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June 4, 2018

Via Electronic Filing

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

Re: Pa. P.U.C. Bureau of Investigation and Enforcement v. Xtreme Energy Company
Docket No. C-2017-2599145

Dear Secretary Chiavetta:

Enclosed for electronic filing, please find the Xtreme Energy Company's Memorandum of Law with regard to the above-captioned matter. Copies to be served in accordance with the attached Certificate of Service.

Sincerely,



Karen O. Moury
KOM/lww
Enclosure

cc: Hon. Joel Cheskis w/enc.
Cert. of Service w/enc.

CERTIFICATE OF SERVICE

I hereby certify that this day I served a copy of Xtreme Energy Company's Memorandum of Law upon the persons listed below in the manner indicated in accordance with the requirements of 52 Pa. Code Section 1.54.

Via Email and First Class Mail

Michael L. Swindler, Esq.
Deputy Chief Prosecutor
Bureau of Investigation & Enforcement
PA Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105-3265
mswindler@pa.gov

Date: June 4, 2018



Karen O. Moury, Esq.

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Pennsylvania Public Utility Commission,	:	
Bureau of Investigation and Enforcement,	:	Docket No. C-2017-2599145
Complainant	:	
v.	:	
	:	
Xtreme Energy Company,	:	
Respondent	:	

**XTREME ENERGY COMPANY'S
MEMORANDUM OF LAW**

TO THE HONORABLE JOEL CHESKIS:

Pursuant to the request of Deputy Chief Administrative Law Judge (“DCALJ”) Joel Cheskis at the Prehearing Conference held on May 2, 2018, Xtreme Energy Company (“Xtreme Energy”) submits this Memorandum of Law to address issues raised by the filing of a Complaint and Notice of Amount Due (“Complaint”) by the Commission’s Bureau of Investigation and Enforcement (“I&E”) against Xtreme Energy. Specifically, this Memorandum offers support for Xtreme Energy’s proposals to: 1) hold this matter in abeyance until the Supreme Court of Pennsylvania acts in the matter of *Snyder Brothers, Inc. v. Pa. Public Utility Commission*, 157 A.3d 1018 (Pa. Cmwlth. 2017), appeals pending at 47 and 48 WAP 2017; and 2) establish a schedule for the submission of pre-served written testimony in this proceeding, if DCALJ Cheskis determines that the matter should not be held in abeyance pending issuance of a decision in the *Snyder Brothers* appeal.

I. BACKGROUND

On April 12, 2017, I&E filed this Complaint seeking to recover impact fees and administrative charges for calendar years 2014 and 2015 from Xtreme Energy, pursuant to Act 13

of 2012, the Unconventional Gas Well Impact Fee Act, 58 Pa.C.S. §§ 2301-2318 (“Impact Fee Act”). On May 18, 2017, Xtreme Energy timely filed an Answer and New Matter. By its Answer and New Matter, Xtreme Energy raised issues concerning: (i) the responsibility of the prior well owner during the years in question; and (ii) whether one of the wells meets the definition of a stripper well and is therefore exempt from the payment of impact fees and administrative charges. I&E filed a Reply to New Matter on June 6, 2017.

On March 6, 2018, the Commission issued a Hearing Notice to the parties, scheduling an Initial Hearing for May 2, 2018. By Prehearing Order issued on March 12, 2018, ALJ Cheskis directed the filing of Prehearing Memoranda by April 25, 2018.

On April 11, 2018, Xtreme Energy filed a Motion requesting that the Initial Hearing scheduled for May 2, 2018 be converted to a Prehearing Conference. Alternatively, Xtreme Energy requested that the May 2, 2018 Initial Hearing be held for the sole purpose of having I&E present its case-in-chief and that a subsequent date be selected for Xtreme Energy to present its evidence in defense of the Complaint.

On April 24, 2018, I&E filed an Answer not opposing Xtreme Energy’s Motion with respect to the proposed conversion of the Initial Hearing to a Prehearing Conference. I&E, however, opposed Xtreme Energy’s request for alternative relief where the Initial Hearing would be held for the sole purpose of having I&E present its case-in-chief and that a subsequent date would be selected for Xtreme Energy to present its evidence in defense of the Complaint.

On April 25, 2018, DCALJ Cheskis indicated that the Initial Hearing scheduled for May 2, 2018 would be converted to a Prehearing Conference. On May 2, 2018, the Prehearing Conference convened as scheduled. Following a discussion of procedural issues raised by Xtreme

Energy, DCALJ Cheskis requested the filing of Memoranda of Law by Xtreme Energy and I&E by June 4, 2018. This Memorandum of Law is submitted pursuant to that request.

II. DISCUSSION

A. Holding Proceeding in Abeyance

I&E's Complaint was filed pursuant to the Impact Fee Act, alleging that Xtreme Energy did not: (i) file Annual Reports for reporting years 2014 or 2015; (ii) pay administrative charges for reporting years 2014 or 2015; and (iii) pay impact fees for reporting years 2014 and 2015. The allegations pertain to two unconventional wells in Somerset County, for which Xtreme Energy holds permits from the Department of Environmental Protection ("DEP"). In its request for relief, I&E seeks the payment of \$90,368 in impact fees, administrative charges, interest and penalties, along with a civil penalty of \$21,180.

With respect to one of the wells (Permit No. 111-20277), Xtreme Energy contends that the prior owner was responsible for paying impact fees for reporting years 2014 and 2015. As to the other unconventional well for which Xtreme Energy holds DEP Permit No. 111-20272, the information attached to I&E's Complaint as Attachment B shows that this well produced on average less than 90,000 cubic feet of gas per day in the months of February, April, August, September, November and December of 2015. Under the definitions in the Impact Fee Act, an unconventional gas well incapable of producing more than 90,000 cubic feet of gas per day during any calendar month, is a "stripper well." 58 Pa.C.S. §2301. Section 2302 of the Impact Fee Act exempts stripper wells from paying impact fees. *See Snyder Brothers, Inc. v. Pa. Public Utility Commission*, 157 A.3d 1018 (Pa. Cmwlth. 2017), appeals pending at 47 and 48 WAP 2017. The Commonwealth Court's *Snyder Brothers* decision is attached as Appendix A.

The *Snyder Brothers* appeal revolves around the question of whether a well qualifies as a stripper well if the well produces less than 90,000 cubic feet of gas per day in any single month during the twelve-month reporting period. The producer argued that it was exempt from impact fees because the well had produced less than 90,000 cubic feet of gas per day in at least one month. The Commission disagreed with the producer and found that a well is exempt from the impact fees only if it produces on average less than 90,000 cubic feet of gas per day during every month of the twelve-month reporting period. Therefore, because the well at issue produced on average more than 90,000 cubic feet of gas per day in some months, the Commission found that the producer was not exempt under the stripper well definition and had to pay the impact fee. *Snyder Brothers* at 1021-1022.

The Commonwealth Court reversed the Commission's decision, finding that the Commission's interpretation of the word "any" in the Impact Fee Act as meaning "every" month was misplaced. Observing that the Commission would have the Court engraft non-existent verbiage onto the definition of "stripper well," which it is not authorized to do, the Court declined to grant the Commission's requested relief. *Snyder Brothers* at 1025-1026. Therefore, relying on the plain language of the Impact Fee Act, the Court concluded that if the well at issue produces less than 90,000 cubic feet of gas in at least one month, it is a stripper well for which no impact fees must be paid. *Snyder Brothers* at 1023-1031.

By Order issued on October 18, 2017, the Supreme Court of Pennsylvania granted the Commission's Petition for Allocatur of the Commonwealth Court's decision in *Snyder Brothers*. Briefs were filed in January and February 2018, and oral argument was held on April 11, 2018.

The matter is now ripe for issuance of a decision by the Supreme Court.¹ It is expected that the Supreme Court's decision in *Snyder Brothers* will shed light on the proper resolution of the stripper well exemption raised by Xtreme Energy in this proceeding. Therefore, it would promote administrative efficiency to hold this matter in abeyance pending issuance of that decision.

At a very minimum, Xtreme Energy requests that the briefing schedule for this proceeding be held in abeyance pending issuance of that decision. Otherwise, Xtreme Energy will be forced to make its legal arguments based on speculation as to whether the Supreme Court will uphold the Commonwealth Court decision, which may be favorable to Xtreme Energy, or if it will reverse that decision, which may require Xtreme Energy to make arguments that distinguish the present case from either the facts or rationale of that ruling.

Not knowing the "law of the land" on this issue would make briefing very challenging. Also, if briefs are filed in this proceeding on the issue of whether one of the wells in question is exempt from the impact fees while the *Snyder Brothers* decision is pending and a decision is issued during the pendency of the proceeding, it is quite possible that Xtreme Energy will request that the matter be reopened for the submission of supplemental briefs.

B. Submission of Pre-Served Written Testimony

Xtreme Energy proposes that DCALJ Cheskis establish a schedule for the service of written testimony in this proceeding, so that I&E serves direct testimony, followed by service of rebuttal testimony by Xtreme Energy and service of surrebuttal testimony by I&E. A possible schedule could be as follows:

¹ While Xtreme Energy did not conduct extensive research regarding the timeframes for Supreme Court decisions, it notes that in *Pennsylvania State Police v. Workers' Compensation Appeal Board*, No. 14 WAP 2017, oral argument was held on October 18, 2017 and the Supreme Court issued its opinion on May 29, 2018.

Action	Date
Complainant's Written Direct Testimony	July 6, 2018
Respondent's Written Rebuttal Testimony	August 3, 2018
Complainant's Written Surrebuttal testimony	August 17, 2018
Evidentiary Hearings	August 29, 2018
Main Briefs	October 5, 2018
Reply Briefs	October 19, 2018

The reasons supporting Xtreme Energy's proposal include: 1) the need to afford Xtreme Energy sufficient opportunity to respond to the factual allegations of I&E, as supported by direct testimony, including the factors related to imposition of any civil penalty; and 2) the possibility of sufficiently narrowing the factual disputes through the submission of written testimony so as to avoid the need for Xtreme Energy's witness to travel from Texas.

The Commission's regulations encourage the use of written testimony. 52 Pa. Code § 5.412. Although this practice is typically followed in connection with the testimony of expert witnesses, it is generally encouraged by the regulation and nothing in the regulation interferes with the ability of parties to utilize this tool for lay witnesses. Indeed, written testimony of lay witnesses has been submitted in other enforcement proceedings initiated by I&E. *See, e.g., Pa. P.U.C. v. Clearview Electric, Inc.*, Docket No. C-2016-2543592 (Order entered June 1, 2017); *See Cmwlth. of Pennsylvania, et al. v. Respond Power, LLC*, Docket No. C-2014-2427659, and *Pa. P.U.C. v. Respond Power, LLC*, Docket No. C-2014-2438640 (Order entered August 11, 2016).

When an action seeks to impose civil penalties, a defendant is entitled to full due process rights. *Northview Motors, Inc. v. Commonwealth, Attorney Gen.*, 562 A.2d 977, 980 (Pa. Cmwlth. 1989). That is, the defendant must be (1) "informed with reasonable certainty of the nature of the accusation lodged against him, (2) [have] timely notice and opportunity to answer the charges and to defend against attempted proof of such accusation, and (3) the proceedings are conducted in a fair and impartial manner." *Id. See also, Pocono Water Co. v. Pa. Public Util. Comm'n*, 630 A.

2d 971 (Pa. Cmwlth. 1993) (reversing a penalty imposed by the Commission for failure to comply with a prior order on due process grounds).

By affording Xtreme Energy an adequate opportunity to thoroughly present its defense, the submission of written testimony would ensure that Xtreme Energy receives its fundamental rights of due process. This protection is particularly important given the magnitude of the impact fees in dispute and I&E's request for the imposition of civil penalties. Notably, litigation is not supposed to be about surprises but rather about developing a complete evidentiary record upon which the Commission may apply the law and reach a fair determination. Through written testimony, Xtreme Energy would be aware of how I&E seeks to justify the requested civil penalty amount and be able to respond in kind. Moreover, I&E has not identified and Xtreme Energy is unable to determine any possible prejudice to I&E from using this approach.

As to the potential narrowing of the issues that may result from the service of written testimony, Xtreme Energy points to the benefits of possibly avoiding the need for its witness to travel to Harrisburg from Texas. After three rounds of testimony from the parties, it is quite possible that little or no need would exist for evidentiary hearings. However, if any parties desire to conduct cross-examination or DCALJ Cheskis has any questions of the witnesses, only then would evidentiary hearings be required. Otherwise, the parties could move directly into briefing. Even if factual disputes would remain after the service of written testimony, Xtreme Energy believes it is worthwhile to make this attempt in the interest of promoting judicial economy and conserving resources.

By contrast, if the hearing is held for the purpose of receiving live testimony, without full awareness of the facts that I&E plans to present through its case-in-chief, Xtreme Energy's witness will be required to travel to Harrisburg to ensure that facts are presented into the record that should

not otherwise be in dispute, such as when Xtreme Energy purchased the wells in question and when DEP issued permits for these wells. Also, if live testimony is taken, it is possible that Xtreme Energy will not have a necessary witness available due to an issue being raised by I&E that was not expected.

In lieu of pre-served testimony, Xtreme Energy suggests that another acceptable alternative would be to hold bifurcated hearings. The first hearing would be held for the purpose of I&E presenting its case in chief and the second hearing would afford Xtreme Energy the opportunity to present its defense. Through this approach, Xtreme Energy's due process protections would be adequately preserved since it would have an opportunity to review I&E's testimony and to identify the appropriate witnesses or documents to present at a subsequent hearing. Also, in the same way as written testimony would give the parties an opportunity to narrow the issues in dispute, this approach could likewise have that result and eliminate the need for Xtreme Energy's witness to travel for the hearing.

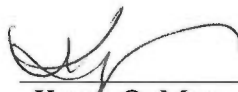
During the prehearing conference, some discussion was held about the possibility of Xtreme Energy's witness testifying by telephone to avoid the need to travel from Texas. While Xtreme Energy would certainly appreciate such an accommodation, it is difficult to gauge the acceptability of this approach, if both I&E and Xtreme Energy testimony is taken on the same day. For instance, if the I&E witness would raise an issue that requires responsive testimony from the Xtreme Energy witness, which may turn on credibility, the fact that Xtreme Energy's witness is not in the hearing room could be detrimental in presenting an effective defense. Certainly, to the extent that a bifurcated hearing is held, this approach would adequately protect Xtreme Energy's due process rights by affording it an opportunity to determine the necessary testimony and evidence to produce in response to I&E's case in chief.

III. CONCLUSION

Based on the foregoing, Xtreme Energy Company respectfully requests that Deputy Chief Administrative Law Judge Cheskis hold this matter in abeyance pending the issuance of a decision by the Pennsylvania Supreme Court in the *Snyder Brothers* appeal. In the alternative, Xtreme Energy requests that DCALJ Cheskis schedule evidentiary hearings and establish a briefing schedule following such hearings that commences upon issuance of the *Snyder Brothers* decision.

In addition, if DCALJ determines not to hold this case in abeyance, Xtreme Energy respectfully requests that DCALJ Cheskis establish a schedule for the submission of written testimony by the parties. In the alternative, Xtreme Energy requests that DCALJ Cheskis establish a bifurcated schedule under which a hearing date is set for I&E to present its case-in-chief, followed by a separate hearing date at which Xtreme Energy presents its defense.

Respectfully submitted,



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Date: June 4, 2018

Attorneys for Xtreme Energy Company

APPENDIX A

157 A.3d 1018 (Pa.Cmwth. 2017), 1043 C.D. 2015, Snyder Brothers, Inc. v. Pennsylvania Public Utility Commission /**/ div.c1 {text-align: center} /**/

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157 A.3d 1018 (Pa.Cmwth. 2017)

Snyder Brothers, Inc., Petitioner

v.

Pennsylvania Public Utility Commission, Respondent;

Pennsylvania Independent Oil & Gas Association, Petitioner

v.

Pennsylvania Public Utility Commission, Respondent

Nos. 1043 C.D. 2015, 1175 C.D. 2015

Commonwealth Court of Pennsylvania

March 29, 2017

Argued February 8, 2017.

Appealed from No. C-2014-2402746. State Agency Pennsylvania Public Utility Commission. Brandon D. Coneby and Thomas C. Reed, Pittsburgh, for petitioner Snyder Brothers, Inc.

Kevin J. Moody, General Counsel, Harrisburg, for intervenor Pennsylvania Independent Oil & Gas Association.

BEFORE: HONORABLE MARY HANNAH LEAVITT, President Judge, HONORABLE ROBERT SIMPSON, Judge, HONORABLE P. KEVIN BROBSON, Judge, HONORABLE PATRICIA A. McCULLOUGH, Judge, HONORABLE MICHAEL H. WOJCIK, Judge, HONORABLE JULIA K. HEARTHWAY, Judge, HONORABLE JOSEPH M. COSGROVE, Judge.

OPINION

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PATRICIA A. McCULLOUGH, JUDGE.

Snyder Brothers Inc. (SBI) and intervenor Pennsylvania Independent Oil & Gas Association (PIOGA) (collectively, Petitioners) petition for review of the June 11, 2015 order of the

Pennsylvania Public Utility Commission (Commission) denying their exceptions in part, granting them in part, and adopting as modified the initial decision and order of an administrative law judge (ALJ).^[1] After careful review, we reverse.

Background

The decisive question presented on appeal is one of statutory interpretation and involves the definition of a "stripper well" in Act 13,^[2] which unlike a "vertical gas well,"^[3] does not have to pay impact fees. See Section 2302(f) of Act 13, 58 Pa.C.S. § 2302(f). In pertinent part, a "stripper well" is denoted as an "unconventional gas well incapable of producing more than 90,000 cubic feet [cf] of gas per day during any calendar month" Section 2301 of Act 13, 58 Pa.C.S. § 2301 (emphasis supplied). We are asked to determine whether the General Assembly intended the word "any" to mean "one" or "every."

The essential facts are not in dispute. The Bureau of Investigation and Enforcement (I& E) filed a complaint on January 17, 2014, alleging that SBI did not identify and pay impact fees on 24 wells in 2011 and 21 wells in 2012. In its answer and new matter, SBI claimed that the wells were stripper wells, not vertical wells, and thus not subject to impact fees. SBI also

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noted that Act 13 does not contain a mechanism allowing it to pay the challenged fees under protest or to receive a refund if it is later determined that they had been paid erroneously. (Commission's decision at 2-3.)

Thereafter, SBI moved for summary judgment, arguing that a "stripper well" in Act 13 unambiguously refers to a well that produces *less than* 90,000 cf of gas per day in one month, or *any single month*, during the twelve-month reporting period. SBI also asserted, in the alternative, that the impact fees were a tax and that the term "any" in stripper well must be strictly construed in its favor as the taxpayer pursuant to section 1928(b)(3) the Statutory Construction Act of 1972 (SCA),^[4] 1 Pa.C.S. § 1928(b)(3) (stating that "provisions imposing taxes" shall be strictly construed). I& E countered that the word "any" made the definition of stripper well ambiguous because it could mean either "one or another taken at random" or "every," and noted that it had received numerous inquiries from natural gas producers about how to determine which wells qualified as stripper wells. (Commission's decision at 10-13.)

The ALJ agreed with I& E that the definition of "stripper well" was ambiguous, citing four prior orders of the Commission.^[5] The ALJ noted that the Commission suggested in prior Reconsideration and Proposed Rulemaking Orders that a vertical gas well was subject to the impact fee if it produced *more than* 90,000 cf of gas per day in *any* calendar month in a calendar year. The ALJ also found that the impact fee was not a tax because it does not raise revenue for the general funds of either the Commonwealth or the municipalities, but the revenue is distributed

to affected municipalities to offset the impact of drilling. Concluding that SBI was not entitled to summary judgment, and that I& E's interpretation of " stripper well" was consistent with the Commission's previous interpretations of " vertical gas well," the ALJ scheduled a hearing on the calculation of the fees, charges, and penalties sought by I& E. (Commission's decision at 13-15.)

In its recommended decision, the ALJ found that SBI did not challenge the accuracy of I& E's calculations of the amount of outstanding impact and administrative fees. On this basis, the ALJ awarded: (1) interest under section 2308(a) of Act 13, 58 Pa.C.S. § 2308(a),^[6] and accepted I& E's proposed 3% interest rate as reasonable; (2) a mandatory penalty under section 2308(b) of Act 13, 58 Pa.C.S. § 2308(b),^[7] at

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the 25% maximum rate; and (3) a discretionary civil penalty in the amount of \$50,000.00 under section 2310(a) of Act 13, 58 Pa.C.S. § 2310(a).^[8] Petitioners filed numerous exceptions that objected to the ALJ's interpretation of the term " stripper well," determination that the disputed impact fees were not paid in a timely fashion, and conclusion that SBI's conduct justified the imposition of interest or penalties. I& E filed responses to the exceptions explaining why the ALJ did not err. (Commission's decision at 18-27.)

In a decision dated June 11, 2015, the Commission determined that the definition of " stripper well" was ambiguous because the word " any" was subject to multiple reasonable meanings, notably the interpretations proffered by the parties. In applying the factors for ascertaining legislative intent in section 1921(c) of the SCA, 1 Pa.C.S. § 1921(c),^[9] the Commission found, among other things, that adopting the interpretation put forth by Petitioners would: impede the collection of impact fees to provide relief to the municipalities affected by the drilling of gas wells in their boundaries, one of the primary purposes of Act 13; permit unscrupulous drillers to artificially lower the amounts produced in one month of the year in order to avoid paying impact fees; and contravene the General Assembly's intent, which was evidenced by the General Assembly's replacing of " a" with the word " any" in the final version of Act 13. The Commission further concluded that the ALJ's interpretation was consistent with the Commission's interpretations in the Reconsideration Order and Proposed Rulemaking Order. (Commission's decision at 37-43.)

In addition, the Commission found no error in the ALJ's conclusion that the impact fees are not taxes because such fees are not imposed on all or many citizens, but only on some producers of natural gas as a condition and privilege for the extraction of that gas, and do not raise revenue directly for the Commonwealth's general fund. Citing our Supreme Court's decision in *Dechert LLP v. Commonwealth*, 606 Pa. 334, 998 A.2d 575, 584 n.8 (Pa. 2010) (" [W]hile any doubt or uncertainty as to the imposition of a tax must be resolved in the favor of the taxpayer, such doubt is only implicated after our efforts at statutory construction yield no definitive conclusion") (internal quotation marks and citation omitted), the Commission also determined

that it was not required to construe the ambiguity in SBI's favor because the statutory construction factors led to a definitive conclusion that the General Assembly intended "any" to mean "all" or "every." Finally, the Commission concluded that the ALJ did not err in finding that SBI violated Act 13 by not paying impact fees on the wells at issue and that the imposition of interest and penalties was mandatory pursuant to sections 2308(a) and (b) of Act 13. However, the Commission agreed with Petitioners that a discretionary civil penalty was not warranted under the facts and circumstances of this case and granted the exceptions related to that issue. (Commission's decision at 43-67.)

Petitioners then filed petitions for review with this Court. By single-judge order dated August 12, 2015, this Court granted SBI's motion for a stay and directed SBI to perfect and post a bond to cover 120% of the remaining unpaid balance of what the Commission determined SBI owed in impact fees, interest, and penalties. SBI filed an appeal bond, and the parties thereafter argued this matter before the Court *en banc*.

Discussion

On appeal to this Court,^[10] Petitioners argue that the Commission erred in its interpretation of the word "any" in the definition of a "stripper well." Petitioners contend that "any" is an unambiguous term and that its plain usage in the vernacular "means 'one' -- it does not mean 'each and every' or 'all.'" (SBI's brief at 17; *accord* PIOGA's brief at 29.) In the alternative, Petitioners assert that "any" is ambiguous, and because the impact fees are bona fide taxes, the term must be construed in their favor as taxpayers per section 1928(b)(3) of the SCA.

Statutory Interpretation Principles

The cardinal rule of all statutory interpretation is to ascertain and effectuate the intent of the General Assembly. *O'Rourke v. Commonwealth of Pennsylvania, Department of Corrections*, 566 Pa. 161, 778 A.2d 1194, 1201 (Pa. 2001). To accomplish that goal, "statutory language must be read in context, that is, in ascertaining legislative intent, every portion of statutory language is to be read together and in conjunction with the remaining statutory language, and construed with reference to the entire statute as a whole." *Pennsylvania Gaming Control Board v. Office of Open Records*, 628 Pa. 163, 103 A.3d 1276, 1285 (Pa. 2014).

Where the words of a statute are clear and free from ambiguity, the legislative intent is to be gleaned from those very words, and the plain language is not to be disregarded under the pretext of pursuing its spirit. *Pennsylvania Financial Responsibility Assigned Claims Plan v. English*, 541 Pa. 424, 664 A.2d 84, 87 (Pa. 1995); *Coretsky v. Board of Commissioners of Butler Township*, 520 Pa. 513, 555 A.2d 72, 74 (Pa. 1989). "Only if a statute is unclear may a court embark upon the

task of ascertaining the intent of the legislature by reviewing the necessity of the act, the object to be attained, circumstances under which it was enacted and the mischief to be remedied."

Coretsky, 555 A.2d at 74. Stated somewhat differently, the statutory construction factors listed in section 1921(c) of the SCA only become pertinent when the language of the statute is ambiguous. *Ramich v. Workers' Compensation Appeal Board*

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(*Schatz Electric, Inc.*), 564 Pa. 656, 770 A.2d 318, 322 (Pa. 2001); accord *Commonwealth v. Dellisanti*, 583 Pa. 106, 876 A.2d 366, 369 (Pa. 2005). "A statute is ambiguous when there are at least two reasonable interpretations of the text under review." *Warrantech Consumer Products Services, Inc. v. Reliance Insurance Co.*, 626 Pa. 218, 96 A.3d 346, 354-55 (Pa. 2014).

The SCA instructs courts that words and phrases are to be interpreted according to their common and approved usage. Section 1903(a) of the SCA, 1 Pa.C.S. § 1903(a). "The word 'any' is defined by Webster as 'one indifferently out of a number.' It is an indefinite pronominal adjective used to designate things in a general way without pointing out any one in particular." *Benat v. Mutual Benefit Health and Accident Association*, 191 Pa.Super. 547, 159 A.2d 23, 25 (Pa. Super. 1960) (citations omitted); see *Maierhoffer v. GLS Capital, Inc.*, 730 A.2d 547, 550 (Pa.Cmwlth. 1999) ("In common usage, 'any' means 'one or more indiscriminately from all.'") (citation omitted). To be sure, the term "any" conveys a full spectrum of quantities, including: (1) one; (2) one, some, or all regardless of quantity; (3) one or more; (4) great, unmeasured, or unlimited in amount; and (5) all. Webster's Third New International Dictionary 97 (1976). Typically, "[t]he significance of the word 'any' is discoverable in its context." *Benat*, 159 A.2d at 25 (citations omitted).

Plain Language Analysis

Section 2302(f) of Act 13 imposes, on an annual basis, scheduled impact fees on a "vertical unconventional gas well . . ." 58 Pa.C.S. § 2302(f). For purposes of impact fees, the parties concede that a "vertical gas well" and a "stripper well" differentiate each other. A vertical gas well is subject to the impact fee, while a stripper well, which does not reach the necessary production level, is not. Although there may be one instance where the two wells are not functionally the same, *i.e.*, when a stripper well does not utilize the fracking technique,^[11] there is no dispute in this case that the gas wells at issue will qualify as either stripper wells or vertical wells, depending on their level of production.

Section 2301 of Act 13, entitled "Definitions," defines these two types of wells as follows:
"Stripper well" -- An unconventional gas well incapable of producing more than 90,000 [cf] of gas per day during **any** calendar month, including production from all zones and multilateral well bores at a single well, without regard to whether the production is separately metered. * * * "Vertical gas well" -- 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.

Viewing the plain language of the statutory provision in a common sense

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fashion, we agree with Petitioners that the word "any" in the definition of "stripper well" is unambiguous and it clearly and plainly means what it says -- "any month." Pursuant to subsections 2302 (b) and (f) of Act 13, the impact fees are imposed for the "calendar year." 58 Pa.C.S. § 2301(b) and (f).^[13] Because a calendar year is a definite class consisting of twelve individual months, the most natural way to construe "any" is to interpret it to mean at least "one" month out of the year, no matter what or which month ("during any calendar month"). This reading is bolstered by the fact that "any" is located within a prepositional phrase and modifies the singular noun, "calendar month," which signifies that only one or a singular month is contemplated in the grammatical scheme. See William A. Sabin, *The Gregg Reference Manual* 238, 259 (9th ed. 2001) (stating that the term "any" is singular when it modifies a singular noun). Notably, section 2301 of Act 13 does not say "in any calendar month[s]," which would tend to suggest that the General Assembly intended "any" to be the equivalent of "every" or "all" months.

In *Commonwealth v. Davidson*, 595 Pa. 1, 938 A.2d 198 (Pa. 2007), our Supreme Court interpreted language in a statute that made it illegal to possess a certain type of image in "any book, magazine, pamphlet, slide, photograph, film, videotape, computer depiction or other material." *Id.* at 218-19 (citation omitted). Initially, the Supreme Court observed that "[t]he General Assembly's use of the term 'any,' which could mean one or more items, suggests a lack of restriction or limitation," and went on to determine whether possession of multiple images comprised one criminal offense or whether possession of a single image, in and of itself, "constitutes a distinct occurrence of offensive conduct. . . ." *Id.* at 219. The Supreme Court noted with paramount significance that "all of the objects listed in the statute are singular," *id.*, and effectively determined that "any" means "one" image, regardless of its medium, and not "every" or "all" images. On this reasoning, the *Davidson* court concluded that "[t]he plain language of the statute evidences the intent of the General Assembly to make each image . . . possessed by an individual a separate, independent crime." *Id.*

Given the presence of singular nouns in the pertinent statutory phrase, the Supreme Court in *Davidson* interpreted "any" in its singular (one out of many) as opposed to plural sense (every one), and declined to construe "any" as encompassing all of the numerous images in the defendant's possession. Through logical extrapolation, this Court reaches a conclusion similar to and aligned with *Davidson* and, consistent with the reasoning in that opinion, we construe "any" to mean "one." Therefore, based upon the plain and unambiguous language of section 2301 of Act 13, we conclude that when an unconventional gas well cannot produce more than 90,000 cf of gas in at least one month, it is a

stripper well and is not subject to impact fees.^[14]

The Commission contends that section 2302(d) of Act 13, which governs fees for "restimulated" wells, 58 Pa.C.S. § 2302(d), compels the conclusion that the General Assembly intended "any" in the definition of "stripper well" to mean "every" or "all." This provision states:

(d) Restimulated unconventional gas wells. (1) An unconventional gas well which after restimulation qualifies as a stripper well shall not be subject to this subsection. (2) The year in which the restimulation occurs shall be considered the first year of spudding for purposes of imposing the fee under this section if: (i) a producer restimulates a previously stimulated unconventional gas well following the tenth year after being spud by: (A) hydraulic fracture treatments; (B) using additional multilateral well bores; (C) drilling deeper into an unconventional formation; or (D) other techniques to expose more of the formation to the well bore; and (ii) the restimulation results in a substantial increase in production. (3) As used in this subsection, the term "substantial increase in production" means an increase in production amounting to more than 90,000 cubic feet of gas per day during a calendar month.

58 Pa.C.S. § 2302(d).

However, this statutory section is inapplicable and not informative because it deals with a unique brand of fees that are separate and distinct from impact fees under section 2302(f) of Act 13. More importantly, our interpretation of "stripper well" is entirely consonant with the definitional concepts of "stripper well" and a substantial increase in restimulation in subsections (1) and (3) of section 2302(d). Quite simply, a restimulation fee will be imposed when an unconventional gas well is restimulated and produces more than 90,000 cf of gas a month, see 58 Pa.C.S. § 2302(d)(1), but is -- or will become -- a "stripper well" not subject to the restimulation fee if it produces less than 90,000 cf of gas in one month. See 58 Pa.C.S. § 2302(d)(3). Indeed, the Commission has suggested this result in its Reconsideration Order, where it determined that "[a] vertical gas well which falls below designated production levels is no longer, by definition, a vertical gas well," but, instead, is a stripper well. *Id.*

Ultimately, the Commission's interpretation of "any" in a broad manner to mean "every" is misplaced and would have this Court engraft non-existent verbiage onto the definition of "stripper well," which is something that we are simply not authorized to do. See *Shafer Electric & Construction v. Mantia*, 626 Pa. 258, 96 A.3d 989, 994 (Pa. 2014) (" [I]t is not for the courts to add, by interpretation, to a statute, a requirement which the legislature did not see fit to include."); *Halko v. Board of Directors of School District of Foster Township*, 374 Pa. 269, 97 A.2d 793, 794 (Pa. 1953) (" We cannot rewrite the statute."). It is the General Assembly's duty to write the laws and the General Assembly could have easily replaced the word "any" with the term "every" if it so intended. But the General Assembly did not take this course

of action, and this Court cannot alter the plain language of the statutory text.

Having concluded that the term " any" is unambiguous and plainly means " one," there is no need for us to resort to the statutory construction factors that the Commission relied upon, see 1 Pa.C.S. § 1921(c), including the contemporaneous legislative history; the occasion and necessity for impact fees; and the perceived consequences of Petitioners' interpretation, particularly the notion that well producers will intentionally lower production for one month to avoid paying impact fees. See *Dellisanti*, 876 A.2d at 369; *Ramich*, 770 A.2d at 322. Furthermore, because our decision is based solely on the plain language of section 2301 of Act 13, the Commission is not entitled to any administrative deference in its interpretation of this provision. See *Seeton v. Pennsylvania Game Commission*, 594 Pa. 563, 937 A.2d 1028, 1037 (Pa. 2007).

Ambiguity Analysis

Nonetheless, this Court concludes in the alternative that Petitioners' proposed interpretation is, at the very least, reasonable. Assuming that the Commission's interpretation is also reasonable, the term " any" is ambiguous and resort to statutory construction factors is necessary. See *Warrantech Consumer Products Services*, 96 A.3d at 354-55; *Ramich*, 770 A.2d at 322.

With respect to application of the statutory construction factors, this Court is not persuaded by the Commission's contention that unless " any month" is recast to mean " every month," a well producer could theoretically alter the infrastructure or take other measures to escape paying impact fees. (Commission's decision at 41.) Notably, this claim was never made against SBI, the well producer in this case. To meet the definition of a " stripper well," the producer is obligated to demonstrate that the subject well is " incapable" of producing 90,000 cf of gas and, consequently, any deliberate efforts to depress production will not succeed in establishing that the well is incapable of meeting the threshold level of production. Indeed, such unscrupulous behavior by a well producer would naturally come with the risk of civil penalties and fines under Act 13's enforcement provisions. Moreover, the record clearly shows here that SBI submitted records of well operation which reflected it had consistently operated the wells to full capacity. This representation was never challenged by the Commission. We therefore conclude, contrary to the Commission, that Petitioners' interpretation would not thwart or undermine the purpose of Act 13 or permit well producers to escape its requirements.

Similarly, this Court finds unpersuasive the Commission's conclusion that Petitioners' interpretation would frustrate legislative intent by impeding the collection of impact fees, which the Commission considered to be one of the primary purposes of Act 13. (Commission's decision at 40-41.) In our view, the Commission's analysis rests upon a shaky foundation in its belief that " stripper well" should be interpreted narrowly in order to provide for greater reimbursement to the government. Regardless of whether a well is a " stripper well" or a " vertical well," it is possible that the surrounding areas will be subjected to some detrimental effect, but our General Assembly, as

the policy-making branch of government, decided to exempt " stripper wells" from impact fees.

More importantly, we do not believe that the definition of " stripper well" should be liberally construed based upon the sheer desire to collect a larger amount of so-called " impact fees." According to the Dissent, " the imposition of Act 13 impact fees

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... are collected to provide relief to municipalities affected by unconventional gas drilling, a primary purpose of the statute." (Dissent op. at 2-3.) To the contrary, local municipalities are not the primary recipient of reimbursement from the impact fees. See Section 2314 of Act 13, 58 Pa.C.S. § 2314. Instead, impact fees are placed in a general fund and are appropriated in a predetermined numerical basis first to county conservation districts, then to enumerated state agencies, a natural case development program, and, finally, the municipalities, as a whole, receive a nominal percentage of the revenue then remaining in the fund. Section 2314(d) of Act 13, 58 Pa.C.S. § 2314(d). Notably, placing impact fees aside, a county or municipality may adopt an ordinance imposing its own yearly fees on well producers and these fees apply to a " stripper well" and " vertical gas well" alike and in the same manner. See Section 2302(b) of Act 13, 58 Pa.C.S. § 2302(b) (stating that a fee adopted by a county or municipality will be " imposed on every producer and shall apply to unconventional gas wells spud in this Commonwealth regardless of when spudding occurred."); 58 Pa.C.S. § 2301 (defining a " vertical gas well" and a " stripper well" as both being " unconventional gas wells."). Because a county or municipality may impose its own fees on an unconventional gas well, in accordance with a statutory graduated scale beginning with a range of \$40,000.00 to \$60,000.00 per well, this appears to be the primary means by which the municipalities receive money under Act 13. In all events, the municipalities are incidental beneficiaries of impact fees, and it cannot be said that the General Assembly's paramount intent in devising impact fees was to provide financial relief to the municipalities. Accordingly, we find the Commission's statutory construction analysis unfounded and unconvincing.

Further, much was made by the Commission of the General Assembly's deletion of " a" and insertion of " any" in the final version of the definition of " stripper well," which the Commission believes reflects the General Assembly's intent that " any" means " every." (Commission's decision at 41.) Even if " any" is an ambiguous term, and analysis of the contemporaneous legislative history is proper, we do not ascribe any significance to this change because there is no explanation from the General Assembly or committee members that accounts for it. In this context, it is fair to say that such changes in style or word usage disclose nothing about the General Assembly's intent -- except the intent to express itself in language it thought more acceptable. See *Consumers Education and Protective Association v. Schwartz*, 495 Pa. 10, 432 A.2d 173, 178-79 (Pa. 1981) (concluding that this Court engaged in " pure speculation" when we viewed changes to language in drafts of legislation as evidence of legislative intent because there was no expressed reason for the changes). Accordingly, we conclude that consideration of legislative history does not militate in favor of the Commission's interpretation.

Finally, although the Commission concluded that I& E's interpretation was consistent with the Commission's previous orders, (Commission's decision at 42), the Commission concedes that in its Proposed Rulemaking Order, it never enunciated an interpretation for the term " any" in the definition of a " stripper well," (Commission's decision at 40), nor did it previously find the term to be ambiguous. As a result, the Commission in the present case felt obligated to consider the principles of statutory construction in order to devise, for the first time, an interpretation pertaining to the production levels of a " stripper well." (Commission's decision at 40.)^[15]

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Where an agency's interpretation is presented in the course of litigation and has not been articulated previously in an official rule or regulation, the interpretation may still be given deference but only to the extent that it is persuasive. *Securities Exchange Commission v. Rosenthal*, 650 F.3d 156, 160 (2d Cir. 2011).

Here, I& E, a subdivision of the Commission, proffered its instant interpretation of " stripper well" for the first time during the course of this litigation via a complaint and enforcement action against SBI. Acting in its capacity as an administrative tribunal reviewing an ALJ's determination, the Commission accepted I& E's definition of the term " any." Because the Commission's interpretation (or more accurately, I& E's interpretation) was not previously announced in an official rule, regulation, or formal adjudication, if it is entitled to a degree of deference, that deference is not so great as to definitively resolve the ambiguity in the word " any." This is especially true considering that none of the other statutory construction factors offer persuasive support for the Commission's interpretation, and the Commission has concluded that " any" is ambiguous without providing any convincing rationale as to why its interpretation is reasonable, or is equally as reasonable as, Petitioners on a textual level.

Moreover, in its Proposed Rulemaking Order, the Commission appears to have taken the view that " any" means " one," at least when that term is implied into the definition of " vertical well," and it is incongruous for the Commission to now say that " any" means " all" for purposes of distinguishing and defining a " stripper well." See Proposed Rulemaking Order, at 8 (" 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

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well *during any calendar month* in the reporting year. 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.") (emphasis in original). Clearly, the Commission interpreted the phrase " during any calendar month" to mean " only one

month of the year" but it offers a contrary view in the matter at hand. An administrative agency's " interpretation of its statute is entitled to little deference when it is at odds with a prior interpretation." *Dauphin County Industrial Development Authority v. Pennsylvania Public Utility Commission*, 123 A.3d 1124, 1135 (Pa.Cmwlt. 2015).^[16] Tellingly, the Commission does not advance any practical explanation or public policy rationale for its 180 degree turn. As such, we conclude that the legal concept of administrative deference cannot settle the ambiguity.

Consequently, assuming that the term " any" is ambiguous and after undertaking an examination of the pertinent statutory construction factors, this Court concludes that " any" would still remain an ambiguous term. In our role as the judiciary, tasked with the obligation of deciphering legislative intent, it is our responsibility to resolve this ambiguity consistent with the rules of statutory construction. According to Petitioners, Act 13 imposes a tax; however, this Court need not go so far because we can rest on narrower grounds, namely that Act 13, at the very least, inflicts a penalty. *See United States v. La Franca*, 282 U.S. 568, 572, 51 S.Ct. 278, 75 L.Ed. 551 (1931) (differentiating a " tax" from a " penalty").

In this case, as a direct result of an ambiguous term in Act 13, the Commission ordered SBI to pay a mandatory 25% percent statutory civil penalty on amounts that SBI would not have had to owe but-for the ambiguity. *See* 58 Pa.C.S. § 2308(b) (" [T]here shall be added to the amount of the fee due a penalty . . . not to exceed 25% in the aggregate."). Significantly, this civil penalty is penal in nature and implicates the rule of lenity and the rule of strict construction. *See Louisiana Board of Ethics v. Holden*, 121 So.3d 113, 118 (La.Ct.App. 2013) (" Because violations of the [statute] can result in the assessment of a civil penalty . . . the statute is penal in nature"); 3A Sutherland, *Statutory Construction* § 75.06 (5th ed. 1992) (" A penalty provision in a statute should be strictly construed in favor of the person being penalized."); *see also* Section 1928 of the SCA (requiring that every penal provision, whether in a civil or criminal statute, be strictly construed).

" The rule of lenity provides that where a statute is penal and the language of the statute is ambiguous, the statute must be construed in favor of the defendant . . . and against the government." *Sondergaard v. Department of Transportation, Bureau of Driver Licensing*, 65 A.3d 994, 997-98 (Pa.Cmwlt. 2013). " The rule of lenity provides a means of assuring fairness to persons subject to the law by

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requiring penal statutes to give clear and unequivocal warning in language that people generally would understand, as to what actions would expose them to liability for penalties and what the penalties would be." *Sawink, Inc. v. Philadelphia Parking Authority*, 34 A.3d 926, 932 (Pa.Cmwlt. 2012) (en banc).

In a similar vein, section 1922(3) of the SCA provides a presumption that the General Assembly does not intend to enact laws that are unconstitutional, 1 Pa.C.S. § 1922(3), " and

statutes are to be construed whenever possible to uphold their constitutionality." *In re William L.*, 477 Pa. 322, 383 A.2d 1228, 1231 (Pa. 1978). In discussing the unconstitutionality of vague statutes, the United States Supreme Court has explained:

Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application.

Grayned v. City of Rockford, 408 U.S. 104, 108-109, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972). A statute is void for vagueness if it: (1) fails to provide fair warning as to what conduct will subject a person to liability, or (2) fails to contain an explicit and ascertainable standard to prevent arbitrary and discriminatory enforcement. See *Pennsylvania Medical Society v. Foster*, 137 Pa.Cmwth. 192, 585 A.2d 595, 598 (Pa.Cmwth. 1991) (en banc).

Having determined that the term "any" reflects an unresolved ambiguity within Act 13, and that SBI sustained civil penalties due to that ambiguity, this Court applies the rule of lenity. We find that application of the rule is especially necessary in order to maintain a constitutional application of Act 13, as to SBI in this particular case, because the definitions of and distinction between a "vertical well" and a "stripper well" is patently vague and the Commission has not articulated its interpretation previously in an official rule, regulation, or formal adjudication. See *Upton v. Securities Exchange Commission*, 75 F.3d 92, 98 (2d Cir. 1996); *General Electric Co. v. United States Environmental Protection Agency*, 53 F.3d 1324, 1328-31, 311 U.S.App.D.C. 360 (D.C. Cir. 1995).^[17] Therefore, we must construe the word "any" in favor of SBI and the net result is that SBI's interpretation prevails over the interpretation proffered by the Commission.

Conclusion

For the above-stated reasons, we conclude that the word "any" in the term "stripper well" unambiguously means "any" or "one" and not "all" or "every." Because the uncontroverted evidence establishes that the wells at issue have produced less than 90,000 cf of gas in at least one month, (R.R. at 76a), they are "stripper wells" and SBI does not have to pay impact fees for these wells. Alternatively, assuming, *arguendo*, that "any" is an ambiguous

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term, this Court concludes that an analysis of the statutory construction factors do not resolve the ambiguity and that the ambiguity must be construed in favor of SBI. Accordingly, we reverse the Commission's conclusion that SBI violated Act 13 and owed impact fees for improperly listed stripper wells. With there being no violation of Act 13, we also reverse the Commission's

imposition of interest and penalties on SBI.

ORDER

AND NOW, this 29th day of March, 2017, the June 11, 2015 order of the Pennsylvania Public Utility Commission is reversed.

DISSENT

DISSENTING OPINION

MICHAEL H. WOJCIK, Judge

I respectfully dissent from the majority's thoughtful opinion because I would affirm the Pennsylvania Public Utility Commission's (PUC) interpretation of the definition of "stripper well" in Section 2301 of the statute commonly referred to as Act 13, 58 Pa. C.S. § 2301. To be considered a type of unconventional gas well, or a "vertical gas well," upon which Act 13 impact fees may be levied, the well must produce natural gas in quantities greater than that of a "stripper well." *Id.* In turn, 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 at a single well, without regard to whether the production is separately metered.

Id. (emphasis added).

As explained by the majority, the central dispute in this case concerns the meaning of the word "any" within the foregoing definition. The PUC determined that if a well produces more than the specified production level in any one month, it is capable of reaching this level and should not be deemed to be a "stripper well" under Act 13. Instead, such a well is considered to be a "vertical gas well" subject to the Act 13 impact fees. In contrast, Snyder Brothers, Inc. and intervenor Pennsylvania Independent Oil & Gas Association (collectively, Petitioners) contend that the term "any" in the definition means "all," "each," or "every" so that a well is only subject to the Act 13 impact fees if its production level exceeds the specified statutory minimum in every month.

I agree with the PUC's rationale and result in this case and in prior decisions^[1] based on statutory construction principles. The Superior Court has explained that "'[a]ny' is a broad and comprehensive term and generally means 'all' or 'every,' but not always. Its significance is discoverable in its context and often by considering other relevant legislation." *Board of Christian Education v. School District of the City of Philadelphia*, 171 Pa.Super. 610, 91 A.2d 372, 378 (Pa. Super. 1952).

As noted by the PUC, adopting Petitioners' construction would impede the imposition of Act 13 impact fees, which are collected to provide relief to municipalities affected by unconventional gas drilling, a primary purpose of the statute.^[2]

The PUC correctly explained that Petitioners' construction contravenes the General Assembly's intent that is manifested in the legislative history of Act 13's enactment because the word " a" was removed and replaced by the word " any" in a different provision of the statute dealing with stripper wells. See Section 1921(c)(4), (7) of the Statutory Construction Act, 1 Pa. C.S. § 1921(c)(4), (7) (" [T]he intention of the General Assembly may be ascertained by considering . . . [t]he object to be attained [and t]he contemporaneous legislative history.").

I agree that adopting this construction would encourage drillers to artificially suppress production levels to pierce the statutory floor in one month thereby avoiding the payment of impact fees for an entire calendar year regardless of production in the other months of that year. See Section 1921(c)(8) of the Statutory Construction Act, 1 Pa. C.S. § 1921(c)(8) (" [T]he intention of the General Assembly may be ascertained by considering . . . [t]he consequences of a particular interpretation."); Section 1922(1), (5), 1 Pa. C.S. § 1922(1), (5) (" In ascertaining the intention of the General Assembly in the enactment of a statute the following presumptions, among others, may be used: . . . That the General Assembly does not intend a result that is absurd, impossible of execution or unreasonable[; and] That the General Assembly intends to favor the public interest against any private interest.").

The PUC also properly relied on *Dechert LLP v. Commonwealth*, 606 Pa. 334, 998 A.2d 575, 584-86 (Pa. 2010), to avoid construction in Petitioners' favor^[3] because its statutory construction analysis definitively reveals the General Assembly's intent. " Moreover, when construing statutory language, it is this Court's practice to afford substantial deference to the interpretation rendered by the agency charged with its administration." *Id.* at 586 (citation omitted). See also Section 1921(c)(8) of the Statutory Construction Act, 1 Pa. C.S. § 1921(c)(8) (" [T]he intention of the General Assembly may be ascertained by considering . . . administrative interpretations of such statute.").^[4] Finally, I discern no error

in the PUC's decision to refrain from imposing a discretionary civil penalty, or imposing mandatory interest and penalties under Section 2308(a) and (b).^[5]

Accordingly, unlike the majority, I would affirm the PUC's order.

Judge Cosgrove joins in this dissent.

Notes:

[1] By order dated August 3, 2015, this Court consolidated the separate appeals filed by SBI and PIOGA.

[2] 58 Pa.C.S. §§ 2301-3504.

[3] A "Vertical gas well" is defined 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." Section 2301 of Act 13, 58 Pa. C.S. § 2301.

[4] 1 Pa.C.S. §§ 1501-1991.

[5] Act 13 of 2012 - Implementation of Unconventional Gas Well Impact Fee Act, Implementation Order Regarding Chapter 23, Docket No. M-2012-2288561, entered May 10, 2012 (Implementation Order); Act 13 of 2012 - Implementation of Unconventional Gas Well Impact Fee Act, Reconsideration Order Regarding Chapter 23, Docket No. M-2012-2288561, entered July 19, 2012 (Reconsideration Order); Act 13 of 2012 - Implementation of Unconventional Gas Well Impact Fee Act, Docket No. M-2012-2288561, entered December 20, 2012 (Clarification Order); Act 13 of 2012 - Implementation of Unconventional Gas Well Impact Fee Act, Proposed Rulemaking Order, Docket No. L-2013-2375551, entered October 17, 2013 (Proposed Rulemaking Order).

[6] "The [C]ommission shall assess interest on any delinquent fee at the rate determined under section 2307(a) (relating to commission)." 58 Pa.C.S. § 2308(a). Pursuant to section 2307(a) of Act 13, the "[C]ommission shall have the authority to make all inquiries and determinations necessary to calculate and collect the fee, administrative charges or assessments imposed under this chapter, including, if applicable, interest and penalties." 58 Pa.C.S. § 2307(a).

[7] "In addition to the assessed interest under subsection (a), if a producer fails to make timely payment of the fee, there shall be added to the amount of the fee due a penalty of 5% of the amount of the fee if failure to file a timely payment is for not more than one month, with an additional 5% penalty for each additional month, or fraction of a month, during which the failure continues, not to exceed 25% in the aggregate." 58 Pa.C.S. § 2308(b).

[8] "In addition to any other proceeding authorized by law, the [C]ommission may assess a civil penalty not to exceed \$2,500 per violation upon a producer for the violation of this chapter. In determining the amount of the penalty, the [C]ommission shall consider the willfulness of the violation and other relevant factors." 58 Pa.C.S. § 2310(a).

[9] The statutory factors set forth in section 1921(c) of the SCA are as follows:

(c) When the words of the statute are not explicit, the intention of the General Assembly may be ascertained by considering, among other matters:

- (1) The occasion and necessity for the statute.
- (2) The circumstances under which it was enacted.
- (3) The mischief to be remedied.
- (4) The object to be attained.
- (5) The former law, if any, including other statutes upon the same or similar subjects.
- (6) The consequences of a particular interpretation.
- (7) The contemporaneous legislative history.
- (8) Legislative and administrative interpretations of such statute.

1 Pa.C.S. § 1921(c).

[10] Our scope of review of the Commission's order is limited to determining whether constitutional rights were violated, whether an error of law was committed, or whether the findings, determinations or order are supported by substantial evidence. *Regency Transportation Group, Ltd. v. Pennsylvania Public Utility Commission*, 44 A.3d 107, 110 n.3 (Pa.Cmwlth. 2012).

[11] See 58 Pa.C.S. § 2301 (definitions for "Stripper well," "Vertical gas well," "Unconventional gas well," and "Unconventional formation"); *infra* note 5.

[12] An "unconventional gas well" is "[a] bore hole drilled or being drilled for the purpose of or to be used for the production of natural gas from an unconventional formation." 58 Pa.C.S. § 2301. An "unconventional formation" is "A geological shale formation existing below the base of the Elk Sandstone or its geologic equivalent stratigraphic interval where natural gas generally cannot be produced at economic flow rates or in economic volumes except by vertical or horizontal well bores stimulated by hydraulic fracture treatments or by using multilateral well bores or other techniques to expose more of the formation to the well bore." *Id.*

[13] SBI submitted an annual report listing each well and the total gas produced on a per day, average monthly basis. (Reproduced Record (R.R.) at 76a.) The Commission found that this report accurately set forth the amount of gas produced, (Commission's decision at 6), and there is no issue before this Court whether the term "per day" in "stripper well" is a literal as opposed to an averaged figure. Nonetheless, in its Rulemaking Order, the Commission stated: "In order to determine average daily production levels for a vertical gas well, the Commission expects producers to divide the well's monthly production by the number of days the wells are in production in the relevant calendar month(s)." Rulemaking Order, at 8, n.14.

[14] Conversely, a " [v]ertical gas well" is a well that produces more than 90,000 cf in every month during the calendar year.

[15] In its current decision, the Commission stated:

In the [Proposed] Rulemaking Order, we explained the production levels necessary to qualify as a vertical gas well. *Id.* at 8. We clarified that if a vertical well produces 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 Act 13 fees. However, the term 'any' is not included in the definition of a 'vertical well.' Rather, 'any' only appears in the definition of a stripper well. Furthermore, a vertical well is defined by what it is not -- a stripper well. Therefore, our interpretation of 'any' in the [Proposed] Rulemaking Order was in the context of the vertical gas well As indicated above by the diversity of meaning of the word 'any,' context is important. Thus, the potential for more than one possible meaning of the word requires consideration of the principles of statutory construction in this proceeding.

(Commission's decision at 40.) An examination of the Commission's previous orders reveals that, while the Commission stated that a " vertical gas well" is one that produces more than a stripper well in only one month, the Commission never set forth or explained what production levels a " stripper well" must produce in order to be designated as such. See Proposed Rulemaking Order, at 8 (" [E]ven 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.") (emphasis in original). And in discussing the production levels for a " vertical gas well," the Commission merely repeated the ambiguity presented in the case, offering no clarification or meaningful distinction between a vertical gas well and a stripper well. See Reconsideration Order, *Id.* (" If a vertical gas well qualifies as such, via production levels, during any calendar month in a calendar year, that well will be subject to the impact fee."); Proposed Rulemaking Order, at 7 (same).

[16] With respect to a " stripper well," the Dissent's reading identifies the Commission's interpretation of " any" to mean one, but the Dissent fails to mention that the Commission previously proffered the same definition of " any" when construing a " vertical well." (Dissent op. at 2.) Simply put, the Commission cannot have it both ways. Even the United States Supreme Court has said so. *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 132 S.Ct. 2156, 183 L.Ed.2d 153 (2012) (stating that deference is unwarranted when there is reason to suspect that the agency's interpretation " does not reflect the agency's fair and considered judgment on the matter in question," which " might occur when the agency's interpretation conflicts with a prior interpretation").

[17] See also *Solid Waste Agency of N. Cook County v. United States Army Corps of Engineers*, 531 U.S. 159, 174, 121 S.Ct. 675, 148 L.Ed.2d 576 (2001); *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568, 574-75, 108 S.Ct. 1392, 99 L.Ed.2d 645 (1988).

[1] See Act 13 of 2012-Implementation of Unconventional Gas Well Impact Fee Act, Reconsideration Order Regarding Chapter 23, Docket No. M-2012-2288561, entered July 19, 2012; Act 13 of 2012-Implementation of Unconventional Gas Well Impact Fee Act, Proposed Rulemaking Order, Docket No. L-2013-2375551, entered October 17, 2013.

[2] Citing Section 2314 of Act 13, 58 Pa. C.S. § 2314, the majority mischaracterizes the affected municipalities as merely " incidental beneficiaries" of the impact fees paid under Act 13. Majority op. at 17-18. To the contrary, as explained by the PUC, " [Act 13] provides for the imposition of an unconventional gas well fee (also called an impact fee), and the distribution of those funds to local and state governments. . . . A significant portion of the funds collected will be distributed directly to local governments to cover the local impacts of drilling."

http://www.puc.pa.gov/filing_resources/issues_laws_regulations/act_13_impact_fee_.aspx (last visited March 24, 2017). Indeed, as provided in Section 2314(d), following disbursements to conservation districts and state agencies, a full " 60% of the revenue remaining in the fund from fees collected for the prior year are hereby appropriated to counties and municipalities for purposes authorized under subsection (g)." 58 Pa. C.S. § 2314(d). Moreover, the amount of impact fees paid to municipalities is so significant that the General Assembly has set a ceiling regarding the amount that a municipality may receive. 58 Pa. C.S. § 2314(e). By expressly providing for the collection and distribution of such impact fees to municipalities within the body of Act 13, the General Assembly manifestly stated as paramount its intent to mitigate the negative effects of such unconventional drilling.

[3] See Section 1928(b)(3) of the Statutory Construction Act, 1 Pa. C.S. § 1928(b)(3) (" All provisions of a statute of the classes hereinafter enumerated shall be strictly construed: . . . (3) Provisions imposing taxes."). *But cf. Board of Christian Education*, 91 A.2d at 378 (" [A]fter a study of the legislative background, Chief Justice Moschzisker found that an Act authorizing a city to make a new assessment in 'any ward or wards' empowered it to make a new assessment for the whole city. *Glen Alden Coal Co. v. City of Scranton*, [282 Pa. 45, 127 A. 307, 308 (Pa. 1925)].").

[4] The majority makes much of the fact that the PUC has interpreted the word " any" to have a different meaning with respect to the provisions relating to vertical wells. Majority op. at 20-21. However, it is well settled that " precisely the same words, or combination of words, may have different meanings when used under varying circumstances," and that " '[w]hen used under different circumstances and with different context, the same words may express different intentions.'" *Commonwealth ex rel. Woodruff v. Benn*, 284 Pa. 421, 131 A. 253, 258 (Pa. 1925) (citations omitted). See also *Public School Employees' Retirement System v. Pennsylvania School Boards Association, Inc.*, 545 Pa. 597, 682 A.2d 291, 295 (Pa. 1996) (Cappy, J. dissenting) (" That the term 'full school year' can mean different things in different statutory contexts (and even within the same statutory context) and for different purposes proves to me that the Board's regulation which defines 'full school year' for purposes of crediting retirement benefits, where the [Public

School Employees'] Retirement Code[, 24 Pa. C.S. § § 8101-8534,] is admittedly silent as to the definition, is not unreasonable, and therefore, should not be stricken."). This is particularly true where the word " '[a]ny' is a broad and comprehensive term," and " [i]ts significance is discoverable in its context and often by considering other relevant legislation." *Board of Christian Education*, 91 A.2d at 378. Thus, the PUC's differing interpretation of the same " broad and comprehensive term" does not relieve this Court of our duty to defer to the PUC's interpretation of Act 13. See, e.g., *Tool Sales & Service v. Board of Finance and Revenue*, 536 Pa. 10, 637 A.2d 607, 613 (Pa. 1993) (" It is a well-established principle of administrative law that agencies are entitled deference in interpreting the statutes they enforce. Other courts in this Commonwealth have held that an administrative agency's interpretation should be overturned or disregarded only for cogent reasons or where it is 'clearly erroneous.' Where the statutory scheme is [] technically complex [], 'a reviewing court must be even more chary to substitute discretion for the expertise of the administrative agency.'") (citations omitted).

[5]58 Pa. C.S. § 2308(a) and (b). Section 2308(a) and (b) state:

(a) Assessment.--The commission shall assess interest on any delinquent fee at the rate determined under section 2307(a) (relating to commission).

(b) Penalty.--In addition to the assessed interest under subsection (a), if a producer fails to make timely payment of the fee, there shall be added to the amount of the fee due a penalty of 5% of the amount of the fee if failure to file a timely payment is for not more than one month, with an additional 5% penalty for each additional month, or fraction of a month, during which the failure continues, not to exceed 25% in the aggregate.
