COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA PUBLIC UTILITY COMMISSION
P.O. BOX 3265, HARRISBURG, PA 17105-3265

IN REPLY PLEASE
REFER TO OUR FILE

March 26, 2015

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

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

Dear Secretary Chiavetta:

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

Sincerely,

Heidi L. Wushinske

Heidi L. Wushinske, Prosecutor
Bureau of Investigation and Enforcement

Enclosures

**BEFORE THE PENNSYLVANIA**
**PUBLIC UTILITY COMMISSION**

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

# PENNSYLVANIA PUBLIC UTILITY COMMISSION BUREAU OF INVESTIGATION AND ENFORCEMENT'S REPLY TO EXCEPTIONS FILED BY SNYDER BROTHERS, INC. AND PIOGA


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Dated: March 26, 2015

The Bureau of Investigation and Enforcement ("I&E") of the Pennsylvania Public Utility Commission ("PUC" or "Commission") through Prosecutor, Heidi L. Wushinske, files the following Reply to Exceptions filed by Snyder Brothers, Inc. ("Snyder Brothers") and The Pennsylvania Independent Oil & Gas Association ("PIOGA") to the Recommended Decision of Administrative Law Judge ("ALJ") David A. Salapa, and states as follows:

**Reply to PIOGA's "Introduction":**

PIOGA's "Introduction and Summary of Position" of its Exceptions should be dismissed. In this "Introduction," PIOGA attempts to reply to I&E's Reply Brief, which is a filing not contemplated or permitted by the regulations. PIOGA's "Introduction" does not refer to any specific conclusions of law, findings of fact, or any other portion of the ALJ's decision. Nor does PIOGA's "Introduction" serve merely as a traditional introduction or provide a summary of the specific portions of the ALJ's decision to which it objects. Rather, PIOGA has disguised a reply to I&E's Reply Brief as an "Introduction." PIOGA's attempts to make additional reply arguments not provided for in the Commission's regulations should be rejected.

**Reply To Snyder Brothers Exception No. 1; PIOGA's Exception No. 6:**

Snyder Brothers and PIOGA object to the ALJ's Finding of Fact ("FF") No. 54. Snyder Brothers alleges that FF No. 54 is not supported by the record and is inconsistent with other findings of fact. However, as discussed below, the ALJ's FF No. 54 is supported by the record and is consistent with other findings of fact. FF No. 54 states "[i]t is possible to lower the amount of gas produced by a gas well or to shut down a gas

well for maintenance." R.D. 16. This finding of fact is supported by the record and is consistent with the ALJ's other findings of fact.

FF No. 54 is supported by the record. Snyder Brother's own witness, Mr. David O'Hara, testified that it was possible that a gas well's production could be lowered or that it could be shut down for maintenance. Tr. 132. FF No. 54 directly reflects Mr. O'Hara's testimony.

Moreover, FF No. 54 is consistent with the ALJ's other findings of fact. The ALJ's findings that Snyder Brothers operated its wells to produce the maximum volume of gas during calendar years 2011 and 2012 (FF No. 50) and that wells producing less than a daily average of 90,000 cubic feet of natural gas were not capable of producing more (FF No. 51), are not inconsistent with a finding that it is possible for gas wells to lower their production or to shut down for maintenance (FF No. 54). The ALJ's FF Nos. 50 and 51 do not preclude the possibility that the production of a gas well can be lowered or that it can be shut down for maintenance. Therefore, Snyder Brothers' exception No. 1 should be denied.

PIOGA argues that FF No. 54 is immaterial to the case. In support of this argument, PIOGA states that because the Complaint did not contain allegations regarding the capability of Snyder Brothers wells and evidence of this issue (other than the evidence cited in support of the ALJ's FF No. 54) was not presented at the hearing, that this fact is immaterial. This argument ignores the main issue in this case, as acknowledged by all the parties, which is the interpretation of the term "stripper well." In reaching his decision on this issue, whether or not it is possible to lower a well's

production or to shut it down for maintenance is absolutely relevant. This fact is relevant to such factors as a determination of the mischief to be remedied by a statute and the consequences of a particular interpretation, among others. Accordingly, PIOGA's exception should be denied.

**Reply To Snyder Brothers Exceptions No. 2 and 2a; PIOGA's Exceptions No. 1 and 2:**

In its second Exception, Snyder Brothers argues that the 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, R.D. 43). Snyder Brothers also argues, in its Exception titled 2a, that 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 legislative history (Conclusion of Law No. 10, R.D. 43, 23-27). PIOGA makes similar arguments in its Exceptions No. 1 and 2.

I&E asserts that the ALJ correctly interpreted the term "stripper well" and properly assessed Act 13 Fees, Interest and Penalties for the Years 2011 and 2012. I&E incorporates by reference the arguments addressing this issue made in its Brief and Reply Brief and notes that the issue has fully and exhaustively been addressed by the ALJ and the parties in two Petitions for Interlocutory Review, a Motion for and Answer to Summary Judgment, a Summary Judgment Decision, Briefs and Reply Briefs, and a Recommended Decision.

I&E further argues that the ALJ correctly applied the rules of statutory construction and properly relied upon the legislative history in reaching his interpretation of the term "stripper well." Although, I&E asserts that this issue was fully and accurately covered by the ALJ in his well reasoned decision, several points are worthy of additional stress. First, Snyder Brothers erroneously contends that the ALJ's interpretation is inconsistent with that of the Commission. To make this tenuous argument, Snyder Brothers focuses on the word "any" and argues that the Commission has not consistently interpreted this term. However, a look at the Commission's multiple Orders issued on this matter clearly show that the ALJ's interpretation of "stripper well" is consistent with the Commission's interpretation. *See Reconsideration Order* at 4; *Implementation Order Regarding Chapter 23*, p. 7, Docket No. M-2012-2288561 (Order entered May 10, 2012) (*Reconsideration Order)*; *Implementation Order Regarding Chapter 23*, p. 7, Docket No. M-2012-2288561 (Order entered May 10, 2012) (*Implementation Order*).

PIOGA makes a similar argument in its Exceptions No. 1 and 2. These efforts to argue that the Commission has a different interpretation of the word "any" is a red herring attempt to introduce inconsistency between the ALJ's interpretation and that of the Commission and should be denied.

In its Exception No. 1, PIOGA also excepts to the ALJ's summarization of the argument advanced in its Brief. R.D. 24. Specifically, PIOGA excepts to the ALJ's consideration of its argument in combination with that of Snyder Brothers. The ALJ was well within his discretion to address these arguments in combination. Snyder Brothers' and PIOGA's arguments both deal with their interpretations of "stripper well; "

interpretations that both advocate a conclusion that a stripper well is one that produces less than 90,000 cf of gas per day in any month during the reporting period. Moreover, the ALJ is not required to address each and every legal argument raised by a party. *See* 66 Pa. C.S. § 335 (setting forth requirements of initial decisions).

Second, Snyder Brothers incorrectly attacks the ALJ's reliance on the legislative history, despite the fact that the version of Act 13 that the ALJ referenced can be readily found at General Assembly House Bill 1950 Session of 2011 Printer's No. 2837. Snyder Brothers' argument, that the ALJ cannot use this prior version in his analysis because there is no commentary on the change in the General Assembly's published reports, attempts to rob the ALJ of judicial discretion and should be rejected.

**Reply to PIOGA's Exception No. 3:**

Again, in this "Exception," PIOGA attempts to submit a reply to I&E's Reply Brief. Exceptions are permitted to be filed to an Initial, Tentative, or Recommended Decision, not to make reply arguments to a Reply Brief. 52 Pa. Code § 5.533. Furthermore, Exceptions are to identify the finding of fact or conclusion of law to which exception is taken. Although PIOGA identifies Conclusions of Law Nos. 10 and 11 in its Exception No. 3, it focuses the majority of its argument in countering I&E's arguments in its Brief and Reply Brief. I&E asserts that this is not the purpose of Exceptions. Replies to Reply Briefs are not permitted, and PIOGA's attempts to introduce this type of pleading into its Exceptions should be denied.

It is unclear why PIOGA identifies Conclusion of Law No. 11 in this Exception as PIOGA does not address Conclusion of Law No. 11 in this Exception, but in its

Exception No. 4, which follows. Regarding PIOGA's further Exception to Conclusion of Law No. 10, I&E incorporates by reference its position as set forth in its Brief and Reply Brief. I&E asserts that the ALJ properly and thoroughly applied the rules of statutory construction in reaching his decision. Therefore, PIOGA's Exception should be denied.

**Reply to Snyder Brothers' Exception No. 4; PIOGA's Exception No. 4:**

In its Exception No. 4, Snyder Brothers argues against the ALJ's conclusion that Act 13 Impact Fees are not taxes, Conclusions of Law No. 10 and 11, R.D. 43, 27-30. PIOGA makes a similar argument, citing Conclusion of Law No. 11. I&E incorporates by reference its discussion of this issue made in its Brief. I&E again notes that this issue has been extensively addressed by the parties in their previous filings and by the ALJ in his prior Orders and Recommended Decision.

The ALJ, in his Recommended Decision, thoroughly discussed the issue of Act 13 Impact Fees and their status as fees, rather than taxes. R.D. 27-30. The ALJ's discussion included a detailed and thorough analysis of the relevant case law, including the case that Snyder Brothers claims is "binding." *See Building Indus. Ass'n. v. Manheim Twp.*, 710 A.2d 141 (Pa. Commw. 1998). The ALJ properly found that because the fee at issue in *Building Indus. Ass'n.* was defined as a charge to generate revenue for funding the costs of transportation capital improvements, the definition of impact fee in that case was inapplicable to the facts of this case. R.D. 30. Finding that *Building Indus. Ass'n* was inapplicable to this case, the ALJ properly analyzed the facts of this case using the legal standards articulated in *Wheeling and Lake Erie Railway Co. v. Pa. Pub. Util. Comm'n*, 141 F. 3d 88, 96 (3d. Cir. 1998).

In this Exception, Snyder Brothers attempts to introduce yet another inapplicable case, citing *Simpson v. City of New Castle*, 740 A.2d 287 (Pa. Commw. 1999). This case is also distinguishable from the instant case. *Simpson v. City of New Castle* involved a registration fee for a rental unit, which the Court characterized as a "licensing fee." Unlike the fee at issue in *Simpson v. City of New Castle*, Act 13 fees are not licensing fees, nor are they "user fees."[1] Because Act 13 fees are not licensing or user fees, the analysis of whether these fees exceed the cost regulation or whether the proportion of income collected through Act 13 fees relative to the costs of collection and supervision is irrelevant in this matter.

As the ALJ correctly found, Act 13 Impact Fees do not contribute to the general fund or raise money for the general welfare, but rather are distributed to municipalities to offset the impacts of drilling. R.D. 27. As such, the ALJ correctly found that Act 13 Impact Fees are fees, not taxes; and therefore, any ambiguities in the statute should not be construed in favor of Snyder Brothers.

Again, PIOGA attempts to use its Exceptions as an effort to reply to I&E's Reply Brief. In its Exception No. 4, PIOGA attempts to argue against points raised in I&E's Reply Brief that were not even mentioned by the ALJ. As stated previously, this is improper, not provided for in the regulations, and should be dismissed. PIOGA's efforts are a blatant attempt to circumvent the Commission's regulations and should not be permitted.

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[1] As Snyder Brothers correctly notes, Act 13 producers pay "user fees" to the Department of Environmental Protection.

**Reply to Snyder Brothers' Exceptions No. 4 and 5:**

Alternatively, Snyder Brothers disagrees with the ALJ's conclusions that Act 13's interest and statutory penalties are mandatory. Conclusions of Law 8 and 9, R.D. 42-43, 32-35. The ALJ properly found the statutory interest and penalty provisions of Section 2308 of Act 13 to be mandatory. I&E incorporates by reference its arguments on this issue made in its Brief and Reply Brief.

In its Exceptions, Snyder Brothers argues that the Commission has found these mandatory Section 2308 interest and penalties to be discretionary, and cites the Commission's October 13, 2013 Order at Docket No. L-2013-2375551, for support of this proposition. This argument ignores the plain language of Act 13, which clearly states that for producers with delinquent fees, the Commission *shall* assess interest. 58 Pa.C.S. § 2308(a) (emphasis added).

Section 2308 further provides that in addition to the assessed interest, the Commission *shall* add a penalty of 5% of the amount of the fee if the failure to timely pay is for less than one month, with an additional 5% penalty for each additional month or fraction of a month, not to exceed 25% in the aggregate. 58 Pa.C.S.§ 2308(b) (emphasis added). In addition, the only evidence produced on this issue was the testimony of I&E's witness, who stated that she considered Section 2308 interest and penalties to be mandatory. Tr. 22. The ALJ carefully considered all of these factors in reaching his determination that Section 2308 of Act 13's interest and penalties were mandatory.

**Reply to Snyder Brothers' Exception No. 6:**

Snyder Brothers excepts to what it characterizes as the ALJ's finding that it violated Act 13, citing paragraph 3 of the ordering paragraphs of the Recommended Decision, in which the ALJ ordered Snyder Brothers to cease and desist from future violations of Act 13. R.D. 44. For the reasons set forth below, as well as those set forth in I&E's Brief and Reply Brief, which it incorporates by reference, Snyder Brothers' Exception is without merit.

First, Act 13 requires payment in full of Administrative and Impact Fees by the dates stated in the Act. There are no exceptions for good faith, cooperation, or anything else. Therefore, Snyder Brothers' nonpayment of the full amount of the Impact Fees and Administrative Charges due on its qualifying vertical wells constitutes violations of Act 13.

Second, Snyder Brothers asserts that I&E merely proved that Snyder Brothers disputed the amount of Impact Fees and Administrative Charges. To the contrary, as the ALJ correctly found, I&E proved that Snyder Brothers did not timely pay its Impact Fees and Administrative Charges, as required by Act 13. For these reasons, this Exception should be denied

**Reply to Snyder Brothers' Exception No. 7:**

Snyder Brothers alternatively argues that its constitutional rights of appeal and due process were violated by the mandatory nature of Act 13's interest and penalty provisions. I&E incorporates by reference the arguments in its Reply Brief that address this issue.

**Reply to Snyder Brother's Exception No. 8; PIOGA's Exception No. 5:**

Alternatively, Snyder Brothers argues that the ALJ incorrectly judged Snyder Brothers' conduct when he imposed the statutory Section 2308 interest and penalties and calculated the $50,000.00 civil penalty. R.D. ordering paragraph No. 2, p. 43, 25-41. PIOGA makes a similar argument, also identifying Conclusion of Law No. 11. For the reasons stated above, as well as those set forth in I&E's Brief and Reply Brief incorporated by reference, Section 2308 interest and penalties are mandatory and no analysis of conduct is required or even permitted in assessing these penalties. Regarding the civil penalty, the ALJ properly found that a $50,000.00 civil penalty was warranted in this case.

Snyder Brothers' argument that I&E failed to meet its burden regarding any of the civil penalty factors set forth in Section 69.1201 and that the ALJ misapplied these criteria is without merit. 52 Pa. Code § 69.1201. I&E specifically addressed each of the Section 2308 factors, citing relevant supporting evidence. The ALJ also carefully considered each of the factors in his decision, analyzing them over three pages of his Recommended Decision. That Snyder Brothers disagrees with the ALJ's analysis does not lead to the conclusion that the ALJ misapplied the criteria.

**Reply to Snyder Brothers' Exception No. 10a.:**

Snyder Brothers excepts to the first factor, the seriousness of the conduct at issue, arguing that this factor is not relevant and was misapplied. Snyder Brothers' argument is essentially that conduct not found to be of a serious nature, such as fraud or misrepresentation, is irrelevant and should not be considered. This argument is at odds

with the language of the standard regarding seriousness of conduct, which states that less egregious conduct may warrant a lower civil penalty. 52 Pa. Code § 69.1201(c)(1). Finding nothing in the record to support a finding that Snyder Brothers committed fraud or misrepresentation, the ALJ properly weighed this factor in Snyder Brothers' favor and found that its conduct warranted a lesser civil penalty, as directed by Section 1201(c)(1). *Id.*

**Reply to Snyder Brothers' Exception No. 10b:**

Snyder Brothers next excepts to the ALJ's application of the second factor, the consequences of the conduct at issue, set forth at 52 Pa. Code § 69.1201(c)(2). In making this argument, Snyder Brothers inaccurately states that the ALJ found that a potential for harm existed. In fact, the ALJ rejected the notion of any potential harm, stating that it required speculation, and weighed this factor in favor of Snyder Brothers. Specifically, the ALJ stated that the Commission focuses on actual harm and does not speculate on potential harm. R.D. 39, *citing Final Policy Statement for Litigated and Settled Proceedings Involving Violations of the Public Utility Code and Commission Regulations,* Docket No. M-00051875 (Order entered November 30, 2007) (*Policy Statement Order*). Weighing the factor of the consequences of the conduct at issue in favor of Snyder Brothers, the ALJ correctly found that consideration of this factor should result in a lesser civil penalty.

**Reply to Snyder Brothers Exception 10c:**

Snyder Brothers excepts to the ALJ's application of the third section 1201 criteria, whether the conduct at issue was intentional or negligent. R.D. 39. Specifically, Snyder

Brothers objects to the ALJ's finding that its conduct was negligent in this matter. R.D. 39. However, the ALJ, properly applying the relevant evidence (in particular, Snyder Brothers' admission that it had never read and of the Commission's Orders regarding this issue), weighed this factor in Snyder Brothers' favor and found that its conduct was negligent, as opposed to intentional. The ALJ further found that because of this, a lesser civil penalty was warranted.

Snyder Brothers' argument that the PUC was the one whose conduct was negligent is misplaced. This factor only examines the conduct of the Respondent, not the PUC.

**Reply to Snyder Brothers Exception 10d:**

Snyder Brothers excepts to the ALJ's application of the sixth factor, its compliance history. Again, the ALJ weighed this factor in Snyder Brothers' favor, stating that it has no Commission compliance history and that this violation was of an isolated nature. R.D. 40. The ALJ properly analyzed Snyder Brothers' compliance history, as directed by Section 1201(c)(6), and found that this factor warranted a lesser civil penalty.

**Reply to Snyder Brothers' exception No. 10e:**

The ALJ properly applied fact the eighth factor, whether the entity cooperated with the PUC, and again weighed this factor in Snyder Brothers' favor, finding that this factor warranted a lesser civil penalty. R.D. 40. Snyder Brothers' argument that this factor should not be considered if it cooperated is without merit and contrary to the structure of Section 1201, which sets out specific factors to be weighed against each other

in determining a civil penalty. 52 Pa. Code § 1201. Furthermore, it is unclear why Snyder Brothers is arguing against the application of a factor that weighs in its favor against other factors, thereby meriting the application of a lesser civil penalty than would be warrant absent this mitigating factor.

**Reply to Snyder Brothers' exception No. 10f:**

Contrary to Snyder Brothers' Exception 10f, the ALJ properly applied the ninth factor, the amount of civil penalty necessary to deter future violations. R.D. 40-41. In making this determination, the ALJ considered both I&E's argument that a $50,000.00 civil penalty is less than 10% of the amounts past due and sufficient to deter future violations, and Snyder Brothers' argument that this would not deter future violations, but potentially coerce entities from disputes. The ALJ properly applied this factor and ultimately found that an amount larger than $50,000.00 was not necessary to deter future violations.

**Reply to Snyder Brothers' Exception No. 10g:**

The ALJ correctly applied the tenth factor, which addresses other relevant factors, and found that a $50,000.00 civil penalty as opposed to the potential civil penalty of $912,000.00 per year was reasonable. R.D. 41. Snyder Brothers' argument that the ALJ should have and failed to consider whether any civil penalty was appropriate is erroneous. The ALJ in fact did consider whether Snyder Brothers should pay any civil penalty and concluded that it should. R.D. 41. "I conclude that a *minimal* civil penalty is warranted based on my review of the factors set forth above." R.D. 41 (emphasis added).

The ALJ properly considered all of the relevant civil penalty factors, in addition to considering whether or not any civil penalty at all was warranted in this case.

**Reply To Snyder Brothers' request to orally argue its exceptions:**

Snyder Brothers has not provided any reasons, let alone any compelling reasons, why its request to orally argue its exceptions should be granted. The majority of Snyder Brothers' Exceptions have already been extensively addressed by the parties and the ALJ in the form of Petitions for Interlocutory Review, a Motion for Summary Judgment, Briefs, Reply Briefs, a Summary Judgment Decision, and a Recommended Decision. Granting oral argument for the purpose of arguing these Exceptions, when there is already more than sufficient evidence to make a determination without oral argument, would be an unnecessary strain on already limited administrative resources. Therefore, Snyder Brother's request should be denied.

WHEREFORE, for the foregoing reasons, the Bureau of Investigation and Enforcement of the Pennsylvania Public Utility Commission requests that the Commission DENY the Exceptions of Snyder Brothers and PIOGA and DENY Snyder Brothers' request to orally argue these Exceptions.

Respectfully submitted,

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Date: March 26, 2015

## CERTIFICATE OF SERVICE

I hereby certify that I am this day serving the foregoing Reply Exceptions in accordance with the requirements of 52 Pa. Code § 1.54 *et seq.* (relating to service by a participant).

**Notification by first class mail addressed as follows:**

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The Honorable David A. Salapa
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Dated: March 26, 2015