) (the United States Supreme Court did not defer to the agency, pursuant to *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984), due to the lack of a reasoned explanation for a change in the agency's longstanding position).

Under both Federal and Pennsylvania law, an administrative agency's interpretation of a statute or regulation is not entitled to deference where it is plainly erroneous and inconsistent with the applicable regulation. *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945); *Crown*

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[6] *See also* Section II.C.4, *infra*.

Castle NG East LLC v. Pa. Pub. Util. Comm'n, 660 Pa. 675, 679 (2020). If PHMSA interprets the "apartment complex" as meaning "apartment building," its decision is plainly erroneous and inconsistent with the regulation, and is not entitled to deference. The Commission should find that a "definable area" does not include a single apartment building.

b. ARE WESTOVER'S GAS FACILITIES "WITHIN, BUT NOT LIMITED, TO" THE RELEVANT DEFINABLE AREA?

The first element of the test of a "master meter system" also requires that the system be "within, but not limited to" the definable area. Westover and I&E agree that each Westover System is located entirely on Westover's property and only serves occupants of buildings on Westover's property. Nevertheless, the Recommended Decision concluded that every Westover System satisfies the first element of the test of a "master meter system." Westover excepts to this conclusion.

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

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

- "within" has multiple meanings, including "being inside: enclosed;"[7]

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[7] https://www.merriam-webster.com/dictionary/within

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

Applying these definitions to Section 191.3's definition of a "master meter system," the phrase "within, but not limited to, a definable area" means that, to be a "master meter system," a gas system must be enclosed in, on the other hand, not restricted to, the definable area. In other words, to be a "master meter system," a gas system must be located partly within, and partly outside, the definable area of the apartment complex. Here, the Parties agree that every Westover System is limited to the definable area of Westover's property.

By arguing that Westover's Systems meet the first element of the test of a "master meter system," I&E stands the federal regulation on its head. I&E interprets the regulation to mean that, to be a "master meter system," a pipeline system must be "within, <u>and</u> limited to, a definable area." This interpretation is contrary to the plain language of the regulation, which requires that the pipeline system be "within, <u>but not</u> limited to, a definable area" in order to be a "master meter system."

The Recommended Decision nonetheless adopted I&E's interpretation. The Recommended Decision claims that its interpretation of Section 191.3 is consistent with the plain reading of that regulation, but simultaneously admits that it reads the regulation to mean "within, <u>and</u> limited to, a definable area" rather than "within, <u>but not</u> limited to, a definable area." R.D. at 67-68. For the reasons explained above, the Recommended Decision's interpretation of 49 CFR § 191.3 is contrary to the plain meaning of the non-technical terms used in the regulation.

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

The Recommended Decision was persuaded by PHMSA interpretation letters finding that "master meter systems" can be located in an apartment complex or building. R.D. at 67. According to the Recommended Decision: "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." R.D. at 67.

The Recommended Decision conflates the first and second parts of the first element of the test of a "master meter system." Regardless of how the "definable area" is defined in a particular case, the gas system must still be "within, but not limited to," that definable area. The Recommended Decision fails to give effect to the words "but not limited to," which is error.

The Recommended Decision states: "since PHMSA interpretation letters are the sole source of guidance on these matters, they should have persuasive value on this issue." R.D. at 67. The Recommended Decision erred in deferring to PHMSA's interpretation letters for several reasons. Most importantly, the Recommended Decision admits that PHMSA's interpretation letters have not specifically addressed the meaning of the phrase "within, but not limited to, a definable area." R.D. at 67. It was error for the Recommended Decision to find PHMSA interpretation letters persuasive on the meaning of this phrase when they do not even construe it.

Second, as discussed above, under both Federal and Pennsylvania law, an administrative agency's interpretation of a statute or regulation is not entitled to deference where it is plainly erroneous and inconsistent with the applicable regulation. *Bowles, Crown Castle, Dauphin County Industrial Development Auth.* If PHMSA interpreted the regulation as meaning "within, and limited to" rather than "within, but not limited to" a definable area, its decision is plainly erroneous and inconsistent with the regulation, and is not entitled to deference.

As an agency created by the General Assembly, the Commission has only the powers given to it by the General Assembly, either explicitly or implicitly. *Feingold, supra*. Act 127 gives the Commission authority to apply Federal pipeline safety regulations. Reading Section 191.3 to mean that a "master meter system" must be "within and limited to" a definable area, rather than "within, but not limited to" a definable area, is not *applying* the Federal regulation; it is *rewriting* that regulation. The Commission lacks authority to rewrite a Federal regulation.

Although this case involves an issue of first impression, the Commission has previously given guidance to the regulated community. In a 2014 publication that still appears on the Commission's website, the Commission advised the regulated community as follows:

> **6. WHAT IS CONSIDERED A PIPELINE OPERATOR UNDER ACT 127?**
>
> Pipeline operators include: Companies engaged in the gathering, transportation or distribution of natural gas or hazardous liquids.
>
> These include gathering companies; midstream companies; pipeline companies; gas distribution systems that are not public utilities (cooperatives, municipalities and municipal authorities); *master meter systems that provide service to property owned by third parties*; and propane distribution systems subject to the federal pipeline safety laws.

Frequently Asked Questions Brochure at 1 (emphasis added). Westover argued that this publication indicates that the Commission believes a system must be located partly inside, and partly outside, the apartment complex to be a "pipeline operator."[10] Westover M.B. at 36.

The Recommended Decision rejected this argument, based on the answer to Question 7 in the Frequently Asked Questions Brochure (emphasis added), which states:

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[10] Although unofficial statements and opinions by Commission personnel do not have the force and effect of law and are not binding on the Commission, 52 Pa. Code § 1.96, the Commission should not lightly disregard its own publication providing guidance to the regulated community for almost a decade. The guidance was likely provided based on a legal interpretation of Act 127 by the Commission's own Law Bureau. It is also telling that the issue of Commission jurisdiction over apartment complexes is just now (after over a decade) being brought to an adjudication.

> **7. WHAT IS NOT CONSIDERED A PIPELINE OPERATOR UNDER ACT 127?**
>
> Those who are not pipeline operators include: Public utilities and city natural gas distribution operations, *ultimate consumers who own service lines on their real property (including master meter systems serving their own property)* and pipelines subject to the exclusive jurisdiction of the Federal Energy Regulatory Commission (FERC).

According to the Recommended Decision, some Westover Systems are not the ultimate consumer of the gas and/or receive service from distribution lines rather than service lines. R.D. at 68.

Significantly, the Frequently Asked Questions Brochure does not support the argument that Westover's Systems *are* pipeline operators. Even under the Recommended Decision's interpretation, Westover is not a pipeline operator as stated in the answer to Question 6, and the answer to Question 7 does not address Westover's specific situation.

In this case, the facts are clear: Westover's Systems are located entirely on Westover's property and only serve occupants of Westover's buildings. The law is also clear: to be a "master meter system," a gas system must be "within, but not limited to, a definable area" such as an apartment complex. Consequently, the conclusion is clear: Westover's Systems do not satisfy the first element of the test of a "master meter system."

For all of the above reasons, Westover respectfully requests that the Commission modify the Recommended Decision by finding that no Westover System satisfies the first element of the test of a "master meter system."

2. DOES WESTOVER PURCHASE GAS FOR RESALE THROUGH A DISTRIBUTION SYSTEM AND SUPPLY IT TO THE ULTIMATE CONSUMER?

The Recommended Decision found that the Westover Systems at Black Hawk Apartments, Concord Court Apartments, and Lansdale Village are not "master meter systems" because, at these complexes, Westover consumes all the gas and does not supply any of it to the occupants of its

buildings. These systems do not satisfy the third element of the test of a master meter system: the gas distribution pipeline system must supply gas to the ultimate consumer to be a "master meter system." R.D. at 77. Westover does not except to this finding.

3. WHO IS THE ULTIMATE CONSUMER OF THE GAS SERVICE AT THE APARTMENT COMPLEXES IDENTIFIED IN THE STIPULATION?

As stated above, the third element of the test of a "master meter system" is that the pipeline system must supply gas to the ultimate consumer. R.D. at 66. The Recommended Decision found that the Systems at Black Hawk Apartments, Concord Court Apartments, and Lansdale Village are not "master meter systems" because these gas distribution systems do not distribute gas to the ultimate consumer. Instead, Westover consumes all of the gas. At these apartment complexes, the Recommended Decision found that Westover is the ultimate consumer. R.D. at 83. Westover does not except to this portion of the Recommended Decision.

At some apartment complexes, Westover's System is structured differently in different sections of the complex. For example, at Paoli Place North – Buildings A-K, Westover consumes some of the gas in a central boiler and distributes the remainder to the ultimate consumer, but in Buildings L-R, the NGDC supplies gas directly to building occupants and building occupants pay the NGDC through a meter. Westover Main Brief pp. 42, 45. In its Main Brief, Westover contended that the System at Buildings L-R does not constitute a "master meter system" because it does not satisfy the second element of the test (the operator must purchase gas from an outside source for resale to be a "master meter system"), the third element of the test (the pipeline must supply gas to the ultimate consumer to be a "master meter system") or the fourth element of the test (at a "master meter system," the ultimate consumer purchases the gas from the system operator, either through a meter or by other means, such as rent). Westover M.B at 38-39.

In contrast, I&E argued that, if any portion of the gas system at an apartment complex meets the test of a "master meter system," the entire gas system at that apartment complex is a "master meter system." The Recommended Decision rejected I&E's argument, stating that regulating portions of Westover's System that do not satisfy the test of a "master meter system" "would be an overextension of Commission authority, since doing so would result in Westover being regulated for systems where it is the ultimate consumer." R.D. p. 84. Westover does not except to this conclusion.

The Recommended Decision, however, did not apply this same reasoning to "hybrid" gas systems – systems such as Mill Creek I and Mill Creek II, at which Westover consumes some of the gas in a central boiler and distributes the remainder to building occupants (in this case, for cooking). The Recommended Decision held that these systems are "master meter systems" in their entirety – even the portions in which Westover is the ultimate consumer of the gas. R.D. at 77-78. Westover excepts to this finding.

To the extent that Westover consumes gas in its own central boiler, and supplies heat and/or hot water (rather than gas) to building occupants, Westover does not satisfy the definition of a "master meter system." To borrow the words of the Recommended Decision, Commission regulation of these portions of the Westover Systems "would be an overextension of Commission authority, since doing so would result in Westover being regulated for systems where it is the ultimate consumer." Portions of these "hybrid" Systems do not satisfy the definition of a "master meter system" in 49 CFR § 191.3. Therefore, Act 127 does not give the Commission authority to regulate them. The Commission should modify this portion of the Recommended Decision.

4. DOES A NATURAL GAS SYSTEM THAT IS EXCLUSIVELY OR PRIMARILY COMPRISED OF INTERIOR PIPING SATISFY THE DEFINITION OF "MASTER METER SYSTEM"?

At several apartment complexes, Westover's gas distribution pipeline system is comprised exclusively or primarily of interior piping. For example, at Mill Creek Village II, the NGDC delivers gas at a meter in a mechanical room inside each building. All of Westover's gas piping is inside a building at this apartment complex. Stipulation ¶¶ 69-70. At Country Manor, Fox Run, Paoli South (Buildings A-D) and Woodland Plaza, the NGDC delivers gas to a meter located outside each apartment building, and the only exterior piping is located between the meter and the exterior wall of the apartment building. Stipulation ¶ 25, 31, 94, 113. At Norriton East, which is comprised of a single apartment building, the only exterior piping is located (a) between the outside gas meter and the exterior wall of the building, and (b) between the exterior wall of the building and an emergency generator located about 10 yards from the back wall of the building. Stipulation ¶ 75. Westover submits that these Systems, which are exclusively or primarily comprised of interior piping, do not meet the test of a "master meter system."

The 2002 Report, discussed above, indicates that OPS's position as of 2002 was that a system that is comprised exclusively or primarily of interior piping inside a single apartment building does not meet the test of a "master meter system." This is because the examples of a "definable area" in 49 CFR § 191.3 (a mobile home park, a housing project and an apartment complex) all involve multiple structures. Therefore, OPS concluded that the regulation implicitly required that a "master meter system" involve underground or exterior piping serving more than one building.

This position is reflected by interpretation letter PI-76-0114. Westover Exhibit PQ-11. There, PHMSA was asked whether the piping downstream from a meter constitutes a "master meter system" if "none of the piping is exposed or underground." PHMSA opined:

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

See also, interpretation letter PI-01-0113 (stating that the Anaconda Housing Authority ("AHA") operated a "master meter system" but "the interior piping within the buildings, beyond the first penetration of building wall is non-jurisdictional");[11] and interpretation letter PI-01-011 (stating that interior piping with buildings, beyond the first penetration of each building wall, is non-jurisdictional) (described in Westover's Amended Petition, Exhibit 8).

Although 49 CFR § 191.3 has not been changed since 2002, and the federal courts have not construed that Section after 2002, PHMSA's interpretation of that regulation apparently has changed. PHMSA now takes the position that "[t]he location of gas pipelines is only one of many factors that determine whether a gas pipeline system is a master meter system or not." Interpretation letter dated September 21, 2020, at 2 (Exhibit 8 to Westover's Amended Petition). Based on PHMSA's new position, the Recommended Decision concluded that a natural gas system that is exclusively or primarily comprised of interior piping at a single building satisfies the definition of a "master meter system." R.D. at 96. Westover excepts to this holding.

The Recommended Decision observed that, while federal 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." R.D. at 96. However, Act

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[11] https://www.phmsa.dot.gov/sites/phmsa.dot.gov/files/legacy/interpretations/Interpretation%20Files/Pipeline/2001/g01-06-25_Tierney_192.3-master_meter-nlmx.pdf

127 only gave the Commission authority to regulate pipeline operators, which are defined as persons that own or operate "equipment or facilities in this Commonwealth for the transportation of gas or hazardous liquids by pipeline or pipeline facility *regulated under Federal pipeline safety laws*." 58 P.S. § 801.102 (emphasis added). If a system is not a "master meter system" under federal law, the owner/operator of that system is not a "pipeline operator" under Pennsylvania law.

The Recommended Decision stated that 49 CFR § 191.3 does not explicitly exempt systems that are exclusively or primarily comprised of interior piping from being "master meter systems." This argument should be rejected. As discussed above, the first element of the test of a "master meter system" explains a "definable area" by giving several examples: a mobile home park, a housing project or an apartment complex. All of these examples involve multiple structures, which require exterior and/or underground piping to connect them. The 2002 Report correctly stated that 49 CFR § 191.3 implicitly exempts systems that are exclusively or primarily comprised of interior piping within a single building. The explicit terms of the regulation are inconsistent with the notion that a system comprised exclusively or primarily of interior piping inside a single building can constitute a "master meter system."

The Recommended Decision also concluded that PHMSA's current interpretation of Section 191.3 should control, regardless of PHMSA's previous interpretations of Section 191.3. R.D. at. 96. The Commission should not defer to PHMSA's current interpretation. The definition of a "master meter system" in 49 CFR § 191.3 has not changed since it was adopted in 1984. 49 *Fed. Reg*. 18960 (May 3, 1984) and there are no court decisions interpreting the regulation after 2002. There is no reason why PHMSA should have changed its interpretation of the regulation after 2002. As discussed above, an agency's interpretation is not entitled to great deference after the agency changes its position – particularly where, as here, the agency does not explain the reason

for its change in position. *Cardozo-Fonseca, Dauphin Cty. Ind. Dev. Auth., Encino Motorcars, LLC.* Moreover, if an agency's interpretation of a regulation is plainly inconsistent with the applicable regulation, it is not entitled to deference. *Bowles, Crown Castle.*

PHMSA's interpretation letters are very different from Commission decisions.

> These letters reflect the agency's current application of the regulations to the specific facts presented by the person requesting the clarification. Interpretations are not generally applicable, do not create legally-enforceable rights or objections and are provided to help the specific requestor understand how to comply with the regulations.

Westover's Amended Petition Exhibit 8. Additionally, PHMSA's interpretation letters are not subject to judicial review.

In contrast, the Commission's decision in this case will be issued after an adjudication of facts, will establish legally-enforceable rights and obligations, and is subject to judicial review. The Commission's decision must be based on substantial evidence in the record – not on speculation as to what PHMSA would say in an interpretation letter. Finally, a reviewing court will determine whether the Commission's decision is consistent with applicable statutes and regulations.

Several of Pennsylvania's neighboring states have not followed PHMSA's current interpretation. Ohio defines a master meter system, in pertinent part, as excluding "a pipeline within a manufactured home, mobile home, or a building." Ohio Administrative Code Rule 4901:1-16-01(I). Similarly, Maryland defines a gas master meter operator, in pertinent part, as "a person that owns or operates a pipeline system, *other than piping within a building*." Maryland Code, Public Utilities § 1-101(l) (emphasis added). New Jersey defines a master meter system, in pertinent part, as "any *underground gas pipeline system* operated by a residential or commercial customer of a New Jersey gas utility which is utilized for the distribution of gas to ultimate consumers within, but not limited to, a definable area, such as a mobile home park, a housing

project or an apartment complex, where the operator purchases metered gas from a public utility for resale through the operator's distribution system which is beyond the control of the utility." N.J. Admin. Code § 14:6-6.2 (emphasis added).

The Commission should follow the explicit language of 49 CFR § 191.3. That regulation provides that, to be a "master meter system," a gas system must satisfy every element of a multi-part test. The first element of the test is that the system must be "within, but not limited to, a definable area, such as … an apartment complex." A system that is entirely or primarily comprised of piping inside a single apartment building, by definition, does not satisfy the first element of the test of a "master meter system."

Public safety would not be jeopardized by a finding that a system exclusively or primarily comprised of interior piping inside a single building is not a "master meter system" subject to Commission jurisdiction. First, as OPS properly concluded several decades ago, there is no reason to apply the full panoply of federal pipeline safety laws and regulations that apply to interstate transmission pipelines to pipes inside a single building. Such pipes are not subject to the same stresses from weather and other conditions as are pipelines with considerable underground and/or exterior piping. That would be a classic example of over-regulation because the federal regulatory scheme goes well beyond what is necessary to ensure public safety with regard to pipes inside a building.

Additionally, the Construction Code gives municipalities and L&I authority to regulate fuel gas piping systems at buildings. If the Commission does not have authority, under the federal pipeline safety laws, to regulate a gas pipeline system comprised exclusively or primarily of piping inside a building, that pipeline system would continue to be subject to regulation by the same

entities that regulate the gas pipelines in many other structures in the Commonwealth of Pennsylvania.

The argument offered in Exception 2 above – that the Construction Code conflicts with Act 127, and should control over it – is particularly strong with regard to systems that are exclusively or primarily comprised of pipes inside a single building. The Construction Code explicitly preempts conflicting state statutes. 35 P.S. § 7210.104(d)(1). Any conflict the Construction Code and Act 127 therefore should be resolved in favor of the Construction Code.

For all of the above reasons, the Commission should modify the Recommended Decision by finding that the Systems that are primarily or exclusively comprised of interior piping inside a single building are not "master meter systems."

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?"

49 CFR § 191.3 establishes a complex test for determining whether any particular gas system is a "master meter system." I&E asked the ALJ to establish a simple rule of evidence for determining whether a gas system is a "master meter system." According to I&E, the existence of an apartment complex-owned sub-meter is dispositive of the issue of whether that system is a "master meter system." I&E M.B. at 47.

The Recommended Decision concluded "I find that the existence of an apartment complex owned and actively used submeter, 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." R.D. at 99. Westover excepts to this portion of the Recommended Decision.

First, there is no need for the Commission to establish a simple rule of evidence that encapsulates 49 CFR § 191.3. Every case must be evaluated based on all of the facts and circumstances of that particular case.

Second, if the Commission does establish the requested simple rule of evidence, that rule must encapsulate all the elements of the test of a "master meter system." The Recommended Decision's proposed rule of evidence does not; it effectively reads the first element of the test of a "master meter system" out of 49 CFR § 191.3. The first element of the test is that a gas distribution pipeline system must be "within but not limited to a definable area" such as an apartment complex. The presence of a sub-meter owned by the system operator does not provide any evidence about the geographic location or extent of the system in question.

In reading a statute or regulation, effect must be given to every word. *Leocal* and *Habecker, supra*. The Commission should not adopt a rule of evidence that fails to give effect to every word in 49 CFR § 191.3. Consequently, the Commission should modify the Recommended Decision by finding that the presence of a sub-meter owned by the system operator is not in and of itself dispositive of whether a gas system meets every element of the test of a "master meter system."

6. AT WHICH PROPERTIES (IF ANY) DOES WESTOVER DISTRIBUTE GAS "IN OR AFFECTING INTERSTATE OR FOREIGN COMMERCE?"

The second element of the test of a "master meter system" is that "the operator purchases metered gas from an outside source for resale through a gas distribution pipeline system." 49 CFR § 191.3. The operator of a "master meter system" is defined as someone who is engaged in the transportation of gas, which is, in turn, defined as "the gathering, transmission, or distribution of gas by pipeline, or the storage of gas*, in or affecting interstate or foreign commerce.*" *Id.* (emphasis added). For the Commission to find that Westover is the "operator" of a "master meter

system," it must find that the system is engaged in the gathering, transmission, or distribution of gas by pipeline, or the storage of gas, in or affecting interstate or foreign commerce.

Westover contends that the Commission must make this finding based on substantial evidence in the record. *Lyft v. Pa. Pub. Util. Comm'n,* 145 A.3d 1235, 1240 (Pa. Cmwlth. 2016). Substantial evidence is such relevant evidence that a reasonable mind might accept as adequate to support a conclusion. *Borough of E. McKeesport v. Special/Temporary Civil Serv. Comm'n,* 942 A.2d 274, 281 (Pa. Cmwlth. 2008). More is required than a suspicion of the existence of a fact sought to be established. *Norfolk &Western Ry. Co. v. Pa. Pub. Util. Comm'n,* 413 A.2d 1037, 1047 (Pa. 1980).

The Recommended Decision found 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." R.D. at 109. In other words, Westover's Systems are engaged in or affect interstate or foreign commerce as a matter of law. Westover excepts to this finding.

In pertinent part, 49 U.S.C. § 60101 defines "transporting gas" as "the gathering, transmission, or distribution of gas by pipeline, or the storage of gas, in interstate or foreign commerce." If this statute contemplated that all intrastate gas pipelines were, as a matter of law, "in interstate or foreign commerce," there would have been no need for the regulation at 49 CFR § 191.3 to define the transportation of gas as "the gathering, transmission, or distribution of gas by pipeline, or the storage of gas, in or affecting interstate or foreign commerce." The Recommended Decision effectively reads the phrase "in or affecting interstate or foreign commerce" out of the regulation. As discussed above, this result is inconsistent with both the federal and the Pennsylvania rules of construction. *Leocal, supra*; *Habecker, supra*.

Commission proceedings are governed by the Code and the Code states "the proponent of a rule or order has the burden of proof." 66 Pa. C.S. § 332(a). The Pennsylvania Supreme Court held in *Burleson v. Pa. Pub. Util. Comm'n,* 501 Pa. 433, 437, 461 A.2d 1234, 1236, (1983), when a party bears the burden of proof, that party must establish that: "the elements of that cause of action are proven with substantial evidence which enables the party asserting the cause of action to prevail, precluding all reasonable inferences to the contrary." There is no reason why this should be any different in cases involving the Federal gas pipeline safety laws.

I&E introduced no evidence whatsoever to demonstrate that any Westover System is engaged in or affects interstate or foreign commerce. In contrast, Westover introduced extensive evidence demonstrating that no Westover System is engaged in or affects interstate or foreign commerce. The Recommended Decision acknowledged that the evidence demonstrates that Westover's systems are not engaged in interstate commerce. R.D. 107. Moreover, Westover's Systems do not "affect" interstate or foreign commerce because:

- Westover's distribution of gas to building occupants does not increase or decrease the amount of gas purchased and sold, compared to what it would have been if building occupants had purchased gas directly from the NGDC;
- each System's purchase of gas from the NGDC, and resale of gas to building occupants, is well downstream of any transaction in interstate or foreign commerce, and each System's purchase and resale of gas involves such a small amount of gas that it does not "affect" those upstream transactions. The amount of gas that Westover purchases for resale to building occupants is particularly small at "hybrid" systems. For example, at Country Manor, Mill Creek Village I and II, Oak Forest, Paoli Place South, Buildings E-H, and Woodland Plaza, building occupants only purchase gas from Westover for cooking.

Westover M.B. at 53-55.

The Recommended Decision relied, in part, on the Commission's approval of a settlement of an I&E Complaint alleging that certain mobile home parks in York County are "master meter systems." *Pa. Pub. Util. Comm'n v. Brookhaven MHP Management LLC,* Docket No. C-2017-

2613983 (Opinion and Order entered Aug. 23, 2018). The gas systems at these mobile home parks were intrastate gas systems. According to the Recommended Decision, if the Commission believed that these mobile home parks were not subject to Act 127, the Commission would not have approved the settlement. R.D. at 109. Therefore, the Recommended Decision concluded that "the Commission is already regulating master meter systems located entirely within the state of Pennsylvania." R.D. at 108.

Westover respectfully submits that the Recommended Decision made far too much of the Commission's approval of the settlement in *Brookhaven*. The Commission's approval of a settlement generally is not afforded precedential value. *See, e.g., Pa. Pub. Util. Comm'n, et al. v. PECO Energy Company – Gas Division,* Docket No. R-2020-3018929 (Opinion and Order entered June 22, 2021) at 65. Even if it was afforded precedential value, the *Brookhaven* case does not stand for the proposition that every intrastate gas pipeline system in Pennsylvania is deemed, as a matter of law, to engage in and affect interstate or foreign commerce.

The Recommended Decision also relied, in part, on a PHMSA interpretation letter stating "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." R.D. at 108. As discussed above, PHMSA interpretation letters, unlike Commission decisions, are not adjudications that must be supported by substantial evidence.

For all of the above reasons, the Commission should modify the Recommended Decision by finding that none of Westover's Systems are engaged in or affect interstate or foreign commerce.

III. CONCLUSION

WHEREFORE, for all of the reasons set forth above, Westover Property Management Company, L.P., d/b/a Westover Companies respectfully requests that the Commission:

(1) Modify Ordering Paragraphs 7-10 to read:

> 7. That for the gas systems determined to be master meter systems, within sixty (60) days of the date of a final, unappealable Commission or court 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, unappealable Commission or court 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 final, unappealable Commission or court 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, unappealable Commission or court 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.

(2) Modify the Recommended Decision to find that none of Westover's Systems are "master meter systems."

(a) No System is "within, but not limited to, a definable area, such as … [an] apartment complex."

(b) With respect to "hybrid" systems, in which Westover consumes some gas and resells some gas to building occupants: To the extent that Westover consumes the gas, that portion of the System is not a "master meter system."

(c) A System that is exclusively or primarily comprised of piping inside a single apartment building is not a "master meter system."

(d) The presence of an apartment complex-owned sub-meter is not dispositive of whether the System is a "master meter system."

(e) None of Westover's Systems are engaged in or affect interstate or foreign commerce.

(3) Modify the Recommended Decision to find that Westover's Act 127 Registration forms were null and void *ab initio* because no Westover System is a "pipeline operator" pursuant to Act 127.

(4) Modify the Recommended Decision by finding that, if any Westover System is a "master meter system," the System is nevertheless regulated by municipalities and L&I pursuant to the Construction Code, rather than by the Commission pursuant to Act 127;

(5) Modify the Recommended Decision to dismiss the Complaint; and

(6) Modify the Recommended Decision to grant the Amended Petition.

[Signature appears on next page.]

Respectfully submitted,

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