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March 13, 2015

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

Re: I&E v. Snyder Brothers, Inc., No. C-2014-2402746

Dear Secretary Chiavetta:

Enclosed are Exceptions to the Recommended Decision in the above captioned matter.

Please note that Snyder Brothers, Inc. has requested the opportunity to orally argue its exceptions.

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

Respectfully submitted,



Thomas C. Reed
Counsel for Snyder Brothers, Inc.

cc: Heidi Wushnuske, Esquire
Kevin Moody, Esquire
David Salapa, ALJ

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Pennsylvania Public Utility
Commission, Bureau of
Investigation and Enforcement,
Complainant

C-2014-2402746

v.
Snyder Brothers, Inc.,
Respondent

EXCEPTIONS OF SNYDER BROTHER'S INC. TO RECOMMENDED DECISION OF ALJ
DAVID SALAPA RECEIVED via EMAIL ON FEBRUARY 23, 2015

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Dated: 3/13/15

I. INTRODUCTION

The Bureau of Investigation and Enforcement (“I&E”) initiated this “enforcement” action after it became clear that there was a dispute between Snyder Brothers, Inc. (“SBI”) and the Office of Administration of the Pennsylvania Public Utility Commission (“Commission” or “PUC”) concerning whether certain unconventional gas wells operated by SBI were “vertical wells,” as that term is defined by 58 Pa.C.S. § 2301, and thus subject to the payment of Impact Fees and Administrative Fees (collectively “Act 13 Fees”), imposed on such wells by Act 13 of 2012 (“Act 13” or “the Act”).

Act 13 Fees for 2011 and 2012 were due on any “vertical gas well” operated during those years, which the Act defines as, 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.” 58 Pa.C.S. § 2301. Therefore, a “Stripper Well” is not a “vertical gas well, upon which Act 13 Fees can be assessed.

Act 13 defines “Stripper Well” as “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 as a single well, without regard to whether the production is separately metered.”

It is SBI’s position that a well qualifies as a “Stripper Well,” and is therefore not a “vertical gas well” if, as stated in the definition of the term “Stripper Well,” during **any** month of a calendar year it does not produce more than 90 mcf of gas per day on average.

It is the I&E’s position that to qualify as a “Stripper Well” a well must not produce more than 90 mcf of gas per day on average during **each and every** month of a calendar year.

If SBI’s interpretation is the correct one it owes no additional Impact Fees for either 2011

or 2012 and, of course, owes no interest, statutory penalties or civil penalties.

On the other hand, if I&E's interpretation is correct, other issues arise namely, whether SBI's good faith withholding payment of Impact Fees for 2011 and 2012, done in a manner consistent with directions from the Commission, constituted "violations" of Act 13 and, if so, whether the interest and statutory penalties provided for by Section 2308 of Act 13 must be imposed in a situation like this one and, whether I&E proved that any "discretionary" civil penalty, as provided for by Section 2310 of Act 13, was justified in this case.

Act 13 Fees were first required to be paid by August of 2012 and SBI timely submitted its 2011 Annual Report to the Commission which identified those of its unconventional gas wells it believed were "vertical gas wells" and those which it believed were not "vertical wells" because despite maximum production efforts they produced, on average, less than 90 mcf of natural gas daily during any, or one, month of that year. SBI's submittal provided the Commission with a full explanation of the average daily production of each unconventional gas well it operated which it believed was a "Stripper Well." Following receipt of a "statement" from the Commission, which was consistent with SBI's interpretation of the term "Stripper Well," SBI paid what it believed were all the Impact Fees due and owing for 2011 in a timely fashion. Findings of Fact ("FF") 1-11.

It was not until March of 2013 that SBI first learned that its interpretation of the term "Stripper Well" differed from that of the Commission. *See* FF 48. ("Snyder did not realize that the Commission disagreed with its interpretation of the term 'stripper well' until after it submitted its second annual report to the Commission."). *See also*, FF 53.

Therefore, it is clear that SBI, in good faith, believed (and still believes) its interpretation of the term "Stripper Well" is the correct one and that it did not, in bad faith, or with any intent

to violate Act 13, “underpay” Act 13 Fees for either 2011 or 2012.

It is also clear that after being informed there was a dispute SBI followed precisely the approach outlined by the Commission when invoking its right to dispute whether Act 13 Fees were due on a particular well by again paying the amount of the Act 13 Fees that were not in dispute for 2012 and withholding payment of those that were until the dispute was finally resolved. FF 12-25. *See also* Order of the Commission dated, October 13, 2013 and docketed at No. L-2013-2375551 (“October 13, 2013 Order), p. 18, n. 27.

As will be explained in the Exceptions which follow, SBI’s interpretation of the term “Stripper Well” is the correct one, regardless of whether the definition of that term, including the word, “any,” is viewed as ambiguous. Furthermore, the Recommended Decision compounded its erroneous interpretation of the statutory term “Stripper Well” by incorrectly: (i) finding that SBI’s conduct in disputing the amount of Act 13 Fees claimed due by the Commission for 2011 and 2012 in the manner recommended by the Commission, constituted violations of the Act; (ii) concluding that the interest and statutory penalty provisions of Section 2308 of the Act were mandatory, thus construing these provisions in a manner inconsistent with acceptable rules of statutory construction, and (iii) incorrectly concluding that I&E “proved” that SBI’s conduct in this case justified the imposition of any interest or penalty charges, whether or not discretionary.

Exceptions

1. ***Exception No. 1. FF 54 Is Not Supported By The Record And Is Inconsistent with Other Findings of Fact.***

Recommended Decision, page 16.

SBI takes exception to FF 54 to the extent it “finds,” or otherwise implies, that SBI sought to, or did, in any manner takes steps to lower the gas produced by the wells it operated during calendar years 2011 and 2012 or that the wells which SBI reported as having produced,

on average, less than 90,000 cubic feet of natural gas per day for a particular calendar month were other than “incapable” of producing more than that amount in said month .

That something is “possible” does not support a “finding” that it in fact occurred, and there was no testimony to support a “finding” that SBI sought to, or did, through any action or inaction, lower gas production on the wells it operated during 2011 or 2012 or that the wells reported as “incapable” of producing more than a daily average of 90,000 cubic feet of natural gas were “capable” of doing so in such month.

Furthermore, FF-54 is inconsistent with FF-50 and FF-51, which correctly found that during calendar years 2011 and 2012 SBI “operated its wells so that the wells would produce the maximum volume of gas” (FF-50) and that “if [SBI’s] production figures for 2011 and 2012 indicated that a well produced less than 90,000 cf of natural gas, that well was not capable of producing more,” (FF-51, emphasis added.)

2. *Exception No. 2. The Administrative Law Judge (“ALJ”) Incorrectly Interpreted The Term “Stripper Well,” and Therefore Improperly Assessed Act 13 Fees, Interest and Penalties for the Years 2011 and 2012.*

Conclusion of Law No.10, Recommended Decision, p. 43. Recommended Order.

Exception No.2a. The ALJ Incorrectly Applied the Rules of Statutory Construction When Interpreting the Statutory Term “Stripper Well,” and Therefore Improperly Assessed Act 13 Fees, Interest and Penalties for the Years 2011 and 2012 by, Inter Alia, Finding This Term To Be Ambiguous, and Improperly Relying Upon “So-Called” Legislative History.

Conclusion of Law No. 10, Recommended Decision, p. 43, Discussed at pages 23-27 of the Recommended Decision. ¹ Recommended Order.

¹ These exceptions are addressed collectively in the discussion which follows.

The interpretation of statutory language in Pennsylvania is governed by the provisions of 1 Pa.C.S. § 1901. These principles of statutory construction mandate that the first step in interpretation is to examine the language of the statute itself. If that language is clear and unambiguous, resort to other methods of statutory interpretation is not required. 1 Pa.C.S. § 1921(b), *The School District of Philadelphia v. Department of Education*, 2014 Pa. Lexis 1337 (2014). (“The best indication of legislative intent is the plain language of the statute. When the words of a statute are clear and free from all ambiguity, the letter of the statute is not to be disregarded under the pretext of pursuing its spirit.”)

Giving the words and phrases in the definition of “Stripper Well” their common and approved usage, as 1 Pa. C. S. A. §1903(a) requires, it is clear that the General Assembly meant a “Stripper Well” to be one that could not, during any of the several months of the multiple month reporting period, produce a daily average of more than 90,000 c.f. of gas.² Had the General assembly meant to achieve any other result, the linguistic tools for it to do so were readily available. For example, it could have said “every month” or “each month” or “all months.” Instead, it chose a word which even the Commission concedes commonly means “one,” as is clear from the following statement made at page 8, of its Proposed Rulemaking Order dated October 17, 2013, docketed at No. L-2013-2375551, which relates to proposed rules to implement Act 13:

“All vertical gas wells...will be subject to a fee...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 a reporting year. This means that even if a vertical well produces natural gas in quantities greater than a stripper well in

² For example, for the year 2011, SBI reported Well Permit No. 005-30250 (Freehling Unit 1) as a stripper well based on the following reported average daily productions (in mcf) January – 94, February – 89, March – 90, April – 82, May – 82, June – 92, July – 90, August – 88, September – 88, October – 84, November – 79, and December 83. The Freehling Unit 1 is a “Stripper Well” because during several months the reported production did not exceed a daily average of 90,000 cubic feet (90 mcf) of gas. See Joint Exhibit No. 1.

only *one* month of a calendar year, that vertical well will be subject to the fee.” (emphasis in the original.)

While this interpretation of the term stripper well is, SBI submits, incorrect, it does confirm that the Commission reads the word “any” to mean “one,” not “every.” Thus to the extent the ALJ reads the word “any” to mean “every,” his position is inconsistent with the Commission’s understanding of the common meaning of that word.

When intending to convey the concept that something must happen or not happen “every” or “all” or “each” day of the week or month of the year, people simply do not commonly say it must happen or not happen “any day” or “any month.”

The ALJ’s “interpretation” also ignores the rule of statutory construction that each of the words used in the statute has meaning, as required by 1 Pa.C.S. § 1921(a). In this case the ALJ reads the term “Stripper Well” to mean that any well which is “capable” of producing a certain amount gas in “any” month is not a “Stripper Well.” The ALJ thus gave no meaning at all to the term “incapable.”

The ALJ’s interpretation also assumes, without any factual basis in the record, that a well that has produced more than 90,000 cubic feet per day of gas in any given month must, perforce, be capable of producing a similar amount of gas in every month and thus, apparently, is never “incapable” of producing less than that amount in “any month” of the year. Thus the ALJ has read into the General Assembly’s definition of the term “Stripper Well” a presumption namely, that capability to produce gas at a certain level in any one month establishes this ability to produce at the same or higher level for all other months of the year. This was done, however, without any factual basis to connect the known fact, production in one month in excess of 90,000 cubic feet of gas, to the assumed fact, that this same well is capable of producing at this same level in any other month. While legislatures can create statutory presumptions, there must be

“some rational connection between the fact proven and the ultimate fact presumed.” *Rich Hill Coal Company v. Bashore*, 7 A.2d 302, 313 (Pa. 1939). Absence of any offered “proof” as to why it is “obvious” that a well which produces more than X amount of gas in one month will do so in every other month, the ALJ’s construction of the term “Stripper Well” is without merit.

Another well settled rule of construction ignored by ALJ is that when statutory language is clear and unambiguous, resort to other methods of statutory interpretation (such as suggested by the I&E) is not required; indeed they are **not** to be considered. 1 Pa.C.S. § 1921(b), *Herd Chiropractic Clinic, P.C. v. State Farm Mut. Auto. Ins. Co.*, 64 A.3d 1058, 2013 Pa. LEXIS 304 (Pa 2013), (“When the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit.”).

In addition to ignoring this rule, the ALJ misapplied other rules of statutory construction reaching his conclusion. First, he relies on an “interpretation” of the term “Stripper Well” set forth by the Commission in an Order entered at Dk.No. M-2012-2288561, dated July 19, 2012 and in Proposed Rulemaking Order dated October 17, 2013 at Dk.No. L-2013-2375551. This reliance was improper because an agency’s interpretation of a statute when advanced during litigation is not entitled to deference, *ARIPPA v. Pennsylvania Public Utility Commission*, 792 A.2d 636, 660 (Pa.Comm. 2002); and, further, because the Commission has not interpreted the term “Stripper Well” in a consistent manner---having originally interpreted that term using an annualized approach.³

The ALJ further improperly considered what he characterized as the “legislative history” of the term “Stripper Well” noting that in a prior draft of Act 13 the term “Stripper Well” was defined as an unconventional well that was “incapable of producing more than 90,000 cubic feet

³ See Order dated May 10, 2012 at Dk/No. M-2012-2288561, at page 6, where the Commission states: “for 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.”

of gas per day during a calendar month” and therefore by “changing” the word “a” to “any” in the final version this showed a legislative intent to adopt the interpretation advanced by I&E. First, there is nothing in the published reports of the General Assembly relating to Act 13 to support this view. More importantly, absent such commentary, it is pure speculation to assign any meaning to such a minor word change which could have just as easily been a modification made by the Legislative Reference Bureau (“LRB”), something that unfortunately cannot be confirmed because the LRB refuses to disclose what, if any, non-substantive changes it makes to language before submitting its version to the General Assembly for consideration.

The statutory definition of the term “Stripper Well” is not ambiguous, the common (not the arcane dictionary) understanding of the term “any” means “one,” it does not mean “each and every” or “all.”

3. Exception No. 4 Alternatively, If Act 13’s Definition of the Term “Stripper Well” is Considered Ambiguous The ALJ Incorrectly Concluded that Act 13 Impact Fees Are Not, For Purposes of Statutory Construction, Taxes, and Therefore Failed To Construe This Term Most Strictly Against the Commonwealth, Thus Improperly Assessing Act 13 Fees, Interest and Penalties for the Years 2011 and 2012.

Conclusion of Laws No. 10 and 11, Recommended Decision, p. 43, Discussed at pages 27-30 of the Recommended Decision.⁴ Recommended Order.

In the event that there is some ambiguity as to the definition of a stripper well, any such ambiguity must be resolved in favor of the SBI. Although the bulk of the moneys sought to be collected are denominated as an “impact fee,” the revenue generated is a tax within the meaning of 1 Pa.C.S. § 1928(b) (3).⁵

⁴ These exceptions are addressed collectively in the discussion which follows.

⁵ 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 ALJ improperly dismisses 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). The ALJ’s conclusion ignores the facts of the *Building Indus. Ass’n* 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 *Building Indus. Ass’n* the Impact Fee imposed by Act 13 is a “tax.” It is the “substance” of the levy that controls under State law not the “fund” into which it placed.

The ALJ also improperly relied upon the decision of a federal court, specifically *Wheeling & Lake Erie Railway Company v. PUC*, 141 F.3d 88 (3rd Cir. 1998), to resolve an issue of state law. Whether a levy is a tax for purposes of a federal law is not germane to whether a levy, like those at issue here, is a tax for state law purposes. Absent a decision of the United States Supreme Court, the decisions of federal courts are not binding on state courts. *Rader v. Pennsylvania Turnpike Comm’n*, 182 A.2d 199 (Pa. 1962). On the other hand a decision of the Commonwealth Court, specifically *Building Indus. Ass’n.*, which found that a “fee” charged to offset alleged additional costs on local government by private developers is a “tax,” is binding on the ALJ and the Commission.

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 meaning of the term “Stripper Well” the nature of the “fees” being sought is such that the strict rule of construction set forth in 1 Pa.C.S. § 1928(b) (3) is applicable to interpreting the statutory “stripper well.”

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 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”).⁶ 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 also 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

⁶ Of course, SBI does pay a true “user fee” to DEP as part of the review of each application for a permit it files.

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.

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 “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.

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, and the provision of housing and payment of judicial services is, at a minimum, subject to the application of 1 Pa.C.S. § 1928(b) (3).

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 namely, SBI.

Accordingly, all reasonable doubt as to the meaning of the language should have been 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).; and, in this case the ALJ erred when he failed to do so because, without a doubt, the ALJ did not resolve any, let alone all, doubt as to the meaning of the term “Stripper Well” in favor of SBI.

4. ***Exception No.4. Alternatively, The ALJ Incorrectly Interpreted The Interest Provision of Section 2308 Act 13 To Be Mandatory.***

5. ***Exception No.5. Alternatively, The ALJ Incorrectly Interpreted The 5% (Maximum 25%) Statutory Penalty of Section 2308 of Act 13 to be Mandatory.***

Conclusions of Law 8 and 9, Recommended Decision pp, 42-43, Discussed at pages 32-25.⁷ Recommended Order.

The ALJ’s conclusion that he was required to impose the interest and penalties outlined in Section 2308 of Act 13 is squarely at odds with the interpretation the Commission has already given to this “sanctions” provision of Act.

⁷ These exceptions are addressed collectively in the discussion which follows.

Regardless of the level of deference due a proposed regulation⁸, the fact remains that the Commission has offered its interpretation of the nature of the penalties and interest provisions set forth in Section 2308 of Act 13 and indicated that they should be interpreted as “discretionary” in nature. Specifically, at page 8 of the October 13, 2013 Order, entered at Dk.No. L-2013-2375551, at page 18, the Commission states: “Based on the foregoing, the Commission **may** assess interest and penalties on untimely or delinquent impact fee payments **as permitted** by Sections 2308-2313 of the Act if (1) the producer fails to pay the delinquent impact fee in full in compliance with the Notice of Amount Due, (2) the producer fails to file a timely response with the Commission if no payment is made, or (3) after hearing, the Commission sustains the amount due by final order. 58 Pa.C.S. §§ 2308-2310.” (emphasis added). *See also* Proposed 52 Pa.Code § 131.6(b)(2), set forth in Appendix A to the October 13, 2013 Order, the content of which is incorporated herein by reference and which confirms the non-mandatory nature of these sanctions.

As noted, however, the ALJ failed to even address this argument, although it was advanced by SBI, in its post-hearing briefs, stating only that the word “shall,” which appears in both Section 2308(a), relating to interest, and in Section 2308(b), relating to a 5% (25% maximum) statutory penalty, is generally interpreted to be mandatory. Therefore, he had no choice but to impose the maximum amount of Section 2308 interest and penalties sought by the I&E. *See Recommended Decision* at pages 32-33.

While it is true that the word “shall” generally is intended to impose a “mandatory” requirement, it is equally true that this is not universally the case. For a variety of reasons, the

⁸ Oddly enough the ALJ was willing to “misapply” the principle that deference be given the interpretations of statute made by agency’s changed with enforcing them when the doctrine of “administrative deference” was advanced by the I&E. *See, e.g.*, discussion in the Exceptions to be filed by Intervenor, Pennsylvania Independent Oil & Gas Association. However, when it was called to the ALJ’s attention by SBI that the Commission agreed with SBI’s interpretation of Section 2308, he chose to not even address the Commission’s views on this issue. This too was error.

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

Furthermore, there is a very good reason why it was appropriate to construe the interest and penalty provisions of Section 2308 of Act 13 to be discretionary and that is because to do otherwise raises a serious constitutional issue namely, whether imposing mandatory interest and penalties on a citizen solely because they unsuccessfully exercised their right to challenge a claim made against them by a state agency is a violation of that person’s constitutional rights to appeal and to due process of law.

It is a well settled rule of statutory construction (also ignored by the ALJ, although called to his attention by SBI) that when interpreting statutory language constitutional questions are to be avoided if possible, i.e., statutes should be given a constitutional reading where possible.. *See, e.g., Bricklayers of Western Pennsylvania Combined Funds, Inc. v. Scott’s Development Company*, 90 A.3d 682, 691 (Pa. 214) [“The Legislature is presumed not to intentionally pass unconstitutional laws, and courts give statutes a **constitutional** interpretation if that is reasonably possible,” (emphasis in the original)]; 1 Pa.C.S. §§ 1922(3) [when interpreting statutes there is a presumption that the General Assembly did not intend to violate the Constitution of the United

States or this Commonwealth]. Furthermore, in the context of Act 13's enforcement scheme it would also be an absurd construction of the law to view it as imposing mandatory sanctions on a citizen solely because they unsuccessfully challenged an agency claim, and did so in the precise manner outlined by law and the agency involved----an outcome statutory interpreters are required to avoid. 1 Pa.C.S. § 1922(1) .

There is, in Pennsylvania, a constitutional right to appeal governmental actions.⁹ There is also a due process right, guaranteed by both the Constitutions of the United States and Pennsylvania that citizens have a right to be heard before property is taken from them by the state. Therefore, without a doubt, SBI had a constitutional right to challenge I&E's claim that SBI's interpretation of the term "Stripper Well" was incorrect and that it owed additional Impact Fees for 2011 and 2012.

However, when drafting Act 13 the General Assembly failed to provide any direct appeal mechanism to enable a citizen to challenge a claim that it owed additional Act 13 Fees, such as are common in other statutes which authorize agencies to take actions against Pennsylvania citizens. Instead, Act 13 provides that unpaid and disputed Act 13 Fees would be recovered in accordance with Commissions rules of practice and procedure relating to complaints and related enforcement. 52 Pa.C.S. § 2308. In addition, it set up a system requiring the Commission to promptly distribute all Act 13 Fees collected, but did not provide any mechanism for refunding any "overpaid" Act 13 Fees once those fees had been distributed. *See generally* pp.16-19_of the October 13, 2013 Order.

Given this statutory scheme, if the penalty provided for by § 2308(b) and the interest

⁹ Article 5 Section 9 of the Pennsylvania Constitution provides: There shall be a right of appeal in all cases to a court of record from a court of record, and there shall also be a right of appeal from a court of record or from an administrative agency to a court of record or to an appellate court, the selection of such court to be as provided by laws; and there shall be such other rights of appeal as may be provided by law

provided for by § 2308(a) were interpreted as mandatory in all cases (and particular one like this one where a citizen of the Commonwealth is exercising its right to challenge a claim that it must pay money to the State) a person seeking to challenge whether Act 13 Fees were due would be faced with the following dilemma: pay the fees and if its challenge was successful not be able to have the wrongfully paid fees refunded, or withhold payment of the disputed amount of the fees until the dispute was resolved and risk, simply by defending itself, having to pay substantial penalties and interest automatically if its challenge failed. Such an interpretation would seriously burden a citizen's constitutional right to appeal the actions of state agencies and raise an issue as to whether or not the enforcement provisions of Chapter 23 of Act 13 were constitutional because it would impose an impermissible burden on the exercise of a constitutional right. *See, e.g., Commonwealth v. Quarles*, 324 A.2d 452, 460-462 (Pa.Super. 1974) (plurality)[it would violate the doctrine of "unconstitutional conditions" to find that a citizen of Pennsylvania "impliedly consented" to the waiver of a right to not be subjected to a warrantless search or to self-incrimination by virtue of applying for a license to drive a car]; *Commonwealth v. Littlejohn*, 250 A.2d 811 (Pa. 1969) [risk that a successful appeal could result in imposition of death penalty imposed "unconstitutional condition" of the constitutional right to appeal]. The risk that an "unsuccessful appeal" may result in mandatory fines and penalties, while certainly not as serious as the risk of death, it is nonetheless an impermissible and unconstitutional condition on a constitutional right.¹⁰

Therefore, SBI submits the Commission's interpretation of Chapter 23 of Act 13's penalties and interest provisions as "discretionary" is a proper interpretation of these provisions and any other interpretation would lead to a construction which is absurd, in contradiction of

¹⁰ Here if § 2803 penalties and interest were deemed mandatory SBI would be faced with having to pay excess of \$100,000 for the right to appeal or challenge the Commission's claim in this case.

1Pa.C.S. § 1922(1) namely, a person must be fined and charged mandatory interest if they in good faith, and unsuccessfully, exercise a right to challenge an agency action.

The Commission should stand by its proposed rulemaking on this issue and sustain SBI's Exceptions 4 and 5.

6. *Exception No.6. Alternatively, The ALJ Incorrectly Found That SBI "Violated" Act 13 and Improperly Declined to Even Address SBI's Claim That In The Circumstances Present Here No "Violation" of Act 13 Occurred.*

Conclusions of Law Generally, Recommended Order Paragraph 3, page 44.

Section 2310(a) of Act 13 provides that the Commission may impose a civil penalty for a "violation" of the Act's provisions. As the party seeking relief I&E clearly has the burden of proving that a violation of the Act occurred. *Rosemary Galligan v. West Penn Power Company*, 2014 PUC LEXIS 627 *14 (2014).

However, all the evidence established in this case was that in 2011 SBI timely paid the amount of Act 13 Fees it believed in good faith to be due and not in dispute, paying the amount the "statement" form the PUC requested be paid (JS-1 #17); and that in 2012 SBI again timely paid the amount of Act 13 Fees it did not dispute (JS-1 #27) In sum, the evidence established that there existed a good faith dispute about how much Act 13 Fees SBI owed for 2011 and 2012. There was no evidence (let alone) proof offered that SBI intentionally or wantonly withheld information, misled or otherwise deliberately, or in bad faith, refused to pay fees it "knew" should have been paid. Furthermore, the only mechanism available to SBI to dispute the amount of the Act 13 Fees claimed due by (&E was to await an enforcement action.

SBI submits (as it did to the ALJ) that it cannot be a "violation" of law for a citizen to make use of the only mechanism available to challenge a claim made against it by the state.

For these reasons alone, SBI's non-payment of **disputed** Act 13 Fees in 2011 and 2012 (the only allegation made against it) was not a "violation" of Chapter 23 of Act 13.

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

In its October 13, 2013 Order, the Commission acknowledges that Act 13 "does not provide dispute mechanisms for producers concerning the overpayment of impact fees," (October 13, 2013 Order, p. 16, n. 26) and, for this reason, specifically advises operators, like SBI, that "if the producer is disputing whether particular wells are subject to the impacts fees, the producer **should not pay** the corresponding impact fees for those "disputed" wells unless and until the dispute is resolved. This practice will prevent over-payment issues from arising." (*Ibid.* p. 18, n. 27. (emphasis added)).

With respect to an alleged "violation" of Act 13, all that I&E "proved" in its case in chief concerning SBI's "conduct" is that SBI disputed the amount of the Impact Fees claimed by it (*See, e.g.,* HT p.55, lines 14-19); SBI "cooperated" with the Commission throughout this matter and did not seek to "mislead" the Commission (HT p. 93, lines 12-25); I&E's only witness had no reason to believe SBI was not acting in "good faith" while disputing the amount of Act 13 Fees it owed (HT p. 109, lines 17-23); and that SBI did exactly what the Commission said it should do namely, withhold payment of all "disputed" Act 13 Fees until the dispute was resolved. Indeed, the second set of "statements" from the PUC which SBI received after first learning its interpretation of the term "Stripper Well" differed from the Commission's expressly

notes the amount of Act 13 Impact Fees and Administrative Fees which were then (and still are) “in dispute” and the amount of “undisputed” Act 13 Fees that should be paid. (Joint Ex. 6). Of course, SBI then promptly paid all Act 13 Fees it was not disputing, for both 2011 and 2012. (JS-1 #24-27)

In such circumstances SBI submits that I&E failed to establish that SBI “violated” any provision of Chapter 23 of Act 13; and, absent proof of a “violation,” no penalties of any sort should be imposed. Simply put, the only thing I&E proved in this case is that SBI did exactly what the Commission advised it to do namely, not make payment of disputed Act Fee amounts until the dispute concerning whether they were owing was resolved.

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

7. Exception No. 7: Alternatively, The ALJ Incorrectly Rejected and Improperly Declined to Even Address SBI's Claim That If The Interest And Statutory Penalty Provisions of Section 2308 of Act 13 Were Mandatory Applying These Sanctions In The Circumstances of this Case Violated SBI's Constitutional Rights To Appeal And To Due Process of Law.

Recommended Order Paragraph 2, page 43.

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

Nonetheless, if a penalty of 25% (the maximum penalty which can be imposed by § 2308(b) is found to be “mandatory,” resulting in SBI paying an additional \$60,300 in “penalties” for 2011 and an additional \$37,262.50 for 2012, together annual interest of 3% added on to the

amount “owed” since September 1, 2012 (in the case of the 2011 Reporting Year) and from April 1, 2012 (in the case of the 2012 Reporting Year), solely because it was determined that SBI’s interpretation of Act 13’s definition of “Stripper Well” was incorrect, this would result in SBI’s unquestioned right to a meaningful appeal being improperly conditioned in violation of the “unconstitutional conditions” doctrine.

The doctrine of “unconstitutional conditions” generally holds that the enjoyment or exercise of a government entitlement (not even a one which is constitutionally guaranteed) may not be conditioned upon the waiver or relinquishment of a constitutional right, particularly in the absence of any societal interests that would justify the subordination of such rights under the circumstances. As summarized by the Supreme Court of the United States, “[Our] cases reflect an overarching principle, known as the unconstitutional conditions doctrine that vindicates the Constitution’s enumerated rights by preventing the government from coercing people into giving them up.” *Koontz v. St. John’s River Water Management District*, 133 S.Ct. 2586, 2594 (2013) Thus, for example, a state cannot burden the constitutional right to travel by imposing an unreasonable waiting period on indigent travelers before affording them medicaid benefits. *Memorial Hospital v. Maricopa County*, 94 S.Ct. 1076 (1974), cited with approval in *Koontz*. Also, in *Commonwealth v. Quarles, supra*, our Superior Court concluded that it would violate this doctrine if the Commonwealth could argue that a citizen “implied waived” their right to not be subjected to a warrantless search; and in *Commonwealth v. Littlejohn*, 250 A.2d 811 (Pa. 1969), conditioning a right to appeal on the risk of a more severe penalty was found to violate this doctrine. *See also, discussion at Note, Unconstitutional Conditions*, 73 Harv. L. Rev. 1595 (1960).

To impose mandatory penalties and interest on an unsuccessful defendant in Act 13 Fees

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

However, when constitutional rights, such as the rights to appeal and to due process, are involved this is precisely the type of “Hobson’s Choice” which the Unconstitutional Condition’s Doctrine declares to be invalid.

8. *Exception No. 8: Alternatively, The ALJ Incorrectly Concluded That SBI’s Conduct Justified The Imposition of Interest and Penalties Pursuant To Section 2308 of Act13, And The Imposition of An Additional \$50,000.00 Civil Penalty.*¹¹

Recommended Order, Paragraph 2, page 43 discussed at pages 25-41 of the Recommended Decision.

The guidance on the issue of how to properly assess a “penalty” for an actual “violation” of Chapter 23 of Act 13 is set forth at 52 Pa.Code § 69.1201 (“PUC Penalty Policy”), which lists 10 “factors” to be weighed when determining whether, or how much of, a penalty or related sanction should be imposed. It was I&E’s burden to establish that SBI’s conduct merited a civil penalty.

Because the interest and statutory penalty provisions of Section 2308 of Act 13 are, like the civil penalty provisions of Section 2307 of Act 13, discretionary in nature, I&E was required to offer proof that one or more of the factors outlined in 52 Pa.Code § 69.1201 (“PUC Penalty Policy”) justified the imposition of all he interest and penalties sought. *Rosemary Galligan v.*

¹¹ Assuming the Commission accepts SBI’s argument that the interest and penalty provisions of Section 2308 are discretionary, the discussion which follows supports SBI’s exception to not only the imposition of interest and penalties pursuant to Section 2308 but also the imposition of a civil penalty pursuant to Section 2307 of Act 13.

West Penn Power Company, supra.

I&E failed to meet its burden with respect to any of the factors outlined in § 69.1201, many of which have no application to this situation and ALJ Salapa clearly misapplied certain of these criteria.

Exception 10 a. I&E Did Not Prove that SBI's Conduct Was Of a "Serious Nature And the ALJ Misapplied 52 § 69.1201(c) (1).

There was no evidence that SBI 's Conduct was of a "serious nature" namely, involved fraud or misrepresentation. *Rosemary Galligan v. West Penn Power Company, supra* * 28

Indeed the only "evidence" offered by I&E on the nature of SBI's conduct established that SBI "cooperated" with the Commission and its only witness testified she had no basis to believe, and was not "suggesting" SBI did, anything "intentional[ly wrong] or fraudulent." (HT p. 92, line 23 through p. 93, line 1).

Furthermore, all that SBI did in this matter was exercise its right to challenge the Commission's claim that it owed additional Act 13 Fees for 2011 and 2012. It paid the amount of these fees which it believed were due in a timely manner and, consistent with the Commission's own recommendation to operators, withheld the balance of the disputed amounts pending resolution of the dispute.

Nevertheless, the ALJ concluded that this conduct was of such a nature that it only justified a "lesser penalty." Recommended Decision, p. 38. It is preposterous to suggest that the exercise of a right to appeal an agency action, done in the manner suggested by that agency can be deemed "conduct" that can justify any penalty. The first factor of the PUC Penalty Policy had no application in this situation and was misapplied.

Exception 10 b. I&E Did Not Prove That Any Injury Resulted From SBI's Conduct

And the ALJ Misapplied 52 § 69.1201(c) (2).

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

The only "evidence" of any alleged harm to any third party was testimony from I&E's only witness that local municipalities *might* be harmed by the fact that they did not receive the Act 13 Fees withheld by SBI pending resolution of this dispute. It was pure speculation, and I&E offered no concrete evidence to the effect that, a county or other entity suffered any, let alone, a serious financial hardship as a result of not receiving SBI's "disputed" Act 13 Fees.

More importantly, because the Commission itself has advised producers like SBI not to pay disputed Act 13 Fees until disputes like this one are resolved, any "harm" resulting from a county not receiving such funds until a dispute over whether they are due is finalized was not caused by SBI, it was caused by the Commission's own recommended policy and the failure on the part of the drafter's of Act 13 to provide a mechanism for refunding disputed Act 13 Fees.

Nevertheless Judge Salapa found that a so-called "potential for harm" was present here, and the application of this factor only justified a lower, not any, penalty. Recommended Decision, p. 39.

It is again preposterous to suggest that the exercise of a right to appeal an agency action, done in the manner suggested by that agency can be deemed "conduct" that can justify any penalty. The second factor of the PUC Penalty Policy had no application in this situation and was misapplied.

Exception 10 c. SBI's Conduct Cannot Be Considered "Negligent" And The ALJ Misapplied 52 § 69.1201(c) (3).

Apparently the ALJ believed SBI was “negligent” because it failed to familiarize itself with how the Commission’s various interpretations of the term “Stripper Well” changed over time, some penalty was justified. In fact, had SBI familiarized itself with how the Commission finally interpreted the term “Stripper Well” nothing would have changed, it still would have disputed the Commission’s final interpretation of this term and exercised its right to dispute that interpretation. Thus SBI’s “conduct” with respect to staying abreast of PUC Orders posted only on its web page cannot be considered irrelevant to any issue in this case.

Moreover, the evidence in this matter clearly established that SBI submitted its 2011 Annual Report to the Commission **before** any effort was made by the Commission staff to directly advise operators of its interpretation of the term “Stripper Well” (HT p. 108 line 5 through p. 109, line 4)---a term I&E now contends (and the ALJ apparently agrees) is ambiguous. Furthermore, it was not until **after** SBI had submitted its second Annual Report in March of 2012, again in good faith using the same understanding of the term “Stripper Well” which it had in 2011, that anyone from the PUC raised the issue with SBI that its interpretation of this term was inconsistent with the PUC’s. (HT p. 129, line 3 through p. 130, line 5).

Therefore, if any one was negligent about communicating what the PUC believed was the proper interpretation of the term “Stripper Well” and whether SBI’s 2011 Annual Report was in error, it was the PUC itself. Not only did the Commission fail to offer any explanation of the meaning of an important statutory term, which some now contend was ambiguous, until just a few weeks before the deadline to submit the initial Act 13 Annual Report based on that term, it waited even longer to actually undertake efforts to directly notify operators of the PUC’s interpretation of this important term. Of course, by the time the PUC got around to individually contacting operators about its interpretation of the term “Stripper Well,” SBI had already

submitted its 2011 Annual Report to the Commission. The PUC then compounded its own misfeasance, by leading SBI to believe the Commission agreed with SBI's interpretation of the term "Stripper Well" by sending SBI a statement that requested payment of a sum entirely consistent with the amount SBI believed it owed. (Compare Joint Exhibits 1 and 2) and, testimony of Yvonne Hess, HT p. 85, lines 18-22).

However, and as noted above, of greatest importance is that SBI had a right to "dispute," in good faith, the Commission's and the I&E's interpretation of the term "Stripper Well" regardless of whether SBI was aware (which it was not) of the Commission's interpretation when it submitted its 2011 and 2012 Annual Reports and, to do so, it had to wait until an enforcement action was brought.

SBI's conduct was not a "but for" cause of any relevant event in this matter. Therefore no "negligence" was proven and the ALJ misapplied the criteria of 52 Pa.Code § 69.1201(c)(3).

Exception 10 d. The ALJ Misapplied 52 § 69.1201(c) (6).

The factor outlined in subsection (c) (6) of the PUC Penalty Policy directs that it is appropriate to consider a company's "compliance history." By its very terms this factor requires some prior, or past, event be present which can be factored in, yet in this case even Judge Salapa concedes SBI had no prior "history" of ever having run afoul of any statute or regulation administered by the PUC and there was no evidence offered that SBI had ever violated any other type of law or regulation.

Moreover, as argued above, SBI's conduct did not violate any law or regulation simply because disputing an agency's claim in the precise manner allowed by law and recommended by that agency cannot be deemed improper conduct, and should not be considered so.

Exception 10 e. The ALJ Misapplied 52 § 69.1201(c) (8).

With respect to this factor the only relevant evidence established that SBI did “cooperate” fully with the PUC, as noted in the RD, p. 40.

Nevertheless, rather than considering this a factor which was not applicable, Judge Salapa merely viewed it as one which justified a lesser penalty. The burden is on the I&E to introduce evidence which supports imposing a penalty. Thus it was I&E’s burden to offer evidence tending to establish that SBI was somehow other than cooperative, not that it did fully cooperate, which was what I&E’s own evidence demonstrated. Absent any evidence indicating SBI was less than “cooperative” this factor should either be deemed not applicable (having not been proven to be present) or as one mitigating against any penalty.

Exception 10 f: I&E Did Not Prove That A Civil Penalty Would Deter Future Violations And the ALJ Misapplied 52 § 69.1201(c) (9).

Given that SBI has cooperated fully to date there is no reason to believe it will not comply with any final decision issued in this matter, even one it disagrees with.

Indeed, imposing any penalty based on this “factor” will do nothing to deter future “violations,” except it may deter SBI (and other citizens) from exercising their right to challenge future claims that Act 13 Fees are being improperly sought, but it will not deter “future” violations by SBI.

Exception 10 g: Judge Salapa Misapplied 52 § 69.1201(c) (10).

This subsection of the PUC’s Penalty Policy requires the consideration of “other factors” relating to an appropriate penalty. Other than offer testimony that the requested amount was “reasonable” because the maximum penalty (allegedly in excess of \$1,000,000.) would not be, the I&E offered no evidence at all as to whether a \$50,000.00 civil penalty was merited in this

case for “other reasons.”

Also, the only “other factor” the ALJ apparently considered was the “reasonableness” of the request that a civil penalty of only \$50,000.00 be imposed in a situation where a citizen has, in his view, unsuccessfully exercised its right to appeal a claim by the PUC that it owes additional Act 13 Fees.

The ALJ did not consider whether imposing any type civil penalty upon a person simply for unsuccessfully exercising their right to appeal was an appropriate additional consideration.

Nor did the ALJ consider that this was nothing more than a legitimate dispute between a state agency and one its citizens as to the meaning of statutory language, or that the PUC itself led SBI to believe its view of what the term “Stripper Well” meant was the correct one by sending it a “statement” that was entirely consistent with that view, and then, thereafter, doing nothing to question SBI’s view until months later after it was acted a second time on that view.

Finally, and assuming without admitting that it is proper to impose interest and penalties under Section 2308 (totaling in excess of \$100,000.00) on a citizen of Pennsylvania that was acknowledged to have cooperated with the PUC while defending itself in the precise manner recommended by the PUC, then the imposition of these other sanctions certainly should have been an “other” factor counseling against adding more insult to the injury by also imposing a “discretionary” civil penalty of \$50,000., thus further penalizing a citizen for simply having unsuccessfully appealed a PUC claim.

Request For Oral Argument

Pursuant to 52 Pa.Code § 5.538 SBI respectfully requests that the Commission grant it the opportunity to orally argue the foregoing exceptions.

Conclusion

Based on the foregoing SBI respectfully requests that the Commission reject the Recommended Decision's findings of fact and conclusions of law and the Recommended Order relating to and directing SBI it pay additional Act 13 Fees for 2011 and 2012, together with interest and penalties, in the amounts set forth in Paragraph 2 of the Recommended Order and enter an order dismissing the Complaint.

Alternatively, SBI respectfully requests that the Commission reject the Recommended Decision's findings of fact and conclusions of law and the portion of the Recommended Order concluding that SBI's actions in this case "violated" any provision of Act 13.

Alternatively, SBI respectfully requests that the Commission reject the Recommended Decision's findings of fact and conclusions of law and the portion of the Recommended Order concluding that the interest and statutory penalty provisions of Section 2308 of Act 13 are "mandatory," and thus reject that portion of paragraph 2 of the Recommended Order directing SBI to pay interest, statutory penalties and a civil penalty.

Alternatively, SBI respectfully requests that the Commission reject the Recommended Decision's findings of fact and conclusions of law and the portion of the Recommended Order relating, and directing SBI, to pay a civil penalty of \$50,000.00.

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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