

BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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

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MAIN POST-HEARING BRIEF OF SNYDER BROTHER'S INC.

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Dated: 1/16/15

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**POST-HEARING BRIEF OF SNYDER BROTHERS, INC.**

**Introduction To Post-Hearing Brief**

It remains the position of Snyder Brothers Inc. (“SBI”) that the Pennsylvania Public Commission (“PUC” or “Commission”) and its Bureau of Investigation and Enforcement (“I&E”) have misinterpreted the term “stripper well” used in Act 13 of 2012 (“Act 13”) to define the type of well that is subject to the tax or impact fee imposed by that Act. However, given the Order dated August 27, 2014 SBI will not reiterate herein the arguments it has made, to date, in support of this position.

Nevertheless, SBI hereby fully reserves the right to continue to pursue this contention and again does so herein, by incorporating by reference as if set forth herein, its prior arguments in support of its position that each of the wells listed by SBI on Joint Exhibit 1 (SBI’s 2011 Act 13 Report) and Joint Exhibit 4 (SBI’s 2012 Act 13 Report) as “NOT SUBJECT TO FEE” are not “vertical wells” for which an Act 13 Impact Fee or Administrative Fee (“Act 13 Fees”) was due because the production from these wells was such that each well constituted a “stripper well” within the meaning of that term as set forth in Act 13.<sup>1</sup>

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<sup>1</sup> Specifically, SBI incorporates the arguments advanced in support of this position which are set forth in its Briefs in Support of its Motion for Summary Judgment and in its Brief in Support of its Position in a Joint Petition for

## HISTORY OF THE PROCEEDINGS

On January 17, 2014, almost 10 months after the Pennsylvania Public Utility Commission (“PUC” or “Commission”), first advised SBI that it had allegedly failed to remit all Act 13 Fees purportedly due pursuant Act 13, I&E finally filed a complaint against SBI, which was ultimately docketed at the above number.

The Complaint alleges that: (i) for the 2011 Reporting Year, SBI incorrectly identified 24 of its unconventional gas wells as “stripper wells,” and thus exempt from the payment of Act 13 Fees; and (ii) for the 2012 Reporting Year, SBI incorrectly identified 21 of its unconventional gas as “stripper wells,” and thus exempt from the payment of Act 13 Fees.

The Complaint requested that SBI be ordered to pay allegedly past due Act 13 Fees, statutory penalties and interest charges, plus an additional civil penalty of \$50,000.

On February 5, 2014 SBI filed an Answer with New Matter to the Complaint which denied that it owed any additional Act 13 Fees for Reporting Years 2011 and 2012 and raised various factual and legal defenses in New Matter, including claims that I&E (and the PUC) had incorrectly interpreted the term “stripper well,” and, imposing statutory penalties and interest, or a separate civil penalty in the circumstances present here was factually and legally not warranted.

Thereafter, on February 11, 2014, the Pennsylvania Independent Oil and Gas Association (“PIOGA”) filed a Petition to Intervene, which was granted by the presiding ALJ David A. Salapa on March 24, 2014.

On February 27, 2014 I&E filed its reply to SBI’s New Matter, which generally denied the allegations set forth by SBI in its New Matter.

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Interlocutory Review. This latter submission was served on ALJ Salapa but inadvertently not e-filed with the Commission.

Thereafter, a pre-hearing conference Order dated March 20, 2104 was entered setting forth the issues to be discussed at a previously scheduled April 22, 2014 pre-hearing conference.

On April 7, 2014 SBI filed a Petition requesting that it be authorized to escrow the amount of any Act 13 Fees in dispute for the 2013 Reporting Year. This Petition alleged that absent such relief it could be faced with either having to pay the amount of the disputed fees with no hope of a refund if it prevailed, or refusing to pay the disputed amount and then face the imposition of statutory penalties and interest if it did not prevail. After the I&E filed its response to this Petition, which opposed the requested relief, ALJ Salapa entered an order dated, April 24, 2014, denying the Petition because “the Commission lacked the authority to order Snyder to escrow funds.” See Order Denying Motion for Summary Judgment, dated August 27, 2014, p. 5 (“August 27, 2014 Order”).

By an Order dated April 28, 2014 Judge Salapa also denied a Motion to Compel responses to discovery, which concluded the requested information “was outside the scope of discovery.” *Ibid*, p. 5.

On June 4, 2014, I&E filed a petition for interlocutory review pursuant to 52 P.S. § 5.302, which sought to have the issue of how to interpret Act 13’s definition of “stripper well” answered by the PUC. This petition, which was opposed by SBI and PIOGA, was denied by an order of the PUC dated July 24, 2014.

On June 19, 2013, while I&E’s petition for interlocutory review was pending, and as authorized by an Order dated April 23, 2014, SBI filed a Motion for Summary Judgment, in which PIOGA joined.

In its Motion SBI argued, that the Impact Fee imposed by Act 13 was a “tax” and further that the proper interpretation of the term “stripper well,” as defined by Act 13, was such that

each of the wells I&E was claiming were subject to Act 13 Fees were, in fact, based on their reported production, a “stripper well” and, therefore, not a “vertical well,” subject to payment of Act 13 Fees for the years 2011 and 2012. Based on these arguments (which as noted are again incorporated herein by reference), SBI argued it was entitled, as a matter of law, to a judgment in its favor.

On August 27, 2014, after considering I&E response, which contended its interpretation of the term “stripper well” was correct, ALJ Salapa entered an Order denying SBI’s Motion for Summary Judgment, which also concluded that Act 13 Impact Fees were not taxes, and that to be considered a “stripper well” an unconventional gas well had to produce a daily average of less 90 MCF each and every month of a Reporting Year. *See* August 27, 2014 Order, generally.

The August 27, 2014 Order further directed that this matter should proceed to a hearing where the evidence would be limited to “whether the amount I&E is seeking for past due impact fees, interest, penalties and administrative charges totaling \$507,586 has been correctly calculated and whether the civil penalty I&E is seeking in the amount of \$50,000 is appropriate, considering the factors set forth in 52 Pa.Code § 69.1201 and other relevant criteria.” August 27, 2014 Order, p. 19.

Therefore, on September 11, 2014, the parties jointly petitioned the PUC to grant a petition for interlocutory review, which would “finally” (for purposes of appellate review) resolve whether SBI’s or I&E’s interpretation of the term “stripper well” was the correct one.

By an order dated October 2, 2014 the PUC denied the parties Joint Petition.

Subsequently, an evidentiary hearing was held on December 4, 2014 before ALJ Salapa.

**SUMMARY OF DISCUSSION/ARGUMENT**

The following issues raised by the pleadings in this matter were resolved on an interlocutory basis by ALJ Salapa's August 27, 2014 Order:

- A. Are Act 13 Impact Fees taxes for purposes of interpreting the phrase "stripper well" as it is defined in Act 13?
- B. What is the proper interpretation of the phrase "stripper well" as set forth in Act 13?

The following issues, also raised by the pleadings, remain open.

- 1. If I&E's interpretation of the term Stripper Well is correct, what additional Act 13 Impact Fees are due for the 2011 and 2012 Reporting Years?
- 2. If I&E's interpretation of the term Stripper Well is correct, is the statutory 5% per month (not to exceed 25%) statutory penalty authorized by § 2308 (b) and interest authorized by § 2308(a) of Act 13 on unpaid Act 13 Fees mandatory; and, if not, how much, if any, such penalty does the evidence in this case justify? <sup>2</sup>
- 3. If I&E's interpretation of the term Stripper Well is correct should a discretionary civil penalty as authorized by § 2310 of Act 13 be imposed? <sup>3</sup>

SBI preserves its position with respect to issues A and B above, for the reasons previously argued; and the Complaint in this matter should be dismissed. *See* note 1, *supra*.

Alternatively, I&E had the burden of proving that a violation of Chapter 23 of Act 13 occurred in this case and, assuming without admitting a violation was shown, the burden of proving penalties and interest under §§ 2308 (a), 2308 (b) and 2310 of Act 13 were warranted.

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<sup>2</sup> These issues raised multiple question, including whether the statutory penalty and interest provisions of § 2308 are mandatory and if not, whether the facts of this case justify imposing a discretionary penalty or interest amount; and, if so, whether such a construction of Act 13 would be unconstitutional.

<sup>3</sup> This issue also raised multiple questions. First, did I&E prove any "violation" of Chapter 23 of Act 13 and, if so, whether a discretionary penalty is warranted under the facts of this case after the factors set forth in 52 Pa.Code § 69.1201 are applied.

It is **not** a “violation” of Chapter 23 of Act 13 to in good faith dispute a claim for additional impact fees and to do so in the exact manner recommended by the Commission. Assuming *arguendo* it is a “violation” of Chapter 23 of Act 13 to comply with the method for disputing in good faith a claim for Act 13 Fees recommended by the Commission, I&E failed to prove that any civil penalty authorized by § 2310 of Act 13 was warranted, given the factors outlined in 52 Pa.Code § 69.1201.

The statutory penalty provided for by § 2308(b) and the statutory interest provided for by § 2308(a) are not “mandatory.” See proposed 52 Pa.Code § 131.6(b)(2) set forth in Order dated October 17, 2013 docketed at No.L-2013-2375551. Such a construction of these two “penalty” provisions is reasonable because to construe them as mandatory would violate the doctrine of “unconstitutional conditions,” in that an unreasonable burden would be placed on the exercise of a constitutional right, namely the right to challenge state actions before being deprived of property guaranteed by Article 5, section 9 of the Pennsylvania Constitution and the Due Process clauses of the Constitutions of the United States and Pennsylvania.

I&E also failed to establish the factors necessary to justify imposing any penalties or interest pursuant to §§ 2308 (a) or (b).

## **DISCUSSION/ARGUMENT**

### **I.** **NO PENALTIES OR INTEREST OF ANY TYPE SHOULD BE IMPOSED IN THIS** **CASE**

Chapter 23 of Act 13 provides three different types of financial “penalties” relating to Act 13 Fees: (1) a statutory penalty of 5% of the amount of the unpaid fees for each month the fees remain unpaid, not to exceed 25% in the aggregate, §2308(b) of the Act; (2) interest on the

unpaid amounts, §2308(a)<sup>4</sup>; and (3) a discretionary civil penalty of up to \$2,500 per violation, § 2310 (a).

SBI will first address the issue of whether any penalty should be assessed pursuant to § 2310(a) and then address whether the statutory interest and penalty authorized by § 2308(a) and (b) can, or should, be imposed in this type of case, which involves a good faith dispute concerning the amount of Act 13 Fees due.

**A. NO “DISCRETIONARY” CIVIL PENALTY PURSUANT TO § 2310 SHOULD BE IMPOSED IN THIS CASE**

Section 2310(a) provides as follows:

In addition to any other proceeding authorized by law, the commission **may** assess a civil penalty not to exceed \$2,500 **per violation** upon a producer for the violation of this chapter. In determining the amount of the penalty, the commission shall consider the willfulness of the violation and other relevant factors. (emphasis added).

The civil penalty authorized by § 2310 (a) is not mandatory. This is clear both from the language of the statute, which provides that “the Commission may” impose a civil penalty, and the testimony of I&E’s only witness, Mr. Yvonne Hess. December 4, 2014 Hearing Transcript, page 90, lines 11-14 (hereinafter “HT, p.\_\_\_\_, line \_\_\_\_”)

In addition, a § 2310 (a) civil penalty can only be imposed for a “violation” of the Act and, if one occurred, only be set in an amount which takes into consideration the “willfulness of the violation and other factors.”

**1. No Section 2310(a) Civil Penalty Can Be Imposed In This Case Because SBI’s Conduct In This Matter Was Not, And Cannot Be Deemed, A Violation Of Chapter 23 of Act 13**

As the party seeking relief I&E clearly has the burden of proving that a violation of the Act occurred. *Rosemary Galligan v. West Penn Power Company*, 2014 PUC LEXIS 627 \*14 (2014).

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<sup>4</sup> The rate of interest which the Commission can impose is 3% and is not compounded. HT p. 82, lines 8-13).

However, all that the evidence established in this case is that in 2011 SBI timely paid the amount of Act 13 Fees it believed in good faith to be due and not in dispute, paying the amount which the “statement” from the PUC requested be paid (JS-1 #17); and that in 2012 SBI again timely paid the amount of Act 13 Fees it did not dispute. (JS-1 #27). In sum, that there existed a good faith dispute about how much Act 13 Fees SBI owed. There was no evidence (let alone proof) that SBI intentionally or wantonly withheld information, misled or otherwise deliberately, in bad faith, refused to pay fees it “knew” should have been paid.

The only mechanism available to SBI to dispute the amount of Act 13 Fees claimed due by I&E was to await an enforcement action. It cannot be a “violation” of anything for a citizen to make use of the only mechanism available to challenge a claim made against it by the state.

For these reasons alone, SBI’s non-payment of disputed Act 13 Fees in 2011 and 2012 was not a “violation” of Chapter 23 of Act 13.

There is also an equally compelling reason why, when an operator declines to pay a disputed claim for Act 13 Fees, that such action is not a “violation” of Chapter 23 of Act 13 and that is because the Commission itself has stated that in such a situation an operator should not pay the disputed amount because Act 13 contains no provision authorizing the Commission to make “refunds” of improperly paid Act 13 Fees.

In an Order of the Commission dated, October 13, 2013 and docketed at No. L-2013-2375551 (“October 17, 2013 Order), the Commission acknowledges that Act 13 “does not provide dispute mechanisms for producers concerning the overpayment of impact fees,” (October 17, 2013 Order, p. 16, n. 26) and, for this reason, specifically advises operators, like SBI, that “if the producer is disputing whether particular wells are subject to the impacts fees, the producer **should not pay** the corresponding impact fees for those “disputed’ wells unless and

until the dispute is resolved. This practice will prevent over-payment issues from arising.” (*Ibid.* p. 18, n. 27. (emphasis added)).

With respect to an alleged “violation” of Act 13, all that I&E “proved” in its case in chief concerning SBI’s “conduct” is that SBI disputed the amount of the Impact Fees claimed by it (*See*, e.g., HT p. 55, lines 14-19); SBI “cooperated” with the Commission throughout this matter and did not seek to “mislead” the Commission (HT p. 93, lines 12-25); I&E’s only witness had no reason to believe SBI was not acting in “good faith” while disputing the amount of Act 13 Fees it owed (HT p. 109, lines 17-23); and that SBI did exactly what the Commission said it should do namely, withhold payment of all “disputed” Act 13 Fees until the dispute was resolved. Indeed, the second set of “statements” from the PUC which SBI received after first learning its interpretation of the term “stripper well” differed from the Commission’s expressly notes the amount of Act 13 Impact Fees and Administrative Fees which were then (and still are) “in dispute” and the amount of “undisputed” Act 13 Fees that should be paid. (Joint Ex. 6). Of course, SBI then promptly paid all Act 13 Fees it was not disputing, for both 2011 and 2012. (JS-1 #24-27)

In such circumstances SBI submits that I&E failed to establish that SBI “violated” any provision of Chapter 23 of Act 13; and, absent proof of a “violation,” no § 2310(a) “discretionary” civil penalty can be imposed.

Simply put, the only thing I&E proved in this case is that SBI did exactly what the Commission advised it to do namely, not make payment of disputed Act Fee amounts until the dispute concerning whether they were owing was resolved.

It would make a mockery of “due process” if conduct encouraged and recommended by a state agency was deemed a “violation” of anything.

**2. Alternatively, If Following The Commission's Advice Can Be Deemed A Violation Of Chapter 23 of Act 13 Then The I&E Failed to Establish That SBI's "Conduct" Warranted The Imposition of Any Civil Penalty Pursuant to § 2310 (a)**

The only "guidance" currently available on the issue of how to properly assess a "civil penalty" for an actual "violation" of Chapter 23 of Act 13 appears to be the Commission's guidance set forth at 52 Pa.Code § 69.1201, which lists 10 "factors" to be weighed when determining whether, or how much of, a civil penalty should be imposed for an actual violation of the Public Utility Code. Here again, it was I&E's burden to establish that SBI's conduct merited a civil penalty. *Rosemary Galligan v. West Penn Power Company, supra*.

As discussed below, here again, I&E failed to meet its burden with respect to any of the factors outlined in § 69.1201, many of which have no application to this situation.

1. Whether the conduct at issue was of a serious nature. § 69.1201(c) (1). Conduct of a "serious nature" is conduct involving "willful fraud or misrepresentation," *Rosemary Galligan v. West Penn Power Company, supra* \* 28.

Here the only "evidence" offered by I&E established that SBI "cooperated" with the Commission and its only witness testified she had no basis to believe, and was not "suggesting" SBI did, anything "intentional[ly wrong] or fraudulent." (HT p. 93, line 13 through p. 94, line 1).

2. Whether the consequences of the conduct at issue were of a serious nature...such as personal injury or property damage. § 69.1201(c) (2).

No evidence at all was offered to suggest that SBI's only conduct in this case, withholding payment of disputed Act 13 Fees until the dispute relating to them was resolved, caused any "injury" of any type.

Nonetheless, I&E may suggest that SBI's non-payment temporarily "injured" the counties to whom the funds would have been distributed because they did not have the "time value" of these funds. First, it is pure speculation, and I&E offered no concrete evidence, that a

county or other entity suffered any, let alone, a serious financial hardship as a result of not receiving “disputed” Act 13 Fees. More importantly, however, the Commission itself has advised producers like SBI not to pay disputed Act 13 Fees until the dispute is resolved, so any “harm” resulting from a county not receiving such funds until a dispute over whether they are due is finalized was not caused by SBI, it was caused by the Commission’s own recommended policy and the failure on the part of the drafter’s of Act 13 to provide a mechanism for refunding disputed Act 13 Fees.

3. Whether the conduct at issue was intentional or negligent. § 69.1201(c) (3).

Here again, the only conduct SBI engaged in was to exercise its right to have a dispute concerning its liability for Act 13 Fees resolved in accordance with available procedures which, as noted, provide that disputed amounts should not be paid until the dispute is resolved. Such conduct is no way “culpable.”

Moreover, the evidence in this matter clearly established that when SBI submitted both its 2011 and 2012 Annual Reports it believed it was properly identifying each of its “vertical wells” for which Act 13 Fees were due. For example, the evidence confirmed that SBI submitted the 2011 Annual Report to the Commission **before** any effort was made by the Commission to directly advise operators of its interpretation of the term “stripper well” (HT p. 108 line 5 through p. 109, line 4)---a term I&E now contends (and ALJ Sapala apparently agrees) is ambiguous. Furthermore, it was not until after SBI had submitted its 2012 Annual Report, again in good faith using the same understanding of the term “stripper well” which it had in 2011, that anyone from the PUC raised the issue with SBI that its interpretation of this term was inconsistent with the PUC’s. (HT p. 129, line 3 through p. 130, line 5).<sup>5</sup>

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<sup>5</sup> I&E may suggest that an order issued on July 19, 2012 “explained the Commission’s understanding of the definition of “stripper well,” and, therefore, SBI was somehow “at fault” because it did not read this “clarification.”

4. Whether the regulated entity made efforts to modify internal practices and procedures to address the conduct at issue and prevent similar conduct in the future, including such things as training and improved techniques and supervision. § 69.1201(c) (4).

This factor has no relevance to this matter since it has yet to be finally determined whether or not SBI needs to change any of its procedures for determining the amount of Act 13 Fees it owes. On the other hand, if ultimately SBI is proven wrong there is absolutely no reason to believe it will not, going forward, comply with any final order entered in this matter, without having to be “coerced” to do so through a penalty.

5. The number of customers affected and the duration of the violation. § 69.1201(c) (5).

Here again, this factor has no relevance. To the extent it might be deemed to have some, the reason why the sums in dispute have yet to be paid is because SBI simply followed the guidance set out by the Commission when a dispute like this one arises and, to assure that its right to review was meaningful, withheld payment pending resolution of the dispute.

6. The compliance history of the entity. § 69.1201(c) (6).

Once again, this factor has no relevance. SBI has yet to be found to have done anything wrong (and there is no “crime” in disputing in good faith whether Act 13 Fees are due) and there was no evidence presented that SBI had ever had a prior issue with the Commission with respect to any program or activity it might otherwise regulate.

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First, if any one was negligent about communicating what the PUC believed was the proper interpretation of the term “stripper well” it was the PUC itself. No attempt was made to fully “clarify” the meaning of an important statutory term, which some now content was ambiguous, until the Commission proposed a rulemaking “defining” this term in October of 2013. Of course, by the time the PUC got around to explaining to operators its interpretation of the term “stripper well,” SBI had already submitted its Annual Report to the Commission and, to compound its own misfeasance, the PUC led SBI to believe that it agreed with SBI’s interpretation of the term “stripper well” by sending SBI a statement that requested payment of a sum entirely consistent with the amount SBI believed it owed. (Compare Joint Exhibits 1 and 2) and, testimony of Yvonne Hess (HT p. 85, lines 18-22). However, of greatest importance is that SBI had a right to “dispute,” in good faith, the Commission’s and the I&E’s interpretation of the term “stripper,” regardless of whether SBI was aware (which it was not) of the Commission’s interpretation when it submitted its 2011 and 2012 Annual Reports; and, to do so, it had to wait until an enforcement action was brought.

7. Whether the regulated entity cooperated with the PUC. § 69.1201(c) (7).

With respect to this factor, of course, the evidence established that SBI did “cooperate” with the PUC. *See* discussion, *supra*.

8. The amount of penalty necessary to deter future violations. § 69.1201(c) (8).

Yet again, this factor has no relevance as there is yet no final decision suggesting SBI has misinterpreted Act 13 or otherwise violated any of its provisions. Moreover, given that SBI has cooperated fully to date there is no reason to believe it will not comply with any final decision issued in matter, even one it disagrees with.

9. Past Commission decisions. § 69.1201(c) (9).

With respect to this factor there is simply no precedent to consider.

As to the final factor namely, “other relevant factors,” § 69.1201(c)(10), SBI submits such other facts as were established in this case all mitigate against imposing any type of financial penalty on SBI, including the fact that the sole explanation offered by I&E’s only witness for why a civil penalty of \$50,000 was “appropriate,” who admitted not even considering any of the “factors” set forth in § 69.1201 (HT p. 91, lines 15-18), was because it was “because 2 million was not.” (HT p. 93, lines 1-3).

**B. NO PENALTIES OR INTEREST PURSUANT TO § 2308 SHOULD BE AWARDED  
IN THIS CASE**

As noted in note 2, *supra*, the first issue raised with respect to § 2308 of Act 13 is whether the penalty and interest provided for therein are “mandatory” or discretionary. If the answer to that question is such penalties and interest are discretionary, then the question becomes whether, in the circumstances present here, the factors set forth in 52 Pa Code § 69.1201 justifying imposing any such penalties or interest. If the answer to that question is that such

penalties and interest are mandatory (i.e., must be imposed) then the issue is whether it is constitutionally permissible to impose them in a case like these one.

**1. The Penalty and Interest Provisions of § 2308 Are Not Mandatory**

In this regard, the Commission itself construes the penalty and interest provisions of § 2308 to be discretionary, not mandatory. In its Order setting forth its construction of the various provisions of Act 13, including the 5% penalty and interest provision of that Act, the Commission states: “Based on the foregoing, the Commission **may** assess interest and penalties on untimely or delinquent impact fee payments **as permitted** by Sections 2308-2313 of the Act if (1) the producer fails to pay the delinquent impact fee in full in compliance with the Notice of Amount Due, (2) the producer fails to file a timely response with the Commission if no payment is made, or (3) after hearing, the Commission sustains the amount due by final order. 58 Pa.C.S. § 2308-2310.” (emphasis added) October 17, 2013 Order, p. 18. *See also* Proposed 52 Pa.Code § 131.6(b)(2), set forth in Appendix A to the October 13, 2013 Order.

It is, clear, given the above discussion, that the Commission, unlike I&E’s only witness at the hearing in this matter, interprets all of the penalty and interest provisions of Chapter 23 of Act 13 to be “discretionary” and not “mandatory.”

There is, also, a very sound reason why the Commission’s conclusion that the penalty and interest provisions of § 2308 are discretionary and this is so because if they were not, a serious constitutional issue would, as discussed *infra*, be raised by the Act 13 Fees “collection” mechanism; and, it is a well recognized principle of statutory construction that, if possible, statutes are to be interpreted in a manner which avoids constitutional questions. *See, e.g., Bricklayers of Western Pennsylvania Combined Funds, Inc. v. Scott’s Development Company*, 90 A.3d 682, 691 (Pa. 214) [“The Legislature is presumed not to intentionally pass unconstitutional

laws, and court give statutes a **constitutional** interpretation if that is reasonably possible,” (emphasis in the original)]; 1 Pa.C.S. § 1922(3) [when interpreting statutes there is a presumption that the General Assembly did not intend to violate the Constitution of the United States or this Commonwealth].<sup>6</sup>

There is, in Pennsylvania, a constitutional right to appeal governmental actions. Article 5, Section 9 of the Pennsylvania Constitution provides:

§ 9. Right of appeal.

There shall be a right of appeal in all cases to a court of record from a court not of record; and there shall also be a right of appeal from a court of record or from an administrative agency to a court of record or to an appellate court, the selection of such court to be as provided by law; and there shall be such other rights of appeal as may be provided by law.

There is also a due process right, guaranteed by both the Constitutions of the United States and Pennsylvania that citizens have a right to be heard before property is taken from them by the state.

Therefore, without a doubt, SBI had a constitutional right to challenge I&E’s claim that SBI’s interpretation of the term “stripper well” was incorrect and that it owed additional Impact Fees for 2011 and 2012.

However, when drafting Act 13 the General Assembly elected not to provide any direct appeal mechanism such as are common in other statutes which authorize agencies to take actions against Pennsylvania. Instead, Act 13 provides that unpaid **and disputed** Act 13 Fees would be

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<sup>6</sup> Furthermore, courts have, for a variety of reasons, interpreted the word “shall” to be discretionary: “[A]ppellate courts of this Commonwealth have declined to construe “shall” as mandatory and “may” as discretionary. Instead, the question of whether a statute will be deemed mandatory or discretionary has been decided with reference to the perceived intent of the legislature with respect to the use of the terms “shall” and “may” in the particular statute at issue. See *Tyler v. King*, 498 A.2d 16, 19-20 (Pa.Super.1985) (collecting cases). Thus the appellate courts of this Commonwealth have, in effect, declared that the term “shall” is sufficiently ambiguous to avoid application of the plain meaning rule...and the common and approved usage rule....*Commonwealth v. Ferguson*, 552 A.2d 1075, 1079 (Pa.Super.1988).

recovered in accordance with Commissions rules of practice and procedure relating to complaints and related enforcement. 52 Pa.C.S. § 2308. In addition, it set up a system requiring the Commission to promptly distribute all Act 13 Fees collected, but did not provide any mechanism for refunding any “overpaid” Act 13 Fees once those fees had been distributed. *See generally* pp. 16-19 of the October 17, 2013 Order.

Given this statutory scheme, if the penalty provided for by § 2308(b) and the interest provided for by § 2308(a) were interpreted as mandatory in all cases (and particular one like this one where a citizen of the Commonwealth is exercising its right to challenge a claim that it must pay money to the State) a person seeking to challenge whether Act 13 Fees were due would be faced with the following dilemma: pay the fees and if its challenge was successful not be able to have the wrongfully paid fees refunded or withhold payment of the disputed amount of the fees until the dispute was resolved and risk, simply by defending itself, having to pay substantial penalties and interest automatically if its challenge failed. Such an interpretation would seriously burden a citizen’s constitutional right to appeal the actions of state agencies and raise an issue as to whether or not the enforcement provisions of Chapter 23 of Act 13 were constitutional because it would impose an impermissible burden on the exercise of a constitutional right. *See, e.g., Commonwealth v. Quarles*, 324 A.2d 452, 460-462 (Pa.Super. 1974) (plurality) [it would violate the doctrine of “unconstitutional conditions” to find that a citizen of Pennsylvania “impliedly consented” to the waiver of a right to not be subjected to a warrantless search or to self-incrimination by virtue of applying for a license to drive a car]; *Commonwealth v. Littlejohn*, 250 A.2d 811 (Pa. 1969) [risk that a successful appeal could result in imposition of harsher sentence imposed “unconstitutional condition” of the constitutional right to appeal]. The risk that an “unsuccessful appeal” may result in mandatory fines and penalties, while certainly not as

serious as the risk of a harsher criminal sentence, is nonetheless an impermissible and unconstitutional condition on a constitutional right.<sup>7</sup>

Therefore, SBI submits the Commission's interpretation of Chapter 23 of Act 13's penalties and interest provisions as "discretionary" is a proper interpretation of these provisions.

**2. Applying the Factors Set Forth In 52 Pa.Code § 69.1201 To The Facts Of This Matter  
No § 2308 Penalties or Interest Is Warranted**

Since the 5% penalty and 3% interest provisions of Act 13 are properly viewed as discretionary the issue of whether any such penalties or interest should be imposed presumably should be determined by the application of the factors outlined in 52 Pa.Code § 69.1201; and, here again, it was I&E's burden to prove that when these factors are applied a penalty and interest amount should be awarded.

With respect to SBI's "culpability" the evidence in this case shows that in the view of I&E's only witness "in the first year, and even the second year...[t]here were many glitches in [the Impact Fees program]...in calculating who owed what." (HT p. 101, lines 5-7). Furthermore, as discussed previously, SBI submitted its 2011 Annual Report with the good faith belief that it had identified every "vertical well" upon which Impact Fees were due; and, as of the date submitted its 2011 Annual Report to the Commission it had yet to make any effort to directly advise producers how it was interpreting one of the terms most crucial to determining whether an "unconventional gas well" qualified as a "vertical well," namely, the phrase "stripper well."

Although the information supplied to the PUC by SBI was more than sufficient to enable the PUC to determine if SBI's interpretation was inconsistent with its own, rather than review this information (as it apparently did a year later) it sent SBI a "statements" seeking payment of

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<sup>7</sup> Here is § 2803 penalties and interest were deemed mandatory SBI would be faced with having to pay excess of \$100,000 for the right to appeal or challenge the Commission's claim in this case. *See, discussion, infra.*

an amount of Impact Fees and Administrative Fees entirely consistent with SBI's view of what was owed. (HT p. 85, line 13 through p. 86, line 6). Thereafter, the PUC did not bother to again contact SBI about the amount of Act 13 Fees it had paid in 2011 until March of 2013, after it had submitted its Second Annual Report.<sup>8</sup>

For the same reasons why a discretionary civil penalty of \$50,000 should not be imposed (assuming without admitting that I&E showed any violation in this case) no 5% penalty or 3% interest should be added on to any award of Act 13 Fees made in this case.

A party who has a right, which it exercised in good faith, to dispute a State agency's interpretation of a statute, which promptly paid all sums which were not in dispute as a result of the difference in interpretation, which withheld the disputed sums in a manner consistent with the recommendation of that agency, should not then be forced to pay an additional 5% (up to a maximum of 25%) of the amounts owing, together with 3% interest on the unpaid balance. Indeed, in the present circumstances to impose such a sanction would not only run afoul of the Commission's own penalty "factors" guidance, it would raise serious "due process" questions, because it would clearly, and unreasonably, burden SBI's constitutional right to appeal an action of a state agency.

SBI is willing, should it ultimately be determined that its interpretation of the nature of Act 13 Fees and the statutory phrase "stripper well" is incorrect, to pay what is "due" for the years 2011 and 2012, but it should not be penalized by being required to pay one dime more for

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<sup>8</sup> Presumably, had the PUC bothered to "audit" what was paid by producers, including SBI, for 2011, it would "noticed" that SBI's understanding of what a "stripper well" was inconsistent with its own. Therefore, the long delay in commencing proceedings to "recover" alleged past due Act 13 Fees, which continued for almost another full year, cannot be attributed to SBI. In this regard, to the extent it was determined that some type of interest could be awarded in this case, it should not run from September 1, 2012 but from the first date SBI had any reason to believe it may "owe" additional Act 13 Impact Fees, April 1, 2013.

having exercised its right to make this challenge, particularly in the very manner now recommended by the PUC.

**C. IMPOSING A MANDATORY STATUTORY PENALTY OR INTEREST AWARD IN THIS WOULD VIOLATE THE DOCTRINE OF UNCONSTITUTIONAL CONDITIONS**

As noted above, this issue need not (and indeed, should not be) reached because it can be avoided by construing the statutory penalty and interest provisions of § 2308 as discretionary and only invoked in, for example, a situation where a person has either intentionally failed to remit Act 13 Fees it knew were due or where a dispute as to whether Act 13 Fees are due is raised in “bad faith,” neither of which is present here.

Nonetheless, if a penalty of 25% (the maximum penalty which can be imposed by § 2308(b)) were imposed here, resulting in SBI paying an additional \$60,300 in “penalties” for 2011 and an additional \$37,262.50 for 2012, together annual interest of 3% added on to the amount “owed” since September 1, 2012 (in the case of the 2011 Reporting Year) and from April 1, 2012 (in the case of the 2012 Reporting Year), solely because it was determined that SBI’s interpretation of Act 13’s definition of “vertical well” (or “stripper well”) was incorrect, this would result in SBI’s unquestioned right to a meaningful appeal being improperly conditioned in violation of the “unconstitutional conditions” doctrine.

The doctrine of “unconstitutional conditions” generally holds that the enjoyment or exercise of a government entitlement (not even one which is constitutionally guaranteed) may not be conditioned upon the waiver or relinquishment of a constitutional right, particularly in the absence of any societal interests that would justify the subordination of such rights under the circumstances. As summarized by the Supreme Court of the United States, “[Our] cases reflect an overarching principle, known as the unconstitutional conditions doctrine, that vindicates the

Constitution's enumerated rights by preventing the government from coercing people into giving them up." *Koontz v. St. John's River Water Management District*, 133 S.Ct. 2586, 2594 (2013)

Thus, for example, a state cannot burden the constitutional right to travel by imposing an unreasonable waiting period on indigent travelers before affording them Medicaid benefits. *Memorial Hospital v. Maricopa County*, 94 S.Ct. 1076 (1974), cited with approval in *Koontz*.

Also, in *Commonwealth v. Quarles, supra*, our Superior Court concluded that it would violate this doctrine if the Commonwealth could argue that a citizen "implied waived" their right to not be subjected to a warrantless search by exercising their privilege to drive a car; and in *Commonwealth v. Littlejohn*, 250 A.2d 811 (Pa. 1969), conditioning a right to appeal on the risk of a more severe penalty was found to violate this doctrine. *See also, discussion* at Note, *Unconstitutional Conditions*, 73 Harv. L. Rev. 1595 (1960).

To impose mandatory penalties and interest on an unsuccessful defendant in Act 13 Fees collection case is particularly pernicious because the only avenue available to a party like SBI to "dispute" or appeal a claim that Act 13 Fees are due is to decide whether or not to defend a collection action filed by I&E. Therefore, to even defend itself, SBI would be forced, if § 2803 penalties and interest are mandatory, to risk paying over \$100,000 for the "right" to do so.

When constitutional rights, such the right to appeal and to due process, are involved this is precisely the type of "Hobson's Choice" which the Unconstitutional Condition's Doctrine declares to be invalid.

### **CONCLUSION**

For the reasons previously set forth in prior submissions to ALJ Salapa, SBI again requests that the complaint in this matter be dismissed and an order entered finding remanding this matter for a recalculation of Act 13 Fees due for the years 2011 and 2012 because all the

wells it operated which produced less 90,000 cubic feet of gas per day in any month of these two calendar years are not “vertical wells” subject to the payment of such fees.

Alternatively, SBI submits, for the reasons set forth above it should not be required to pay any form of penalty or interest in addition to the total amount of Act 13 Fees otherwise determined due.<sup>9</sup>

## **PROPOSED FINDINGS OF FACT**

### **Parties**

1. The Complainant is the Investigation and Enforcement Bureau of the Pennsylvania Public Utility Commission (“I&E”). (Joint Stipulation of Fact Number 1, #2 (hereinafter” JS-1, #\_\_\_”).
2. The Respondent is Snyder Brothers Inc., (“SBI”) an oil and gas producer, as that term is defined in Act 13 of 2012 (“Act 13”), with a principal place of business at One Glade Park East, P.O. Box, Kittanning, PA 16201. ( JS-1, #3.)
3. The Intervenor is the Pennsylvania Independent Oil and Gas Association (“PIOGA”).

### **Act 13 and Act 13 Fees**

4. Act 13 became effective in February of 2012. (December 4, 2014 Hearing Transcript, page 59, lines 22-23 (hereinafter “HT p. \_\_\_, line \_\_\_”).
5. Pursuant to Act 13, each “unconventional gas well,” as defined therein, that meets the definition of “vertical gas well,” as defined therein, is subject to an annual impact fee (“Impact Fee”) and administrative fee (“Administrative Fee”). (JS-1, #7)
6. A “vertical gas well” is defined by Act 13 as “an unconventional gas well which utilizes hydraulic fracture treatment through a single vertical well borehole and produces natural gas in quantities greater than that of a “stripper well.” (JS-1 #5)
7. A “stripper well” is defined by Act 13 as “an unconventional gas well incapable of producing more than 90,000 cubic feet of gas per day during any calendar month, including

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<sup>9</sup> Assuming without admitting that the PUC’s interpretation of the phrase “stripper well” is accurate SBI would, based on the evidence submitted by I&E ,owe an additional \$241,200 in Act 13 Fees (\$240,000 in Impact Fees and \$1,200 in Administrative Fees) for 2011 and \$149,050 in Act 13 Fees (\$148,000 in Impact Fees and \$1,050 in Administrative Fees) for 2012.

production from all zones and multilateral well bores as a single well, without regard to whether the production is separately metered.” (JS-1 #6)

8. Pursuant to Act 13, the operator of each “vertical well” in a county which has enacted an appropriate ordinance is required to pay an annual Impact Fee on each such well, which fee can vary from year to year, and an annual Administrative Fee of \$50 per well. (hereinafter collectively “Act 13 Fees”) (JS-1, #'s 7 and 8)

9. Pursuant to Act 13 each operator of a gas well that was permitted as an “unconventional gas well” is required to file an annual report (“Annual Report”) with the PUC which reports on the number of such wells it operated that year and whether or not such wells are “vertical wells” subject to Act 13 Fees or are exempt for payment of such fee (e.g., either because it was not subjected to hydraulic fracture treatment, did not produce from an “unconventional formation,” or met the definition of “stripper well”). *HT Passim*

10. The first Act 13 Annual Report covered all permitted unconventional gas wells that were drilled prior to January 1, 2012 (“2011 Annual Report”) and was due on or before September 1, 2012. (JS-1 #9)

11. The second Act 13 Annual Report covered all permitted unconventional gas wells that were in operation during the period from January 1, 2012 through December 31, 2012 (“2012 Annual Report”), including new wells drilled during the 2012 calendar year, and was due on or before April 1, 2013. (JS-1 #9)

12. For the 2011 Reporting Period an Impact Fee of \$10,000 was due for each “vertical gas well” operated during the 2011 Reporting Period, including all such wells drilled before January 1, 2012 and which were operated prior to that date. (HT p. 60, line 2 through p. 61, line 1)

13. For the 2012 Reporting Period an Impact Fee of \$9,000 was due for each “vertical gas well” first drilled and operated during 2012 and an Impact Fee of \$7,000 was due for each “vertical gas well” first reported as in operation on the 2011 Annual Report and which still qualified as a “vertical gas well during the 2012 Reporting Period, or its “second year of operation.” *Ibid.*

14. For both the 2011 and 2012 Reporting Periods an Administrative Fee of \$50 was due on each “vertical gas well” for which an Impact Fee was due that year. (HT p. 61, lines 2-17)

#### **SBI’s Act 13 Annual Reports and Payments**

15. All the permitted “unconventional gas wells,” operated by SBI during the 2011 and 2012 Reporting Periods utilized a single vertical borehole. (JS-1 #4)

16. SBI submitted its 2011 Annual Report to the PUC on August 15, 2012. (JS-1 #10; Joint Exhibit 1)

17. SBI's 2011 Annual Report accurately sets forth each permitted "unconventional gas well" it operated during 2011 which was potentially subject to Act 13 Fees and also accurately sets forth for each month of the 2011 operating year that month's average daily production for each well SBI contended was not a "vertical well." (JS-1 #'s 11 and 12; Joint Exhibit 1)

18. SBI submitted its 2012 Annual Report to the PUC on March 27, 2013. (JS-1 #18; Joint Exhibit 4)

19. SBI's 2012 Annual Report Report accurately sets forth each permitted "unconventional gas well" it operated during 2012 which was potentially subject to Act 13 Fees and also accurately sets forth for each month of the 2012 operating year that month's average daily production for each such well SBI contended was not a "vertical well." (JS-1 #'s 19 and 20; Joint Exhibit 4)

20. During 2011 and 2012 SBI operated all of its wells so as to produce the maximum of gas each was capable of producing. (HT p.130, lines 6-17), therefore any well listed on SBI's 2011 and 2012 Annual Report which was reported as producing less than a daily average of 90,000 cubic feet of natural gas in a given month was incapable of producing more than that amount during that period.

21. Four of the wells listed on SBI's 2011 and 2012 Annual Report, as "NOT SUBJECT TO FEE," specifically well permit numbers, 005-30329, 005-30392, 005-30635 and 005-30944, are not "vertical gas wells" because they had not been subjected to hydraulic fracture treatment during these years. (HT p. 55, line 14 through p. 56, line 13; Joint Exhibits 1 and 4 (See Exhibit B to each such Exhibit).

22. SBI paid \$170,000 in Impact Fees for 2011 and \$850 in Administrative Fees for the 2011 Reporting Period. (JS-1 #'s 14-17)

23. SBI paid \$237,000 in Impact Fees for 2012 and \$1400 in Administrative Fees for the 2012 Reporting Period. (JS-1 #'s 24-27)

24. If SBI's interpretation of the words "stripper well" I&E's claim should be dismissed.

25. If I&E's interpretation of the words "stripper well" as set forth in Act 13 is correct SBI underpaid, in good faith, Act 13 Fees for 2011 by \$241,200. (I&E Trial Exhibit 1.)

26. If I&E's interpretation of the words "stripper well" as set forth in Act 13 is correct SBI underpaid, in good faith, Act 13 Fees for 2012 by \$149,050. (Ibid)

### **Penalty Issues**

27. Following the passage of Act 13 there was considerable confusion at the PUC in general, and the Bureau of the PUC responsible for “administering” the Impact Fee provisions of Act 13 in particular, as to how to calculate “who owed what.” (HT p. 101, lines 5-8)

28. The first Act 13 Annual Report was due or before September 1, 2012, approximately 6 months after the Act became effective. (HT p. 86, lines 3-)

29. Operators potentially subject to the Impact Fee provisions of Act 13 were required to comply not only with these provisions but a myriad of other regulatory changes. (HT. p. 127, lines 9-14)

30. SBI has a very small administrative staff whose responsibilities included not only attempting to comply with the Impact Fee provisions of Act 13 but also all the new regulatory requirements imposed by that Act on gas well drilling and operation. (HT p. 127, lines 15-24)

31. The PUC issued multiple “clarification” orders following the passage of Act 13, but did not “clarify” in an order what it believed was the proper definition of the term “stripper well” until its October 2013 Rulemaking Order which was issued after the first Act 13 Annual Reports were due. *See* PUC Orders dated March 15, 2012; dated May 10, 2012; and July 19, 2012, all docketed at No. M-2012-2288561; and PUC Rulemaking Order dated October 17, 2013, docketed at L-2013-2375551.

32. The first attempt by the PUC to directly communicate to producers how the Commission interpreted the term “stripper well” occurred in late August of 2012, just a few days before the first Act 13 Annual Report was due. HT p. 108, line 5 through p. 109, line 1.

33. The individual employed by SBI who was responsible for preparing its first Act 13 Annual Report was David O’Hara. HT p. 128, lines 5-8.

34. Mr. O’Hara did not read, nor was he aware of, the “clarification orders.” HT p. 131, lines 7-23.

35. Mr. O’Hara determined what SBI believed to be the proper definition of what wells were subject to an Impact Fee by reading Act 13 (HT p. 128, lines 17-24), and he found the definition of stripper well to be “straightforward.” (HT p. 131, lines 11-12).

36. SBI submitted its 2011 Annual Report to the PUC on August 15, 2012, over a week before the PUC first sought to directly inform producers of the PUC’s interpretation of the term “stripper well.” HT p. 108, line 21 through p. 109, line 4.

37. Following submission of SBI’s first Act 13 Annual Report the PUC SBI received a “statement” or “invoice” on August 29, 2012 requesting payment of Impact Fees totaling \$170,000.00, a sum which was in line with the number of its wells SBI believed were subject to an Impact Fee for that reporting period and consistent with its belief as to the proper interpretation of the term “stripper well.” (JS-1 #'s 13-16; HT p. 85, line 13 through p. 86, line 6)

38. SBI promptly paid the amount set forth on the “statement” or “invoice” it received on August 29, 2012. (HT p. 86 lines 3-6)

39. The PUC did not communicate further with SBI concerning the manner in which it calculated its 2011 Annual Report until after SBI had submitted its 2012 Annual Report. (HT 109, lines 5-16)

40. SBI prepared its 2012 Annual Report in the same manner, and using the same interpretation of the term “stripper well,” it used to prepare its 2011 Annual Report. (Compare Joint Exhibits 1 and 4; HT p. 129 line 18 through p. 130, line 2)

41. The first time that any representative of the PUC advised Mr. O’Hara that SBI’s interpretation of the term “Stripper well” was purportedly incorrect occurred in April of 2013, after both its 2011 and 2012 Annual Reports had been submitted. (HT p. 109, lines 12-16)

42. Once advised that the PUC was claiming additional Act 13 Impact Fees for 2011 and 2012 SBI disputed the PUC’s demand. (HT p. 55, lines 14-19)

43. The first time SBI could have disputed the PUC’s demand for additional Act 13 Fees was after April 2013, which it did. (HT 104, lines 6-17)

44. The nature of the dispute raised by SBI is (and was) such that it could not have been “resolved” before the Commission believes it is required to disburse all Act 13 Fees it collects. (HT p. 102, lines 5-20); Also, *see generally* Order dated October 17, 2013, docketed at No. L-2013-2375551).

45. The statement received by SBI relating to its 2012 Annual Report states that SBI should pay \$236,000 in Impact Fees for 2012, an additional \$173,000 being in dispute. (Joint Exhibit 6).

46. After receiving Joint Exhibit 6 SBI promptly paid the amount which was “not in dispute. (JS-1 #25)

47. SBI offered to place the disputed amount of fees into escrow but was told there was no mechanism for this, nor any mechanism whereby it could receive a refund if its interpretation was determined to be correct. (HT 129, lines 11-15)

48. The PUC has announced that operators, like SBI, who dispute whether a well is subject to Impact Fees should not pay the amount of fees in dispute because Act 13 has no mechanism for refunding overpayments of Act 13 Fees. (*See generally* Order dated October 17, 2013, docketed at No. L-2013-2375551)

49. SBI believed in good faith that its 2011 and 2012 Annual Reports properly identified those of its wells which were subject to an Impact Fee and those which, by virtue of production, were not. (HT, Testimony of David O’Hara generally).

50. Ms. Yvonne Hess, the PUC representative with whom SBI dealt, believed SBI was “cooperative” with the PUC and did not intend to “mislead” the Commission (HT 109, lines 17-23) and had no reason to believe it was attempting to improperly avoid payment of Impact Fees. (HT p. 93, lines 13-25)

51. Other operators were confused about how to interpret the term “stripper well.” (HT p. 109 line 24 through p. 110, line 1)

52. I&E is seeking to recovery a penalty of 5% (not to exceed 25%) of the unpaid Act 13 Fees for the years 2011 and 2012, together with interest at a rate of 3% per year on said fees, (“§ 2308 Penalty & Interest”) plus a civil penalty of \$50,000 (“§ 2310 Penalties) (collectively “Penalties/Interest”).

53. When determining whether or not to assess penalty or similar monetary add on, which is discretionary the factors outlined at 52 Pa.Code § 69.1201 are weighed. (“Civil Penalty Criteria”). HT p. 91, lines 9-12.

54. The only witness who testified in support of the requested Penalties/Interest stated that she did not consider the Civil Penalty Criteria. (HT p. 91, lines 15-18)

55. The only witness who testified in support of the requested § 2310 Penalties of \$50,000 said the demand of \$50,000 was “reasonable “because 2 million was not.” (HT p. 93, lines 1-3)

56. There exists no mechanism in Act 13 whereby SBI could have paid “under protest” the amount of any Impact Fees which it disputed, or such other manner where it could have any successfully disputed fees returned to it. JS-1 #28.

57. There exists no mechanism in Act 13 where the PUC can “refund” any Impact Fees or Administrative Fees which were paid and disbursed to a municipality but thereafter determined to not be due and owing or otherwise to have been erroneously paid. JS-1 #29.

58. The PUC has proposed a regulation which provides that in an appropriate case it “may” impose § 2308 Penalty & Interest. October 17, 2013 Order, Appendix A, proposed 52 Pa.Code § 131.6(b)(2). *See also* Text of October 17 Order, pp. 16-19.

59. The only “conduct” in which SBI engaged, which is the subject of this proceeding, is that has challenged, in good faith, the PUC’s interpretation of the term “stripper well” as used in Act 13 to define what is the subject of an Impact Fee namely, a “vertical well” as defined therein, not paying that portion of the Act 13 Fees which are in dispute. HT Passim.

60. SBI’s conduct was not “willful or fraudulent” and SBI had a right to contest the manner in which the PUC interprets Act 13.

61. SBI’s conduct was not the cause of any harm to any third party.

## PROPOSED CONCLUSIONS OF LAW Set I

1. I&E, as the party seeing relief has the burden of proof. *Rosemary Galligan v. West Penn Power Company*, 2014 PUC LEXIS 627 \*14 (2014).
2. SBI's interpretation of the term "stripper well" is the correct interpretation for the reasons set forth in SBI's Brief in Support of its Motion for Summary Judgment and its Brief in Support of its Position in the Joint Petition for Interlocutory Decision.
3. Statutory wording should be given its common, ordinary meaning. 1 Pa.C.S. § 1903 (a).
4. The language of § 2301 defining "Stripper well" is sufficient clear, and the ordinary every day meaning of the words therein are such that the appropriate interpretation of the term "stripper well" is that "any" unconventional gas well which produces during any one month of a calendar year a daily average of less than 90,000 cubic feet of natural gas is not a "vertical well," subject to any Act 13 Fees.
5. Alternatively, what a source of revenue is called does not matter, what matters is whether, in substance, it constitutes a "tax." *Sterling v. Philadelphia*, 378 Pa. 538, 342 (1954) and cases cited therein.
6. Alternatively, Act 13 Impact Fees are a tax because:
  - (a) "impact fees" are considered "taxes." *Building Indus. Ass'n v. Manheim Twp.*, 710 A.2d 141 (Pa. Commw. Ct. 1998) "[A]n impact fee is a government charge or fee used to generate revenue; it is, therefore, a tax;"

(b) Impact Fees generate large amounts of “revenues” for local and state government which amount greatly exceeds the costs of collecting these revenues. *Simpson v. City of New Castle*, 740 A.2d 287, 1999 Pa. Commw.LEXIS 848;

(c) a source of revenue, such as an Impact Fee, which can be used by its recipient to “reduce taxes,” 58 Pa.C.S. § 2314 (g)(6), is necessarily itself a tax.

7. Because the term “stripper well” is part of the definition of what is taxable namely, a “vertical well,” any ambiguity with respect to the language defining the term “stripper well” must be resolved in favor of the tax payer, SBI in this case. *In re Estate of Ross*, 815 A.2d 30, 2002 Pa. Commw. LEXIS 1005, app. Den., 827 A.2d 1203 (Pa. 2003); 1 Pa.C.S. § 1928(b) (3); and, therefore, the appropriate interpretation of the term “stripper well” is that “any” unconventional gas well which produces during any one month of a calendar year a daily average of less than 90,000 cubic feet of natural gas is not a “vertical well,” subject to any Act 13 Fees.

8. Based on the production information provided to the Commission, which the parties have stipulated is accurate, I&E claims for additional Act 13 Impact Fees for the years 2011 and 2012 must be denied and this complaint dismissed.

#### **PROPOSED CONCLUSIONS OF LAW Set II**

1. I&E, as the party seeing relief has the burden of proof. *Rosemary Galligan v. West Penn Power Company*, 2014 PUC LEXIS 627 \*14 (2014).

2. Section 2310(a) of Act 13 provides as follows:

In addition to any other proceeding authorized by law, the commission **may** assess a civil penalty not to exceed \$2,500 **per violation** upon a producer for the violation of this chapter. In determining the amount of the penalty, the commission shall consider the willfulness of the violation and other relevant factors. (emphasis added).

**CIVIL PENALTY PURSUANT TO SECTION 2310**

3. Before any § 2310 Penalties can be assessed I&E must first prove that a violation of Chapter 23 of Act 13 has occurred. 58 PaC.S. § 2310(a).

4. SBI's conduct in this matter did not constitute a "violation" of Chapter 23 of Act 13 because all it did was to dispute, at the first opportunity available to it, the amount of Act 13 Fees claimed due by the Commission, and did so in good faith.

**PENALTIES AND INTEREST PURSUANT TO SECTION 2308**

5. The PUC has proposed a regulation which provides that the 5% penalty (up to a maximum of 25%) provided for by § 2308(b) may be, but is not required to be, assessed in an action to collect unpaid Act 13 Fees. Order of October 17, 2013. Appendix A.

6. The PUC has also proposed a regulation which provides that the 3% interest provided for by § 2308(a) may be, but is not required to be, assess in an action to collect unpaid Act 13 Fees. Ibid.

7. SBI had a constitutional right to contest the manner in which the PUC (and I&E) interpret the term "stripper well" as set forth in Act 13. Pennsylvania Constitution, Article 5, Section 9; and the Due Process of Law provisions of the Constitutions of the United States and Pennsylvania.

8. Pursuant to Act 13 the only mechanism available to SBI to challenge the PUC's (I&E's) interpretation of the term "stripper well" was to defend this "enforcement action."

9. Pursuant to Act 13 all Act 13 Fees paid to the PUC must be "promptly" distributed to those entities entitled thereto and in this instance any Act 13 Fees disputed by SBI would have had to be distributed before this dispute could be resolved.

10. Parties, like SBI seeking to dispute the amount of Act 13 Fees it owes have been advised by the PUC not to pay any disputed Act 13 Fees because the PUC cannot “refund” such fees once paid. Order of October 13, 2013.

11. If the penalty provided for by § 2308(b) and the interest provided for by § 2308(a) were interpreted as mandatory in all cases a person seeking to challenge whether Act 13 Fees were due would be faced with the following dilemma: Pay the fees and if its challenge was successful not be able to have the wrongfully paid fees refunded or withhold payment of the disputed amount of the fees until the dispute is resolved and risk, if its challenge failed, having § 2308(b) penalties and § 2308(a) interest changes “automatically” assessed. Such an interpretation raises a serious constitutional issue because it imposes a “penalty” or condition upon the exercise of a constitutional right. *Koontz v. St. John’s River Water Management District*, 133 S.Ct.2586, 2594 (2013); *Memorial Hospital v. Maricopa County*, 94 S.Ct. 1076 (1974); *Commonwealth v. Quarles*, 324 A.2d 452, 460-462 (Pa.Super. 1974) (plurality); and *Commonwealth v. Littlejohn*, 250 A.2d 811 (Pa. 1969). *See also, discussion at Note, Unconstitutional Conditions*, 73 Harv. L. Rev. 1595 (1960).

12. Construing the penalty provision of § 2308(b) and the interest provision of § 2308(a) to be non-mandatory, i.e., discretionary is a reasonable interpretation of Act because statutes should be construed, when possible, to avoid unconstitutional questions. *Bricklayers of Western Pennsylvania Combined Funds, Inc. v. Scott’s Development Company*, 90 A.3d 682, 691 (Pa. 214); 1 Pa.C.S. §§ 1922 (3).

13. To determine whether or not to impose a discretionary penalty or interest award the factors outlined in 52 Pa.Code § 69.1201 should be considered.

14. It is the I&E burden to establish the extent to which the factors outlined in 52 Pa.Code § 69.1201 are present and thus justify imposing a specific amount of penalty or interest.

15. Based on the foregoing Findings of Fact it is concluded that I&E failed to justify the imposition of any statutory penalty under § 2308 (b) or statutory interest under § 2308 (a) or any discretionary civil penalty under § 2310.

16. Alternatively, imposing any penalties or interest in this case would violate the Unconstitutional Conditions Doctrine and the Due Process Clauses of the United States and Pennsylvania Constitution.

**PROPOSED ORDERING PARAGRAPHS**

ALTERNATIVE I

THEREFORE,  
IT IS ORDERED:

1. The Complaint in this matter is dismissed and the matter remanded for a recalculation of Impact Fees and Administrative Fees owed by Snyder Brother, Inc. for the years 2011 and 2012, in a manner consistent with the foregoing and the proper definition of the term “stripper well..”

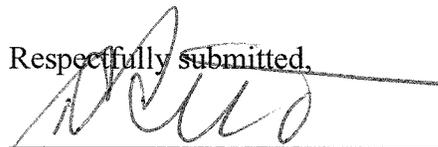
ALTERNATIVE II

THEREFORE,  
IT IS ORDERED:

1. That Snyder Brothers, Inc. shall within forty-five (45) days pay an additional \$241,200 in Act 13 Fees for 2011 and \$149,050 in Act 13 Fees for 2012.

2. No penalties or interest of any type are warranted in this case.

Respectfully submitted,



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*Counsel for Respondent Snyder Brothers,  
Inc.*

CERTIFICATE OF SERVICE

I hereby certify that service of the foregoing was made upon the persons listed below in the manner indicated:

SERVICE BY FIRST CLASS MAIL AND VIA E-MAIL ADDRESSED TO:

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Dated: 11/6/15



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Thomas C. Reed