

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Pennsylvania Public Utility	:	
Commission, Bureau of	:	
Investigation and Enforcement,	:	
Complainant	:	
	:	
v.	:	C-2014-2402746
	:	
Snyder Brothers, Inc.,	:	
Respondent	:	
	:	
Intervenor: Pennsylvania Independent	:	
Oil & Gas Association	:	

**MAIN BRIEF OF
PENNSYLVANIA INDEPENDENT OIL & GAS ASSOCIATION
IN OPPOSITION TO PROSECUTION**

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

Date: January 16, 2015

I. STATEMENT OF THE CASE

This prosecution is based upon a disputed legal issue – the proper application of the correct interpretation of the word “any” in the statutory definition of “stripper well” in Chapter 23 of Act 13 of 2012, which imposes local impact “fees” on certain unconventional natural gas wells. The complaint alleges that Snyder Brothers, Inc. (SBI) should have paid these fees for calendar years 2011 and 2012 on unconventional wells SBI asserts qualify as “stripper wells” but that the Commission’s Bureau of Investigation and Enforcement (I&E) asserts are “vertical gas wells.”

The Pennsylvania Independent Oil & Gas Association (PIOGA)¹ has members, including SBI, that are subject to the Chapter 23 fees, so PIOGA and its members are directly affected by the Commission’s resolution of this matter. PIOGA’s legal position is based upon the Commission’s correct interpretation of the word “any” in the statutory definition of “stripper well” as meaning “one” – and, more precisely, the proper application of this correct interpretation to the statutory “stripper well” definition rather than to the “vertical gas well” definition, which does not even contain the word “any.” PIOGA also supports SBI’s position on the statutory interpretation issue to the extent consistent with PIOGA’s position.

The Commission’s first clear public statement of its application of its interpretation of the word “any” in the stripper well definition to mean “one” is set forth in its October 2013 Notice of Proposed Rulemaking (NOPR) concerning Chapter 23, which was issued about three months before I&E filed this complaint (*see* last sentence):

¹ PIOGA is the comprehensive trade association representing oil and natural gas interests throughout Pennsylvania. 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).

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.* [July 19, 2012 Reconsideration Order at 5.] 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.²

PIOGA agrees that the Commission's interpretation of the word "any" in the stripper well definition as meaning "one" is correct and consistent with applicable principles of statutory construction.

SBI has raised issues, which PIOGA also supports, concerning I&E's request for penalties and interest pursuant to 58 Pa. C.S. §§ 2308(a), 2308(b) and 2810.

II. HISTORY OF THE PROCEEDING

As relevant to PIOGA's issues, on January 17, 2014 I&E filed and served the complaint in this proceeding. SBI timely filed an answer and new matter, and PIOGA timely petitioned to intervene. By order dated March 14, 2014, Administrative Law Judge (ALJ) David A. Salapa granted PIOGA's petition to intervene. With respect to what PIOGA believes is the overriding issue in this matter, I&E initially sought interlocutory review of the following material question, which PIOGA and SBI opposed:

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

The Commission declined to answer the question and returned the matter to the ALJ. However, after issuance of the ALJ's order dated August 27, 2014 denying SBI's motion for

² *Act 13 of 2012 – Implementation of Unconventional Gas Well Impact Fee Act; Chapter 23*, Docket No. L-2013-2375551, Order entered October 17, 2013 (*Chapter 23 NOPR*), at 8 (*italics in original; bold emphasis added*).

summary judgment on this legal issue, all parties sought interlocutory review of the following 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?
2. Whether Act 13 impact fees are fees or “taxes?”

The Commission again declined to answer the questions and the matter proceeded to hearing on December 4, 2014. PIOGA submits this brief in accordance with 52 Pa. Code §§ 5.501 and 5.502 and the ALJ’s prehearing order dated October 28, 2014

III. DISCUSSION

The *Chapter 23 NOPR* shows clearly that the Commission has erroneously applied its correct interpretation of the word “any” to the “vertical gas well” definition rather than to the “stripper well” definition. This prosecution just as clearly shows I&E has committed the same legal error. By this misapplication, the Commission and I&E have turned the statutory definition of stripper well on its head.

PIOGA respectfully submits that the ALJ also erred in denying SBI’s motion for summary judgment and essentially answering the following question “no”:

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?

The ALJ’s order continues the same *application* error the Commission committed in its *Chapter 23 NOPR*. Proper application of the correct meaning of the word “any” requires dismissal of the prosecution and renders moot the issues concerning penalties and interest.

IV. SUMMARY OF ARGUMENT

The correct interpretation of the statutory term “any” as meaning “one” is properly applied to the statutory definition in which the word “any” is found – the stripper well definition. This prosecution relies upon an error in applying the correct meaning of “any” as “one” instead to the vertical gas well definition. This erroneous application gives the plain meaning of the terms in the stripper well definition their opposite effect and contradicts the clear intent of Chapter 23 – to exclude marginally producing unconventional natural gas wells from paying the Chapter 23 fees.

Alternatively, if the prosecution is not dismissed, no penalties should be imposed and interest should not be imposed for the time period requested by I&E, for the reasons set forth in SBI’s main brief.

To the extent the Commission’s correct interpretation of the statutory term “any” as meaning “one” does not remove the need to determine whether Chapter 23 “impact fees” are in legal substance “taxes” for purposes of statutory construction, PIOGA asserts that the Chapter 23 fees are legally taxes and the ALJ erred in concluding otherwise. This correct characterization requires that the Chapter 23 provisions imposing the fees must be construed strictly against the Commonwealth, any ambiguity must be resolved in favor of the fee payers, and the exclusion of stripper wells from the fees must be construed in the fee payers’ favor.

V. ARGUMENT

A. **This prosecution should be dismissed because the wells at issue are “stripper wells” excluded from the Chapter 23 fees.**

PIOGA stands by its position that this prosecution should be dismissed because the legal basis for recharacterizing SBI’s wells from “stripper wells” to “vertical gas wells” is lacking. However, as PIOGA’s arguments in support of this position have been rejected by the ALJ,

PIOGA will not repeat them all here. Instead, PIOGA sets forth in this brief what PIOGA believes is the determinative point of this dispute that PIOGA respectfully submits has not been apprehended thus far by the Commission, I&E and the ALJ – the erroneous and improper application of the meaning of “any” as “one” to the vertical gas well definition rather than to the stripper well definition.³

The statutory terms “unconventional gas well,” “vertical gas well” and “stripper well” are defined in Section 2301 of Act 13, 58 Pa.C.S. § 2301, as follows:

“Unconventional gas well.” A bore hole drilled or being drilled for the purpose of or to be used for the production of natural gas from an unconventional formation.

“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 multilateral well bores at a single well, without regard to whether the production is separately metered.

It is clear that the word “any” – which the Commission has correctly interpreted as meaning “one” – appears only in the statutory definition of the word “stripper well.” It seems equally clear and beyond argument that the correct interpretation of this word is properly applied to the statutory definition in which the term appears. These definitions show that the Chapter 23 fees are to be imposed on “vertical gas wells” but not on “stripper wells,” that is, not on unconventional gas wells that are marginally producing – which the statute defines as “*incapable* of producing more than 90,000 cubic feet of gas per day during any [or “only one”] calendar month.” (Emphasis added).

³ Nonetheless, PIOGA adopts and hereby incorporates by reference the arguments set forth in its June 13, 2014 brief in opposition to I&E’s request for interlocutory review and answer to a material

The difference in the questions presented to the Commission for interlocutory review shows clearly the erroneous application of the term “any” meaning “one” to the vertical gas well definition rather than to the stripper well definition:

I&E Petition

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?

Joint Petition

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?

The first question is stated in the terms of the vertical gas well definition while the second question is stated in the terms of the stripper well definition. The first question is also stated in terms of the Commission’s and I&E’s position concerning when a vertical unconventional gas well is subject to the Chapter 23 fee:

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.⁴

The erroneous application turns the “stripper well” definition on its head because that definition refers to a well’s *incapability* to produce “more than 90,000 cubic feet of gas per day during any calendar month,” whereas the “vertical gas well” definition refers to a well’s actual production being “greater than that of a stripper well.” To paraphrase what SBI stated in its brief supporting the joint request for interlocutory review, the erroneous application of the Commission’s correct interpretation of the word “any” turns the English language on its head to

question and in its September 22, 2014 brief in support of the joint request for interlocutory review and answer to a material question. 52 Pa. Code § 1.33(a).

⁴ *Chapter 23 NOPR*, at 8 (*italics* in original; **bold** added).

suggest that “incapable” means “capable” and that “any calendar month” means “each calendar month” or “every calendar month”.

Proper application of the Commission’s interpretation of “any” to the stripper well definition would change the second sentence in the Commission’s *Chapter 23 NOPR* (p. 8) as follows (additions in **bold**):

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~~ **less** than that of a stripper well in *only one* month of a calendar year, that vertical well will be **not** subject to the fee for that year.

This changes the focus from what a well actually produces during any calendar month to what the well is *incapable* of producing “in *only one* month of a calendar year,” which is what the “stripper well” definition requires.⁵

While PIOGA believes this prosecution should be dismissed and SBI’s arguments concerning I&E’s request for penalties and interest pursuant to 58 Pa. C.S. §§ 2308(a), 2308(b) and 2810 thereby rendered moot, alternatively PIOGA hereby adopts and incorporates by reference the portion of SBI’s main brief that addresses the penalty and interest issues.

B. Chapter 23 impact fees are taxes for purposes of statutory construction.

In the order denying SBI’s summary judgment request, the ALJ concluded that Chapter 23 impact fees are not “taxes” for purposes of statutory construction:

⁵ The incapability or capability of SBI’s well to produce is not disputed in this prosecution. SBI’s witness testified at the hearing that it produced all its wells, including the wells at issue in this prosecution, to their maximum amount, and that if a well produced less than 90 Mcf average per day in any given month, “that well was then incapable of producing more.” Hearing Transcript, 130:3-17. This testimony was not disputed or undermined in any respect.

I agree with I&E that the impact fees imposed by Act 13 are not taxes. The mere fact that the impact fee generates revenue does not render it a tax. Not every fee levied by a Commonwealth agency is a tax. The Commission may impose a civil penalty for violation of the Public Utility Code, pursuant to 66 Pa. C.S. § 3301. The civil penalty generates revenue for the Commonwealth, yet one would not characterize the civil penalty as a tax solely on the basis that it raises revenue.

The Act 13 impact fees do not raise revenue for the general fund of the Commonwealth or its municipalities. Rather, the money raised by the impact fees is distributed to the municipalities to offset the impacts of drilling in the municipalities. Since the impact fee does not raise money for the general welfare or contribute to the general fund of either the Commonwealth or the municipalities, the impact fee is not a tax. *Wheeling and Lake Erie Railway Co. v. Pa. Pub. Util. Comm'n*, 141 F.3d 88 (3d. Cir. 1998). Since the impact fee is not a tax, any ambiguity in the term “stripper well” should not be strictly construed in favor of Snyder.⁶

PIOGA respectfully submits that this conclusion is based upon an incorrect understanding of the use of the fees, inapplicable case law and incorrect standards, and a false analogy.

Impact Fee Distributions

First, all impact fees are deposited into the Unconventional Gas Well Fund established by Chapter 23 and, for 2011, \$22 million was distributed first to the following entities: County Conservation Districts; PA Fish & Boat Commission; Dept of Environmental Protection; Pennsylvania Emergency Management Authority; Office of State Fire Commissioners; and Pennsylvania Dept of Transportation. These total distributions increase in subsequent years and occur before any other distributions.⁷

Second, 60% of the remaining funds are distributed from the Unconventional Gas Well Fund to counties and municipalities for various restricted uses⁸ and to the Housing Affordability

⁶ *Order Denying Motion For Summary Judgment*, August 27, 2014, at 17-18.

⁷ 58 Pa. C.S. § 2314(c).

⁸ 58 Pa. C.S. §§ 2314(d), 2314(g).

and Rehabilitation Enhancement Fund, including any excess funds not distributable to municipalities.⁹ This is the portion of the impact fees I&E and the ALJ relied upon.

Third, 40% of the funds remaining after the first “off-the-top” distributions from the Unconventional Gas Well Fund are distributed to the Marcellus Legacy Fund for redistribution to the following funds and entities: Commonwealth Financing Authority; Environmental Stewardship Fund; Highway Bridge Improvement Fund (within the Motor License Fund); PennVest and H2O PA Program; Environmental Initiatives by counties; and the Dept of Community and Economic Development.¹⁰

Clearly, the fees are distributed for more purposes than allowing counties and municipalities to offset the impacts of drilling, and even the funds distributed for this purpose offset funds the counties and municipalities would otherwise require from taxes.¹¹ The same is true of the “off-the-top” distributions and the Marcellus Legacy Fund distributions, which provide funds that otherwise would be generated by General Fund taxes and appropriated to the state entities and redistributed among the special funds. All these uses of the funds are for the general welfare and contribute, indirectly, to the General Fund.

Inapplicable Case Law and Incorrect Standards

As shown above, the proposition the *Wheeling and Lake Erie Railway Co.* is cited for does not correctly describe the uses of the impact fees. In addition, that decision is not authority for the standards for determining whether a *state* imposed fee is in legal substance a tax because that decision involved a federal statute, and federal statutory construction and preemption principles on principles. The appropriate standards are set forth in another case in which costs

⁹ 58 Pa. C.S. § 2314(e),(f).

¹⁰ 58 Pa. C.S. § 2315.

related to reconstruction of a bridge-rail crossing were determined to be neither “taxes” nor “fees” under Pennsylvania law:

The classic tax is “imposed by a legislature upon many, or all citizens ... raises money, contributed to a general fund, and spent for the benefit of the entire community”. *San Juan Cellular Telephone Co. v. Public Service Commission of Puerto Rico*, 967 F.2d 683 (1st Cir.1992). A tax is an “enforced contribution to provide for the support of government”. *United States v. LaFranca*, 282 U.S. 568, 51 S.Ct. 278, 75 L.Ed. 551 (1931). Where a charge is imposed by a state or municipality not in its capacity as a sovereign but rather under a voluntary, contractual relationship, it has been held not to be a tax. *United States v. City of Columbia, Missouri*, 914 F.2d 151, 156 (8th Cir.1990). A “fee” is paid to a public agency for bestowing a benefit which is not shared by the general members of the community and is paid by choice. *City of Vanceburg, Kentucky v. Federal Energy Regulatory Commission*, 571 F.2d 630, 644 (D.C.Cir.1977), cert. denied, 439 U.S. 818, 99 S.Ct. 79, 58 L.Ed.2d 108 (1978). The Supreme Court distinguished taxes and fees in *National Cable Television Association v. United States*, 415 U.S. 336, 340, 94 S.Ct. 1146, 1149, 39 L.Ed.2d 370 (1974):

Taxation is a legislative function, and [a legislature] ... may act arbitrarily and disregard benefits bestowed by [a g]overnment on a taxpayer and go solely on ability to pay.... A fee, however, is incident to a voluntary act, e.g., a request that a public agency permit an applicant to practice law or medicine or construct a house or run a broadcast station.

The PUC's allocation of costs does not meet the definition of a tax: it is not a legislative function; it does not disregard benefits to the railroad; it is not a revenue-raising method imposed on a class of similarly situated parties; and, it is not intended for general public benefit. Nor is it a fee charged for a specific benefit by a public agency.¹²

Under these standards, it is clear that the Chapter 23 fees are not in legal substance “fees” but instead are taxes. The statute’s description of these charges as “fees” does not support a different conclusion.¹³ PIOGA respectfully submits that the ALJ erroneously rejected authority that

¹¹ See Section 2314(g). Indeed, one of these restricted purposes is *reducing* taxes. 58 Pa. C.S. §§ 2314(g)(6).

¹² *City of Philadelphia v. Pa. Pub. Util. Comm'n*, 676 A.2d 1298, 1307-08 (Pa.Cmwlt.1996) (footnote omitted).

¹³ “[W]e have frequently held that the name given to a tax is far from conclusive in determining its real nature. It is the substance of the law or ordinance, rather than the designation or name given it by the

addresses charges more analogous to the Chapter 23 charges and supports the conclusion that the Chapter 23 charges are taxes.¹⁴

False Analogy

As shown above, raising revenue is not the sole standard for determining whether a charge is a tax. Nonetheless, comparing the Chapter 23 impact fees to penalties the PUC may impose under Section 3301 of the Public Utility Code is a false analogy. The discussion above shows that the two are simply not comparable. Whether PUC penalties are taxes is certainly not an issue in this matter or context.

Accordingly, the Chapter 23 provisions imposing the fees must be construed strictly against the Commonwealth, any ambiguity must be resolved in favor of the fee payers, and the exclusion of stripper wells from the fees must be construed in the fee payers' favor.

legislative body, that is controlling in that regard.” *Sterling v. City of Philadelphia*, 106 A.2d 793, 795 (Pa. 1054), *rehearing denied* (citations omitted).

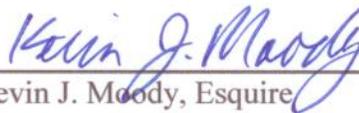
¹⁴ *Building Industry Association of Lancaster County v. Manheim Township*, 710 A.2d 141, (Pa.Cmwth. 1998) (impact fees authorized by Municipality Planning Code used “to generate revenue for funding the costs of transportation capital improvements” are taxes).

VI. CONCLUSION AND RELIEF REQUESTED

I&E's prosecution is based upon an erroneous and improper application of the Commission's correct interpretation of the word "any" and the resulting erroneous interpretation of the stripper well definition. Accordingly, PIOGA requests that the prosecution be dismissed.

In the alternative, PIOGA requests that I&E's request that SBI be required to pay penalties and interest pursuant to 58 Pa. C.S. §§ 2308(a), 2308(b) and 2810 be rejected.

Respectfully submitted,



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

Date: January 16, 2015

CERTIFICATE OF SERVICE

I hereby certify that this day, January 16, 2015, I served copies of the foregoing PIOGA Main Brief on the persons listed below in the manner indicated in accordance with the requirements of 52 Pa. Code § 1.54.

VIA E-MAIL & HAND DELIVERY

THE HONORABLE DAVID A. SALAPA
ADMINISTRATIVE LAW JUDGE
PA PUBLIC UTILITY COMMISSION
P.O. BOX 3265
HARRISBURG, PA 17105-3265
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
wascott@pa.gov

VIA E-MAIL & FIRST CLASS MAIL, POSTAGE PREPAID

DAVID C. O'HARA
VICE PRESIDENT
SNYDER BROTHERS, INC
PO BOX 1022
KITTANNING, PA 16201
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



KEVIN J. MOODY, ESQUIRE
PIOGA

PROPOSED FINDINGS OF FACT

1. During 2011 and 2012 SBI operated all of its wells so as to produce the maximum of gas each was capable of producing. Hearing Transcript (HT) 130:6-10.
2. Wells listed on SBI's 2011 and 2012 Annual Report reported as producing less than a daily average of 90,000 cubic feet of natural gas in any month were incapable of producing more than that amount during that month. HT 130:11-17.

PROPOSED CONCLUSIONS OF LAW

1. The Commission's interpretation of the word "any" in the stripper well definition as meaning "one" is a correct application of statutory construction principles and is correct as a matter of law.
2. If an unconventional gas well produces 90,000 cubic feet or less of natural gas in only one month of a calendar year, that well is not subject to Chapter 23 impact fees for that year.
3. Chapter 23 impact fees are in legal substance taxes for purposes of statutory construction.

PROPOSED ORDERING PARAGRAPHS

ORDER

THEREFORE,

IT IS ORDERED:

1. That the complaint of the Bureau of Investigation and Enforcement at Docket No. C-2014-2402746 is hereby dismissed.
2. That the docket at Docket No. C-2014-2402746 is marked closed.