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June 9, 2014

The Honorable Rosemary Chiavetta  
Secretary  
Pennsylvania Public Utility Commission  
P.O. Box 3265  
Harrisburg, PA 17105-3265

Re: I&E v.Snyder Brothers, Inc., No. C-2014-2402746

Dear Secretary Chiavetta:

Enclosed is the Response of Snyder Brothers, Inc. to the recent filed Petition for Interlocutory Commission Review and Answer.

Please cause this matter to resolved as quickly as possible.

If your office has any questions feel free to contact me.

Respectfully submitted,

Thomas C. Reed  
Counsel for Snyder Brothers, Inc.

cc: Heidi Wushnuske, Esquire  
Kevin Moody, Esquire

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JUN 09 2014

PA PUBLIC UTILITY COMMISSION  
SECRETARY'S BUREAU

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Pennsylvania Public Utility	:	
Commission, Bureau of	:	
Investigation and Enforcement	:	C-2014-3402746
	:	
v.	:	
	:	
Snyder Brothers, Inc.	:	

**RESPONSE OF SNYDER BROTHER'S INC. TO PETITION FOR INTERLOCUTORY  
COMMISSION REVIEW AND ANSWER TO A MATERIAL QUESTION**

Pursuant to 52 Pa.Code § 5.503(b), Snyder Brothers Inc. ("SBI"), by and through its undersigned counsel, hereby files the Response to Petition for Interlocutory Commission Review and Answer and in support thereof states:

**Summary of Response**

For the reasons discussed in more detail hereafter, the Petition should be summarily denied. The Petition fails to meet the standard for granting such Petitions set forth in 52 Pa.Code § 5.302 in that the Petition does not, as required by 52 Pa. Code §5.302, articulate any basis, let alone a "compelling" basis as to how or why answering the question set forth in the Petition will expedite these proceedings or "prevent" substantial prejudice.

Furthermore, granting the petition will likely prejudice the rights of SBI and raise serious issues of procedural due process in the circumstances present here because the Public Utility Commission (the "Commission"), as opposed to the Administrative Law Judge to whom this issue should be first presented, has already apparently "answered" the question presented in a manner adverse to SBI.

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### **Discussion**

52 P.S. § 5.302 provides that a Petition for Interlocutory Commission Review and Answer must set forth “compelling reasons why interlocutory review will prevent substantial prejudice or expedite the conduct of the proceeding.” *See also, Berkery v. PECO Engery Company*, 2011 Pa.PUC LEXIS 1065 \* 9-10 (Opinion and Order 1/14/2011) (C-2010-2170223).

The Petition filed by the Bureau of Investigation and Enforcement (“BI&E”) fails to meet this standard.

### **Prevention of Substantial Prejudice**

The Petition is utterly devoid of any allegations as to why granting this Petition will “prevent substantial prejudice” to anyone, and for this reason alone it should be denied.

Indeed, and to the contrary, the Petition should also be denied because granting the Petition will likely cause substantial prejudice to SBI and intervenor, Pennsylvania Independent Oil and Gas Association (“PIOGA”), in that the question which the Petition “asks” the Commission to answer has, apparently, already been “answered” by the Commission in a manner adverse to them. *See, e. g.*, Order dated October 17, 2013, where the Commission announced its intention to propose a regulation interpreting the statutory definition of the term “stripper well,” set forth in 59 Pa.C.S. § 2301, in precisely same manner as the BI&E.

Therefore, granting this petition will likely deprive SBI and PIOGA of the opportunity to present to an independent administrative law judge their evidence and arguments (of which the discussion which follows is a non-exhaustive summary) as to why the interpretation of the term “stripper well” being advanced by the BI&E is inconsistent with the language of Section 2301 and violates the Rules of Statutory Construction.

The interpretation of statutory language in Pennsylvania is governed by the provisions of 1 Pa.C.S. Chapter 19, which sets out various rules of statutory construction. 1 Pa.C.S. § 1901.

One such rule, clearly ignored by BI&E's interpretation of the term "stripper well," is that the words in a statute are to be given their common and approved usage. 1 Pa.C.S. § 1903.

The term "stripper well" is defined by the General Assembly, in pertinent part, as "an unconventional gas well *incapable of producing* more than 90,000 cubic feet of gas per day *during any calendar month...*" (emphasis added). The BI&E, however, contends that a well which produces 90,000 cubic feet of gas per day in any calendar month cannot be considered a "stripper well" because, by virtue of having produced more than 90,000 cubic feet per day in any month the well is "obviously" capable of producing 90,000 cubic feet per day, presumably for the entire reporting period. Petition at unnumbered page 3.<sup>1</sup> Stated another way, BI&E defines this term as "an unconventional gas well that is *incapable of producing* more than 90,000 cubic feet of gas per day during *each calendar month of the year*."

Regardless of how BI&E's position is articulated, it turns the English language on its head to suggest that "*incapable*" means "**capable**" or that "*any calendar month*" means "**every or each** calendar month."

BI&E's interpretation also suffers from at least two other problems. First, it does not give each of the words used in the statute meaning. Specifically, BI&E does not account for the words "incapable" or "...any calendar month." Secondly, BI&E's interpretation assumes, without providing any factual basis, that a well that has produced more than 90,000 cubic feet per day of gas in any given month must, perforce, be capable of producing more than that amount of gas in every month. Thus, assuming, but not conceding, BI&E's interpretation is correct, should the

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<sup>1</sup> It should be noted that BI&E's contention stops with the language "90,000mcf average per day," and does not, despite statutory language which does, set forth any time frame for the average.

Commission answer the question presented as BI&E suggests it should, SBI and PIOGA will be denied, to its prejudice, the opportunity to introduce facts contravening BI&E's "obvious" assumption.

Another well settled rule of construction is that when statutory language is clear and unambiguous, resort to other methods of statutory interpretation (such as suggested by the BI&E) is not required; indeed they are NOT to be considered. 1 Pa.C.S. § 1921(b), *Herd Chiropractic Clinic, P.C. v. State Farm Mut. Auto. Ins. Co.*, 64 A.3d 1058, 2013 Pa. LEXIS 304 (Pa 2013), ("When the words of a statute are clear and free from all ambiguity, [\*912] the letter of it is not to be disregarded under the pretext of pursuing its spirit.").

The General Assembly's definition of the term "stripper well" is clear and concise. The statute articulates the relevant daily production needed to be deemed a stripper well in terms of a daily average production in *any* (not each) month. There is absolutely nothing in the statutory language which suggests that to be considered a "stripper well" a well must produce a daily average of gas less than a certain amount for every month of the year. The language of Section 2301 defining "Stripper well" does not say such a well is, as suggested by BI&E (and apparently the Commission), "an unconventional gas well that is in *incapable of producing* more than 90,000 cubic feet of gas per day *during each calendar month of the year.*" The clear and unambiguous language of the statutory definition of "stripper well" defines it in terms of production amounts in any month, not some longer period of time.

Despite the above rules of construction, BI&E necessarily is suggesting there is sufficient ambiguity in the statutory language to necessitate resort to speculating as to legislative intent. Specifically, at unnumbered page 3 of the Petition BI&E argues that "a well that produces more than 90,000 mcf (sic) average per day during a calendar year is obviously capable of producing

more than 90,000 mcf (sic) average per day and is therefore not a “stripper well,” because to conclude otherwise would disregard “legislative intent.”

Initially, it should be noted that where the statutory language is clear and unambiguous, the statutory language is, itself, the best indication of legislative intent. 1 Pa. C. S. §1921(b). Only if the language is ambiguous are other interpretive devices to be used to ascertain “legislative intent.” *Commonwealth v. Raban*, 85 A.3d 467; 2014 Pa. LEXIS 414 (Pa. 2014) In the present case, BI&E has not articulated any basis upon which the Commission should seek to ascertain legislative intent, beyond the plain language of the statute, let alone for determining what that intent, other than as articulated in the plain language of the statute, is.

For example, if the BE&I is suggesting that a gas well which produces in one month a daily average of more than 90,000 cubic feet of gas this fact must be presumed to be “incapable” of producing less than this amount in any other month, it offers no factual basis for such a conclusion. Moreover, what of a well which produced on average just slightly over 90,000 cubic feet of gas per day in January, but thereafter failed to produce more than this amount on a daily basis for the rest of the year? The anomalous production in January does not “prove” anything about the well’s “capability” in any other month and there is certainly nothing in the current record to suggest otherwise.

Indeed, operators like SBI drill wells to maximize their production and have no reason to reduce production. If they report to the Commission that Well X only produced 79,000 or 88,000 cubic feet of gas per day on average in, for example, February of 2012, this adequately documents that Well X was incapable of producing more than 90,000 cubic feet of gas per day in February 2012, and that Well X is a “stripper well,” not subject to any Act 13 fees.

Finally, because the imposition of an impact fee is the imposition of a tax and the term “stripper well” is part of the definition of what is “taxable,” the statutory language at issue must, if any “ambiguity exists” (which, as noted, is not the case here) be strictly construed in favor of the impact fee payor namely SBI. *Building Indus. Ass’n v. Manheim Twp.*, 710 A.2d 141 (Pa. Commw. Ct. 1998). As the Commonwealth Court stated in *Building Indus. Ass’n.*, “[A]n impact fee is a government charge or fee used to generate revenue; it is, therefore, a tax.” Consequently, because “impact fees” are “taxes” the language of the statute imposing or exempting the imposition thereof must be strictly construed, 1 Pa. C. S. A. §1928(b)(3). Accordingly, all reasonable doubt as to the meaning of the language must be construed in favor of the taxpayer and against the assessing or taxing body. *In re Estate of Ross*, 815 A.2d 30, 2002 Pa. Commw. LEXIS 1005 (Pa. Commw. Ct. 2002), app. Den. 573 Pa. 713, 827 A.2d 1203, 2003 Pa. LEXIS 1265 (2003).

Most assuredly, the interpretation given Section 2301 by the BI&E and, it seems the Commission, is far from a “strict” reading of that section’s definition of the term “stripper well” and, without a doubt, fails to resolve any, let alone all, reasonable doubt as to the meaning of that definition in favor of SBI, the taxpayer, and against the taxing body.

The Petition, should also be denied because it is, in essence, a request by a “prosecutor” (the BE&E) to the very agency for which it works (the Commission) to instruct an independent ALJ to find SBI “guilty” in direct convention of the Supreme Court of Pennsylvania’s decision in *Lyness v. State Board of Medicine*, 605 A.2d 1204 (Pa. 1992).

Moreover, if the petition is accepted, and as discussed above, it is likely SBI will be deprived of the right to present its factual and legal arguments as to the proper interpretation of the statutory term “stripper well” to an independent administrative law judge which, SBI

submits, would violate its rights to due process of law guaranteed by the Pennsylvania Constitution and the Constitution of the United States.

### **Expediting the Proceedings**

Alternatively, Petitions for Interlocutory Commission Review and Answer are required, by 52 Pa. Code § 5.503, to set for “compelling reasons” why granting such a petition will “expedite the conduct of the proceedings.” The Petition in this case is devoid of *any* allegations that granting the Petition will expedite the conduct of the proceedings, and for this additional reason the Petition should be denied.

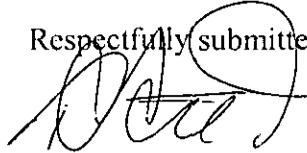
Indeed, granting the Petition will not, in fact, “expedite” these proceedings because even if the Commission were to “instruct” an otherwise independent administrative law judge to find SBI “guilty,” other issues would remain to be resolved including legal and factual issues as to whether, in the context of this matter, “statutory penalties and interest” and a “civil penalty” are properly due and owing, issues on which a recent deposition of a Fiscal Bureau employee focused.

Instead of filing the Petition, which has the potential to delay, not expedite, these proceedings, the BI&E should have filed a Motion for Partial Summary Judgment with the presiding ALJ (the pre-hearing order in this case provides that such motions can be filed and set a time frame for doing so) and sought the very same “answer” it now asks be provided by the Commission in about the same time frame. Indeed, the BI&E could easily have filed such a motion long before it filed this Petition.

**Conclusion**

For the reasons set forth in herein SBI respectfully requests the Commission to deny the Petition for Interlocutory Commission Review and Answer. Alternatively, if it grants this Petition, SBI requests that it be afforded a full and adequate opportunity to address fully the merits of the question as framed by the BI&E.

Respectfully submitted,



June 9, 2014

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**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing was served upon the persons listed below this 9th day of June, 2014 in the manner indicated:

SERVICE BY FIRST CLASS MAIL ADDRESSED TO:

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AND VIA E-MAIL TO Ms. Wushinske and Mr. Moody.

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Dated: June 9, 2014

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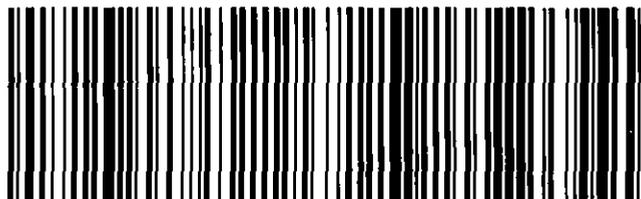
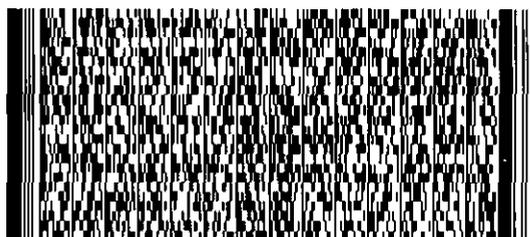
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