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January 27, 2015

The Honorable 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 for filing pursuant to is the Reply Brief of Snyder Brothers, Inc., in the above  
action.

If your office has any questions feel free to contact me.

Respectfully submitted,

Thomas C. Reed  
Counsel for Snyder Brothers, Inc.

Cc: The Honorable David A. Salapa, Administrative Law Judge  
Heidi L. Wushinske, Esquire  
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w/enclosure



pursuant to 58 Pa. C. S. §2302 are denominated as an “impact fee,” the revenue generated is, for all intents and purposes, a “tax” within the meaning of 1 Pa.C.S. A. § 1928(b) (3).<sup>2</sup>

In its Main Brief, at page 16, I&E attempts to dismiss the conclusion of our Commonwealth Court that, “an impact fee is a government charge or fee used to generate revenue; it is, therefore, a tax,” *Building Indus. Ass’n v. Manheim Twp.*, 710 A.2d 141, 145 (Pa. Commw. Ct. 1998), by suggesting the levy in that case is somehow dramatically different from the one at issue here. That is simply not the case. The levy at issue in *Manheim Twp.* was levied upon developers, based “in part, on the amount of vehicular traffic a proposed development would generate.” 710 A.2d at 143. In other words, it was designed to have the developers “pay” to “offset” the additional costs incurred by the local municipality resulting from the additional traffic the proposed new development would cause. This is indistinguishable from some (but as discussed below, not all) of the uses to which Act 13 Impact Fees can be put. Just like the “user fee” in *Mannheim*, the Impact Fee imposed by Act 13 is a “tax.”

Furthermore, that General Assembly choose to call the revenues generated by Act 13 for use by counties and other government entities an “impact fee” and not a “tax,” is not controlling; it is the “substance of the law or ordinance, rather than the designation or name given it by the legislative body, that is controlling...” as how a revenue generating provision is to be characterized. *Sterling v. Philadelphia*, 106 A.2d 793, 795 (Pa. 1954) and cases cited therein.

A tax, unlike a true “user” or “license” fee, is a revenue producing measure characterized by the production of large income and a high proportion of income relative to the costs of

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<sup>2</sup> SBI is not arguing that the “fees” it has been required to pay with respect to its unconventional non-stripper wells are being, or have been, illegally assessed. It is only arguing, in the alternative, that if there is some ambiguity as to the meaning of the term “stripper well” the nature of the “fees” being sought are such that the strict rule of construction set forth in 1 Pa.C.S.A. § 1928(b) (3) is applicable to interpreting the statutory “stripper well.”

collection and supervision. *Simpson v. City of New Castle*, 740 A2d 287, 1999 Commw. Lexis 848.

Applying this test here, the Act 13 “user fee” certainly qualifies as a tax---the amount of revenue which SBI has remitted to the PUC for distribution to the counties where it operates which is not in dispute unquestionably is a “large one,” exceeding several hundreds of thousands of dollars. Indeed, I&E has stressed the “large” amounts of revenue which “user fees” generate.

In addition, the prime intended recipients of Act 13 “user fees” are counties, not the agency which has primary jurisdiction over the regulation of unconventional gas production which, of course, is the Department of Environmental Protection (“DEP”).<sup>3</sup> Thus it is pure sophistry to suggest that “user fees” bear some relationship to local **regulation** of unconventional gas drilling activities. Indeed, as envisioned by the drafters of Act 13, local municipalities would have had virtually no authority to regulate such activities, either where they were located or how they were to be operated.

The amount of “user fees” collected far exceeds the PUC’s cost of “regulating” unconventional gas well drilling activities and administering the user fee collection and distribution system. The \$50 administrative fee provided for by Act 13 (as opposed to the “Impact Fee”) is to “pay for the actual costs of the commission to administer and enforce this chapter.” 58 Pa.C.S. § 2303 (c)(1). Accordingly, the cost of the burden placed on the PUC to gather and collect the information needed to calculate and remit “user fees” is modest at best, and any revenue collected in excess of this modest fee, is merely a device to generate revenue, unrelated to any regulatory or oversight scheme imposed by, or upon, the Commission or, as noted local municipalities.

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<sup>3</sup> Of course, SBI does pay a true “user fee” to DEP as part of the review of each application for a permit it files.

As discussed above, to qualify as a true “user fee” the payments required to be made must not substantially exceed the costs associated with “regulating” the activity at issue, or “off-setting” the burdens which a particular activity may impose upon the locality where it occurs. *National Biscuit Co. v. Philadelphia*, 98 A.2d 182, 187 (Pa.1953) and cases discussed therein.

Yet, as is clear from the language of Act 13, the “user fees” collected by the PUC can be used for many purposes other than regulating” unconventional gas drilling or “off-setting” those costs of government as may be increased as result of any extra burdens placed thereon by such activities.

Perhaps most significantly, the “user fees” which the I&E seeks to collect from SBI can be used to reduce taxes (58 Pa.C.S. § 2314(g)(6), and a “fee” which, once collected, can be used by its recipient to “reduce taxes” is, *per se*, a “tax,” the applicability of which to the “payor” should be strictly construed against the “fee collector.”

The “user fees” sought to be collected here can also be used on projects to increase the availability of safe and affordable housing, (58 Pa.C.S. § 2314(g)(7), the delivery of social services, (58 P.S. § 2314(g)(9), and judicial services (58 Pa.C.S. § 2314(g)(10), purposes which bear no relationship to the “regulation” of, or off-setting the costs of addressing any burdens increased or caused by, unconventional gas drilling activities.<sup>4</sup>

Because the” impact fees” authorized by Act 13 and the term "stripper well" are part of the definition of what is "taxable," the statutory language at issue must be, if any ambiguity exists (which SBI submits is not the case here) strictly construed in favor of the impact fee payor

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<sup>4</sup> That a county can use Act 13 “user fees” for some purposes that may arguably off-set certain increased costs incurred by a county as a result of unconventional gas drilling activities does not mean that a driller’s liability to pay these fees cannot be strictly construed against the “fee” collector. A “fee” which generates revenue, particularly large amounts of revenues like Act 13 “user fees,” that can be put to such general purposes as tax reduction, social service provision, the provision of housing and payment of judicial services is, at a minimum, subject to the application of 1 Pa.C.S.A. § 1928(b)(3).

namely, SBI. Accordingly, all reasonable doubt as to the meaning of the language must be construed in favor of the payor and against the assessing body. *In re Estate of Ross*, 815 A.2d 30, 2002 Pa. Commw. LEXIS 1005 (Pa. Commw. Ct. 2002), app. Den. 573 Pa. 713, 827 A.2d 1203, 2003 Pa. LEXIS 1265 (2003).

Most assuredly, the interpretation given Section 2301 by the I&E is far from a "strict" reading of that section's definition of the term "stripper well" and, without a doubt, fails to resolve any, let alone all, reasonable doubt as to the meaning of that definition in favor of SBI, the taxpayer, and against the taxing body.

**II.**  
**I&E's ARGUMENT WITH RESPECT TO THE APPLICATION OF THE FACTORS SET FORTH IN 52 Pa.Code § 69.1201 MISSES THE MARK AND NO PENALTIES OR INTEREST SHOULD BE AWARDED IN THIS CASE**<sup>5</sup>

I&E has suggested that the factors discussed in subsections (c) (2), (c) (3), (c) (4), (c) (6) and (c) (8) of 52 Pa.Code § 69.1201 all support imposing penalties and interest in this case. As discussed below, I&E's application of these factors misses the mark in the circumstances present here.

**A. Any Delay In Receiving The Act 13 Fees Which Are In Dispute In This Case Was Not Caused By Anything SBI Did Or Did Not Do And 52 Pa.Code § 69.1201(c)(2) Does Not Support Imposing Any Penalty or Interest In This Case.**

Any delay in local counties/municipalities or others receiving additional Act 13 Fees from SBI was **not** caused by anything SBI did or did not do. Simply put, SBI had the right to dispute the Fiscal Bureau's claim that additional Act 13 Fees were due, and once it invoked that right it simply did what it was told to do namely, withhold payment until the dispute was resolved.

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<sup>5</sup> This section of SBI's Reply Brief responds to the discussion contained in pages 16-19 of I&E's Main Brief.

Such delay as may result (there of course will be no delay if SBI's interpretation of the term "stripper well" is correct) in the receipt by governmental units of additional Act 13 Fees resulted because Act 13 contains no refund provision and the Commission's recommendation that persons disputing claims made by the Fiscal Bureau should not pay the disputed amounts until the dispute is resolved. See discussion at pages 8-9 of SBI's Main Post-Hearing Brief.

**B. It Does Not Matter Whether SBI Should Have Read The So-Called Clarification Orders Because It Had The Right To Question The Manner In Which The Public Utility Commission Interprets the Term Stripper Well In Any Event**

I&E claims that it is "negligence" for a regulated entity to make no attempt to understand how its regulator interprets the law. I&E Main Brief, pp. 17-19. Therefore, I&E argues the "culpability" factor of 52 Pa.Code § 69,1201(c)(3) has been met (to some degree) and a civil penalty is justified.

What I&E is really arguing is if had SBI read a "clarification order" (presumably dated July 19, 2012, since all other such "clarification orders" either clarified nothing about the term "stripper well" or defined it in terms of yearly not monthly production) this would have ended the dispute because it would have "known" it had to pay more Act 13 Fees. In other words, I&E is arguing that SBI had no right to question the PUC's interpretation of the statutory term "stripper well;" instead, it was somehow obligated to accept what it could have read as "the law" and simply pay an Impact Fee on every unconventional well it operated that did not produce less than a daily average of 90,000 cubic feet of gas each and every month of an applicable Act 13 Reporting Period.

But of course, our system does not work this way. No citizen of Pennsylvania (or the United States) is obligated to accept what they are "told" is a law which will take some of their property without being afforded the right to question what they may have been told is, in fact, the

law, at a meaningful time and in a meaningful manner. *See, e.g., Goldberg v. Kelly*, 397 U.S. 254, 264 (1970); and *Fuentes v. Shevin*, 407 U.S. 67, 80-84 (1962).

Therefore it does not matter whether or not SBI should have familiarized itself fully with the Commission's so-called "clarification orders." SBI had (and still has) a right to dispute the interpretation which the Fiscal Bureau gives to the term "stripper well" and it had (and has) this right regardless of whether it had knowledge (which it did not) of how the Fiscal Bureau and the Commission interpret the word "stripper well" prior to submitting its 2011 and 2012 Act 13 Reports.

Furthermore, it had the right to do so without paying the Act 13 Fees which are in dispute, simply because Act 13 does not contain any mechanism for "refunding" Act 13 Fees if the "dispute" is resolved in favor of the gas operator. Clearly, a "right to dispute" a government claim, or to a "hearing," is not "meaningful" if the party invoking its right to due process cannot be afforded any relief, something the Commission does seem to understand. *See* October 17, 2013 Order, docketed at No. L-2013-2375551, p. 18, n. 27.

Had the Fiscal Bureau bothered to examine SBI's 2011 Act 13 Report (which contained all the information the Fiscal Bureau needed to determine if SBI disagreed with, or disputed, its interpretation of "stripper well") and informed SBI in the fall of 2012 that there was a disagreement instead of sending it a statement that was consistent with SBI's view of what it owed, SBI would have still had the right to dispute that interpretation and, further, it would have been told NOT to pay the disputed Act 13 Fees until the dispute was resolved, which is what it was told to do when it became clear in 2013 that there was a dispute over how to interpret the term "stripper well." *See* Joint Exhibit 6.

Of course, the evidence in this case established that SBI was not aware of how the Commission and Fiscal Bureau interpreted the term “stripper well” until April of 2013, but it simply does not matter whether it was or was not aware of this sooner because if it had been it would still have had the right to dispute whether it owed the Act 13 Fees claimed due by the Fiscal Bureau.

SBI had the right to dispute how the PUC interprets the term “stripper well” **and that is all that matters.** Whether SBI knew, did not know, or should have known, how the Commission interpreted the term “stripper well” before it submitted its 2011 and 2012 Act 13 Reports (which both disclosed fully to the Fiscal Bureau all the information it needed to know to determine how SBI interpreted that term) does not matter.<sup>6</sup>

**C. It Is Incorrect To Argue That Imposing Fines and Penalties In This Case Will, Within The Meaning 52 Pa.Code § 69.121(c) (4), Cause SBI To Change Its Internal Practices Thus Preventing Similar Violations**

What I&E really is arguing here is that imposing a penalty here will likely cause SBI to begin to read PUC “Clarifications Orders” and the Pennsylvania Bulletin in the future. What if it does? It is not a violation of any law to not look at the PUC’s website or the Pennsylvania Bulletin on a daily basis, or at all. Furthermore, if it does encourage SBI to do so, that does not mean that SBI will not, again, take issue and dispute some interpretation of the law the Commission might “announce” (all that has occurred here), which, in the future, comes to its attention after a diligent review of the Pennsylvania Bulletin or the Commission’s webpage.

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<sup>6</sup> Of course, as the evidence established the hands of the Commission and its Fiscal Bureau are “far from clean.” Had the Fiscal Bureau bothered to read SBI’s 2011 Report it would have noted what it noted a year later and this dispute would have, presumably, already been resolved. Also, for the Commission to suggest that publishing multiple “clarifications” on its webpage constitutes “notice” of anything belies the fact that its Fiscal Bureau saw the need to finally “clarify” its understanding of the term “stripper well” by attempting to directly contact operators via emails just two weeks before the first report was due and AFTER SBI’s 2011 Report had been submitted. See discussion at pages 17-18 of SBI’s Main Post-Hearing Brief.

All that has occurred here is that a citizen of Pennsylvania has disputed (in good faith) a claim by a state agency that it should pay it money in precisely the manner it was entitled to. Imposing a fine is not going to cause SBI to change any procedures which will, in the future, prevent or lessen the likelihood of future “violations” of the law.

**D. It Is Nonsense To Argue That Factor Discussed in 52 Pa.Code § 69.1201(c) (6) Applies In This Case.**

52 Pa.Code § 69.1201(c) (6) directs that a party’s compliance “history” be taken into consideration. There was no evidence introduced that SBI had ever previously been found to have violated any provision of law or any regulation administered by the Commission. It has **no history** of any prior “bad conduct” and therefore, by definition subsection (c) (6) of 52 Pa.Code § 1201(c) (6) does not apply. Moreover, as SBI has repeatedly argued it’s decision to pay what it believed it owed and dispute what it believed was not owed, in the precise manner recommended by the Commission and the Fiscal Bureau is **not** a violation of anything.

**E. The Factor Discussed in 52 Pa.Code § 69.1201(c) (8) Also Does Not Apply**

As argued in SBI’s Main Brief, and also above, there has been no “violation” of Chapter 23 of Act 13 in this case, therefore there is no future conduct that needs to be “deterred.”

Instead, imposing sanctions of any type in this case will not deter “future violations,” it will only serve to potentially “coerce” citizens, including SBI, into possibly foregoing their constitutional right to dispute state agency claims for fear that “sanctions” will be imposed upon them if they, in good faith, unsuccessfully challenge a governmental action.

In summary, none of the factors outline in 52 Pa.Code § 69.1201 are applicable or relevant and I&E failed to establish that any type of penalties or interest is appropriate in this case.

**CONCLUSION**

The Complaint in this matter should be dismissed for the reasons set forth in SBI's Main Brief and above. Alternatively, no interest or penalties of any kind should be imposed in this matter for the reasons set forth above and in SBI's Main Brief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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

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Dated: January 27, 2015



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Thomas C. Reed