



COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA PUBLIC UTILITY COMMISSION
COMMONWEALTH KEYSTONE BUILDING
400 NORTH STREET, HARRISBURG, PA 17120

BUREAU OF
INVESTIGATION
&
ENFORCEMENT

November 30, 2023

Via Electronic Filing

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

Re: Pennsylvania Public Utility Commission,
Bureau of Investigation and Enforcement v.
Westover Property Management Company, L.P.
d/b/a Westover Companies
Docket Nos. C-2022-3030251; P-2021-3030002
I&E's Reply to Westover's Exceptions

Dear Secretary Chiavetta:

Enclosed for electronic filing please find the Pennsylvania Public Utility Commission's **Bureau of Investigation and Enforcement's Reply to the Exceptions of Westover Property Management Company, L.P. d/b/a Westover Companies** in the above-referenced proceeding.

Copies have been served on the parties of record in accordance with the Certificate of Service. If you have any questions, please contact the undersigned.

Sincerely,

A handwritten signature in blue ink that reads 'Kayla L Rost'.

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**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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

**BUREAU OF INVESTIGATION AND ENFORCEMENT’S
REPLY TO EXCEPTIONS OF
WESTOVER PROPERTY MANAGEMENT COMPANY, L.P.,
d/b/a WESTOVER COMPANIES**

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Dated: November 30, 2023

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I. INTRODUCTION

On October 31, 2023, Deputy Chief Administrative Law Judge (“ALJ”) Christopher P. Pell issued a Recommended Decision in the above-captioned proceeding, which correctly (1) approved the Joint Petition for Partial Settlement without modification; (2) determined that the Commission is authorized and obligated to supervise and regulate pipeline operators within the Commonwealth consistent with Federal pipeline safety laws; (3) determined that Westover Property Management Company, L.P., d/b/a Westover Companies (“Westover”) is a pipeline operator who operates master meter systems as defined by Federal Pipeline Safety Law, 49 C.F.R. § 191.3; (4) and determined that seventeen (17) of Westover’s apartment complexes are master meter systems subject to the Commission’s jurisdiction.

On November 20, 2023, Westover served its Exceptions to the ALJ’s Recommended Decision.

Pursuant to the procedural schedule established in the October 31, 2023 Cover Letter for the Recommended Decision and in accordance with Commission regulations at Section 5.535, I&E now submits this Reply to Westover’s Exceptions.¹ For the reasons fully explained below, I&E respectfully requests that the Pennsylvania Public Utility Commission (“Commission”) generally deny Westover’s Exceptions and wholly affirm the ALJ’s Recommended Decision and the Joint Petition for Partial Settlement.

Pursuant to 52 Pa. Code § 1.33 and to avoid repeating arguments, I&E hereby incorporates its Main Brief and Reply Brief filed in this instant proceeding on July 3, 2023 and August 3, 2023, respectively.

¹ 52 Pa. Code § 5.535.

II. SUMMARY OF ARGUMENT

In short, Westover reiterates the arguments presented throughout the litigation of the Formal Complaint and Petition for Declaratory Order, and requests the Commission to completely overturn every legal analysis and determination carefully evaluated and articulated by the ALJ in the Recommended Decision. The Recommended Decision is supported by the stipulated facts of the Parties, and is legally bolstered by the applicable statutes, regulations, and legal interpretations. Accordingly, there is no basis for the Commission to overturn or modify the legal conclusions in the Recommended Decision. While I&E does agree with Westover's Exception 1 as it relates to Ordering Paragraphs modifying the terms of the Joint Petition for Partial Settlement, I&E maintains its position that the Recommended Decision correctly holds that the Commission retains jurisdiction and enforcement authority over Westover because Westover is a pipeline operator subject to the Gas and Hazardous liquids Pipelines Act (Act 127)² who operates master meter systems³ at seventeen (17) of its apartment complexes.

III. I&E REPLY EXCEPTIONS

A. **I&E Reply to Westover Exception 1: The Recommended Decision approved the Settlement Agreement without modification, but the Ordering Paragraphs modify the settlement.**

Westover notes that the Ordering Paragraphs in the Recommended Decision are slightly contradictory in that they approve the Joint Petition for Partial Settlement without modification but then impose deadlines within a specific period after the date of "a final Commission Order" or "this Order." I&E agrees that the language in the Ordering

² Gas and Hazardous liquids Pipelines Act (Act 127), 58 P.S. §§ 801.101–801.1101.

³ 49 CFR § 191.3.

Paragraphs is slightly inconsistent with the terms provided in the Joint Petition for Partial Settlement, and agrees that Ordering Paragraphs 7-10 of the Recommended Decision should be modified consistent with the settlement terms.

B. I&E Reply to Westover Exception 2: The ALJ correctly found that Act 127 applies to gas systems at apartment complexes located downstream from a natural gas distribution company.

In Exception 2, Westover reiterates its argument that Act 127 conflicts with the Construction Code⁴ and the International Fuel Gas Code,⁵ and that the General Assembly did not intend to give the regulation of fuel gas piping at buildings to the Commission, but rather to the local municipalities and the Department of Labor and Industry.⁶

The Recommended Decision already carefully reviewed Westover's arguments and correctly found that Federal law, as adopted by Pennsylvania under Act 127, preempts any other state or local regulation. The tenet of federal preemption⁷ dictates that Act 127, which adopts the federal pipeline safety laws,⁸ trumps any conflicting state law which stands as an obstacle to the accomplishment and execution of the purposes and objectives found in the federal Pipeline Safety Act.⁹ The Recommended Decision noted that the Construction Code was adopted in 1999 while Act 127 was enacted in 2011, thus the rules of statutory constructions dictate that Act 127, the statute latest in date of final enactment, shall prevail.¹⁰

⁴ 35 P.S. §§ 7210.101 *et seq.*

⁵ 35 Pa.C.S. § 7210.301; 34 Pa. Code § 403.21(a)(4).

⁶ Westover also makes an argument for the first time in its Exceptions that no court has found the Construction Code to be unconstitutional. The Recommended Decision did not make a determination or finding related to the constitutionality of the Construction Code, and thus is not an issue to be addressed in this matter. Rather, the Recommended Decision determined gas systems of a specific fact pattern which conflict with Federal safety laws are preempted.

⁷ A discussion related to federal preemption can be found in I&E's Reply Brief, pgs. 3-6 (filed August 3, 2023).

⁸ 58 P.S. § 801.302(a).

⁹ 49 U.S.C. §§ 60101-60143.

¹⁰ Recommended Decision, pg. 58.

The Recommended Decision also directly addressed Westover's arguments relating to the General Assembly's intent relating to Marcellus Shale. To this end, the Recommended Decision noted that if the intention behind Act 127 was to only regulate or address Marcellus Shale concerns, then Act 127 would have been limited to only those regulations which related to Marcellus Shale.¹¹ Rather, the General Assembly drafted Act 127 to adopt Federal safety laws beyond the scope of Marcellus Shale concerns.¹² Accordingly, the ALJ correctly found that Act 127 applies to gas systems at apartment complexes located downstream from a natural gas distribution company.

C. I&E Reply to Westover Exception 3: The ALJ correctly found that some of Westover's gas systems are master meter systems as defined in 49 CFR § 191.3.

In short, the ALJ correctly found that seventeen (17) of Westover's gas systems are master meter systems as defined by the Federal pipeline safety laws and regulations, and that Westover is a pipeline operator subject to the Commission's jurisdiction.

1. Westover's gas facilities are located within, but not limited to, a definable area.

Here, Westover argues that a single apartment building is not a definable area and that the Recommended Decision's reliance on the PHMSA interpretation letters is misguided. Notably, Westover provides the citation which supports the Recommended Decision in making its argument. The 2002 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

¹¹ Recommended Decision, pgs. 58-59.

¹² Recommended Decision, pgs. 58-59.

gas pipeline safety regulators for *safety regulation purposes*.”¹³ Thus, 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. Moreover, PHMSA interpretations issued since the 2002 Report show that the policy has evolved since 2002.

Furthermore, the Recommended Decision correctly found Westover’s interpretation of “within, but not limited to, a definable area” as illogical and not consistent with the plain reading of the definition of a master meter system.¹⁴ “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.¹⁵ 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. Accordingly, the

¹³ 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 (emphasis added).

¹⁴ Notably, PHMSA has issued interpretations finding an apartment complex, a housing development, and a mall complex to be master meter systems. PHMSA Interpretation PI-11-0014 (March 27, 2012) and (August 27, 2012); PHMSA Interpretation PI-01-0113 (June 25, 2001); PHMSA Interpretation PI-16-0012 (December 6, 2016).

¹⁵ Merriam-Webster Dictionary, <https://www.merriam-webster.com/dictionary/within>.

Recommended Decision's finding that seventeen (17) of Westover's apartment complexes are located within a definable area should not be disturbed.

2. Westover purchases gas for resale through a distribution system and supplies it to the ultimate consumer.¹⁶

Westover states that it excepts to the Recommended Decision's finding that the hybrid gas systems are master meter systems, but fails to provide any reasoning or argument to support this exception. Indeed, the Recommended Decision explains that, in accordance with PHMSA interpretation letters, the definition of master meter system is met where Westover consumes some of the gas and provides the remainder to the tenants because the tenants are the ultimate consumers of the gas.¹⁷ Accordingly, the Recommended Decision should not be modified.

3. A natural gas system that is exclusively or primarily comprised of interior piping satisfies the definition of a master meter system.

Westover again reiterates its position that gas piping located exclusively or primarily interiorly does not satisfy the definition of a master meter system. The Recommended Decision correctly found that Westover's arguments were unpersuasive and notably contradictory to the plain language of the definitions of master meter system, pipeline, pipeline facility, or pipeline operator which do not limit the application of or exclude interior piping.¹⁸ Additionally, the Recommended Decision noted that both I&E and Westover acknowledged that PHMSA interpretation letters have been issued since the 2002 Report which have transitioned away from the stance or policy that Section 191.3 implicitly

¹⁶ Please note that the numbering is not identical to the numbering provided in Westover's Exceptions as I&E is only addressing those sections which Westover excepted.

¹⁷ Recommended Decision, pgs. 83-84.

¹⁸ Recommended Decision, pg. 95.

excludes systems that are primarily or exclusively comprised of interior piping within a single building.¹⁹

Moreover, Westover's references to other states support the Recommended Decision's holding. Westover cites Ohio, Maryland, and New Jersey law to argue that those states exclude piping in a building and thus Pennsylvania should follow suit. What Westover fails to recognize is that those states have specific code or regulatory provisions which limit the applicability of a master meter system rather than utilizing the definition found in the Federal safety laws. Thus, if Ohio, Maryland, and New Jersey have enacted definitions or code sections which exclude or limit certain gas facilities from the definition of a master meter system in that state, then the logical result is that the federal definition of a master meter system includes those gas systems located within a building. Accordingly, the Recommended Decision's findings related to interior piping in a single building should not be disturbed.

4. An apartment complex which owns and actively uses a submeter, and which supplies the ultimate consumer who either purchases gas directly or through other means, such as rents, is dispositive of a master meter system.

Westover argues that the ALJ incorrectly established a simple rule to determine whether a gas system is a master meter system. However, this position is misguided and over-simplifies the ALJ's decision. In rendering reaching his conclusion, the ALJ noted that there are several elements which must be met for a gas system to be a master meter system, and then listed those elements.²⁰ Based upon the elements of a master meter system, the ALJ

¹⁹ Recommended Decision, pg. 96.

²⁰ Recommended Decision, pgs. 98-99.

correctly determined that the existence of an apartment complex owned and actively using sub-meters, where the apartment complexes supplies the ultimate customer who either purchases gas directly through a meter or other means, such as rents, is dispositive of a master meter system.²¹ Thus, the ALJ correctly applied each element of the definition of a master meter system in rendering this finding, and did not create a “simple rule.”

5. Westover distributes gas in or affecting interstate or foreign commerce.

The Recommended Decision correctly found that Westover’s gas facilities affect interstate commerce. Westover’s argument that the Recommended Decision went “too far” by following the Commission’s approval of the settlement in *Brookhaven*²² is misguided. While settlements generally are not precedential, the fact that the Commission approved the settlement is notable because the Commission would not have approved the settlement if it determined that it did not have jurisdiction over the gas system.²³

Moreover, while Westover attempts to further disparage PHMSA interpretations, the law, as articulated and explained in I&E’s Main Brief²⁴ and Reply Brief,²⁵ supports the finding that there is no question that every element of gas gathering, transmission, and distribution line is moving gas, which is either in or affecting interstate commerce. Accordingly, the Recommended Decision’s finding that Westover distributes gas in or affecting interstate or foreign commerce should not be disturbed.

²¹ Recommended Decision, pg. 99.

²² *Pennsylvania Public Utility Commission v. Brookhaven MHP Management LLC*, Docket No. C-2017-2613983 (Opinion and Order entered Aug. 23, 2018).

²³ *See generally Pennsylvania Public Utility Commission, Bureau of Investigation and Enforcement v. East Dunkard Water Authority*, Docket No. C-2021-3027615 (Opinion and Order entered November 1, 2023) (Commission rejected settlement for lack of Commission jurisdiction).

²⁴ I&E Main Brief, pgs. 47-50 (filed July 3, 2023).

²⁵ I&E Reply Brief, pgs. 14-16 (filed August 3, 2023).

IV. CONCLUSION

I&E respectfully requests that the Commission deny, with one exception, the Exceptions of Westover Property Management Company, L.P., d/b/a Westover Companies for the reasons discussed above. Specifically, I&E respectfully requests that the Commission grant Westover's Exception 1 as it relates to modifying the Ordering Paragraphs to be consistent with the Joint Petition for Partial Settlement, and deny Westover's Exception 2 and Exception 3(1)-(6).

Respectfully submitted,



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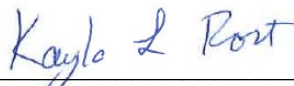
CERTIFICATE OF SERVICE

I hereby certify that I have this day, November 30, 2023, served a true copy of the foregoing **Bureau of Investigation and Enforcement’s Reply to the 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).

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