



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

IN REPLY PLEASE
REFER TO OUR FILE

September 22, 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 the Joint 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 THE JOINT PETITION FOR
INTERLOCUTORY COMMISSION REVIEW AND ANSWER TO A MATERIAL
QUESTION**

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Dated: September 22, 2014

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Introduction

The Pennsylvania Public Utility Commission's ("Commission") Bureau of Investigation and Enforcement ("I&E") submits this brief in support of the Joint Petition for Interlocutory Review and Answer to Material Question filed pursuant to 52 Pa. Code § 5.302 on September 11, 2014.

Material Questions

I&E, Snyder Brothers, Inc. ("Snyder Brothers" or "Respondent"), and Pennsylvania Oil and Gas Association ("PIOGA" or "Intervenor") ask the Commission to review and answer, on an interlocutory basis, the following material questions:

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?

I&E's Suggested Answer: No

2. Whether Act 13 impact fees are fees or "taxes?"

I&E's Suggested Answer: Act 13 impact fees are fees, and not taxes

Discussion

A. The Commission Should Accept the Joint Petition

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

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 in dispute,² Commission review and answer to the material question presented by the parties would prevent substantial harm to Respondent and greatly expedite the *conduct of the proceeding*.

I&E notes that its previous petition for interlocutory Commission review of a material question, which was denied, was opposed by Snyder Brothers and PIOGA. The current petition is supported by all the parties, as the prompt resolution of this matter is to the mutual benefit of all parties and is necessary to prevent substantial harm. The Commission denied I&E's previous petition for interlocutory review on the basis that there was no showing of irreparable harm or substantial prejudice to a party. *Pa. Public Utility Commission, Bureau of Investigation and Enforcement v. Snyder Brothers, Inc.*, Docket No. C-2014-2402746, (Order entered July 24, 2014) p. 9.

By following the typical procedural process, it is likely that there will be no final resolution to this issue before Snyder Brother's next impact fees become due in April 2015. Additionally, Act 13 of 2012, the Unconventional Gas Well Impact Fee Act ("Act 13") provides no mechanism by which Snyder Brothers may escrow impact fee funds or receive a refund for payments later determined not to be owed. *See Order Denying Petition to Escrow Disputed Amounts of Snyder Brothers, Inc.*, Docket No. C-2014-

² The parties have agreed on a stipulation of facts, which was attached to the Joint Material Question Petition.

2402746, (Order entered April 24, 2014). Act 13 also directs the Commission to charge interest and penalties on any amounts not timely paid.³ 58 Pa. C.S. § 2308(a); 58 Pa. C.S. § 2308(b). Therefore, a delay in the resolution of this case, should Snyder Brother's ultimately not prevail, would likely result in it paying additional interest and penalties that it would not have otherwise been charged. Furthermore, although the results are not easily quantifiable, the affected municipalities are being harmed by not timely receiving the funds that they would otherwise receive should I&E prevail in this case.

The Administrative Law Judge ("ALJ") has already expressed his agreement with the Commission's interpretation of "stripper well." *Order Denying Motion for Summary Judgment*, Docket No. C-2014-2402746, (Order entered August 27, 2014). By failing to accept this Joint Petition, the Commission will force the parties to expend time and financial resources in proceeding along a time consuming path involving hearings, exceptions, and petitions for reconsideration. On the other hand, by accepting this Joint Petition, the Commission may provide an expedited mechanism for ultimate disposition.

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

³ Specifically, Act 13 states, "[t]he commission *shall* assess interest on any delinquent fee at the rate determined under section 2307(a)." 58 Pa. C.S. § 2308(a) (emphasis added). Section 2308(b) states, "...there *shall* be added to the amount of the fee due a penalty of 5% of the amount of the fee if failure to file a timely payment is for not more than one month, with an additional 5% penalty for each additional month, not to exceed 25% in the aggregate." 58 Pa. C.S. § 2308(b) (emphasis added).

any calendar month in 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). In other words, where, as in this case, an unconventional gas well produces more than an average of 90,000 cubic feet 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's case law and statutory construction rules, 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 of 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 clear or unambiguous, which necessitates an examination of the factors set forth in Pennsylvania’s rules of statutory construction. 1 Pa. C.S. § 1921(c); *See also Order Denying Motion for Summary Judgment* at 16. The Commission received multiple questions and requests for clarification during the implementation of its responsibilities under Act 1, including 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). This confusion clearly indicates that the statute is not free from ambiguity and is in need of clarification. This necessitated an *Implementation Order, Reconsideration Order, and Clarification Order*.

Furthermore, 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 September 22, 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 cubic feet average per day in some calendar months in a year.

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 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, reducing the amount of fees to be distributed by nearly half million dollars, merely from Snyder Brothers’ disputed wells.⁴

Second, looking at the object 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 object is not attained by exempting an active, producing unconventional well from paying impact fees merely because its production falls below 90,000 cubic feet average per day in one calendar month out of twelve.* A review of the object 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.

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,

⁴ The impact fees and administrative charges due on Snyder Brothers’ disputed wells for 2011 and 2012 total \$391,250.00. There are also disputed wells, and therefore disputed impact fees and administrative charges, for 2013.

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 fewer cubic feet in *a* calendar month, 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.⁵ 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 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 Administrative Law Judge has also agreed with the Commission’s interpretation. *Order Denying Motion for Summary Judgment* at 16-17. 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.

The Commission’s interpretation of the Public Utility Code is entitled to great deference and should not be reversed unless clearly erroneous. *Energy Conservation Council of Pa. v. Pa. Pub. Util. Comm’n*, 63 A. 3d 480 (Pa. Cmwlth. 2013); *.1-A Realty v. Pa. Pub. Util. Comm’n*, 63 A.3d 480 (Pa. Cmwlth. 2013). The Commission’s

⁵ 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 cubic feet or less in each calendar month in a calendar year.

interpretation of “stripper well” is not clearly erroneous for the reasons stated above. The Commission has been charged with implementing and enforcing the provisions of Act 13, as it does the Public Utility Code. Therefore, although the term “stripper well” is contained in Act 13, the Commission’s interpretation of it is entitled to similar deference.

Moreover, in this case, even if the definition of “stripper well” was unambiguous, it is still necessary to look beyond the plain meaning argued by Snyder Brothers. 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).

Accepting the definition that Snyder Brothers puts forth would also create a result that is absurd by allowing a company that produces over 90,000 cubic feet of gas per day in eleven months of the year to fall below (intentionally or unintentionally) in just one month, to avoid paying any impact fee at all. 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. *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 a result that favors private interests over the public or creates an absurd result. *Mercury Trucking* at 1068.

C. Act 13's Impact Fees are fees and not "taxes"

Act 13's Impact Fees are not "taxes," but are, as clearly stated in the Act, fees. Nowhere does Act 13 refer to impact fees and administrative charges as a "tax." Moreover, Act 13 distinguishes between its fees and taxes in section 2318. "The Secretary of the Commonwealth shall, upon the imposition of a severance *tax* on unconventional gas wells in this Commonwealth, submit for publication in the Pennsylvania Bulletin notice of the imposition." 58 Pa. C.S. §2318(a) (emphasis added). Thus, the General Assembly clearly differentiated between the Act 13's impact *fees* and taxes.

Unlike a tax, the purpose of Act 13's impact fees is to distribute money to the municipalities affected by unconventional wells. This is very different from the type of revenue generating "impact fee" that has been found to be akin to a tax. *See Building Indus. Ass'n. v. Manheim Twp.*, 710 A.2d 141 (Pa. Commw. 1998). Act 13's impact fees are not akin to a tax because they are not used to generate revenue, but rather to provide distributions to local municipalities to offset environmental and other issues associated with unconventional gas wells.

The Administrative Law Judge agreed with I&E that Act 13 impact fees are not taxes. *Order Denying Motion for Summary Judgment* at 17-18. The ALJ specifically found that Act 13's impact fees do not raise money for the general welfare or contribute to the general fund of the Commonwealth or the affected municipalities. Fees raised for purposes other than these, such as for the cost of local improvements, have been held not to be taxes. *Wheeling and Lake Erie Railway Co. v. Pa. Pub. Util. Comm'n*, 141 F. 3d

88, 96 (3d. Cir. 1998). *Order Denying Motion for Summary Judgment* at 17-18. Because Act 13 impact fees are not taxes, Snyder Brothers' interpretations are not entitled to resolution in its favor.

WHEREFORE, for the foregoing reasons, I&E respectfully requests that the Commission grant the Joint Petition for Interlocutory Commission review and answer the material questions in its favor.

Respectfully submitted,



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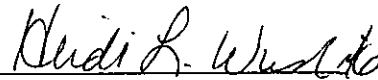
I hereby certify that I am this day serving the foregoing Brief in Support of Petition for Interlocutory Commission Review and Answer to a Material Question in accordance with the requirements of 52 Pa. Code § 1.54 *et seq.* (relating to service by a participant).

Notification by first class mail addressed as follows:

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