



COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA PUBLIC UTILITY COMMISSION
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IN REPLY PLEASE
REFER TO OUR FILE

January 27, 2015

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105-3265

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

Dear Secretary Chiavetta:

Enclosed please find The Bureau of Investigation and Enforcement's Reply Brief in the above referenced matter. Copies have been served on the parties as indicated in the attached certificate of service.

Sincerely,

Heidi L. Wushinske, Prosecutor
Bureau of Investigation and Enforcement

Enclosures

**BEFORE THE PENNSYLVANIA
PUBLIC UTILITY COMMISSION**

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

**PENNSYLVANIA PUBLIC
UTILITY COMMISSION'S BUREAU OF INVESTIGATION AND
ENFORCEMENT'S REPLY BRIEF**

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Dated: January 27, 2015

By Order dated October 28, 2014, the Honorable David A. Salapa directed the parties to file simultaneous briefs with reply briefs due January 23, 2015. By Order dated January 7, 2015, Administrative Law Judge (“ALJ”) Salapa granted the Bureau of Investigation and Enforcement’s (“I&E”) request to extend the reply brief deadline for all parties to January 27, 2015. I&E hereby files this reply brief in response to the main briefs filed Snyder Brothers, Inc. (“Snyder Brothers” or “Respondent”) and the Pennsylvania Independent Oil & Gas Association’s (“PIOGA” or “Intervenor”).

SUMMARY OF REPLY ARGUMENT

In its main brief, Snyder Brothers makes three main arguments: (1) no civil penalty should be imposed in this case; (2) no statutory interest or penalties should be imposed in this case; and (3) imposing a statutory penalty or interest would violate the doctrine of unconstitutional conditions. Regarding Snyder Brothers’ first argument, I&E has discussed the proposed civil penalty at length in its main brief. I&E’s main brief at 16-19. In response to Snyder Brother’s second argument, I&E asserts that Act 13 of 2012, the Unconventional Gas Well Impact Fee Act (“Act 13” or “Act”) speaks for itself regarding the imposition of penalties and interest. *See* 58 Pa.C.S. § 2308(a)(b). With regard to Snyder Brothers’ third argument, Act 13’s statutory interest and penalty provisions do not constitute an unconstitutional condition.

PIOGA, in its main brief, makes two primary arguments: (1) that the wells at issue in this case are “stripper wells,” and thus not subject to Act 13 fees; and (2) that Act 13 impact fees are really “taxes” and therefore, any ambiguities in the statute must be

resolved against the Commonwealth. In answer to PIOGA's first argument, I&E maintains that the wells at issue do not qualify as "stripper wells" under Act 13 and are therefore subject to impact fees and administrative charges. Regarding PIOGA's second argument, I&E asserts that Act 13 impact fees are just that, fees and not taxes. For the reasons discussed below, as well as in I&E's main brief, PIOGA's arguments to the contrary are without merit.

A. A Civil Penalty is Warranted in This Case

Failure to timely pay impact fees and administrative charges is a violation of Act 13. Impact fees and spud fees imposed by Act 13 became due by September 1, 2012, for unconventional wells spud before January 1, 2012, and April 1 following each calendar year after 2011 for wells spud during those calendar years. 58 Pa.C.S. § 2303(a). Snyder Brothers did not and has not paid in full the amount due on its qualifying vertical wells. Specifically, for reporting year 2011, the Commission's Fiscal Office identified an additional 24 wells, for which Snyder Brothers owed a total of \$241,200.00. Tr. 65, 88; I&E Ex. 1. For reporting year 2012, the Fiscal Office identified 21 additional wells, for which Snyder Brothers owed a total of \$149,050.00. Tr. 89; I&E Ex. 1. Although Snyder Brothers has offered arguments to explain its nonpayment, the simple fact remains that Act 13 required payment in full of these fees by the due dates stated in the Act. Therefore, Snyder Brothers' nonpayment of the full amount of the impact fees and administrative charges due on its qualifying vertical wells constitutes violations of Act 13.

I&E does not dispute Snyder Brother's assertion that it did not withhold payment in bad faith. However, good faith is not a factor in determining whether a producer violated Act 13. Snyder Brothers' Brief at 8. Act 13 simply does not provide an exemption for nonpayment, even in instances where producers may have done so in good faith. 58 Pa.C.S. § 2303(a). Thus, I&E asserts that by failing to pay the full amount due by the dates established in Act 13, Snyder Brothers violated Act 13. It is not complicated. The law with regard to this issue is clear.

Because failing to pay the total amount due by the dates established in Act 13 is a violation of the Act, it is necessary to look at the other factors regarding the calculation of civil penalties. I&E has addressed these factors in its Main Brief. See I&E Main Brief at 16-19.

B. The Statutory Interest and Penalties Prescribed by Act 13 Are Not Discretionary

Snyder Brothers also argues that the statutory interest and penalties prescribed by Section 2308 of Act 13 are not mandatory. Snyder Brothers' Brief 14-17. Section 2308 of Act 13 provides that, for producers with delinquent fees, the Commission *shall* assess interest. 58 Pa.C.S. § 2308(a) (emphasis added). This section further provides that in addition to the assessed interest, the Commission *shall* add a penalty of 5% of the amount of the fee if the failure to timely pay is for less than one month, with an additional 5% penalty for each additional month or fraction of a month, not to exceed 25% in the aggregate. 58 Pa.C.S. § 2308(b) (emphasis added). As stated by I&E's witness during her testimony, Act 13 interest and fees are mandatory. Tr. 22.

The word *shall* clearly indicates the mandatory nature of Section 2308 interest and penalties. Although Snyder Brothers cites several cases in which courts have found the term *shall* to be discretionary, this is the exception rather than the rule. Snyder Brothers' Brief at 15 fn.6. Pennsylvania courts have held that "the term 'shall' is *generally* construed as creating a mandatory duty, and that it is only been in rare cases involving matters of time or form that the word 'shall' has been construed as creating a discretionary or directory duty." *Comm. v. Ferguson*, 552 A. 2d 1075, 1080 (Pa. Super. 1088) (emphasis in original)(citing *Commonwealth v. Filius*, A.2d 1078 (Pa. Super. 1985); *Wilkes-Barre Area Vocational School v. Greater Nanticoke Area School District*, 539 A.2d 902 (Pa. Cmwlth. 1988). In this case, the term "shall" directs the Commission to apply a monetary penalty and interest when fees are not timely paid. 58 Pa.C.S. § 2308.

It is also clear that the term "shall," in reference to Section 2308 interest and penalties, is mandatory from looking at other sections in Act 13. For example, Section 2310, Administrative Penalties, states that the Commission *may* assess civil penalties. 58 Pa.C.S. § 2310 (emphasis added). This is in direct contrast to the use of "shall" in reference to Section 2308 penalties and interest. 58 Pa.C.S. § 2308. Thus, Section 2308 penalties and interest require a mandatory application, while Section 2310 penalties are discretionary. 58 Pa.C.S. §§ 2308, 2310.

Because Section 2308 interest and penalties are mandatory and set by statute, it is unnecessary to apply the factors set forth in 52 Pa. Code § 69.1201. Act 13 specifically sets forth the amount of penalties and interest to be charged for failure to make a timely

payment. 58 Pa.C.S. § 2308. By contrast, Section 2310 does not specify the amount of civil penalty, other than setting a maximum, and directs the Commission to consider relevant factors in making its determination. 58 Pa.C.S. § 2310. Section 2308 directs the Commission only to assess interest and penalties at the stated amounts and does not direct it to look to any factors in making these assessments. 58 Pa.C.S. § 2308.

C. Act 13's Mandatory Interest and Penalties Do Not Violate the Doctrine of Unconstitutional Conditions

Snyder Brothers argues that Act 13's mandatory interest and penalty provisions violate the doctrine of unconstitutional conditions. Snyder Brothers' Brief at 15-17, 19-20. This argument is misplaced for several reasons.

Although there is no clear test to determine whether the doctrine of unconstitutional conditions has been violated, in general, unconstitutional conditions can arise when the government conditions the provision of a discretionary benefit on a requirement that a person give up a constitutionally protected right. *See* Gary Feinerman, *Unconstitutional Conditions: The crossroads of Substantive Rights and Equal Protection*, 43 Stan. L. Rev. 1369 (July 1991). Unconstitutional conditions have also been found where the government conditions a benefit on a requirement that a recipient performs an action that the government could not directly force a citizen to do. *Id.*

In this case, the right at issue is Respondent's right to appeal governmental actions, as set forth in the Pennsylvania Constitution. Article 5, Section 9. No one has asked or required Snyder Brothers to give up this constitutionally protected right. The fact that Act 13 applies interest and penalties to untimely payments does not rise to the

level of depriving Snyder Brothers of a right to appeal. If Snyder Brothers is successful in its challenge, it will not owe any additional fees, interest, or penalties. It is only if Snyder Brothers' interpretation is found to be incorrect that Act 13's statutory interest and penalties will be triggered. Moreover, producers who do not exercise the right to appeal are not being offered any special benefit not available to Snyder Brothers. Regardless of whether a producer exercises its right to appeal, it is still subject to statutory interest and penalties for untimely payments. 58 Pa.C.S. § 2308.

In addition, the Commission has not asked Snyder Brothers to do anything that it could not have otherwise have required it to do. As stated above, no one has asked or required Snyder Brothers to give up its right to appeal. Nor has the Commission conditioned receipt of a benefit on Snyder Brothers giving up its right to appeal. Any producer who falls to make a timely payment is subject to Act 13 statutory interest and penalties. This is not a "penalty" uniquely reserved to Snyder Brothers or producers who appeal, but rather is applied to any untimely payment, regardless of whether it was appealed or not.

In support of its claim that Section 2308 interest and penalties represent an unconstitutional condition, Snyder Brothers cites several cases decided by courts of this Commonwealth and the United States Supreme Court. Snyder Brothers' Brief at 16, 19-20. However, all of these cases can be distinguished from the case at hand.

Commonwealth v. Quarles and *Commonwealth v. Littlejohn* are both death penalty cases in which the defendants were subjected to a greater penalty, the death penalty, after exercising their rights to appeal. *Commonwealth v. Quarles*, 324 A.2d 452 (Pa. Super.

1974); *Commonwealth v. Littlejohn*, 250 A.2d 811 (Pa. 1969). In this case, not only are the stakes much lower (interest and penalties versus the death penalty), but there was no increase in penalty. The interest and penalty remained the same, as prescribed in section 2308, whether Snyder Brothers would have challenged the amount due or merely otherwise failed to timely pay the amount due.

Snyder Brothers also cites two United States Supreme Court cases in support of its unconstitutional condition argument. *Koontz v. S. John's River water Management district*, 133 S. Ct. 2586 (2013)(expanding the doctrine of unconstitutional conditions in the area of land use); *Memorial Hospital v. Maricopa County*, 94 S. Ct. 1076 (1974) (invalidating a state waiting requirement for eligibility for free nonemergency medical care). Neither of these cases address a situation similar to this case, where a corporation is disputing fees, and corresponding interest and penalties for late payment, related to its corporate activities.

For the reasons stated above, Section 2308's mandatory interest and penalties provisions do not present an unconstitutional condition.

Snyder Brothers also raises due process before the taking of "property" concerns. Snyder Brothers' Brief at 15. In order to trigger due process protections, the government must take a person's life, liberty, or property without due process of law. In this case, there has been no deprivation of due process. The Commission has afforded Snyder Brothers this administrative process with notice and a hearing before an ALJ. Therefore, Snyder Brothers has no due process claim.

D. The Wells at Issue in This Case Do Not Qualify as “Stripper Wells” Under Act 13

As discussed at length in I&E’s main brief, an unconventional gas well that produces more than an average of 90,000 cubic feet per day in any given month during a calendar year, 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. PIOGA’s arguments to the contrary are without merit.¹

I&E also notes that PIOGA erroneously defines the issue as a “recharacterizing” of Snyder Brothers’ wells from “stripper wells” to “vertical gas wells.” PIOGA’s Brief at 4. In fact, none of Snyder Brothers’ wells were recharacterized. Rather, as soon as the Commission’s Fiscal Office realized that there was a problem with the way in which Snyder Brothers’ characterized its wells on its annual reports, it notified Snyder Brothers. I&E asserts that these wells are and always have been “vertical gas wells” and no “recharacterizing” has ever occurred.

In support of its argument, PIOGA, erroneously argues that the Commission, the ALJ, and I&E have applied the meaning of “any” to the vertical gas well definition instead of the “stripper well” definition. PIOGA’s Brief at 5. This argument is misplaced. First, as can be clearly seen, the word “any” does not appear in the definition of “vertical gas well.”

¹ Snyder Brothers incorporates by reference its prior arguments that the wells at issue in this case are “stripper wells” and thus not subject to Act 13 impact fees and administrative charges. Snyder Brother’s Brief at 1. Therefore, I&E’s “stripper well” arguments are intended to also address Snyder Brothers’ contentions on this issue.

PIOGA's "evidence" of this alleged misapplication is that I&E phrased its question for interlocutory review in terms of whether a well that produces more than 90,000 cf average per day is properly subject to impact and administrative fees. PIOGA's Brief at 6. PIOGA's argument is unsupported. The definition of "stripper well," which is defined as a well producing less than 90,000 cf average per day, is the only definition at issue that quantifies a production level. Whether a well is described as qualifying as a "vertical gas well" if it produces more than 90,000 cf average per day or qualifying as a "stripper well" if it produces less than 90,000 cf average per day is not relevant. The result is the same. The real difference between the interpretation advanced by Snyder Brothers and PIOGA and that advanced by I&E is the definition of the word "any" in the "stripper well" definition, as the ALJ has addressed in his Order Denying Motion for Summary Judgment. *Order Denying Motion for Summary Judgment*, Docket No. C-2014-2402746 (Order entered August 27, 2014) (*Summary Judgment Order*).

PIOGA's arguments regarding the definition of "stripper well" further supports I&E's position- with which the ALJ has previously agreed- that the statute is not free from ambiguity and is in need of clarification. *Summary Judgment Order* at 16. As I&E has argued in its main brief, this requires a review of other considerations, which include *inter alia*, the object to be attained and the legislative history. Such a review supports a finding that I&E's interpretation of "stripper well" is correct.

E. Act 13 Impact Fees are Not Taxes

I&E reiterates its argument that Act 13 impact fees are fees and not taxes. The ALJ properly found that Act 13 impact fees were not taxes in his *Summary Judgment*

Order. Summary Judgment Order at 17-18. For the reasons stated below, the ALJ's finding was legally sound and consistent with Pennsylvania law. PIOGA's arguments to the contrary are simply wrong.

First, contrary to PIOGA's argument, the ALJ correctly understood the use of Act 13 impact fees. In support of its argument, PIOGA lists a number of entities, such as the PA Fish & Boat Commission, that received distributions from the Unconventional Gas Well Fund. PIOGA's Brief at 8. What PIOGA fails to list are the purposes, which are primarily related to unconventional gas well production or conservation, that Act 13 specifically attaches to the distributions to these entities. 58 Pa. C.S. §2314.

Likewise, PIOGA lists a number of entities that receive a portion of Act 13's funds through the Marcellus Legacy Fund, again without acknowledging that these distributions are also restricted in their usages. PIOGA's Brief at 9. The distributions made through the Marcellus Legacy Fund to the various entities listed in Section 2315 of the Act are restricted in their usages to purposes directly related to environmental purposes or infrastructure concerns related to drilling. 58 Pa. C.S. § 2315. Furthermore, many of these entities are directed to distribute the money they receive to the counties for the purposes enumerated in this section. 58 Pa. C.S. § 2315.

PIOGA's assertion that these funds "offset funds the counties and municipalities would otherwise require from taxes," is speculative at best and not relevant. PIOGA's Brief at 9. It is unknown whether the counties and municipalities would or even could raise money from taxes to accomplish these purposes. It is similarly unknown whether the other distributions cited by PIOGA would have been "otherwise generated by general

fund taxes.” PIOGA’s Brief at 9. PIOGA’s speculative assertions do not change Act 13 impact fees from fees into taxes.

PIOGA next argues that the ALJ cited incorrect case law in reaching his determination that Act 13 impact fees are not taxes. PIOGA’s Brief at 10. PIOGA’s argument rests on its assertion that the purpose of Act 13 impact fees is not really to offset the impacts of drilling in the communities affected by it, but rather for the general welfare and to indirectly contribute to the general fund. For the reasons stated above, PIOGA’s assertion is incorrect. Similarly, its argument that the ALJ cited incorrect case law is also incorrect. The case cited by the ALJ is directly applicable to the instant proceeding and correctly describes the use of the impact fees in this case. *See Wheeling and Lake Erie Railway Co. v. Pa. Pub.Util. Comm’n*, 141 F.3d 88 (3d Cir. 1998).

The case PIOGA proposes to substitute for that cited by the ALJ is not applicable to the facts of this case. PIOGA argues that the ALJ should have relied on a case involving cost allocation of a rail crossing. PIOGA’s Brief at 10 (*citing City of Philadelphia v. Pa. Pub Util. Comm’n*, 676 A.2d 1298 (Pa. Cmwlth. 1996) (*City of Philadelphia*)). This case is inapplicable to the instant case because rail crossing cost allocations, as stated in the *City of Philadelphia* case, are neither fees or taxes. *City of Philadelphia* at 1308. In fact, even this case that is not on point would direct a finding that Act 13 impact fees are fees and not taxes. As stated in *City of Philadelphia*, one of the tests regarding whether a charge is a tax or a fee is whether it is intended for the public benefit. *Id.* For the reasons stated previously, Act 13 impact fees are not for the benefit of the general public.

Another test classifying a fee as a fee, rather than a tax, is whether it is paid incident to a voluntary act for a benefit not shared by the general public. *Id.* The business of gas drilling is certainly a voluntary act and not a benefit in which the general public engages. Act 13 impact fees are clearly fees, not taxes, under any of these tests.

I&E asserts that contrary to PIOGA's argument, the ALJ's analogy comparing impact fees to penalties imposed under the Public Utility Code, presents a useful comparison. Nowhere did the ALJ state, as PIOGA implies, that the sole method of distinguishing a tax from a fee was whether it raised revenue. Rather, the ALJ used the example of Public Utility Code penalties to illustrate that "[t]he mere fact that the impact fee generates revenue does not render it a tax." *Summary Judgment Order* at 17. The ALJ properly concluded that Act 13 impact fees were fees, not taxes, and thus any ambiguities should not be strictly construed in favor of Snyder Brothers. *Id.* at 18. PIOGA's attempts to challenge the ALJ's finding on the basis of an analogy with which it disagrees is a "red herring" and should be ignored.

CONCLUSION

WHEREFORE, for the reasons stated above as well as in I&E's main brief, the Pennsylvania Public Utility Commission's Bureau of Investigation and Enforcement urges this Honorable Administrative Law, after consideration of the record, to find Snyder Brother's, Inc. in violation of each and every count as set forth herein and grant the relief as set forth in the main brief of the Bureau of Investigation and Enforcement.

Respectfully submitted,



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Date: January 27, 2015

CERTIFICATE OF SERVICE

I hereby certify that I am this day serving the foregoing Reply Brief 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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