

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Pennsylvania Public Utility Commission,
Bureau of Investigation and Enforcement

v.

Xtreme Energy Company

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C-2017-2599145

INITIAL DECISION

Before
Joel H. Cheskis
Deputy Chief Administrative Law Judge

INTRODUCTION

This decision adopts a settlement filed by the Commission's Bureau of Investigation and Enforcement and an unconventional gas well producer to resolve all issues involving a complaint filed by the Bureau alleging violations of the Unconventional Gas Well Impact Fee Act by the producer. The settlement is adopted in its entirety and without modifications because it is in the public interest and supported by substantial evidence.

HISTORY OF THE PROCEEDING

On April 12, 2017, the Pennsylvania Public Utility Commission's (Commission) Bureau of Investigation and Enforcement (I&E) filed a formal complaint against Xtreme Energy Company (Xtreme), docket number C-2017-2599145. In its complaint, I&E averred that Xtreme has failed to comply with Section 2307(b) of Act 13 of 2012, known as the Unconventional Gas Well Impact Fee Act (Act 13), in that it had not paid the full amount of impact fees and administrative charges imposed under Act 13 for its unconventional gas wells. I&E requested

that Xtreme be ordered to pay its past due impact fees and administrative charges in the amount of \$70,600 plus interest and penalties for a total amount due of \$90,368. I&E also requested that Xtreme be ordered to pay a civil penalty of \$21,180. I&E attached multiple documents to its complaint in support of its position.

On May 18, 2017, Xtreme filed an answer and new matter in response to I&E's complaint.¹ In its answer, Xtreme admitted or denied the various averments I&E made in its complaint. In particular, Xtreme denied that it violated any provision of Act 13 or that it is obligated to pay impact fees and administrative charges for the wells listed in I&E's complaint. Xtreme requested that I&E's complaint be dismissed in its entirety, with prejudice. In its new matter, which was accompanied by a notice to plead, Xtreme provided significant additional discussion regarding its operations, Act 13 and the specific wells with which I&E averred fees and charges are owed. This included a discussion of a decision of the Commonwealth Court in Snyder Brothers, Inc. v. Pa. Pub. Util. Comm'n., 157 A.3d 1018 (Pa. Cmwlth. 2017) (Snyder I), *reversed*, Snyder Brothers, Inc. v. Pa. Pub. Util. Comm'n., 198 A.3d 1056 (Pa. 2018) (Snyder II).

On June 6, 2017, I&E filed an answer denying the averments Xtreme made in its new matter. Notably, with regard to Xtreme's averments about the Commonwealth Court decision in Snyder I, I&E averred that the Pennsylvania Supreme Court has allowed for appeal of the Commonwealth Court's decision and, therefore, the matter is not settled. I&E concluded by requesting that Xtreme's new matter be denied.

On March 6, 2018, a hearing notice was issued establishing an initial hearing for I&E's complaint for Wednesday, May 2, 2018 at 10:00 a.m. in Hearing Room 3 of the Commonwealth Keystone Building in Harrisburg and assigning me to the case. In anticipation of that hearing, a prehearing order was issued on March 9, 2018² setting forth various rules that would govern the hearing.

¹ Xtreme requested and received from the Secretary's Bureau 10 additional days to answer the complaint.

² The prehearing order was inadvertently dated May 9, 2018.

On April 11, 2018, Xtreme submitted a motion seeking to convert the initial hearing to a prehearing conference. On April 24, 2018, I&E submitted an answer to Xtreme's motion. On April 26, 2018, a hearing change notice was issued converting the initial hearing to an initial prehearing conference. Both I&E and Xtreme submitted prehearing memoranda in anticipation of the prehearing conference.

The prehearing conference convened on May 2, 2018, as scheduled. Heidi Wushinske, Esquire, appeared on behalf of I&E. Karen Moury, Esquire, appeared on behalf of Xtreme. During the prehearing conference, an extensive discussion was held regarding whether pre-served written testimony should be submitted in this matter or whether the hearing should be conducted with live testimony. In addition, extensive discussion was held regarding whether the complaint should be held in abeyance pending the Supreme Court's action in response to Snyder I. At the conclusion of the discussion, the parties were asked to submit memoranda of law regarding both of these issues which they both did on June 4, 2018, as agreed.

On June 25, 2018, prehearing order #2 was issued determining that this matter will not be held in abeyance pending the Supreme Court's action in response to Snyder I and requesting that the parties submit an agreed upon schedule for litigating this matter, or if no agreement can be reached, their individual schedules proposed to litigate this matter, by July 5, 2018.

By email dated July 5, 2018, the parties submitted an agreed upon schedule for litigating this matter. A scheduling order dated July 6, 2018 was issued memorializing the procedural schedule proposed by the parties and setting forth additional procedural rules that will govern this proceeding. The parties were also reminded that Commission policy promotes settlements and encouraged to commence settlement discussions as early as possible.

On September 4, 2018, I&E filed an amended complaint to include alleged violations that pertained to the 2016 calendar year.

On September 27, 2018, Xtreme filed an answer and new matter in response to I&E's amended complaint. Again, Xtreme admitted or denied the various averments I&E made in its amended complaint, including specifically denying the alleged violations for the 2016 calendar year. In its new matter, which was accompanied by a notice to plead, Xtreme reiterated its original new matter provided in response to I&E's original complaint and added additional arguments regarding the 2016 calendar year averments. Xtreme requested that the amended complaint be denied in its entirety.

On October 17, 2018, I&E filed an answer to Xtreme's new matter admitting or denying Xtreme's various averments and requesting that Xtreme's new matter and request to dismiss the amended complaint be denied.

On October 24, 2018, Xtreme submitted a motion for a protective order stating that, in its pre-served testimony, it marked information as confidential following an agreement with I&E to maintain the confidentiality of such information pending the issuance of a protective order. Xtreme noted that limitation on the disclosure of proprietary information will not prejudice the rights of the parties and that such limitation balances the interests of the parties, the public and the Commission. I&E did not oppose the motion for a protective order. An order granting motion for a protective order was issued on October 25, 2018.

The parties exchanged the following pre-served testimony pursuant to the procedural schedule:

- I&E Statement No. 1 (Direct Testimony of Amy R. Zuvich), and accompanying Exhibit Nos. 1-20, on September 4, 2018;
- Xtreme Statement No. 1 (Rebuttal Testimony of Michael Hahn) (both proprietary and non-proprietary), and accompanying Exhibit Nos. 1-11, on October 16, 2018; and
- I&E Statement No. 1-SR (Surrebuttal Testimony of Amy R. Zuvich), and accompanying Exhibit Nos. 1-15, on November 16, 2018.

On December 7, 2018, an evidentiary hearing notice was issued formally setting the evidentiary hearing for this matter for January 9 and 10, 2019, beginning at 10:00 a.m. in hearing room 3 of the Commonwealth Keystone Building in Harrisburg.

On December 28, 2018, Xtreme filed a motion to compel production of a discovery request. On January 2, 2019, I&E filed an answer to Xtreme's motion.

By email dated January 7, 2019, the parties indicated that a settlement in principle to resolve I&E's amended complaint had been reached. At the same time, Xtreme agreed to withdraw its motion to compel. A cancellation notice dated January 8, 2019 was issued formally cancelling the hearings scheduled for January 9 and 10, 2019.

On April 19, 2019, the parties submitted a Joint Petition for Approval of Settlement (settlement). Attached to the settlement were appendices A through E consisting of: Appendix A (Joint Proposed Findings of Fact), Appendix B (Joint Proposed Conclusions of Law), Appendix C (Joint Proposed Ordering Paragraphs), Appendix D (I&E statement in support of the settlement) and Appendix E (Xtreme statement in support of the settlement). The parties requested that the Commission approve the terms of the settlement in their entirety as being in the public interest.

The record in this case closed on April 19, 2019 when the settlement was submitted. For the reasons set forth below, the settlement will be approved in its entirety because it is in the public interest and supported by substantial evidence.

FINDINGS OF FACT³

1. On February 19, 2015, Onshore Royalties, LLC ("Onshore"), which is affiliated with Xtreme, acquired two unconventional gas wells in Pennsylvania from Samson Resources Company known as the Menhorn and Hillegass wells. (I&E Statement No. 1 at 7; Xtreme Statement No. 1 at 3).

³ These findings of fact were proposed by the parties in the settlement and are adopted herein.

2. While Onshore is the owner of the Menhorn and Hillegass wells, Xtreme is the operator and began operating the two wells on February 19, 2015. (I&E Statement No. 1 at 7; I&E Statement No. 1-SR at 17).

3. On April 20, 2015, Xtreme received a permit from the Pennsylvania Department of Environmental Protection (“DEP”) related to the Menhorn well, identified as Well No. 111-20272. (Xtreme Statement No. 1 at 5).

4. On April 23, 2015, Xtreme received a permit from DEP related to the Hillegass well, identified as Well No. 111-20277. (Xtreme Statement No. 1 at 5).

5. April 1, 2015 was the due date for reporting 2014 calendar year well data and paying the Act 13 impact fees and administrative fees associated with the 2014 calendar year. (I&E Statement No. 1 at 22-23).

6. April 1, 2016 was the due date for reporting 2015 calendar year well data and paying the Act 13 impact fees and administrative fees associated with the 2015 calendar year. (I&E Statement No. 1 at 24).

7. April 3, 2017 was the due date for reporting 2016 calendar year well data and paying the Act 13 impact fees and administrative fees associated with the 2016 calendar year because April 1, 2017 was a Saturday. (I&E Statement No. 1 at 27).

8. April 2, 2018 was the due date for reporting 2017 calendar year well data and paying the Act 13 impact fees and administrative fees associated with the 2017 calendar year because April 1, 2018 was a Sunday. (I&E Statement No. 1 at 32).

9. Producers may dispute payment of an impact fee and such disputes are identified in Act 13 reports. (I&E Statement No. 1 at 20-21).

10. The dispute process is not established by Act 13 or Commission regulations and is established by Commission Order. (Xtreme Statement No. 1 at 22-23; I&E Statement No. 1-SR at 20).

11. Payment of a disputed impact fee and administrative fee is not owed until the dispute has been resolved and if it has been resolved in the Commission's favor. (I&E Statement No. 1-SR at 22).

12. The Commission's Bureau of Administration did not receive Act 13 reports from Xtreme concerning the 2014, 2015 and 2016 calendar years related to Well No. 111-20272 (Menhorn) and Well No. 111-20277 (Hillegass). (I&E Statement No. 1 at 42).

13. The Commission's Bureau of Administration was not alerted to disputes on any Act 13 reports that Xtreme may have had with respect to payment of the impact fee and administrative fee for the 2014, 2015 and 2016 calendar years related to Well No. 111-20272 (Menhorn) and Well No. 111-20277 (Hillegass). (I&E Statement No. 1 SR at 22-23).

14. Xtreme challenged the payment of the impact fees and administrative charges for the 2014, 2015 and 2016 calendar years for Well No. 111-20272 (Menhorn) and the payment of the impact fees and administrative charges for 2014 and 2015 calendar years for Well No. 111-20277 (Hillegass) by filing an Answer and New Matter on May 18, 2017 and September 27, 2018. (Xtreme Statement No. 1 at 22).

15. If a payment of an impact fee is made, no refunds are available after distribution of the fees by the Commission. (Xtreme Statement No. 1 at 23-24).

16. Xtreme submitted an Act 13 report related to the 2017 calendar year on April 10, 2018, in which Xtreme disputed the impact fee payment for Well No. 111-20272 (Menhorn) averring that the well was a stripper well. (I&E Statement No. 1 at 36).

17. On June 5, 2018, Xtreme submitted a payment to the Bureau of Administration in the amount of \$25,350 in an attempt to pay the 2016 and 2017 impact fees and administrative fees related to Well No. 111-20277 (Hillegass). The Bureau of Administration did not accept the payment because the amount fell short of the total. (I&E Statement No. 1 at 31; Xtreme Statement No. 1 at 20).

18. On September 26, 2018, Xtreme submitted payment in the correct amount of \$35,500 to pay the 2016 and 2017 impact fees and administrative fees related to Well No. 111-20277 (Hillegass). (Xtreme Statement No. 1 at 21).

19. By check dated April 9, 2019, Xtreme has paid the Commission's invoice for Well No. 111-20272 (Menhorn) in the amount of \$20,350 which was issued following the issuance of the Supreme Court's *Snyder Brothers* decision. (I&E and Xtreme Stipulation).

20. Xtreme has submitted its Act 13 reports for calendar year 2018. (I&E and Xtreme Stipulation).

DISCUSSION

A. Legal Standard

The parties submitted a settlement of all issues in this proceeding. Commission policy promotes settlements. 52 Pa. Code § 5.231. Settlements lessen the time and expense the parties must expend litigating a case and at the same time conserve administrative resources. The Commission has indicated that settlement results are often preferable to those achieved at the conclusion of a fully litigated proceeding. 52 Pa. Code § 69.401. The focus of inquiry for determining whether a proposed settlement should be recommended for approval is not a “burden of proof” standard, as is utilized for contested matters. Pa. Pub. Util. Comm'n v. City of Lancaster – Bureau of Water, Docket No. R-2010-2179103 (Opinion and Order entered July 14, 2011) (Lancaster). Instead, the benchmark for determining the acceptability of a settlement or partial settlement is whether the proposed terms and conditions are in the public interest. Id.,

citing, Warner v. GTE North, Inc., Docket No. C-00902815 (Opinion and Order entered April 1, 1996) (*Warner*); *Pa. Pub. Util. Comm'n. v. CS Water and Sewer Associates*, 74 Pa. PUC 767 (1991). In addition, the Commission has held that parties to settled cases are afforded flexibility in reaching amicable resolutions, so long as the settlement is in the public interest. *Pa. Pub. Util. Comm'n v. MXenergy Electric Inc.*, Docket No. M-2012-2201861 (Opinion and Order entered Dec. 5, 2013).

Section 69.1201 of the Commission's regulations provides a Policy Statement regarding factors and standards to be used when evaluating litigated and settled proceedings. 52 Pa.Code § 69.1201. The Policy Statement notes that "these factors and standards will be utilized by the Commission in determining if a fine for violating a Commission order, regulation or statute is appropriate, as well as if a proposed settlement for a violation is reasonable and approval of the settlement agreement is in the public interest." 52 Pa.Code § 69.1201(a). The Policy Statement notes that "when applied in settled cases, these factors and standards will not be applied in as strict a fashion as in a litigated proceeding. The parties in settled cases will be afforded flexibility in reaching amicable resolutions to complaints and other matters so long as the settlement is in the public interest." 52 Pa.Code § 69.1201(b). These factors and standards are as follows:

- (1) Whether the conduct at issue was of a serious nature. When conduct of a serious nature is involved, such as willful fraud or misrepresentation, the conduct may warrant a higher penalty. When the conduct is less egregious, such as administrative filing or technical errors, it may warrant a lower penalty.
- (2) Whether the resulting consequences of the conduct at issue were of a serious nature. When consequences of a serious nature are involved, such as personal injury or property damage, the consequences may warrant a higher penalty.
- (3) Whether the conduct at issue was deemed intentional or negligent. This factor may only be considered in evaluating litigated cases. When conduct has been deemed intentional, the conduct may result in a higher penalty.
- (4) Whether the regulated entity made efforts to modify internal practices and procedures to address the conduct at issue and prevent similar conduct in the future. These modifications may include

activities such as training and improving company techniques and supervision. The amount of time it took the utility to correct the conduct once it was discovered and the involvement of top-level management in correcting the conduct may be considered.

(5) The number of customers affected and the duration of the violation.

(6) The compliance history of the regulated entity which committed the violation. An isolated incident from an otherwise compliant utility may result in a lower penalty, whereas frequent, recurrent violations by a utility may result in a higher penalty.

(7) Whether the regulated entity cooperated with the Commission's investigation. Facts establishing bad faith, active concealment of violations, or attempts to interfere with Commission investigations may result in a higher penalty.

(8) The amount of the civil penalty or fine necessary to deter future violations. The size of the utility may be considered to determine an appropriate penalty amount.

(9) Past Commission decisions in similar situations.

(10) Other relevant factors.

52 Pa.Code § 69.1201(c); *see also*, Rosi v. Bell Atlantic-Pa., Inc. and Sprint Communications Company, Docket No. C-0092409 (Final Order entered February 10, 2000) ("Rosi").

B. Settlement Terms

The terms of the settlement proposed by the parties, with the original paragraph numbering maintained, is as follows:

33. I&E and Respondent, intending to be legally bound and for consideration given, desire to fully and finally conclude this litigation and agree that a Commission Order approving the Settlement without modification shall create the following rights and obligations:

A. Respondent will pay past due impact fees and administrative charges related to Well No. 111-20277 (Hillegass) and Well No. 111-20272 (Menhorn) in the amount of Sixty-Five Thousand, Six Hundred Dollars (\$65,600) within thirty (30) days of the date of the Commission's Final Order approving the Settlement Agreement. Payment of the impact fees and administrative charges, as well as the remaining monetary terms of Paragraph 3, shall be made by certified check or money order made payable to the "Commonwealth of Pennsylvania," with the docket number of this proceeding, C-2017-2599145, indicated on the payment, and sent to:

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street
Harrisburg, PA 17120

B. Respondent will pay interest, pursuant to 58 Pa.C.S. § 2308(a), in the amount of One Thousand, Five Hundred and Nine Dollars (\$1,509) within thirty (30) days of the date of the Commission's Final Order approving the Settlement Agreement. The interest shall not be tax deductible pursuant to Section 162(f) of the Internal Revenue Code, 26 U.S.C.S. § 162(f).

C. Respondent will pay a penalty (hereinafter referred to as "Act 13 penalty"), pursuant to 58 Pa.C.S. § 2308(b), in the amount of Twelve Thousand, Five Hundred and Seventy-Five Dollars (\$12,575) within thirty (30) days of the date of the Commission's Final Order approving the Settlement Agreement. The Act 13 penalty should not be tax deductible pursuant to Section 162(f) of the Internal Revenue Code, 26 U.S.C.S. § 162(f).

D. Respondent will pay an administrative civil penalty, pursuant to 58 Pa.C.S. § 2310, in the amount of Fifteen Thousand Dollars (\$15,000) within thirty (30) days of the date of the Commission's Final Order approving the Settlement Agreement. The administrative civil penalty should not be tax deductible pursuant to Section 162(f) of the Internal Revenue Code, 26 U.S.C.S. § 162(f).

E. I&E agrees to forego prosecuting Respondent, including seeking the imposition of interest, Act 13 penalties and administrative civil penalties, for any late payments related to the impact fee and administrative charge for Well No. 111-20277 (Hillegass) for the 2017 calendar year.

F. Respondent and I&E agree that the Supreme Court of Pennsylvania's decision in *Snyder Brothers, Inc. v. Pa. Pub. Util. Comm'n*, 198 A.3d 1056 (Pa. 2018) is dispositive as to Well No. 111-20272 (Menhorn).

G. Respondent agrees to timely pay the amounts set forth in any invoice sent by the Commission with respect to Well No. 111-20272 (Menhorn) related to the 2017 calendar year. Upon timely payment of this invoice, I&E agrees to forego from prosecuting Xtreme, including seeking the imposition of interest, Act 13 penalties and administrative civil penalties, with respect to any issue regarding the timeliness of Xtreme's Act 13 report and dispute concerning Well No. 111-20272 (Menhorn) related to the 2017 calendar year.

H. Respondent agrees that it will cease and desist from violating Act 13 and will submit Act 13 reports, disputes and applicable payments by April 1 of each year.

I. Xtreme agrees that if it fails to comply with a Commission Order that approves any settlement of this matter, the Company will be subject to the remedies set forth in Act 13, including, *inter alia*, a lien placed on its property pursuant to 58 Pa.C.S. § 2308(e), contempt proceedings in Commonwealth Court pursuant to 58 Pa.C.S. § 2309(b), and suspension of well permits pursuant to 58 Pa.C.S. § 2308(c).

J. The following written testimony and associated exhibits served in this case shall be deemed admitted into the record of this proceeding:

- Direct Testimony of Amy R. Zuvich – I&E Statement No. 1;
- Rebuttal Testimony of Michael Hahn – Xtreme Statement No. 1; and
- Surrebuttal Testimony of Amy R. Zuvich – I&E Statement No. 1-SR.

Settlement at 8-10.

In addition, the settlement contains the normal conditions found on most settlements submitted to the Commission. For example, the settlement is conditioned on the

Commission's approval of the terms and conditions contained in the settlement without modification. Id. at 11. If the Commission modifies the settlement the parties may elect to withdraw from the settlement and proceed with litigation. Id. The settlement also states that it reflects a compromise of the competing positions and does not reflect any party's position with respect to any issue raised in the proceeding. Id. at 12. Furthermore, the settlement is presented without prejudice to the position any party may take in the future on the merits of the issues in future proceedings, except to the extent necessary to effectuate the terms and conditions of the settlement. Id.

C. Public Interest

a. The Parties statements in support

In the settlement, the parties stated that the settlement is in the public interest because it effectively addresses I&E's allegations that are the subject of the complaint proceeding and avoids the time and expense of litigation. Settlement at 11. The settlement states that expenses of litigation include hearings, travel for Xtreme's witness and the preparation and filing of briefs, exceptions and reply exceptions, as well as any possible appeals. Id.

In its statement in support of the settlement, I&E noted the Commission's policy to promote settlements and that the settlement results from the compromise of the parties. I&E Stmt. at 5. I&E added that given the inherent unpredictability of the outcome of a contested proceeding, the benefits of amicably resolving the disputed issues through settlement outweigh the risks and expenditures of litigation. Id.

I&E also stated that approval of the settlement is consistent with the Commission's policy statement regarding evaluating litigated and settlement proceedings. Id. at 8, *citing*, 52 Pa.Code § 69.1201. I&E then evaluated the settlement in terms of the ten factors in the policy statement.

I&E noted that, with regard to the first factor, while the alleged misconduct involves failing to pay administrative fees, the fees are necessary to reimburse municipalities for the local impacts of drilling. Id. at 9. I&E also noted the substantial and time-consuming efforts the Bureau of Administration made in this matter. Id. at 9-10. With regard to the second factor, I&E noted that, while no personal injury or property damage took place, financial consequences ensued. Id. at 10. With regard to whether Xtreme has made efforts to change its practices to prevent similar conduct in the future, I&E noted, among other things, that Xtreme has already submitted an Act 13 report related to 2017 and is currently compliant with Act 13 reporting requirements. Id. at 10-11. I&E added that no customers were affected by Xtreme's conduct in a traditional sense but that municipalities received less money in a timely manner. Id. at 11. With regard to the sixth factor, I&E noted that Xtreme does not have a history of non-compliance at the Commission. Id.

With regard to the eighth, ninth and tenth factors,⁴ I&E stated that the civil penalty agreed to in the settlement is substantial and sufficient to deter future violations given the size of Xtreme's operations. Id. at 12. I&E also noted that the only matter involving a Commission decision in an Act 13 enforcement matter is distinguishable from this case. Id. Finally, with regard to the tenth factor, other relevant factors, I&E noted that the additional relevant factor of whether the case was settled or litigated is of pivotal importance to the settlement. Id. at 13. I&E concluded that it fully supports the terms and conditions of the settlement because it reflects a carefully balanced compromise of the interests of the parties to the proceeding and avoids the necessity of further administrative and potential appellate proceedings that would have been a substantial cost to the parties. Id.

In its statement in support of the settlement, Xtreme focused much of its support for the settlement on the first factor to be considered when evaluating settlements – whether the conduct was of a serious nature. Xtreme stated that any conduct that would have been determined to constitute a violation of the code was the result of administrative errors rather than willful fraud or misrepresentation. Xtreme Stmt. at 5. Xtreme noted, among other things, that it

⁴ I&E contended that factors 3 and 7 are not relevant because factor 3 is only to be considered in litigated cases and factor 7 requires an investigation.

was not familiar with Act 13 or impact fees in Pennsylvania or of the Commission's Act 13 website, had not been served the Commission's Act 13 implementation orders and received no information from the Commission when the Department of Environmental Protection issued the permits. Id. Furthermore, Xtreme noted that, upon receiving I&E's complaint, the company engaged Pennsylvania counsel and timely responded by raising specific challenges to the allegations contained in the complaint that were later supported by testimony. Id. at 6-9. Xtreme noted in particular that there had been an ownership change and that Xtreme's position to challenge payment of the fees on the basis that the well produced less than necessary amount to be considered a stripper well was consistent with the Commonwealth Court's decision in Snyder I. Id.

With regard to the other factors to be considered when evaluating the settlement, Xtreme noted that there have been no allegations about personal injury or damage. Id. at 9. Xtreme added that the company has modified its internal practices and procedures, including having paid various fees while the proceeding was pending. Id. at 10. With regard to the number of customers affected and the duration of the alleged violations, Xtreme stated that no customers were affected. Id. at 10-11. In addition, this proceeding is Xtreme's first encounter with the Commission where violations were alleged so there is no issue with compliance history. Id. at 11.

Finally, with regard to the eighth, ninth and tenth factors,⁵ Xtreme contended that the civil penalty is sufficient to deter future violations because the company is small and the penalties sought by I&E would have had a devastating financial effect on Xtreme, the lone past Commission decision on this matter is of little significance to evaluating the settlement and that the only other factors to consider are the uncertainty and costs of litigation that are avoided and now allows Xtreme to focus on its unconventional gas well operations. Id. at 11-12.

⁵ Similar to I&E, Xtreme contended that factors 3 and 7 are not relevant because factor 3 is only to be considered in litigated cases and factor 7 requires an investigation.

b. Disposition

The settlement submitted by I&E and Xtreme in this proceeding is in the public interest and supported by substantial evidence. Therefore, the settlement will be approved in its entirety and without modification.

As the Commission has noted, on February 14, 2012, Governor Corbett signed in to law Act 13 of 2012 (Act 13), the Unconventional Gas Well Impact Fee Act, which amends Title 58 (Oil and Gas) of the Pennsylvania Consolidated Statutes. *See e.g.*, Act 13 of 2012 – Implementation of Unconventional Gas Well Impact Fee Act, Docket Number M-2012-2288561 (Implementation Order Regarding Chapter 23, entered May 10, 2012). Act 13 provides, *inter alia*, for an impact fee, Oil and Gas Act amendments and standards for local ordinances. *Id.* at 1. Act 13 allows counties to pass ordinances to impose an impact fee on unconventional gas well producers and, alternatively, allows municipalities, under certain circumstances, to adopt resolutions compelling the imposition of fees if a county elects not to do so. *Id.* The Commission has administrative responsibilities for implementing the provisions of Act 13 which are contained within Chapters 23 and 33 of the Act. *Id.* On May 10, 2013, the Commission issued an Implementation Order Regarding Chapter 23 addressing those responsibilities and other issues associated with the implementation of Chapter 23. *Id.*

In part, the settlement submitted by I&E and Xtreme to resolve this matter is in the public interest and should be adopted without modification because it helps the Commission meet its responsibilities under Act 13.

As noted in the settlement, Xtreme is an unconventional gas well producer as defined in Chapter 23 of the Act and operates two unconventional wells in Pennsylvania. In its complaint, I&E averred that Xtreme failed to comply with the Act by failing to pay impact fees and administrative charges required for its two unconventional gas wells for the years 2014 and 2015. Had this complaint been fully litigated, I&E would have proffered evidence and legal arguments to demonstrate that Xtreme committed various violations of Act 13 and, in response, Xtreme would have contended that its responsibility for payment of impact fees and

administrative charges did not take effect until the calendar year 2016. Instead the parties engaged in settlement discussions which resulted in a compromise that included, *inter alia*, Xtreme paying past due impact fees and administrative charges, interest, an Act 13 penalty and a civil penalty. Xtreme also agreed to cease and desist from violating Act 13.

As such, the settlement is in the public interest and should be approved without modification because it resolves the outstanding disputed amount that I&E averred Xtreme owes which will result in municipalities receiving additional monies under Act 13. Such money is put to a variety of uses, including for counties and municipalities to use for purposes associated with natural gas production from unconventional gas wells. 58 Pa.C.S. § 2314(g); *see also*, Snyder II at 198 A.2d at 1060. This money will be used to construct, maintain and repair roads and bridges, as well as water, storm water and sewer systems, and also for emergency preparedness and public safety. Id. In fact, Act 13 articulates thirteen purposes for which counties and municipalities are to use the money. The settlement not only adds to those funds for use by counties and municipalities what I&E averred Xtreme already owed but also ensures that Xtreme pays future money in to the fund as future impact fees and administrative charges. This is in the public interest.

The settlement is also in the public interest because it demonstrates the priority the Commission places on making sure that the provisions of Act 13 are properly followed. To the extent that other producers in the future do not pay the necessary impact fees and administrative charges, this settlement provides notice that the Commission will take the steps required to make sure that all such fees are paid. These actions will also ensure that the goals and policies of Act 13 are satisfied.

Furthermore, as is the case with most settlements, the settlement should be approved as being in the public interest because the settlement will save the parties from expending substantial time and expense involved with further litigation. Although the parties exchanged discovery and three rounds of pre-served testimony, additional costs could have included lengthy hearings, briefs, exceptions and possible appeals, especially since issues relating to Act 13 have been appealed multiple times, including to the Pennsylvania Supreme

Court. Avoiding such expenditures minimizes the costs that might ultimately be passed on to the ratepayers, and also conserves the resources of all other parties involved in these proceedings and the Commission's resources as well.

The settlement is also in the public interest because it is supported by substantial evidence. If appealed, decisions of the Commission must be supported by substantial evidence. 2 Pa.C.S. § 704. As noted above, the parties stipulated to the admission of the pre-served testimony in this proceeding. The pre-served testimony demonstrates the extent to which the issues raised by I&E were investigated and the extensive efforts the parties made in both litigating this case, as well as seeking a settlement. In sum, the admission of the pre-served testimony supports adopting the settlement, since the pre-served testimony constitutes substantial evidence in support of this decision adopting the settlement.

Finally, the settlement is in the public interest when viewed in light of the Commission's policy statement on settlements. That is, the conduct at issue is of a serious nature but was not willful fraud or misrepresentation. The consequences of the conduct did not result in personal injury or property damage. Xtreme has agreed to modify its internal practices and procedures to address the conduct at issue and prevent similar conduct from occurring in the past. No customers were directly affected and the duration of the violation was relatively minimal. Xtreme has no compliance history of concern. The amount of the civil penalty agreed to in the settlement appears sufficient to deter future violations given the size of Xtreme's operations in Pennsylvania. Finally, the Commission's only other Act 13 enforcement action is distinguishable from the facts of this case.

D. Conclusion

In conclusion, the settlement submitted by I&E and Xtreme to resolve the instant complaint will be adopted without modification because it is in the public interest and supported by substantial evidence. *See, Lancaster and Warner, supra*. The settlement resolves the specific issues averred by I&E in its underlying complaints and helps promote the goals and objectives of Act 13 by ensuring proper funding of various funds to be used by counties and municipalities.

The settlement also helps to minimize the costs for the Commission and the parties of further litigation, including possible appeals, and is supported by substantial evidence. The settlement also is consistent with the various factors the Commission uses when analyzing settlements. The parties are commended for their efforts put forth to settle this case.

CONCLUSIONS OF LAW⁶

1. The Commission has jurisdiction over the subject matter and the actions of Xtreme in its capacity as an unconventional gas well producer in Pennsylvania. Unconventional Gas Well Fee Act (“Act 13”) at 58 Pa.C.S. § 2301.

2. Xtreme Energy Company (“Xtreme”) is a producer as defined by Act 13 in that it holds a permit issued by the Pennsylvania Department of Environmental Protection to sever natural gas for sale, profit or commercial use from two unconventional gas wells in Pennsylvania.

3. Xtreme, as an unconventional gas well producer in Pennsylvania, is subject to the Act 13 impact fee. 58 Pa.C.S. §§ 2301, 2302(b).

4. The Commission is authorized to collect, administer and distribute impact fees from unconventional gas well producers pursuant to Chapter 23 of Act 13, 58 Pa.C.S. §§ 2301 *et seq.*

5. The Commission is authorized to enforce the requirements of Chapter 23 of Act 13, including the collection of delinquent impact fees. 58 Pa.C.S. §§ 2308-2309.

6. A producer is required to file an annual report with the Commission on or before April 1 detailing the number of spud unconventional gas wells for the previous calendar

⁶ These conclusions of law were proposed by the parties in the settlement and are adopted herein.

year. 58 Pa.C.S. § 2303(b). *See also* Act 13 of 2012 – Implementation of Unconventional Gas Well Impact Fee Act, Clarification Order Regarding Chapter 23, Docket No. M-2012-2288561 (Order entered December 20, 2012) at 11.

7. Along with the Act 13 report, producers are required to submit payment of the impact fee on or before April 1. 58 Pa.C.S. § 2303(a). *See also* Act 13 of 2012 – Implementation of Unconventional Gas Well Impact Fee Act, Clarification Order Regarding Chapter 23, Docket No. M-2012-2288561 (Order entered December 20, 2012) at 11.

8. Producers may dispute payment of the impact fee and such disputes should be identified on the Act 13 report. Act 13 of 2012 – Implementation of Unconventional Gas Well Impact Fee Act, Clarification Order Regarding Chapter 23, Docket No. M-2012-2288561 (Order entered December 20, 2012) at 11.

9. The Act 13 impact fee will be imposed on unconventional gas wells if their production exceeds 90,000 cubic feet of natural gas per day for even one month of the year. Snyder Brothers, Inc. v. Pa. Pub. Util. Comm’n, 198 A.3d 1056 (Pa. 2018).

10. When a producer for a particular well changes, the producer responsible for filing an Act 13 report on April 1 is responsible for paying the impact fee. Act 13 of 2012 – Implementation of Unconventional Gas Well Impact Fee Act, Clarification Order Regarding Chapter 23, Docket No. M-2012-2288561 (Order entered December 20, 2012) at 12.

11. The Commission has the authority to assess interest on producers with delinquent impact fees. 58 Pa.C.S. § 2308(a).

12. The Commission has the authority to add a penalty of 5% of the amount of the fee if the failure to timely pay the fee is for less than one month, with an additional 5% penalty for each additional month or fraction of a month that the fee is untimely paid, not to exceed 25% in the aggregate. 58 Pa.C.S. § 2308(b).

13. The Commission may assess an administrative civil penalty upon a producer of up to \$2,500 per violation for a violation of Chapter 23 of Act 13. 58 Pa.C.S. § 2310. In determining the amount of the penalty, the Commission shall consider the willfulness of the violation and other relevant factors. 58 Pa.C.S. § 2310(a).

14. The Commission encourages and promotes settlements. 52 Pa. Code § 5.231(a).

15. The benchmark for determining the acceptability of a settlement is whether the proposed terms and conditions are in the public interest. Pa. Pub. Util. Comm'n v. City of Lancaster – Bureau of Water, Docket No. R-2010-2179103 (Order entered July 14, 2011) at 11.

16. The Commission's Policy Statement at 52 Pa. Code § 69.1201 sets forth ten factors (“Rosi factors”) that the Commission will consider in evaluating litigated and settled proceedings and determining whether a fine for violating a Commission statute, regulation or order is appropriate, as well as whether a proposed settlement for the violations is reasonable and approval of the settlement agreement is in the public interest. These factors and standards have been considered by the Commission in a prior Act 13 proceeding, Pa. Pub. Util. Comm'n, Bureau of Investigation and Enforcement v. Snyder Brothers, Inc., Docket No. C-2014-2402746 (Order entered June 11, 2015) at 59-68.

17. When applied in settled cases, the *Rosi* factors will not be applied in as strict a fashion as in a litigated proceeding. 52 Pa. Code § 69.1201(b). The parties in settled cases will be afforded flexibility in reaching amicable resolutions so long as the settlement is in the public interest. Id.

18. Taking into consideration all of the *Rosi* factors, the Settlement is in the public interest.

ORDER

THEREFORE,

IT IS ORDERED:

1. That the Joint Petition for Approval of Settlement filed on April 19, 2019 at Docket No. C-2017-2599145 by the Pennsylvania Public Utility Commission's Bureau of Investigation and Enforcement and Xtreme Energy Company is hereby approved in its entirety without modification.

2. That the following previously served written testimony and associated exhibits are admitted into the record of this proceeding:

- Direct Testimony of Amy R. Zuvich – Bureau of Investigation and Enforcement Statement No. 1;
- Rebuttal Testimony of Michael Hahn – Xtreme Energy Company Statement No. 1; and
- Surrebuttal Testimony of Amy R. Zuvich – Bureau of Investigation and Enforcement Statement No. 1-SR.

3. That the Motion to Compel Production of Document Requested by Set III-9 filed by Xtreme Energy Company on December 28, 2018 is hereby withdrawn.

4. That, in accordance with Section 2303 of Act 13, 58 Pa.C.S. § 2303, and within thirty (30) days of the date this Order becomes final, Xtreme Energy Company shall pay Sixty-Five Thousand, Six Hundred Dollars (\$65,600) related to impact fees and administrative charges related to the 2014, 2015 and 2016 calendar years. Said payment shall be made by: (1)

certified check or money order made payable to the “Commonwealth of Pennsylvania,” with the docket number of this proceeding, C-2017-2599145, indicated on the payment, and sent to:

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street
Harrisburg, PA 17120

Or (2) wire transfer directly to the Commonwealth of Pennsylvania utilizing wire transfer instructions provided by I&E to Xtreme.

5. That, in accordance with Section 2308(a) of Act 13, 58 Pa.C.S. § 2308(a), and within thirty (30) days of the date this Order becomes final, Xtreme Energy Company shall pay interest in the amount of One Thousand, Five Hundred and Nine Dollars (\$1,509). Payment shall be made in the manner set forth in Paragraph 4, *supra*.

6. That, in accordance with Section 2308(b) of Act 13, 58 Pa.C.S. § 2308(b), and within thirty (30) days of the date this Order becomes final, Xtreme Energy Company shall pay a penalty in the amount of Twelve Thousand, Five Hundred and Seventy-Five Dollars (\$12,575). Payment shall be made in the manner set forth in Paragraph 4, *supra*.

7. That, in accordance with Section 2310 of Act 13, 58 Pa.C.S. § 2310, and within thirty (30) days of the date this Order becomes final, Xtreme Energy Company shall pay an administrative civil penalty in the amount of Fifteen Thousand Dollars (\$15,000). Payment shall be made in the manner set forth in Paragraph 4, *supra*.

8. That Xtreme Energy Company shall cease and desist from violating Act 13, 58 Pa.C.S. §§ 2301 *et seq.*, and shall submit Act 13 reports, disputes and applicable payments by April 1 of each year.

9. That, upon fulfillment of the conditions set forth in Paragraph 32(A)-(D) of the Joint Petition for Approval of Settlement, the Complaint filed by the Pennsylvania Public

Utility Commission's Bureau of Investigation and Enforcement shall be marked satisfied and the above-captioned matter shall be marked closed.

10. That copy of this Opinion and Order shall be served upon the Bureau of Administration.

Date: May 7, 2019

_____/s/_____
Joel H. Cheskis
Deputy Chief Administrative Law Judge