

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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

**EXCEPTIONS
OF
THE PENNSYLVANIA INDEPENDENT OIL & GAS ASSOCIATION**

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

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I. INTRODUCTION AND SUMMARY OF POSITION

The Pennsylvania Independent Oil & Gas Association (PIOGA) is the comprehensive trade association representing oil and natural gas interests throughout Pennsylvania.¹ Some PIOGA members are involved in producing natural gas from unconventional formations and are therefore subject to the local impact fee imposed by Act 13 of 2012. PIOGA has been involved in the Commission's proceedings implementing the local impact fee provisions of Chapter 23 of Act 13, having submitted comments – as part of a coalition including the Marcellus Shale Coalition (MSC) and the Associated Petroleum Industries of PA, a division of API (API) (collectively, "Producers") – to the Commission's March 15, 2012 Tentative Implementation Order at Docket No. M-2012-2288561 and a request for reconsideration of the Commission's May 10, 2012 Final Implementation Order. PIOGA also submitted comments to the May 10th order published in the Pennsylvania Bulletin, asking the Commission to address issues concerning disputed impact fees that were not addressed in the final order. Those unresolved issues are not implicated in this matter. PIOGA intervened in this matter to support the position of its member and Respondent, Snyder Brothers, Inc. (SBI).

The Administrative Law Judge (ALJ) and all parties agree that the ultimate issue in this prosecution is the meaning of the word "any" in this provision of Chapter 23, Act 13:

Stripper well. An unconventional gas well incapable of producing more than 90,000 cubic feet of gas per day during any calendar month, including production from all zones and multi-lateral well bores at a single well, without regard to whether the production is separately metered.²

¹ Effective April 1, 2010, the Pennsylvania Oil and Gas Association (POGAM) merged into the Independent Oil and Gas Association of Pennsylvania (IOGA of PA) and the name of the organization changed to Pennsylvania Independent Oil & Gas Association.

² 58 Pa. C.S. § 2301.

The Recommended Decision (RD) in this matter addresses a host of issues but does not address PIOGA's primary argument on this ultimate issue – that the Commission has already correctly interpreted the word “any” to mean “one”:

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.”³

The problem is that the Commission has incorrectly applied its correct interpretation. As shown above, the interpreted word “any” is found in the “stripper well” definition, but instead of applying its correct interpretation to the plain words in the statutory provision in which the word “any” is found, the Commission has applied this interpretation to the “vertical gas well” definition, resulting in the opposite meaning expressed in the plain words in the stripper well definition.

While the RD did not address PIOGA's primary argument, the Bureau of Investigation and Enforcement (I&E) did, and its response shows why misapplication of the correct interpretation of the statutory term “any” as “one” results in a different meaning than if the correct interpretation is applied to the actual statutory provision in which the interpreted word is found, as required by the general rules of statutory interpretation:

Whether a well is described as qualifying as a “vertical gas well” if it produces more than 90,000 cf average per day or qualifying as a stripper well if it produces less than 90,000 cf average per day is not relevant. **The result is the same.**⁴

As shown by this prosecution, the result is **not** the same. If a well is described as qualifying as a “vertical gas well” if it produces more than 90,000 cf average per day “in only *one* month of a

³ *Act 13 of 2012 – Implementation of Unconventional Gas Well Impact Fee Act; Chapter 23*, Docket No. L-2013-2375551, Order entered October 17, 2013 (*Chapter 23 NOPR*) at 8 (citing *July 19, 2012 Reconsideration Order* at 5) (emphasis in original).

⁴ I&E Reply Brief at 10 (emphasis added).

calendar year” [the *Chapter 23 NOPR* language], the result is that SBI must pay the disputed impact fees. On the other hand, if a well is described as qualifying as a stripper well if it produces less than 90,000 cf average per day “in only *one* month of a calendar year,” SBI does not owe the disputed impact fees and this prosecution must be dismissed.

In PIOGA’s view, this prosecution turns on the Commission’s willingness to conclude that its correct interpretation of the word “any” as “one” – an interpretation that has not changed since initial implementation of Chapter 23, and that PIOGA asserts was clearly stated publicly for the first time in the Commission’s *Chapter 23 NOPR* – has been applied contrary to the general rules of statutory construction because it has not been applied to the statutory provision in which the word “any” is found. Applying the Commission’s consistent and correct interpretation of the word “any” to the stripper well definition produces this plain meaning result:

Stripper well. An unconventional gas well incapable of producing more than 90,000 cubic feet of gas per day during [any] *one* calendar month, including production from all zones and multi-lateral well bores at a single well, without regard to whether the production is separately metered.

Only if the Commission now changes its consistent and correct interpretation of the word “any” as “one” must the other issues be addressed. Until now, in the Commission’s view, there has been no ambiguity in the meaning of the word “any” in the stripper well definition, yet I&E – whose witness has been involved in the Commission’s implementation of Chapter 23 from the beginning – asserts that there is ambiguity, and accordingly the ALJ has found ambiguity.

PIOGA respectfully asserts that I&E has not provided any reason for the ALJ’s conclusion or for the Commission to now find ambiguity where it has not found any before. I&E’s position is squarely based upon defending the Commission’s misapplication of its correct interpretation of the word “any” and finding ambiguity where the Commission found none. Both bases for I&E’s position are legally erroneous.

While PIOGA asserts that the correct application of the Commission’s interpretation of the word “any” to the stripper well definition ends the inquiry and this prosecution, PIOGA addresses the ALJ’s erroneous resolution of the other issues to preserve its objections.

II. EXCEPTIONS

Exception No. 1: The ALJ erred in concluding that PIOGA raised the same argument as SBI that the stripper well definition is clear and unambiguous. RD, p.24; Conclusion of Law No. 10, Recommended Ordering Paragraph Nos. 1, 3.

To begin his discussion of the issues, the ALJ stated that he summarized the arguments of SBI and PIOGA:

Snyder argued that the language in 58 Pa.C.S. § 2301 defining what constitutes a “stripper well” was clear and unambiguous. According to Snyder, the statute plainly states that a “stripper well” is one that cannot produce 90,000 cf of gas per day in any month during the reporting period. Therefore, Snyder argued that if a gas well produced less than 90,000 cf per day in a single month during the reporting period, it was a “stripper well” even if that well produced more than 90,000 cf of gas per day for all of the remaining months of the reporting period. Conversely, Snyder contended that in order to be a “vertical gas well” a well must produce more than 90,000 cf of gas per day in every month of the reporting period. Snyder incorporates these arguments into its briefs. M.B. 1, R.B. 1. *PIOGA in its briefs advances these same arguments.* M.B. 4-7, R.B. 2-14.⁵

Even a cursory review of the cited portions of PIOGA’s Main Brief and page 5 of its Reply Brief shows that PIOGA advanced a different argument, one that – as stated above⁶ – the ALJ did not address – that the Commission has correctly found no ambiguity in the meaning of the word “any” in the stripper well definition, as it has consistently and correctly interpreted this word to mean “one.”⁷

⁵ RD at 24 (emphasis added).

⁶ PIOGA hereby incorporates the “Introduction and Summary of Position” above in this exception.

⁷ PIOGA directs the Commission to pages 1-2 and 3-7 of its Main Brief (MB) and page 5 of its Reply Brief (RB) for this argument.

As stated above, the ALJ and all parties agree that the ultimate issue in this prosecution is the proper interpretation of the “stripper well” definition and, more precisely, the meaning of the word “any” in this definition and whether SBI’s disputed wells qualify as stripper wells.⁸

Indeed, at the hearing I&E’s witness stated that the difference between the calculations of the Commission’s Fiscal Office and SBI concerning the disputed wells “is the definition of a stripper well” (Hearing Transcript, 67:19-21), and I&E acknowledges in brief that “[t]he definition of ‘stripper well,’ which is defined as a well producing less than 90,000 cf average per day, *is the only definition at issue that quantifies a production level.*”⁹

It is clear that the interpretation of the stripper well definition advanced by I&E in this prosecution has been the Commission’s consistent interpretation from the beginning and has not changed,¹⁰ and this is also shown by I&E’s briefs in this matter.¹¹ Indeed, the Commission acknowledged as much in its *Chapter 23 NOPR*:

⁸ I&E *Prehearing Memorandum* (4/18/2014) at 2 (definition of stripper well “controls this matter”); I&E *Petition for Interlocutory Commission Review and Answer to a Material Question* (6/4/2014) at 3 (interpretation of stripper well definition “determines the outcome of this case”); I&E *Brief in Support of Petition for Interlocutory Commission Review and Answer to a Material Question* (6/17/2014) at 4 (“I&E agrees with Snyder Brothers that the definition of ‘stripper well’ is the primary issue in this matter.”); I&E *Petition for Stay* (6/20/2014) at ¶s 5, 10; ALJ *Order Staying Proceeding* (7/7/2014) at 7; I&E *Brief re SBI summary judgment motion* (7/28/2014) at 6 (“Whether Snyder Brothers incorrectly classified the wells at issue in paragraphs 16 and 23 of I&E’s Complaint is dependent upon the determination of the ‘stripper well’ question.”); I&E *Brief in Support of Joint Petition for Interlocutory Review and Answer to a Material Question* (9/22/2014) at 3; I&E *Brief* (1/16/2015) at 3 (interpretation of stripper well definition “is pivotal to the outcome of this case”).

⁹ I&E *Brief* (1/16/2015) at 10 (emphasis added).

¹⁰ Hearing Transcript (HT), 63:8-16; 65:9–66:2; 66:16-24; 67:19-21; 83:7-23; 88:25–89:4; 114:20–115:2; 122:10-17; 131:13-16; I&E *Brief* at 9.

¹¹ I&E *Brief in Support of Petition for Interlocutory Commission Review and Answer to a Material Question* (6/17/2014) at 5 (“The Commission has already clearly stated”) (citing *Reconsideration Order Regarding Chapter 13*, M-2012-2288561, July 19, 2012, and *Proposed Rulemaking Order*, 58 Pa. C.S. §§ 2301,2302(f)); I&E *Brief* (1/16/2015) at 7 (“The Commission’s Fiscal Office applied the correct interpretation of ‘stripper well’ when it billed Snyder Brothers for an additional 24 unconventional vertical wells for calendar year 2011 and 21 unconventional vertical wells for calendar year 2011.”), 9 (citing *Reconsideration Order Regarding Chapter 13*, M-2012-2288561 (7/19/2012) and *Chapter 23 NOPR*).

Because this rulemaking is largely based on previous Commission determinations as set forth in our Implementation, Reconsideration and Clarification orders regarding Chapter 23, none of which have been appealed, the Commission does not anticipate receiving comments from parties regarding such determinations contained herein.¹²

And the only public comment shown on the Commission's online docket for this rulemaking notes that "what is being proposed by the Commission under this proposal is what the Commission has been following under previous tentative implementation orders."¹³

I&E's assertion that the Commission's interpretations of stripper well support *I&E's position*¹⁴ is disingenuous – the Commission's interpretation *is* I&E's position.¹⁵ It is equally clear that the first time that the Commission's correct interpretation of the word "any" as "one" was expressly *publicly* stated was in the Commission's *Chapter 23 NOPR*:

All vertical gas wells on the Department of Environmental Protection's (DEP) spud list as of December 31 of each year will be subject to the fee for that year unless the producer verifies to the Commission that a particular well did not produce natural gas in quantities greater than that of a stripper well *during any calendar month* in the reporting year. *Id.* This means that even if a vertical gas well produces natural gas in quantities greater 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. *Id.*¹⁶

I&E and the ALJ have not provided any reason for the Commission to change (i) its consistent and correct interpretation of the word "any" to mean "one" or (ii) the legal conclusion inherent in this interpretation that the term "any" in the stripper well definition is not ambiguous.

¹² *Chapter 23 NOPR* at 2, n.2.

¹³ Comments of Pennsylvania State Association of Township Supervisors (PSATS), <http://www.puc.state.pa.us/pcdocs/1254113.pdf>.

¹⁴ I&E MB at 14; *see also*, RD at 26.

¹⁵ PIOGA RB at 12.

¹⁶ *Chapter 23 NOPR* at 8 (citing *July 19, 2012 Reconsideration Order* at 5) (italics in original; underline emphasis added). *See* PIOGA MB at 1-2, Reply Brief at 1-4.

Exception No. 2: The ALJ erred in rejecting application of the general rules of statutory construction to determine the proper meaning of the stripper well definition. RD, pp.26-27, Conclusion of Law No. 10, Recommended Ordering Paragraph Nos. 1, 3.

Both PIOGA and SBI have shown that the Commission’s interpretation of the word “any” to mean “one” is consistent with, and indeed required by, the general rules of statutory construction:

Guinn v. Alburtis Fire Co., 614 A.2d 218, 220 (Pa. 1992) (the object of all interpretation and construction of statutes is to ascertain and effectuate the intention of the General Assembly; the best indicator of legislative intent is the plain language of the statute); *Sphere Drake Ins. Co. v. Phila. Gas Works*, 782 A.2d 510, 513 (Pa. 2001) (when language of statute is clear and unambiguous, it must be given effect in accordance with its plain and common meaning) (citations omitted).¹⁷

[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)).¹⁸

The interpretation of statutory language in Pennsylvania is governed by the provisions of 1 Pa.C.S. Chapter 19. 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*, 92 A.3d 746, 751(Pa.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.”)¹⁹

¹⁷ PIOGA Brief in Opposition to I&E Petition for Interlocutory Commission Review and Answer to a Material Question (6/13/2014) at 5 (incorporated by reference by PIOGA MB at 5, n3; PIOGA MB at 4-7.

¹⁸ PIOGA RB at 7 (quoting *Commonwealth v. Shiffler*, 879 A.2d 185, 188 (Pa. 2005)), 11-12.

¹⁹ SBI Brief in Support of Motion for Summary Judgment (6/19/2014) at 5, 6-10; SBI Brief in Support of Joint Petition for Interlocutory Review and Answer to a Material Question (9/22/2014) at 5 (same), 6-9. Both briefs were incorporated by reference by SBI Brief (1/16/2015) at 1, n.1.

The ALJ erred in rejecting these arguments.²⁰ The Commission has correctly applied these general rules of statutory construction in making plain language interpretations of other Chapter 23 provisions, rather than presuming the result of the plain language interpretation (i) “favors the private interest over the public interest” and (ii) “is absurd, impossible of execution, or unreasonable.”²¹ The Commission has interpreted:

- Chapter 23, Section 2302(f) as excluding vertical gas wells from the minimum three year fee requirement imposed by Section 2302(b.1) because the plain language of Section 2302(f) imposing the vertical unconventional gas well fee does not include Section 2302(b.1).²²
- Chapter 23, Subsection 2303(c)(3) as limiting the assessment of the Commission’s administrative and enforcement charges not covered by the \$50 administrative charge and other revenues to producers “subject to the unconventional gas well fee” rather than being imposed on all producers without limitation, as the quoted language is clearly a limitation.²³

The Commission’s consistent interpretation of the word “any” in the stripper well definition to mean “one” is another correct application of the general rules of statutory construction. PIOGA respectfully asserts that nothing in this matter supports the Commission’s changing its plain language interpretation of the word “any” in the stripper well definition.

Exception No. 3: The ALJ erred in relying upon rules of statutory construction other than the general rules to determine the proper meaning of the stripper well definition. RD, pp.24-27, Conclusion of Law Nos. 10 and 11, Recommended Ordering Paragraph Nos. 1, 3.

As stated above, the Commission’s consistent and correct interpretation of the word “any” in the stripper well definition renders moot any additional statutory construction inquiry. While I&E acknowledges the general rules of statutory construction that PIOGA asserts were properly applied by the Commission, as explained above, I&E does not apply them. Instead,

²⁰ The ALJ’s statement (addressed in Exception No. 1) that PIOGA and SBI advance the same statutory construction arguments is correct as to the general rules stated above.

²¹ I&E Brief at 9-10.

²² *Reconsideration Order Regarding Chapter 13* at 4.

I&E *presumes* that the plain language interpretation would lead to a result of the plain language interpretation (i) “favors the private interest over the public interest” and (ii) “is absurd, impossible of execution, or unreasonable.”²⁴ The ALJ credited I&E’s argument without referencing or discussing the authority relied upon by I&E to support it:

In addition, Snyder’s interpretation of the term “stripper well” would lead to a result that would favor private interests over public interests. Snyder’s interpretation would favor the private interest of increased revenue to Snyder over the public interest of providing relief to the municipalities affected by drilling.²⁵

To the extent the ALJ relied upon this argument, he erred. PIOGA’s Reply Brief (pp. 5-7) explains why this argument has no place in this matter. Briefly stated, the *Mercury Trucking*²⁶ and *Shiffler*²⁷ 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 plain language statutory construction rules. In contrast, this matter involves one simple definition – not multiple statutes and complicated issues – notwithstanding the ALJ’s acceptance of I&E’s argument that *this matter* (as distinguished from Act 13 generally) involves issues so complicated and misunderstood that the Commission had to issue three implementation orders (this issue is addressed below in this exception).²⁸ As SBI’s witness testified during the hearing:

Q. And how then did you arrive at your interpretation of what the words, “stripper well” meant?

A. We read the Act and the definition in the Act.

²³ *Id.*, at 5.

²⁴ I&E Brief at 9-10, 14-15.

²⁵ RD at 25.

²⁶ *Mercury Trucking, Inc. v. Pa. PUC*, 55 A.3d 1056 (Pa. 2012).

²⁷ *Commonwealth v. Shiffler*, 879 A.2d 185 (Pa. 2005).

²⁸ RD at 26.

Q. And what did you conclude?

A. A stripper well is a well that is not capable of producing more than 90 Mcf a day in any calendar month.

Q. In one month a year?

A. Yes, in any calendar month of a year.²⁹

....

Q. Mr. O'Hara, you testified that you made your interpretation of the term "stripper well" by reading Act 13. Did you look anywhere else to seek guidance on that interpretation?

A. No.

Q. So you read it. *It's a pretty complicated Act*, but you read it and you said, "My definition is right. I'm not going to read the Commission's Clarification Orders or Implementation Orders?"

A. I wasn't aware of those, but I don't agree it's complicated. It's a very straightforward definition.³⁰

I&E essentially argues that any interpretation that would reduce the impact fees paid to the Commonwealth would be an absurd result.³¹ This 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. Yet, as shown in PIOGA's Reply Brief, the Commission's other Chapter 23 interpretations discussed above in Exception No. 2 have the result of reducing Chapter 13 revenues paid to the Commonwealth, but the Commission nonetheless interpreted those provisions in accordance with the plain language of the statute. The two court decisions discussed in PIOGA's Reply Brief also illustrate the point that plain language interpretation trumps use of the rare exceptions applied in the *Mercury Trucking* and *Shiffler* decisions.³²

²⁹ HT, 128:17-24.

³⁰ HT, 131:2-12 (emphasis added).

³¹ I&E Brief at 15.

³² PIOGA RB at 8-10.

The ALJ clearly accepted I&E argument that the stripper well definition is ambiguous so that resort to additional considerations is necessary to ascertain and effectuate legislative intent.³³ The ALJ erred in accepting I&E's arguments.

PIOGA addresses the erroneous application of these other considerations in its Reply Brief at pages 7-11 and will not repeat those arguments here, except to emphasize what PIOGA views as the most obvious errors in the RD, other than the "impact fees are not taxes" determination addressed in Exception No. 4.

The ALJ agreed with I&E that the stripper well definition and the word "any" are ambiguous basically because the Commission "needed to issue" three implementation orders, which "indicated that there was substantial disagreement regarding the interpretation and implementation of Act 13. Relevant to this case, the Commission had to interpret the terms 'stripper well' and 'vertical gas well'."³⁴ As shown in PIOGA's Reply Brief,³⁵ the reason the Commission had to issue those orders is because the Commission erroneously interpreted the plain language of some provisions and issued the additional orders to correct those statutory construction errors. Nowhere in any of those orders does the Commission conclude that the provisions are ambiguous and the reason for the orders. Any argument that ambiguity was the reason for the issuance of these orders is tantamount to "revisionist history," especially in the context of this matter in which the Commission has consistently interpreted the word "any" in the stripper well definition to mean "one."

³³ RD at 26.

³⁴ *Id.*

³⁵ PIOGA RB at

I&E also argues that inquiries from six producers concerning the classification of stripper wells shows the stripper well definition is ambiguous.³⁶ While I&E has not identified the six producers or the nature of their inquiries, the Commission can take official or judicial notice that of the four docketed “objections” to the Commission’s initial invoices sent to producers involved stripper well issues, and three of these involved the stripper well classification issue involved in this prosecution – with the producers advancing the same plain language interpretation as PIOGA and SBI:

- ENERGY CORPORATION OF AMERICA, M-2012-2322701 (9/5/2012) – stripper well classification issue;
http://www.puc.state.pa.us/about_puc/consolidated_case_view.aspx?Docket=M-2012-2322701
- WILMOTH INTERESTS INC, M-2012-23233 (9/10/2012) – no stripper well classification issue, only one well producing well under 90 Mcf average per day;
http://www.puc.state.pa.us/about_puc/consolidated_case_view.aspx?Docket=M-2012-2323383
- CNX GAS COMPANY LLC, M-2012-2323637 (9/11/2012) – stripper well classification issue; http://www.puc.state.pa.us/about_puc/consolidated_case_view.aspx?Docket=M-2012-2323637
- CONSOL ENERGY INC D/B/A CNX GAS COMPANY LLC, M-2012-2324068 (9/13/2012) – stripper well classification issue;
http://www.puc.state.pa.us/about_puc/consolidated_case_view.aspx?Docket=M-2012-2324068

The other docketed “objections” involved other issues, such as: wells not drilled; only conductor pipe installed; and conventional wells misclassified as unconventional. While PIOGA disagrees that a small number of producer inquiries shows that the stripper well definition is ambiguous as a matter of law, the majority of those related to stripper wells having the same plain language interpretation as PIOGA and SBI certainly doesn’t prove I&E’s point.

³⁶ I&E Brief at 10.

The ALJ also agreed with I&E that the Commission’s interpretations at issue in this matter are entitled to great deference: “Since the Commission is charged with implementing and enforcing the provisions of Act 13 and its interpretations of the terms “stripper well” and “vertical gas well” are not clearly erroneous, I concluded that its interpretation of those terms was entitled to similar deference.”³⁷ PIOGA relies upon its Reply Brief at pages 13-14 to refute the ALJ’s conclusion.

Exception No. 4: The ALJ erred in concluding that Chapter 23 impact fees are not taxes for purposes of statutory construction. RD, pp.27-30, 31, Conclusion of Law No. 11, Recommended Ordering Paragraph Nos. 1, 3.

The ALJ rejected PIOGA’s and SBI’s arguments that the impact fees are in legal substance “taxes” *for purposes of statutory construction*. With respect to PIOGA’s arguments, he concluded:

PIOGA’s . . . statement that the impact fees are deposited into the Unconventional Gas Well Fund and the Marcellus Legacy Fund established by Act 13 **only reinforces the conclusion** that the impact fees do not contribute to the general funds of either the Commonwealth of Pennsylvania or the municipalities.

. . . .

Furthermore, PIOGA’s statement that the Wheeling decision applies an incorrect standard because that decision involved a federal court interpreting a federal statute using federal statutory construction principals in determining whether a state imposed fee is a tax is incorrect. M.B. 9-10. While PIOGA argues that the City of Philadelphia decision applies the correct standard, it fails to point out that the City of Philadelphia decision also involves interpreting a federal statute using federal statutory construction and preemption principals. . . .

Substantively, both Wheeling and City of Philadelphia reach the same conclusion: that the Commission’s allocation of costs at a rail-highway crossing, pursuant to 66 Pa.C.S. §§ 2702 and 2704, is not a tax. Here, as in Wheeling and City of Philadelphia, the fee at issue does not raise money for

³⁷ RD at 26-27; I&E Brief at 14.

the general welfare or contribute to the general fund of either the Commonwealth or the municipalities and is therefore not a tax.³⁸

PIOGA relies upon its Main Brief at pages 7-11 to refute the ALJ's conclusions, and emphasizes that his statement that "the money raised by the impact fees was distributed to the municipalities to offset the impacts of drilling in the municipalities" clearly, as the Commission must certainly understand, applies to only 60% of the fees collected and ignores the twenty-some million dollars taken "off the top" for statewide initiatives and the 40% of the balance also disbursed for various statewide and local purposes. I&E's assertion that it is "speculative at best and irrelevant" whether these disbursements offset funds municipalities and counties [and the state] would otherwise be required to raise from taxes³⁹ is simply incredible. PIOGA is confident that this Commission needs no explanation of what government spending qualifies as being for the general welfare or the common sense understanding of how that government spending is raised. Clearly, the impact fees provide funds well over and beyond any legitimate "fee", as SBI points out in its exceptions.

Exception No. 5: The ALJ erred in the application of the Policy Statement factors and standards concerning civil penalties. RD, pp.35-41, Conclusion of Law No. 11, Recommended Ordering Paragraph No. 2.

The ALJ concludes that a \$50,000 civil penalty is reasonable and appropriate.⁴⁰ The ALJ erred in not even considering whether no penalty is reasonable and appropriate under the Commission's Policy Statement and in concluding that the reasonableness of the penalty is an appropriate "other relevant factor" under 52 Pa. Code § 69.1201(c)(10). PIOGA relies upon pages 15-17 of its Reply Brief to refute the ALJ's erroneous conclusions.

³⁸ RD at 29-30 (emphasis in original).

³⁹ I&E Reply Brief at 11.

⁴⁰ RD at 35-41.

By way of example, an appropriate factor under § 69.1201(c)(10) would be SBI's willingness to escrow the disputed amounts in this case, which the ALJ denied on the basis that the Commission cannot order SBI to escrow funds. While this rationale misses the point that SBI was volunteering to do so, that act in clearly is another example of the good faith and reasonable behavior of SBI with respect to this whole matter.

Exception No. 6: Finding of Fact No. 54 is immaterial and must be stricken or vacated. RD, p.16.

Finding of Fact No. 54 states: "It is possible to lower the amount of gas produced by a gas well or to shut down a gas well for maintenance. N.T. 132." While this finding correctly restates testimony provided by SBI's witness on cross-examination, the testimony itself is not material, so this finding must be stricken or vacated.

"A material fact is one that affects the outcome of the case."⁴¹ I&E's complaint made no allegation concerning the incapability of SBI's disputed wells to produce and presented no evidence or argument during the course of this proceeding concerning the incapability of SBI's disputed wells to produce, consequently there is no issue in this proceeding concerning this subject. I&E has acknowledged this throughout this case⁴² – as its evidence consists of SBI's reported production amounts (Joint Stipulation No. 1, ¶s 12, 20), and its witness provided

⁴¹ *Beach v. Burns International Security Services*, 593 A.2d 1285, 1286-87 (Pa. Super 1991) (allegation that employee did not know signing form was condition of employment not a material fact because evidence showed he did know and he was at-will employee); *Bartlett v. Bradford Publishing, Inc.*, 885 A.2d 562, 567-68 (Pa. Super. 2005) (whether defendant in defamation case lied during her deposition about number of times she had contact with her news source not material to whether she acted with actual malice a year earlier than her deposition).

⁴² I&E *Prehearing Memorandum* (4/18/2014) at 2 (no material facts in dispute); I&E *Brief in Support of Interlocutory Review and Answer to a Material Question* (6/17/2014) at 3 (same); I&E *Brief re SBI summary judgment motion* (7/28/2014) at 6 (Joint Stipulation No. 1 "sets forth the material facts relevant to the determination of the 'stripper well' question."); I&E *Brief in Support of Joint Petition for Interlocutory Review and Answer to a Material Question* (9/22/2014) at 3 (no material facts in dispute); I&E *Prehearing Memorandum* (10/24/2014) at 2, 3 (no material facts in dispute).

absolutely no evidence concerning the incapability, or capability, of SBI's disputed wells to produce. The only testimony presented concerning the incapability or capability of SBI's wells to produce was provided by SBI's witness, who testified at the hearing that SBI produced all its wells, including the wells at issue in this prosecution, to their maximum amount, and that if a well produced less than 90 Mcf average per day in any given month, "that well was then incapable of producing more."⁴³

This testimony was not disputed, undermined or contradicted in any respect. Certainly, the mere acknowledgment of what is possible, without more, does not dispute, undermine or contradict SBI's testimony. I&E elicited no evidence concerning how lowering the amount of natural gas produced by a well would be accomplished, the feasibility of doing so, any reasons for doing so, the costs of doing so, or the effect on the operation of a particular well or SBI's operations generally – including its contractual obligations. Indeed, the obvious reason to ask the question was to inject some doubt into the veracity of SBI's production reporting and operations, which had never been an issue as acknowledged by I&E's witness:

Q. And the sum and substance of the difference between what you're claiming and what Snyder Brothers claims they owe turns exclusively on the definition of the term "stripper well," correct?

A. It does.⁴⁴

The mere statement by SBI's witness of what is possible is the same as I&E's witness's acknowledging that it is possible that she or someone else within the Commission could engage in impermissible commingling of prosecutorial and adjudicatory functions. This statement would constitute a "finding" but, absent an allegation or evidence that impermissible

⁴³ HT, 130:3-17.

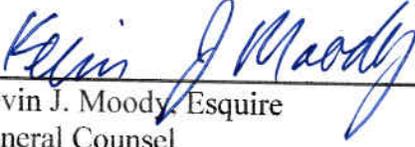
⁴⁴ HT, 88:25-89:4.

commingling occurred, the finding would not be material. Accordingly, Finding of Fact No. 54 must be stricken or vacated.

III. RELIEF REQUESTED

For the reasons set forth above, PIOGA respectfully requests that the Commission reverse the Recommended Decision and dismiss this prosecution.

Respectfully submitted,



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

Date: March 16, 2015

CERTIFICATE OF SERVICE

I hereby certify that this day, March 16, 2015, I served a copies of the foregoing PIOGA Exceptions 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

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

HEIDI L. WUSHINSKE, ESQUIRE
WAYNE T. SCOTT, ESQUIRE
PA PUBLIC UTILITY COMMISSION
BUREAU OF INVEST. & ENFORCEMENT
PO BOX 3265
HARRISBURG PA 17105-3265
hwushinske@pa.gov
wascott@pa.gov

VIA E-MAIL

DAVID C. O'HARA
VICE PRESIDENT
SNYDER BROTHERS, INC
PO BOX 1022
KITTINGING, 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