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 | : | |

# REPLY 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 30, 2015

## I. INTRODUCTION

In accordance with the ALJ's October 28, 2014 prehearing order, as modified by subsequent orders and directives, the Pennsylvania Independent Oil & Gas Association (PIOGA) submits this brief in reply to the arguments in the Main Brief of the Bureau of Investigation and Enforcement (I&E).

## II. SUMMARY OF REPLY ARGUMENT

I&E's reliance on the Commission's reconsideration and clarification orders is misplaced and erroneous because these orders do not clearly state the Commission's (and I&E's and now the ALJ's) position that an unconventional vertical gas well producing more than 90,000 cubic feet of natural gas per day in *only one* calendar month does not qualify as a stripper well and instead qualifies as a vertical gas well subject to the Chapter 23 impact fee for that calendar year.

The rules of statutory construction support the position of PIOGA and Snyder Brothers, Inc. (SBI) that the plain meanings of the words in the stripper well definition and Chapter 23 require the following conclusions: (i) Chapter 23 impact fees are in legal substance taxes; (ii) stripper wells were not intended to be subject to the impact fee and are therefore tax exclusions for purposes of statutory construction; and (iii) an unconventional gas well incapable of producing more than 90,000 cubic feet of natural gas per day in *only one* calendar month qualifies as a stripper well that is excluded from the impact fee for that calendar year.

Imposition of any penalties in this matter is wholly unsupported by the record and Commission standards.

## III. REPLY ARGUMENT

### A. I&E'S Main Brief Actually Support's PIOGA's and SBI's Position Concerning the Legal Interpretation and Application of the Stripper Well Definition.

In its Main Brief I&E repeatedly asserts that:

> The Commission has *clearly stated* that a vertical gas well derives its status based on production levels, which are determined per day during any calendar month. If a vertical gas well's production levels qualify it as a vertical gas well during any calendar month in a calendar year, that well will be subject to Act 13's impact fee.[1]

I&E cites the following Commission orders to support this statement:

- *Reconsideration Order Regarding Chapter 13*, M-2012-2288561, July 19, 2012, at 4.
- *Implementation Order Regarding Chapter 23*, M-2012-2288561, May 10, 2012, at 7.
- *Act 13 of 2012–Implementation of Unconventional Gas Well Impact Fee Act; Chapter 23*, L-2013-237551, October 17, 2013 (*Rulemaking Order*).

Except for the Rulemaking Order (as explained in PIOGA's Main Brief at 1-2, 6-7), these orders do not support the assertion that the Commission clearly stated its "stripper well" interpretation therein.[2]

The statement in the *Reconsideration Order* followed a discussion about whether the three-minimum fee established by 58 Pa.C.S. § 2302(b.1) is lawfully applied to vertical unconventional gas wells. In its May 10th *Implementation Order* (p. 7) the Commission had stated that "for clarity's sake, pursuant to Section 2302(a), it is the spudding of a well, not the production of that well, which is determinative of whether a fee is due." In response, PIOGA and other producer representatives (Producers) asserted that the Commission was wrong:

> [W]ell production *is* determinative of whether a vertical gas well is subject to a local impact fee. **If a vertical gas well produces an average of 90,000 or less cubic feet of natural gas per day, it is not – by definition – a 'vertical gas well' subject to the fee in the first place.**[3]

---

1 I&E Main Brief (MB) at 9; also 11, 14, 17 and 18 (emphasis added).

2 The brief also mentions the *Clarification Order* in this context but otherwise doesn't cite to or quote from this order, which PIOGA assumes means the order entered December 20, 2012 at M-2012-2288561. This order did not involve the question presented in this prosecution.

3 *Joint Petition of Pennsylvania Independent Oil & Gas Association, Marcellus Shale Coalition and Associated Petroleum Industries of PA for Reconsideration and Clarification*, M-2012-2288561, May 25, 2012, ¶8 (*italics* in original; **bold** added).

After agreeing with the Producers that vertical unconventional gas wells are not subject to the fee upon spudding and are not subject to the three-year minimum fee applicable to non-vertical unconventional gas wells, the Commission made the statement relied upon by I&E:

> As a final observation on our treatment of vertical gas wells, we note that a vertical gas well derives its status based on production levels. **Those production levels are determined per day during any calendar month**. If a vertical gas well qualifies as such, via production levels, during any calendar month in a calendar year, that well will be subject to the impact fee. 58 Pa.C.S. §§ 2301, 2302(f).[4]

In the context of the Producers' statements in ¶8 of their reconsideration petition, which are stated in the terms of the *stripper well* definition and which the Commission accepted, the Commission's statement above does not clearly put the public on notice that an unconventional gas well producing *more* than 90,000 cubic feet of natural gas per day in *only one* month of a calendar year loses its stripper well status and becomes subject to the fee as a vertical gas well.[5] This is shown by I&E's position that the word "any" doesn't mean "one" but means "each" or "every".[6] Based on I&E's position, the Commission's statement would read as follows:

> If a vertical gas well qualifies as such, via production levels, during ~~any~~ **each or every** calendar month in a calendar year, that well will be subject to the impact fee.

*This statement is PIOGA's and SBI's position.* This shows that the Commission's statement in its *Reconsideration Order* is not clear.

---

[4] *Reconsideration Order Regarding Chapter 13*, M-2012-2288561, July 19, 2012, at 4; I&E MB at 9, 11 and 14.

[5] The Commission's statement also shows that the Commission's interpretation of the stripper well definition is actually an interpretation of the vertical gas well definition, as argued in PIOGA's Main Brief at 5-7.

[6] I&E MB at 13; I&E brief in support of Interlocutory review, June 17, 2012, at 10; I&E brief in opposition to summary judgment, July 28, 2014, at 11; I&E brief in support of joint petition for interlocutory review, September 2012, at 8-9.

Similarly, the statement in the May 10th *Implementation Order* that "for purposes of calculating production from a stripper well, the Commission expects producers to simply divide the well's monthly production by the number of days the well is in production in the relevant calendar month," does not put the public on notice that a *vertical gas well* producing more than 90,000 cubic feet of natural gas per day in *only one* month of a calendar year loses its "stripper well" status and becomes subject to the fee.[7] Nor does this statement support the position that the stripper well definition is ambiguous (this point is addressed below).

It was not until the *Rulemaking Order* that the Commission clearly informed the public that – even though the Commission interpreted the word "any" in the stripper well definition to mean "one" – a stripper well *not* producing 90,000 or less cubic feet of natural gas per day in *each* or *every* month of the calendar year does not qualify as a stripper well but instead qualifies as a vertical gas well: "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."[8]

Accordingly, I&E's reliance on the Commission's orders prior to the *Rulemaking Order* for a clear statement of the Commission's position on the overriding legal issue in this prosecution is misplaced and erroneous.

---

[7] This statement shows another subject on which the Commission's initial interpretation of the plain words of the statute was incorrect. These statutory interpretation errors are relevant to whether the Commission's interpretations of Act 13 are entitled to deference and are addressed in more detail below in Section III.B.

[8] *Rulemaking Order*, at 8 (*italics* in original).

### B. Rules of Statutory Construction Support PIOGA's and SBI's Position Concerning the Legal Interpretation and Application of the Stripper Well Definition.

As explained in PIOGA's Main Brief (pp. 4-5), there is no need to resort to statutory interpretation of the word "any" in the stripper well definition because (i) the definition is clear and unambiguous and (ii) to the extent the word "any" is ambiguous, the Commission has removed the ambiguity by, correctly in PIOGA's view, determining that the word "any" in the stripper well definition means "one." Nonetheless, to the extent statutory interpretation is necessary to determine whether an unconventional gas well producing 90,000 or less cubic feet of natural gas per day for *only one* calendar month qualifies as a stripper well that is excluded from the fee – as the relevant definitions and other Chapter 23 provisions seem to plainly state – the statutory interpretation rules support PIOGA's and SBI's position, not I&E's.

#### 1. I&E's statutory interpretation "Legal Standard" is not applicable to this matter.

I&E relies on two cases for the legal standard for application of the rules of statutory construction in this matter: *Mercury Trucking, Inc. v. Pa. PUC*, 55 A.3d 1056 (Pa. 2012) and *Commonwealth v. Shiffler*, 879 A.2d 185 (Pa. 2005).[9] These cases involved multiple statutes and complicated issues that required our Supreme Court to go beyond the plain meaning of the statutory language to avoid what the Court determined would be absurd or unreasonable results produced by application of the general rule of statutory interpretation.

These were the issues in *Mercury Trucking*:

> 1. Whether a suit filed against the Commonwealth by a public utility under 66 Pa.C.S. § 510(d) from an order of the [Commission] is brought in the Commonwealth Court's original jurisdiction under 42 Pa.C.S. § 761 or in the Commonwealth Court's appellate jurisdiction under

[9] I&E Main Brief at 10-11. This statement of the legal standard paraphrases the statement at pp. 1067-68 of the *Mercury Trucking* decision.

> 42 Pa.C.S. § 763? Include a discussion of the [Commission]'s position in *United Parcel Service, Inc. v. Pennsylvania Pub. Util. Comm'n,* 789 A.2d 353 (Pa.CmwIth[Cmwlth].2001), *vacated and remanded,* [574 Pa. 304], 830 A.2d 941 (Pa.2003), on this issue.
>
> 2. Whether this Court has jurisdiction under 42 Pa.C.S. § 723(a) or 42 Pa.C.S. § 724(a) to review a final order entered by the Commonwealth Court in a suit filed against the Commonwealth by a public utility under 66 Pa.C.S. § 510(d) from an order of the [Commission]?
>
> 3. Whether a suit that was filed in the Commonwealth Court's appellate jurisdiction by a public utility under 66 Pa.C.S. § 510(d) from an order of the [Commission] and thereafter transferred to and decided in the Commonwealth Court's original jurisdiction was "originally commenced" in the Commonwealth Court within the meaning of 42 Pa.C.S. § 723(a)?
>
> 4. Whether the Commonwealth Court erred as a matter of law by not finding that, pursuant to § 510(b) of the Public Utility Code, where the utility fails to supply its intrastate revenue report the Commission's revenue statement is " binding" for purposes of the assessment calculation and any subsequent assessment objection under § 510(d)?[10]

The Court described the issues in the *Shiffler* case:

> On appeal to this Court, appellant challenges the panel majority's interpretation of Section 9714, arguing that he is but a two-strike offender. Appellant suggests that we read the statute as a whole and interpret it consistently with the recidivist philosophy of sentencing, which the General Assembly intended. He submits that such a reading reveals that, in order to be sentenced as a third-time offender under the statute, the defendant's two predicate convictions must have occurred "sequentially." Moreover, appellant argues that requiring prior convictions to be sequential "is necessary to serve the statute's aim--to impose a stiffer penalty on the incorrigible criminal who has been unaffected by prior punishments." Appellant's Brief at 13. The Commonwealth counters that the Superior Court was correct in remanding the matter for resentencing based on the plain meaning of the statutory text which dictates that appellant be sentenced as a third-time offender. We granted allocatur to consider whether the recidivist philosophy influences or controls the interpretation of the three strikes law.[11]

In contrast to these two cases, this matter involves a simple statutory construction issue – the correct interpretation and application of the stripper well definition.

---

[10] *Mercury Trucking*, 55 A.3d at 1061-62.

As this matter does not involve multiple statutes and complicated issues,[12] application of the general rule of statutory construction recognized in *Shiffler* is appropriate:

> [T]he primary maxim [is] that the object of statutory construction is to ascertain and effectuate legislative intent. . . . [and] '*as a general rule, the best indication of legislative intent is the plain language of a statute*.' *See* [Commonwealth v.] *Bradley,* 834 A.2d [1127] at 1132 (citing *Commonwealth v. Gilmour Mfg. Co.,* 573 Pa. 143, 822 A.2d 676, 679 (2003)).[13]

As the Chapter 23 fees are in legal substance "taxes,"[14] the appropriate statutory construction legal standard to apply in this matter is set forth in a tax case cited in *Shiffler*:

> The General Assembly has directed in the Statutory Construction Act, 1 Pa.C.S. § 1501 *et seq*., that the object of interpretation and construction of all statutes is to ascertain and effectuate the intention of the General Assembly. *See* 1 Pa.C.S. §§ 1903(a), 1921(b). Generally speaking, the best indication of legislative intent is the plain language of a statute. *See*, *e.g.*, *Bowser v. Blom*, 569 Pa. 609, 807 A.2d 830, 835 (2002) (citations omitted). Furthermore, in construing statutory language, "[w]ords and phrases shall be construed according to rules of grammar and according to their common and approved usage...."1 Pa.C.S. § 1903. Another bedrock principle of statutory construction requires that a statute "be construed, if possible, to give effect to all its provisions," so that no provision is mere surplusage. 1 Pa.C.S. § 1921(a). Finally, the Act directs that all provisions of statutes imposing taxes are to be narrowly construed. *Id.* § 1928(b)(3); *see also Ross-Araco Corp. v. Board of Finance and Revenue*, 544 Pa. 74, 674 A.2d 691, 694 (1996).[15]

**2. I&E's application of the statutory construction factors do not support its position.**

I&E references the following seven factors – beyond the plain language of the statute – as relevant to ascertaining and effectuating the General Assembly's intent with respect to the

---

11 *Commonwealth v. Shiffler*, 879 A.2d at 188.

12 In response to a question on cross-examination stating that the stripper well definition was complicated, SBI's witness responded: "I wasn't aware of those [PUC Clarification or Implementation Orders], but I don't agree that it's complicated. It's a very straightforward definition." HT at 131:11-12.

13 *Commonwealth v. Shiffler*, 879 A.2d at 189 (emphasis added).

14 PIOGA Main Brief at 7-11.

15 *Com. v. Gilmour Mfg. Co.*, 822 A.2d 676, 679 (Pa. 2003).

definition and treatment of stripper wells under Chapter 23 of Act 13: the occasion and necessity for the statute; the circumstances under which it was enacted; the mischief to be remedied; the object to be attained; the consequences of a particular interpretation; the contemporaneous legislative history; and legislative and administrative interpretations of such statute.[16] While I&E states that all seven factors support its position, its Main Brief (pp. 12-14) addresses only five factors, corresponding to 1 Pa. C.S. § 1921(c)(1),(4),(6), (7) and (8). But I&E's truncated explanations of these five factors, which apparently were accepted by the ALJ in denying summary judgment to SBI, do not support the interpretation of the statute I&E seeks.

Occasion and necessity for the statute

I&E argues that PIOGA's and SBI's interpretation "would cause a reduction in the amount of these [Act 13] fees and distributions that] would clearly frustrate the purpose of the statute [in collecting and disbursing the fees to municipalities affected by unconventional gas wells]."[17] I&E puts this reduction in fees at "nearly half million dollars" even though it acknowledges that the amount of fees at issue in this matter is only $391,250.[18] Consideration of any fees due for 2013 is beyond the scope of this matter and therefore improper.

As explained in PIOGA's Main Brief (pp. 8-9), collecting and disbursing the fees to municipalities affected by unconventional gas wells is *only one* of the purposes of Chapter 23 of Act 13. But the main flaw in this argument – that also permeates I&E's other statutory construction arguments – is that *any* statutory interpretation that reduces fees is *per se* contrary to legislative intent, unreasonable and absurd. This is an untenable position that is contrary to established case law and the Commission's other statutory interpretations of Chapter 23.

---

16 I&E MB at 11-12. These factors correspond to 1 Pa. C.S. § 1921(c)(1)-(4), (6)-(8).

17 I&E Main Brief at 12.

18 *Id.*, n.1.

The *Gilmour* case is a prime example. The Court's resolution of the issue in that case in the taxpayer's favor reduced the amount of sales tax to be collected by the Commonwealth, yet the Court applied the plain language general rule of statutory construction rather than the rare exceptions applied in *Mercury Trucking* and *Shiffler*. An example with an even more significant reduction in taxes collected by the Commonwealth involved what is commonly known as PURTA – the Public Utility Realty Tax Act. In a decision affirmed *per curiam* by our Supreme Court, the Commonwealth Court interpreted the plain language of the PURTA statute to exclude electric cooperative corporations providing electric service to their members from the imposition of the state-wide PURTA property tax. Despite the significant adverse effect on the Commonwealth's tax collections of excluding prospectively a whole group of entities that had previously paid the state tax, and requiring refunds of the amounts unlawfully collected in previous years, our Commonwealth Court and Supreme Court applied the plain language general rule of statutory construction.[19]

Additional examples could be provided, but these two cases illustrate the point that the argument that any statutory interpretation that reduces taxes or fees is *per se* contrary to legislative intent, unreasonable and absurd could be made in *any* case involving a resolution that would have that result.

Indeed, the Commission has made some plain language interpretations of Chapter 23 that have the result of reducing the amount of fees and administrative charges to be collected compared to the amount that would have been collected if the interpretations had been to the contrary. First, the Commission, properly in PIOGA's view, interpreted Chapter 23, Section 2302(f) as excluding vertical unconventional gas wells from the minimum three year fee

---

[19] *Adams Electric Cooperative et al. v. Com. of Pa.*, 853 A.2d 1162 (Pa.Cmwlth. 2004), *aff'd per curiam*, 887 A.2d 1213 (Pa. 2005).

requirement imposed by Section 2302(b.1) because the plain language of Section 2302(f) imposing the vertical unconventional gas well fee did not include Section 2302(b.1).[20] Second, the Commission, again correctly in PIOGA's view, interpreted the plain language of Chapter 23, Subsection 2303(c)(3) as limiting the assessment of its administrative and enforcement charges not covered by the $50 administrative charge and other revenues to producers "subject to the unconventional gas well fee," as opposed to all producers without limitation.[21] Per I&E's legal standard, these interpretations would be unreasonable and absurd because they reduce the amount of revenue to be collected by the Commission.

Finally, as SBI points out in its briefs, the Commission advised producers not to pay fees in dispute because Chapter 23 contains no refund mechanism.[22] As not paying fees in dispute is provided by the statute, an interpretation of Chapter 23 that reduces fees to be paid cannot be viewed as a frustration of the purpose of the statute in collecting fees.

Object to be attained

I&E argues that the object of the impact fee provisions is "to provide relief to the municipalities affected by unconventional gas wells" and that this object is not attained by "exempting" a stripper well from the fee "merely because" its production is below an average of 90,000 cubic feet per day "in one calendar month out of twelve."[23]

First, stripper wells are excluded, not exempted, from the Chapter 23 fees because stripper wells are not within the scope of the fee imposition in the first place.[24] Second, if there

---

20 *Reconsideration Order Regarding Chapter 13*, M-2012-2288561, July 19, 2012, at 4.

21 *Id.*, at 5.

22 SBI Main Brief at 8-9, 11; SBI Reply Brief at 5-6.

23 I&E MB at 12.

24 *See, e.g., Adelphia House P'ship v. Com. of Pa.*, 709 A.2d 967, 969 n.9 (Pa.Cmwlth. 1998) (exclusions are items that are not included as part of those items intended to be taxed).

is reasonable doubt as to the legislative intent –and, again, PIOGA submits there is not – "exclusions are to be construed strictly against the Commonwealth and in favor of the taxpayer."[25] Finally, as stated above, collecting fees to provide to affected municipalities is but one of the purposes of Chapter 23, and not paying fees in dispute as provided by the statute cannot be viewed as a failure to attain the object of imposing the fees.

Consequences of a particular interpretation

I&E argues that the consequence of adopting PIOGA's and SBI's stripper well interpretation "would be that the municipalities affected by unconventional wells are deprived of funds distributed from impact fees."[26] PIOGA's arguments concerning the statutory construction factors above apply to this argument as well.

Contemporaneous legislative history

I&E argues that legislative history supports its position because during House Bill 1850's journey through the legislature to the Governor's desk, the General Assembly changed the word "a" in the stripper well definition to "any", showing legislative intent that the word "any" means "each" rather than "a" or "one".[27]

The flaws in this argument are the apparent presumptions that the word "a" is more precise than "any" and that the word "a" means only "one." Neither presumption is true. The word "a" may also mean "each" or "any":

> a *adj. indefinite article*
> 1. one; one sort of: we planted *a* tree

---

[25] *AMP Incorporated, v. Com. of Pa.*, 852 A.2d 1161, 1167 (Pa. 2004).

[26] *Id.*, at 13.

[27] "[T]he General Assembly changed the word "a" to "any," evidencing its intention that a well is not a stripper well by virtue of producing 90,000 or fewer cubic feet in *a* calendar month, but qualifies only when its production falls below these values in each calendar month." *Id.* (italics in original).

> 2. each; any one [*a* gun is dangerous]: *a* connotes a thing not previously noted or recognized, in contrast with *the*, which connotes a thing previously noted or recognized[28]

Accordingly, the change from "a" to "any" may be viewed as no legal substantive change, and fully consistent with the Commission's interpretation of the word "any" as "one":

> any—adjective \'e-nē\—used to indicate a person or thing that is not particular or specific; 1 : *one* or some indiscriminately of whatever kind: a : *one* or another taken at random <ask *any* man you meet> ; b : every —*used to indicate one* selected without restriction <*any* child would know that>"[29]

Administrative interpretations of the statute

I&E argues that the Commission's administrative interpretation of stripper well "supports I&E's definition."[30] Initially, the description "I&E's definition" is a misnomer because I&E's definition is the Commission's definition, which I&E has relied upon and defended throughout this proceeding. Above (in Section III.A.) PIOGA has shown that the Commission's orders prior to the *Rulemaking Order* did not provide a clear statement to the public that a stripper well must produce an average of 90,000 or less cubic feet per day in *each* calendar month – rather than "any" or "only one" month – to qualify as a stripper well and be excluded from the fee. In its Main Brief (pp. 5-7) PIOGA showed how the Commission misapplied its correct interpretation of the word "any" as meaning "one" to the "vertical well definition" rather than to the stripper well definition, which has the effect of turning the plain language of the stripper well definition on its head. Accordingly, these orders are not authority for the Commission's and I&E's definition.

---

[28] WEBSTER'S NEW WORLD DICTIONARY 1 (Third College Edition 1988); http://www.yourdictionary.com/a . "In English, the indefinite articles are "**a, an, some, any**." http://www.englishlanguageguide.com/grammar/indefinite-article.asp .

[29] Merriam-Webster Online Dictionary, http://www.merriam-webster.com/dictionary/any (emphasis added).

[30] I&E MB at 14.

Second, issues beyond the Commission's expertise are not entitled to deference.[31] As shown below, interpretations of Chapter 23 are – at this point in time – beyond the Commission's expertise such that the Commission's incorrect application of its correct interpretation of the word "any" is not entitled to any deference, much less "great deference."[32]

• Chapter 23 is a new statute and is *sui generis*, so the Commission has no particular expertise in interpreting its provisions. Indeed, the Commission made some initial interpretations concerning Chapter 23, vertical gas wells and stripper wells that were contrary to the plain meaning of the applicable statutory provisions:

> **1)** "[F]or clarity's sake, pursuant to Section 2302(a), it is the spudding of a well, not the production of that well, which is determinative of whether a fee is due." *Act 13 of 2012 – Implementation of Unconventional Gas Well Impact Fee Act; Chapter 23*, Docket No. M-2012-2288561 (Order entered May 10, 2012) (*Implementation Order Regarding Chapter 23*) at 7.
>
> **Correction**: "The Producers argue that it is production that is determinative of whether a vertical gas well is subject to the impact fee, not spudding as in the case of horizontal unconventional gas wells.
>
> We agree with the Producers' comment . . . ." *Reconsideration Order Regarding Chapter 23* at 3.
>
> **2)** [T]he Commission's initial interpretation is that the unconventional [vertical gas] well will pay the impact fee for at least the first three years of production; if the well then qualifies as a stripper well or is capped after the third year of paying the fee, the fee shall be suspended. *Act 13 of 2012 – Implementation of Unconventional Gas Well Impact Fee Act; Chapter 23*, Docket No. M-2012-2288561 (Order entered March 16, 2012) (*Tentative Implementation Order*) at 6; *Implementation Order Regarding Chapter 23* at 8.
>
> **Correction**: We agree with the Producers' argument. A vertical gas well which falls below designated production levels is no longer, by definition, a vertical gas well. The legislature excluded a reference to Section 2302(b.1) at subsection 2302(f), which concerns the "vertical unconventional gas well

---

[31] *Nationwide Ins. Co. v. Schneider*, 960 A.2d 442, 450 (Pa. 2008) ) (ordinary rule of deference to agency's interpretation is premised [**Page 1067**] on agency's regulatory expertise and is not applied where case does not involve issues within such expertise

[32] *Id.*

fee." Absent reference to that specific section which establishes the minimum three year fee requirement, as well as not qualifying, by definition, as a vertical gas well, a vertical gas well is not subject to the three minimum fee requirement established at Section 2302(b.1). *Reconsideration Order Regarding Chapter 23* at 4.

**3)** "Sections 2303(c)(2) and (c)(3) . . . allow[s] the Commission to assess any remaining balance on all producers in proportion to the number of wells owned by each producer." *Tentative Implementation Order* at

"Nothing in these provisions [Sections 2303(c), 2303(c)(2) and 2303(c)(3)] suggests that the assessment is limited to producers subject to the impact fee." *Implementation Order Regarding Chapter 23* at 17.

**Correction**: "The Producers also comment that the assessment established at subsection 2303(c), 58 Pa.C.S. § 2303(c), should be allocated only to those producers' wells that are subject to the impact fee, not all producers' wells.

. . . . Upon further review, we believe that subsection 2303(c)(3) establishes the proper methodology, limiting the assessment to "producers subject to the unconventional gas well fee." *Reconsideration Order Regarding Chapter 23* at 5.

**4)** [F]or purposes of calculating production from a stripper well, the Commission expects producers to simply divide the well's annual production by the number of days the well is in production in the relevant calendar year. *Act 13 of 2012 – Implementation of Unconventional Gas Well Impact Fee Act; Chapter 23*, Docket No. M-2012-2288561 (Order entered March 16, 2012) (*Tentative Implementation Order*) at 6.

**Correction**: "[F]or purposes of calculating production from a stripper well, the Commission expects producers to simply divide the well's monthly production by the number of days the well is in production in the relevant calendar month. *Reconsideration Order Regarding Chapter 23* at 7.

• The meaning of a statute is a question of law for a court and, when convinced that an agency interpretation or interpretative regulation does not track the meaning of the statute or is violative of legislative intent, the court disregards the regulatory interpretation.[33]

• Unlike Chapter 33 [§ 3305(d)(3),(4)], there is no express authority or directive that the Commission promulgate regulations to implement Chapter 23.

---

[33] *Com. v. Gilmour Mfg. Co.*, 822 A.2d at 679.

### 3. Chapter 23 impact fees are in legal substance "taxes" and exclude stripper wells.

These rules support PIOGA's position that the plain meanings of the words in the stripper well definition and Chapter 23 require the following conclusions: (i) Chapter 23 impact fees are in legal substance taxes; (ii) stripper wells were not intended to be subject to the impact fee and are therefore tax exclusions; and (iii) an unconventional gas well incapable of producing more than 90,000 cubic feet of natural gas per day in only one calendar month qualifies as a stripper well that is excluded from the impact fee for that calendar year.

## C. No Penalties are Appropriate in this Matter.

If the assessment of additional fees is sustained, penalties are not appropriate for the reasons set forth in SBI's main (pp. 6-20) and reply (pp. 5-9) briefs, which PIOGA supports and hereby incorporates by reference.

PIOGA offers the following arguments in addition to SBI's. Initially, the factors in the Commission's Policy Statement concerning penalties are not applicable to this matter by reason of the Commission's order in the *NCIC Operator Services* matter because the penalties sought by I&E are pursuant to Act 13, which is in Title 58 (Oil and Gas) of the Consolidated Statutes, and not pursuant to Title 66, the Public Utility Code, or Commission regulations.[34] However, PIOGA understands that the Commission could determine that the Policy Statement should be applied to matters arising under Title 58, so for purposes of argument PIOGA assumes the Policy Statement to be applicable.

---

[34] *Pa. PUC v. NCIC Operator Services*, M-00001440, Order entered December 21, 2000; I&E Main Brief at 17. I&E's witness acknowledged this at the hearing. HT at 111:12-25 – 112:1-6; see also, Complaint at ¶s 10, 11.

PIOGA emphasizes that the Policy Statement factors are to be applied strictly in litigated cases.[35] Penalties are not appropriate in this case also because I&E admittedly did not consider the factors in the Commission's Policy Statement before filing the complaint and seeking penalties, and the evidence introduced at the hearing to attempt to cure this omission does not support assessment of any penalties, even under a lenient application of the factors, as shown in SBI's briefs and below.

I&E concedes that some factors either do not support penalties[36] or are not applicable,[37] and the factors I&E asserts are applicable are not supported by substantial evidence in favor of penalties.[38] Indeed, as to 52 Pa. Code § 69.1201(c)(4) and (8), SBI's full cooperation [cited with respect to 52 Pa. Code § 69.1201(c)(7)] along with its excellent compliance history [cited with respect to 52 Pa. Code § 69.1201(c)(6)] and SBI's willingness to pay the disputed fee amounts *if* they would be refunded if SBI's position prevails[39] supports the opposite of the conclusions argued by I&E: Penalties are not necessary for SBI to change its internal practices or procedures and to deter SBI's future nonpayment of fees – all that is required is a final resolution of the proper meaning and application of the statutory term "stripper well" that is not subject to further review.

Finally, the only justification for penalties advanced at the hearing and intended to meaningfully address the Policy Statement factors is that the $50,000 penalty is "reasonable" in the opinion of I&E's witness in relation to the maximum level of penalties the Commission is

---

35 52 Pa. Code § 69.1201(b) ("When applied in settled cases, these factors and standards will not be applied in as strict a fashion as in a litigated proceeding.").

36 52 Pa. Code § 69.1201(c)(1),(2),(5),(6) and (7), *see* I&E Main Brief at 17-18.

37 52 Pa. Code § 69.1201(c)(9), *see* I&E Main Brief at 19.

38 *See* SBI Reply Brief at 6-9 re 52 Pa. Code § 69.1201(c)(2),(3),(4) and (8).

39 HT at 129:11-17; see also, SBI Main Brief at 12, 18.

permitted to impose.[40] I&E argues that the reasonableness of the proposed civil penalty should be considered as an "other relevant" factor under the Policy Statement.[41] PIOGA disagrees, as the appropriateness or reasonableness of a penalty is the ultimate conclusion to be established by application of the Policy Statement factors:

> The Commission will consider specific factors and standards in evaluating litigated and settled cases involving violations of 66 Pa.C.S. (relating to Public Utility Code) and this title. *These factors and standards will be utilized by the Commission in determining if a fine for violating a Commission order, regulation or statute is appropriate, as well as if a proposed settlement for a violation is reasonable* and approval of the settlement agreement is in the public interest.[42]

In other words, it is the consideration of all the Policy Statement factors – including "other relevant factors" – that determines whether a penalty is reasonable.

PIOGA also disagrees that the proposed penalty in this matter can be determined to be reasonable by comparing it to the maximum penalty the Commission could impose. That is an inapposite comparison in view of the lack of justification for imposing any penalty in this matter – much less the maximum – as shown above.

Clearly, under the circumstances of this case and in view of the legal dispute involved and the Commission's advice concerning nonpayment of disputed fees, I&E should have exercised its discretion to not propose that any penalties be assessed.

---

40 HT at 89:22-25; 90:2-6; 93:1-12; *see also*, 92:15-19 (ALJ).

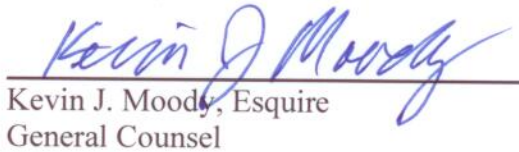
41 I&E Main Brief at 19.

42 52 Pa. Code § 69.1201(a) (emphasis added).

## IV. RELIEF REQUESTED

The complaint in this matter should be dismissed for the reasons set forth above and in PIOGA's Main Brief. In the alternative, no penalties should be imposed for the reasons set forth above and in PIOGA's Main Brief.

Respectfully submitted,



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

Date: January 30, 2015

## CERTIFICATE OF SERVICE

I hereby certify that this day, January 30, 2015, I served copies of the foregoing PIOGA Reply Brief on the persons listed below in the manner indicated in accordance with the requirements of 52 Pa. Code § 1.54.

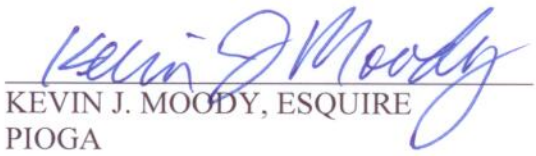
**VIA E-MAIL & FIRST CLASS MAIL, POSTAGE PREPAID**

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
PA PUBLIC UTILITY COMMISSION
BUREAU OF INVEST. & ENFORCEMENT
PO BOX 3265
HARRISBURG PA 17105-3265
hwushinske@pa.gov

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