

BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Pennsylvania Public Utility :  
Commission, Bureau of :  
Investigation and Enforcement : C-2014-2402746  
 :  
v. :  
 :  
Snyder Brothers, Inc. :

---

**BRIEF OF  
PENNSYLVANIA INDEPENDENT OIL & GAS ASSOCIATION  
IN SUPPORT OF JOINT REQUEST FOR  
INTERLOCUTORY REVIEW AND ANSWERS TO MATERIAL QUESTIONS**

---

Kevin J. Moody, Esquire  
General Counsel  
Pennsylvania Independent Oil & Gas Association  
212 Locust Street, Suite 300  
Harrisburg, PA 17101-1510  
717-234-8525

Date: September 22, 2014

## I. INTRODUCTION AND QUESTIONS PRESENTED

The Pennsylvania Independent Oil & Gas Association (PIOGA) is the comprehensive trade association representing oil and natural gas interests throughout Pennsylvania.<sup>1</sup> Some PIOGA members are involved in producing natural gas from unconventional formations and are therefore subject to the local impact fee imposed by Act 13 of 2012. PIOGA has provided comments concerning the Commission's implementation of the local impact fee provisions of Chapter 23 of Act 13. By order dated March 14, 2014, Administrative Law Judge (ALJ) David A. Salapa granted PIOGA's petition to intervene in this prosecution against PIOGA member Snyder Brothers, Inc. (SBI).

This is the second time this issue – the proper meaning of the “stripper well” definition in Act 13 – has been presented to the Commission on interlocutory review. PIOGA opposed the first review requested by the Bureau of Investigation and Enforcement (BI&E) in deference to the litigation process established by the ALJ. The Commission declined to answer the single material question the first time and, following the return of the matter, the ALJ denied SBI's motion for summary judgment. The ALJ's denial answered the two material questions presented by this joint request by all the parties in this prosecution:

1. Whether an unconventional gas well which produces less than a daily average of 90,000 cubic feet of gas in only one month of a calendar year is a stripper well within the meaning of that term as set forth in 58 Pa. C.S § 2301, and not subject to the impact fee for that year?
2. Whether Act 13 impact fees are fees or “taxes?”

There are the compelling reasons why the Commission should grant interlocutory review at this time. As stated in the joint request, resolving the controlling legal issue in this matter at this

---

<sup>1</sup> Effective April 1, 2010, the Pennsylvania Oil and Gas Association (POGAM) merged into the Independent Oil and Gas Association of Pennsylvania (IOGA of PA) and the name of the organization changed to Pennsylvania Independent Oil & Gas Association (PIOGA).

point may obviate the need for further proceedings before the ALJ and thus expedite a final outcome of this matter. In addition, resolving the controlling legal issue now will expedite judicial review of the matter, if necessary. Expediting final resolution of this legal issue is necessary to provide certainty before the next annual impact fee payments are due April 1, 2015. Accordingly, the Commission's granting this joint request for interlocutory review is fully supported by and consistent with the requirements of 52 Pa. Code § 5.302(a).

In accordance with 52 Pa. Code § 5.302(b), PIOGA submits this brief in support of the plain meaning of the word "any" in the statutory stripper well definition that the Commission has already determined – correctly in PIOGA's view – means "one".

So even if there was ambiguity in the meaning of the word "any" in the stripper well definition – and PIOGA asserts there is none – the Commission has resolved the ambiguity in favor of the position of PIOGA and SBI. Thus, there is no reason to resort to statutory construction and answer the second question presented.

However, if statutory construction is necessary, proper application of the rules requires an affirmative answer to Question No. 2 above and produces the same result:

An unconventional gas well that produces less than a daily average of 90,000 cubic feet of gas in any – meaning one – month of a calendar year is a stripper well as defined in 58 Pa. C.S § 2301 and is not subject to the impact fee for that year.

## **II. ARGUMENT**

### **A. The Commission has correctly interpreted the word "any" in the stripper well definition to mean "one".**

As stated above, the Commission has already interpreted the word "any" in stripper well definition to mean "one" and thus has answered Question No. 1 above in the affirmative:

In order for the Commission to determine whether a vertical gas well is subject to the impact fee, producers must verify certain production

information for the corresponding reporting year to the Commission to ensure that a particular well qualifies as a vertical gas well and is therefore subject to the fee. *July 19, 2012 Reconsideration Order* at 5. All vertical gas wells on the Department of Environmental Protection’s (DEP) spud list as of December 31 of each year will be subject to the fee for that year unless the producer verifies to the Commission that a particular well did not produce natural gas in quantities greater than that of a stripper well *during any calendar month* in the reporting year. *Id.* This means that even if a vertical gas well produces natural gas in quantities greater than that of a stripper well in only one month of a calendar year, that vertical well will be subject to the fee for that year. *Id.* Producers must verify on their annual producer report forms filed with the Commission, by April 1 of each year, certain production level information for all vertical gas wells for which a fee is not due. *Id.*<sup>2</sup>

The Commission’s interpretation of the word “any” to mean “one” is correct under the fundamental rules of statutory construction: (i) “The object of all interpretation and construction of statutes is to ascertain and effectuate the intention of the General Assembly.” 1 Pa. C.S. § 1921(a); (ii) Words in a statute shall be construed according to their common and approved usage. 1 Pa. C.S. § 1903; (iii) “The clearest indication of legislative intent is generally the plain language of a statute.” *Walker v. Eleby*, 842 A.2d 389, 400 (Pa. 2004); and (iv) when statutory language is clear, resort to other methods of statutory construction is not to be considered. 1 Pa. C.S. § 1921(b),(c).<sup>3</sup>

The primary common and approved usage, or plain and ordinary meaning, of the word “any” is “one”, not “every” as I&E suggests:

any—adjective \ ' e-nē\—used to indicate a person or thing that is not particular or specific

---

<sup>2</sup> *Act 13 of 2012 – Implementation of Unconventional Gas Well Impact Fee Act; Chapter 23*, Docket No. L-2013-2375551 (Order entered October 17, 2013) (*Impact Fee NOPR*) at 8 (footnotes omitted; underline emphasis added); *see proposed* § 131.3(c)(3)(i).

<sup>3</sup> *Also, Guinn v. Alburdis Fire Co.*, 614 A.2d 218, 220 (Pa. 1992) (the object of all interpretation and construction of statutes is to ascertain and effectuate the intention of the General Assembly; the best indicator of legislative intent is the plain language of the statute); *Sphere Drake Ins. Co. v. Phila. Gas Works*, 782 A.2d 510, 513 (Pa. 2001) (when language of statute is clear and unambiguous, it must be given effect in accordance with its plain and common meaning) (citations omitted).

1 : one or some indiscriminately of whatever kind:

*a* : one or another taken at random <ask *any* man you meet>

*b* : EVERY —used to indicate one selected without restriction <*any* child would know that><sup>4</sup>

Even the meaning of “any” as “every” – in the context in which the word “any” is used in the stripper well definition – is “used to indicate one”. If the General Assembly had intended to base stripper well status on average daily production of less than 90,000 cubic feet of gas in “every” month of the calendar year, as I&E suggests, rather than in “any” or “one” month of the calendar year, the General Assembly would have used the more definite word “every” **that in no context means or implies “one” in the way “any” does:**

ev·ery—adjective \ 'ev-rē\ : including each person or thing in a group or series —used to describe how often some repeated activity, event, etc., happens or is done

—used to describe how far apart the things in a series of things are placed from each other

1 *a* : being each individual or part of a group without exception

*b* : being each in a series or succession <*every* few days> <*every* once in a while><sup>5</sup>

While PIOGA disagrees with I&E’s claim that the relatively few producer inquiries about how the Commission intended to initially interpret the stripper well definition shows that the definition is ambiguous, the Commission has resolved the alleged ambiguity by determining that the phrase “any calendar month” in the stripper well definition means “one calendar month”.

**B. The Commission has incorrectly implemented its correct interpretation of the word “any”.**

The real issue in this prosecution is **not** the proper interpretation of the word “any” in the stripper well definition – it is the Commission’s **implementation** of its correct interpretation of

---

<sup>4</sup> Merriam-Webster online dictionary, <http://www.merriam-webster.com/dictionary/any> (emphasis added), 9/22/14.

<sup>5</sup> Merriam-Webster online dictionary, <http://www.merriam-webster.com/dictionary/every>, 9/22/14.

this word. The Commission’s implementation incorrectly focuses on the “vertical gas well” definition – which does not contain the word “any” – rather than on the “stripper well” definition that does contain the word “any”:

Vertical gas well. An unconventional gas well which utilizes hydraulic fracture treatment through a single vertical well bore and produces natural gas in quantities greater than that of a stripper well.

Stripper well. An unconventional gas well incapable of producing more than 90,000 cubic feet of gas per day during any calendar month, including production from all zones and multi-lateral well bores at a single well, without regard to whether the production is separately metered. (emphasis added).<sup>6</sup>

This erroneous focus is shown by the Commission’s previous determination referenced in the portion of the *Impact Fee NOPR* quoted above:

As a final observation on our treatment of vertical gas wells, we note that a vertical gas well derives its status based on production levels. Those production levels are determined per day during any calendar month. If a vertical gas well qualifies as such [that is, qualifies as a “vertical gas well” rather than qualifies as a “stripper well”], via production levels, during any calendar month in a calendar year, that well will be subject to the impact fee. 58 Pa.C.S. §§ 2301, 2302(f).<sup>7</sup>

This erroneous focus is also shown by the first material question presented in this matter by BI&E:

Whether an unconventional gas well that produces more than 90,000 [m]cf 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?

The Commission’s implementation of its correct interpretation of the word “any” is incorrect because it does not implement the word “any” with respect to the stripper well definition in which the word appears – along with the word “incapable” – but instead implements it with

---

<sup>6</sup> 58 Pa. C.S. § 2301.

<sup>7</sup> *Act 13 of 2012 – Implementation of Unconventional Gas Well Impact Fee Act; Chapter 23*, Docket No. M-2012-2288561 (Order entered July 19, 2012) (*Reconsideration Order Regarding Chapter 23*) at 4 (emphasis added).

respect to a well's "capability" in the context of the vertical gas well definition. In other words, the Commission's incorrect implementation turns the statutory definition of stripper well on its head by focusing on what a vertical gas well is *capable* of producing during any one calendar month rather than what it is *incapable* of producing during any one calendar month. Or in the words SBI uses in its brief, the Commission's implementation turns the English language on its head to suggest that "incapable" means "capable" and that "any calendar month" means "each" or "every calendar month."

**C. The Commission's incorrect implementation of its correct interpretation of the word "any" is not entitled to deference.**

BI&E's prosecution is based upon the Commission's incorrect implementation of its correct interpretation of the word "any". As the Commission's incorrect implementation is not entitled to deference, this prosecution must be dismissed.

In addition to the reasons set forth in SBI's brief with respect to BI&E's interpretation, the Commission's incorrect implementation is not entitled to deference for the following reasons.

- Chapter 23 is a new statute and is *sui generis*, so the Commission has no particular expertise in interpreting its provisions. Indeed, the Commission made some initial interpretations concerning Chapter 23, vertical gas wells and stripper wells that were contrary to the plain meaning of the applicable statutory provisions:

1) "[F]or clarity's sake, pursuant to Section 2302(a), it is the spudding of a well, not the production of that well, which is determinative of whether a fee is due." *Act 13 of 2012 – Implementation of Unconventional Gas Well Impact Fee Act; Chapter 23*, Docket No. M-2012-2288561 (Order entered May 10, 2012) (*Implementation Order Regarding Chapter 23*) at 7.

**Correction:** "The Producers argue that it is production that is determinative of whether a vertical gas well is subject to the impact fee, not spudding as in the case of horizontal unconventional gas wells.

We agree with the Producers' comment . . . ." *Reconsideration Order Regarding Chapter 23* at 3.

2) [T]he Commission's initial interpretation is that the unconventional [vertical gas] well will pay the impact fee for at least the first three years of production; if the well then qualifies as a stripper well or is capped after the third year of paying the fee, the fee shall be suspended. *Act 13 of 2012 – Implementation of Unconventional Gas Well Impact Fee Act; Chapter 23*, Docket No. M-2012-2288561 (Order entered March 16, 2012) (*Tentative Implementation Order*) at 6; *Implementation Order Regarding Chapter 23* at 8.

**Correction:** We agree with the Producers' argument. A vertical gas well which falls below designated production levels is no longer, by definition, a vertical gas well. The legislature excluded a reference to Section 2302(b.1) at subsection 2302(f), which concerns the "vertical unconventional gas well fee." Absent reference to that specific section which establishes the minimum three year fee requirement, as well as not qualifying, by definition, as a vertical gas well, a vertical gas well is not subject to the three minimum fee requirement established at Section 2302(b.1). *Reconsideration Order Regarding Chapter 23* at 4.

3) "Sections 2303(c)(2) and (c)(3) . . . allow[s] the Commission to assess any remaining balance on all producers in proportion to the number of wells owned by each producer." *Tentative Implementation Order* at

"Nothing in these provisions [Sections 2303(c), 2303(c)(2) and 2303(c)(3)] suggests that the assessment is limited to producers subject to the impact fee." *Implementation Order Regarding Chapter 23* at 17.

**Correction:** "The Producers also comment that the assessment established at subsection 2303(c), 58 Pa.C.S. § 2303(c), should be allocated only to those producers' wells that are subject to the impact fee, not all producers' wells.

. . . . Upon further review, we believe that subsection 2303(c)(3) establishes the proper methodology, limiting the assessment to "producers subject to the unconventional gas well fee." *Reconsideration Order Regarding Chapter 23* at 5.

4) [F]or purposes of calculating production from a stripper well, the Commission expects producers to simply divide the well's annual production by the number of days the well is in production in the relevant calendar year. *Id.*

**Correction:** "[F]or purposes of calculating production from a stripper well, the Commission expects producers to simply divide the well's monthly production by the number of days the well is in production in the relevant calendar month. *Reconsideration Order Regarding Chapter 23* at 7.

- The meaning of a statute is a question of law for a court and, when convinced that an agency interpretation or interpretative regulation does not track the meaning of the statute or is violative of legislative intent, the court disregards the regulatory interpretation.<sup>8</sup>

- Unlike Chapter 33 [§ 3305(d)(3),(4)], there is no express authority or directive that the Commission promulgate regulations to implement Chapter 23.

Accordingly, PIOGA respectfully requests that the Commission answer Question No. 1 above in the affirmative and dismiss this prosecution.

**D. Statutory construction rules require the interpretation of the stripper well definition asserted by SBI and PIOGA**

While PIOGA disagrees with BI&E that there is any ambiguity in the meaning of the word “any” in the stripper well definition, and therefore no need to answer Question No.2 above, PIOGA agrees with and supports the arguments of SBI concerning Question No. 2. PIOGA also offers additional reasons why BI&E’s statutory construction arguments are flawed.

First, BI&E focuses on the whole of Act 13 rather than the particular statutory provisions at issue. The proper inquiry is directed to the specific statutory provisions involved.<sup>9</sup> It is clear from all of the Act 13 Chapter 23 provisions addressing stripper wells that the purpose of these provisions is **not** to subject stripper wells to the impact fee and administrative charge. *See, e.g.*, § 2302(b.1) (after minimum three years of fee payments, fee will be suspended for unconventional well that qualifies as a stripper well); § 2302(d)(1) (“An unconventional gas well which after restimulation qualifies as a stripper well shall not be subject to this subsection.”).

---

<sup>8</sup> *Commonwealth of Pennsylvania v. Gilmour Manufacturing Company*, 822 A.2d 676, 679 (Pa. 2003).

<sup>9</sup> *See, Lynnebrook v. Borough of Millersville*, 963 A.2d 1261, 1264-66 (Pa. 2008).

Second, BI&E’s reliance upon the change of the word “a” to “any” in the conference committee bill that became Act 13 is negated by the retention of the word “a” in § 2302(d)(3) concerning when a restimulated well must resume paying the fee:

As used in this subsection, the term "substantial increase in production" means an increase in production amounting to more than 90,000 cubic feet of gas per day during a calendar month. (emphasis added).

Third, the HB 1950 Conference Committee Report for what became Act 13 states the following under the “Fee” heading on page 1:

No sooner than 2016, PUC may adjust minimum production necessary to qualify for a stripper well after determining that quantities do not adequately reflect whether a well is producing profit to the driller over expenses.

While this provision was ultimately not included in Act 13, it confirms the General Assembly’s concern with the profitability of stripper well producers, and BI&E’s interpretation negates that. Along with other provisions in the Conference Committee (CC) Report that **are** included in Act 13,<sup>10</sup> this provision also confirms that the legislature intended to provide favorable impact fee treatment – *i.e.*, imposition of no impact fee – on wells that qualify as stripper wells. This is consistent with what the term “stripper well” means with respect to federal and state tax laws, *i.e.*, favorable tax treatment in some manner.<sup>11</sup>

---

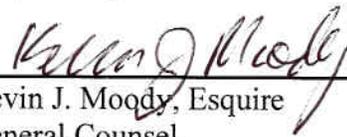
<sup>10</sup> CC Report: “Well that pays 3 year spudding fee, but in year 4 does not produce natural gas greater than a stripper well (90 mcf) shall have its fee suspended”; Act 13: § 2302(b.1). CC Report: “Well that is restimulated but qualifies as stripper well is not subject to fee”; Act 13: § 2302(d).

<sup>11</sup> *See, e.g.*, 26 U.S.C. § 613A(c)(6) (percentage depletion); Colorado, <http://www.colorado.gov/cs/Satellite/Revenue/REVX/1207900867103> (exempt from severance tax); Michigan, [http://www.michigan.gov/taxes/0,4676,7-238-43542\\_43545\\_65133-304806--,00.html](http://www.michigan.gov/taxes/0,4676,7-238-43542_43545_65133-304806--,00.html) (lower tax rate); North Dakota, <http://www.nd.gov/tax/misc/faq/oilgas/index.html> (reduced rates and/or exemption); Utah, <http://tax.utah.gov/commission/effective/r865-15o-002.pdf> (exemption from tax).

### III. CONCLUSION AND RELIEF REQUESTED

For the reasons set forth above and in SBI's brief, PIOGA requests that the Commission answer Question No. 1 in the affirmative and dismiss this prosecution and, if necessary, answer Question No. 2 in the affirmative as well and dismiss this prosecution.

Respectfully submitted,



---

Kevin J. Moody, Esquire  
General Counsel  
PIOGA  
212 Locust Street, Suite 300  
Harrisburg, PA 17101-1510  
(717) 234-8525

Date: September 22, 2014

## CERTIFICATE OF SERVICE

I hereby certify that this day, September 22, 2014, I served a copies of the foregoing PIOGA Brief in Support on the persons listed below in the manner indicated in accordance with the requirements of 52 Pa. Code § 1.54.

### VIA E-MAIL & FIRST CLASS MAIL

THE HONORABLE DAVID A. SALAPA  
ADMINISTRATIVE LAW JUDGE  
PA PUBLIC UTILITY COMMISSION  
P.O. BOX 3265  
HARRISBURG, PA 17105-3265  
[dsalapa@pa.gov](mailto:dsalapa@pa.gov)

HEIDI L. WUSHINSKE, ESQUIRE  
WAYNE T. SCOTT, ESQUIRE  
PA PUBLIC UTILITY COMMISSION  
BUREAU OF INVEST. & ENFORCEMENT  
PO BOX 3265  
HARRISBURG PA 17105-3265  
[hwushinske@pa.gov](mailto:hwushinske@pa.gov)  
[wascott@pa.gov](mailto:wascott@pa.gov)

### VIA E-MAIL

DAVID C. O'HARA  
VICE PRESIDENT  
SNYDER BROTHERS, INC  
PO BOX 1022  
KITTINGING, PA 16201  
[dave.ohara@snydercos.com](mailto:dave.ohara@snydercos.com)

THOMAS C. REED, ESQUIRE  
DINSMORE & SHOHL LLP  
ONE OXFORD CENTER  
301 GRANT STREET, SUITE 2800  
PITTSBURGH, PA 15219  
[thomas.reed@dinsmore.com](mailto:thomas.reed@dinsmore.com)

  
\_\_\_\_\_  
KEVIN J. MOODY, ESQUIRE  
PIOGA