



COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA PUBLIC UTILITY COMMISSION
P.O. BOX 3265, HARRISBURG, PA 17105-3265

IN REPLY PLEASE
REFER TO OUR FILE

June 17, 2014

Rosemary Chiavetta
Pa. Public Utility Commission
2nd Floor, 400 North Street
P.O. Box 3265
Harrisburg, PA 17105

Re: Pennsylvania Public Utility Commission, Bureau of Investigation and
Enforcement v. Snyder Brothers, Inc.; Docket No. C-2014-2402746

Dear Secretary Chiavetta:

Pursuant to the provisions of 52 Pa. Code § 5.302, please accept for filing the Bureau of Investigation and Enforcement's Brief in Support of its Petition for Interlocutory Review and Answer to a Material Question in the above referenced case. Copies have been served on the parties of record in accordance with the Certificate of Service.

If you have any questions on this matter, please call me at 717-214-9594.

Sincerely,

Heidi L. Wushinske
Prosecuting Attorney
Attorney ID No. 93792

Enclosures

cc: As per Certificate of Service

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**BEFORE THE PENNSYLVANIA
PUBLIC UTILITY COMMISSION**

Pennsylvania Public Utility Commission :
Bureau of Investigation and Enforcement :
 :
 :
 v. : **Docket No. C-2014-2402746**
 :
 :
Snyder Brothers, Inc. :

**COMPLAINANT PENNSYLVANIA PUBLIC
UTILITY COMMISSION'S BUREAU OF INVESTIGATION AND
ENFORCEMENT'S BRIEF IN SUPPORT OF ITS PETITION FOR
INTERLOCUTORY COMMISSION REVIEW AND ANSWER TO A MATERIAL
QUESTION**

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Introduction

Pennsylvania Public Utility Commission's ("Commission") Bureau of Investigation and Enforcement ("I&E") submits this brief in support of its Petition for Interlocutory Review and Answer to Material Question filed pursuant to 52 Pa. Code § 5.302 on June 4, 2014.

Material Question

I&E asks the Commission to review and answer, on an interlocutory basis, the following material question:

Whether an unconventional gas well that produces more than 90,000 mcf average per day in any given month during a calendar year is properly subject to the impact fees and administrative charges applicable to said well under Act 13?

Suggested Answer: Yes

Discussion

A. The Commission Should Accept I&E's Petition

1. The Definition of "Stripper Well" is a Material Question The Review of Which Will Expedite the Conduct of this Proceeding

The Commission's regulations permit any party to file a petition requesting Commission review and answer to a material question that has arisen or is likely to arise. 52 Pa. Code § 5.302(a).¹ Interlocutory review is proper where it will prevent substantial prejudice *or* expedite the conduct of the proceeding. 52 Pa. Code § 5.302(a) (emphasis added). Because the current proceeding is essentially a legal question without material facts relevant to it in dispute,² Commission review and answer to the material question presented by I&E would greatly expedite the conduct of this proceeding.

The definition of "stripper well" is a legal question that is material to the outcome of the proceeding currently pending before Administrative Law Judge ("ALJ") David A. Salapa at C-2014-2402746. In their Prehearing documents, both Snyder Brothers and I&E asserted that the definition of "stripper well" is the material question at issue in this case. *See Prehearing Statement of Snyder Brothers, Inc. Submitted Pursuant to an Order Dated March 20, 2014 (Snyder Brothers' Prehearing Statement)*, p. 3; *Prehearing Conference Memorandum of the Bureau of Investigation and Enforcement*, p.

3. Specifically, Snyder Brothers stated:

[t]he primary issue in this matter is whether the bureau of the PUC charged with administering Act 13's "impact" and "administrative" fee provisions has

¹ Respondent's argument that I&E's petition is in violation of *Lyness* is erroneous. Respondent is effectively arguing that requests for interlocutory review cannot be made by I&E. *Lyness v. State Board of Medicine*, 605 A.2d 1204 (Pa. 1992). This is not what the Commission's regulations say. The regulations do not restrict certain parties, but allow any party to file a petition for interlocutory Commission review. 52 Pa. Code § 5.302(a)

² I&E notes that the parties have agreed on a stipulation of facts, which I&E signed on June 10, 2014.

properly interpreted the statutory terms “vertical well” and “stripper well.” In other words, are the “unconventional gas wells” which SBI drilled or operated for the relevant time periods and which were unable, and did not, produce more than 90,000 mcf per day in one calendar month of the reporting period “stripper wells” and, thus, not “vertical wells” subject to payment of Act 13 “fees?”

Snyder Brothers’ Prehearing Statement at 3. I&E agrees with Snyder Brothers that the definition of “stripper well” is the primary issue in this matter.

Because the interpretation of “stripper well” is the primary issue in this matter and is a question of law, it would greatly expedite this proceeding for the Commission to answer this material question. This alone is enough to grant I&E’s petition under the Commission’s regulations. 52 Pa. Code § 5.302. A showing of prevention of substantial prejudice is not required. Moreover, a petition for interlocutory Commission review and answer to material question is proper when the review will prevent substantial prejudice *or* expedite the proceeding. In this case, the proceeding will be expedited by the Commission answering a material question of law and permitting the parties to proceed with presentation of their factual evidence.

2. Granting This Petition Will Not Deprive Snyder Brothers Due Process

An answer to the material question posed by I&E would not deprive Snyder Brothers of any due process. The Commission’s regulations provide all parties with the chance to present their arguments in support of or against the material question posed. 52 Pa. Code § 5.303. Furthermore, the parties still have opportunities to present their factual evidence to the ALJ once the material question of legal interpretation has been answered. It should also be noted that in matters before the Commission, it is the Commission that

is the ultimate finder of fact and decision maker, not the ALJ. *East Goshen Township v. Pa. Pub. Utility Comm'n*, 486 A.2d 550 (1985).

Snyder Brothers' argument that should the petition be granted, its due process rights will be violated because the Commission, as opposed to the ALJ, has already "answered" the question adversely to it is without merit. As support for its position, Snyder Brothers cites the Commission's Proposed Rulemaking Order. *Act 13 of 2012-Implementation of Unconventional Gas Well Impact Fee Act Proposed Rulemaking Order (Proposed Rulemaking Order)*, Docket No. M-2012-2288561 (Order entered October 17, 2013). If the Commission accepts this argument, it could never subsequently rule on a question of statutory interpretation for which it had already provided guidance, such as an implementation order, clarification order, or proposed rulemaking order. Such a result is neither accurate nor practical.

B. The Commission's Definition of "Stripper Well" is Correct as a Matter of Law

The Commission has already clearly stated that a vertical gas well derives its status based on production levels, which are determined per day during any calendar month. If a vertical gas well's production levels qualify it as a vertical gas well during any calendar month in a calendar year, that well will be subject to Act 13's impact fee. *See Reconsideration Order Regarding Chapter 13 (Reconsideration Order)*, Docket No. M-2012-2288561 (Order entered July 19, 2012); *Proposed Rulemaking Order*, 58 Pa. C.S. §§ 2301, 2302(f).

In other words, if an unconventional gas well produces more than 90,000 mcf average per day in any given month during a calendar year, it does not qualify as a stripper well.

Rather, such a well is a vertical well properly subject to the impact fees and administrative charges under Act 13.

1. The Legal Standard

This interpretation is consistent with Pennsylvania case law and the rules of statutory construction, the object of which is “to ascertain and effectuate the General Assembly’s intent.” *Mercury Trucking, Inc. v. Pa. Pub. Utility Comm’n*, 55 A. 3d 1056, 1067 (Pa. 2012); 1 Pa. C.S. § 1901. While the plain language of a statute is usually the best indicator of legislative intent, there are important exceptions to this rule. First, the General Assembly “intends to favor the public interest as against any private interest.” 1 Pa. C.S. § 1922(3), (5). Second, the General Assembly “does not intend a result that is absurd, impossible or execution, or unreasonable.” *Commonwealth v. Shiffler*, 879 A.2d 185, 189-90 (Pa. 2005) (citing 1 Pa. C.S. § 1922(1), (2)). It is necessary to look beyond the language of the statute if the plain meaning would lead to such results. *Mercury Trucking* at 1068.

Likewise, if the words of a statute are unclear or ambiguous, Pennsylvania law directs the interpreter to considerations other than the plain language to discern legislative intent. *Id.* (citing *Commonwealth v. Garzone*, 34 A.3d 67, 75 (Pa. 2012)). These considerations include: the occasion and necessity for the statute, the circumstances under which the statute was enacted; the mischief to be remedied; the object to be attained; the

consequences of a particular interpretation; the contemporaneous legislative history; and the legislative and administrative interpretations of such statute. 1 Pa. C.S. § 1921(c).

2. Statutory Interpretation Supports I&E's Definition of "Stripper Well"

In this case the statute is not completely clear or unambiguous and, therefore, requires some analysis and interpretation. This necessitates an examination of the factors set forth in Pennsylvania's rules of statutory construction. 1 Pa. C.S. § 1921(c). In particular, the meaning of the word "any" in Act 13's definition of "stripper well" is unclear. This is evidenced simply by looking at the dictionary definition of "any." Merriam-Webster defines "any" as "one or some indiscriminately of whatever kind: a: one or another taken at random, b: every." <http://www.merriam-webster.com/dictionary/any?show=0&t=1402491607> (last visited June 16, 2014). The multiple definitions of "any" render Act 13's definition of "stripper well" ambiguous when applied to a situation such as Snyder Brothers, where wells are producing 90,000 or less mcf average per day in some calendar months in a year.

Further evidence of the ambiguity of interpreting Act 13's definition of "stripper well" is the multiple questions and requests for clarification that the Commission received during the implementation of its responsibilities under Act 13. The Commission received multiple questions from various producers regarding how to determine which vertical wells qualified as stripper wells. Specifically, the Commission received at least six inquiries from producers regarding the classification of stripper wells, and addressed this issue specifically in its *Reconsideration Order* (clarifying that if a vertical gas well qualifies as such by producing gas at a level greater than that of a stripper well in any

calendar month in a calendar year, that well will be subject to the impact fee) and *Implementation Order* (explaining that calculations to determine stripper well status are to be based on a well's production per day in a calendar month). *See also Hess Dep.* p. 93. If the statute was free from ambiguity, so many questions would not have arisen and would not have necessitated Commission Orders for clarification. *See Reconsideration Order* at 4; *Implementation Order Regarding Chapter 23*, p. 7, Docket No. M-2012-2288561 (Order entered May 10, 2012).

Because the definition of "stripper well" in Act 13 is not free from ambiguity, it is necessary to look to other considerations, such as: the occasion and necessity for the statute; the circumstances under which the statute was enacted; the mischief to be remedied; the object to be attained; the consequences of a particular interpretation; the contemporaneous legislative history; and the legislative and administrative interpretations of such statute. 1 Pa. C.S. § 1921(c). While, all of these considerations support the interpretation of "stripper well" advocated by I&E, the most pertinent will be discussed below.

First, an examination of the purpose and necessity for the statute supports the definition of stripper well advocated by I&E. Act 13 was enacted to *inter alia* provide for an unconventional gas well fee, distribution of fees and transfers, penalties, and civil penalties. Because one of the primary purposes of Act 13 is to collect impact fees and provide disbursements to the municipalities affected by unconventional gas wells, an interpretation that greatly reduces the amount of these fees and distributions would be at

odds with the purpose of the statute. Accepting Snyder Brothers' interpretation of "stripper well" would do just that.

Second, the clear objective to be attained by Act 13, as it relates to the definition of stripper well, is to provide relief to the municipalities affected by unconventional gas wells. This objective is not attained by exempting an active, producing unconventional well from paying impact fees merely because its production falls below 90,000 mcf in one calendar month out of twelve. The definition that Snyder Brothers puts forth would create a result that is absurd by allowing a company that produces over 90,000 mcf of gas per day in eleven months of the year but falls below in just one month, to avoid paying any impact fee at all. One can only imagine the "scamming potential" that such an interpretation could encourage. It cannot be presumed that the General Assembly intended to produce such an absurd result when it constructed a statute designed to collect and distribute impact fees from unconventional wells. It is necessary to look beyond the language of the statute if the plain meaning would lead to a result that favors private interests over the public or creates an absurd result. *Mercury Trucking* at 1068. A review of the objective to be attained by Act 13 supports I&E's definition of "stripper well."

Third, the consequence of accepting Snyder Brothers' interpretation of "stripper well" would be that the municipalities affected by unconventional gas wells are deprived of funds distributed from impact fees. Depriving the affected municipalities of funds is clearly not the legislative intent. I&E's definition supports the clearly articulated legislative goals of the statute. In fact, accepting the definition of "stripper well" advocated by Snyder Brothers would create a result that favors a private interest over the

public interest, by allowing a private entity to withhold impact fees that the statute intended to be dispersed to the affected municipalities. This is in contradiction to Pennsylvania's rules of statutory construction. 1 Pa. C.S. § 1922(3),(5).

Fourth, the legislative history supports the definition of "stripper well" advocated by I&E. The General Assembly originally defined "stripper well" as "a gas well incapable of producing more than 90,000 cubic feet of gas per day during *a* calendar month, including production from all zones and multilateral well bores at a single well, without regard to whether the production is separately metered." General Assembly House Bill 1950 Session of 2011 Printer's No. 2837 (emphasis added).

If the General Assembly had intended the definition of "stripper well" advocated by Snyder Brothers, that a well qualifies as a stripper well if it is incapable of producing more than 90,000 cubic feet of gas per day during one calendar month in a calendar year, it would have simply left the word "a" in the definition. Instead, the General Assembly changed the word "a" to "any," evidencing its intention that a well is not a stripper well by virtue of producing 90,000 or less mcf in *a* calendar month in a year, but qualifies only when its production falls below these values in each calendar month.

Fifth, the administrative interpretations of "stripper well" support I&E's definition.³ The Commission has clearly stated its interpretation of "stripper well" in both its *Reconsideration Order* and *Proposed Rulemaking Order*, stating that if a vertical gas well's production levels qualify it as a vertical gas well during any calendar month in

³ I&E is unaware of any legislative interpretations of "stripper well." However, as stated previously, the legislature clearly intended for stripper well status to be granted only when production is 90,000 mcf or less in each calendar month in a calendar year.

a calendar year, that well will be subject to Act 13's impact fee. *See Reconsideration Order; Proposed Rulemaking Order*, 58 Pa. C.S. §§ 2301, 2302(f). The Commission is the administrative agency tasked with implementing Chapter 23 of Act 13 and its administrative interpretation of "stripper well" clearly supports the definition asserted by I&E. Since Snyder Brothers and PIOGA do not like this interpretation or insight, they are now attempting to ignore it and create their own convoluted definitions.

Finally, I&E agrees with Snyder Brothers that there are factual issues to be determined in this case, specifically regarding the civil penalty requested in I&E's complaint. I&E does not propose to deprive Snyder Brothers of the opportunity to present its evidence and testimony regarding the proposed civil penalty or any other factual issues. However, it is important to note that the material question presented by I&E is a question of law. Therefore, it is proper and appropriate for the Commission to accept I&E's petition and answer the material question in the affirmative for the reasons stated above.

WHEREFORE, for the foregoing reasons, I&E respectfully requests that the Commission grant this Petition for Interlocutory Commission review and answer the material question affirmatively.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that I am this day serving the foregoing Brief in Support of Petition for Interlocutory Commission Review and Answer to a Material Question in accordance with the requirements of 52 Pa. Code § 1.54 *et seq.* (relating to service by a participant).

Notification by first class mail addressed as follows:

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