

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

PENNSYLVANIA PUBLIC UTILITY	:	
COMMISSION, BUREAU OF	:	
INVESTIGATION	AND	:
ENFORCEMENT,	:	Docket No. C-2025-3053309
	:	
Complainant,	:	
	:	
v.	:	
	:	
REPSOL OIL AND GAS USA, LLC,	:	
	:	
Respondent.	:	

[PROPOSED] ORDER

AND NOW, this __ day of _____, 2026, upon consideration of Respondent Repsol Oil and Gas USA, LLC's Preliminary Objections to Formal Complaint and any response, it is hereby ORDERED that the Formal Complaint is DISMISSED WITH PREJUDICE.

_____, J.

**BEFORE THE
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REPSOL OIL AND GAS USA, LLC,	:	
	:	
Respondent.	:	

NOTICE TO PLEAD

TO: Pennsylvania Public Utility Commission
Bureau of Investigation and Enforcement
c/o Allison Curtin Kaster, Esquire
Pennsylvania Public Utility Commission
Bureau of Investigation and Enforcement
Commonwealth Keystone Building
400 North Street
Harrisburg, PA 17120

You are hereby noticed that an answer to the enclosed Preliminary
Objections shall be filed within 10 days of the date of service of the Objections or
judgment may be entered against you.

Respectfully submitted,

BABST CALLAND, CLEMENTS AND ZOMNIR P.C.

/s/ Casey Alan Coyle

Casey Alan Coyle, Esquire

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Harrisburg, PA 17101

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*Counsel for Respondent Repsol Oil
and Gas USA, LLC*

Dated: January 26, 2026

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

PENNSYLVANIA PUBLIC UTILITY	:	
COMMISSION, BUREAU OF	:	
INVESTIGATION	AND	:
ENFORCEMENT,	:	Docket No. C-2025-3053309
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v.	:	
	:	
REPSOL OIL AND GAS USA, LLC,	:	
	:	
Respondent.	:	

PRELIMINARY OBJECTIONS TO FORMAL COMPLAINT

TO THE PENNSYLVANIA PUBLIC UTILITY COMMISSION:

Pursuant to 52 Pa. Code § 5.101, Respondent Repsol Oil and Gas USA, LLC (“Repsol”), by and through its undersigned counsel, Babst, Calland, Clements & Zomnir, P.C., hereby files the within Preliminary Objections to the Formal Complaint, averring as follows:

BACKGROUND

1. On February 7, 2025, Complainant Pennsylvania Public Utility Commission (the “Commission”), through its Bureau of Investigation and Enforcement (“I&E”), filed the Formal Complaint against Repsol. (*See* Docket.)
2. The Commission alleges violations by Repsol of Section 2307(b) of Act 13 of 2012, 58 Pa.C.S. §§ 2301–2318 (“Act 13”), relating to 72 unconventional gas

wells (the “Rockdale Wells”) that were owned and operated by, and permitted by the Pennsylvania Department of Environmental Protection (“DEP”) for the severance of natural gas to, Rockdale Marcellus Holdings, LLC, and Rockdale Marcellus, LLC (together, “Rockdale”), during the 2021 calendar year (“CY2021”). (See Compl. ¶¶ 15–16.)

3. The Commission alleges that it is Repsol, not Rockdale, that owes the CY2021 Act 13 fees for the Rockdale Wells, and that Repsol is liable to the Commission for the amount of \$1,331,700. (See *id.* ¶¶ 26 & n.4, 35 & n.5.)

4. That amount comprises \$1,428,100 in CY2021 Act 13 impact fees; \$3,600 in CY2021 Act 13 administrative (or spud) fees; and a \$100,000 credit for monies that Rockdale paid to the Commission in full and final satisfaction of the liabilities the Commission had asserted against Rockdale for the CY2021 Act 13 fees in Rockdale’s bankruptcy proceeding in the United States Bankruptcy Court for the Western District of Pennsylvania. (See *id.*)

5. Repsol now moves to dismiss the Formal Complaint on the following grounds, pursuant to 52 Pa. Code § 5.101.

PRELIMINARY OBJECTIONS

Lack of capacity to sue/lack of standing (52 Pa. Code § 5.101(a)(5), (7))

6. The Commission alleges that “Repsol has not paid the Impact Fee in the amount of \$1,428,100, or the Spud Fee in the amount of \$3,600, for the period of January 1, 2021, through December 31, 2021.” (Compl. ¶ 31.)

7. Act 13 states that, where, as here, “the commission determines that a producer has not made a timely payment of the fee, the commission shall send written notice of the amount of the deficiency to the producer within 30 days from the date of determining the deficiency.” 58 Pa.C.S. § 2308(c).

8. However, by its own admission, the Commission did not send the required notice to Repsol.

9. Rather, the Commission sent “mere . . . invoices” to Repsol—and did so more than nine months *after* the Commission sent identical invoices to Rockdale. (*Repsol Oil & Gas USA, LLC v. PUC*, No. 62 MAP 2024 (Pa.), Brief of Appellee at 15, 24, attached hereto as “**Exhibit A**”; *see* Compl. ¶ 25.)

10. The Commission therefore failed to adhere to the procedure set forth in Act 13.

11. Presumably, the Commission bypassed that procedure because the Commission knows it is unconstitutional. *Snyder Bros., Inc. v. PUC*, No. 1043 CD 2015, 2020 WL 587012, at *4, 6–7 (Pa. Commw. Ct. Feb. 6, 2020) (“*Snyder Bros.*

IP) (holding that Act 13 “fails to provide a producer with a meaningful post-deprivation remedy” because it does not authorize a producer to pay under protest or take any other action to avoid the statutory mandatory penalties and interest, nor does it authorize a producer to file an action against the Commission for recovery of any overpayment.)

12. In any event, having bypassed the procedure set forth in Act 13, the Commission lacks the capacity and/or standing to sue Repsol for the CY2021 Impact Fees. 52 Pa. Code § 5.101(a)(5), (7).

13. On this basis alone, this Court should dismiss the Formal Complaint.

14. The Formal Complaint should be dismissed with prejudice because Act 13 provides a three-year statute of limitations for the Commission to challenge the amount of the fee paid as calculated from the date the Act 13 report is filed, 58 Pa.C.S. § 2307(d), and Rockdale filed the Act 13 report on February 9, 2022, and therefore, the Commission cannot cure its lack of capacity and/or standing to sue. *See, e.g., Blackwood, Inc. v. Reading Blue Mountain & N. R.R. Co.*, 147 A.3d 594, 598 (Pa. Super. Ct. 2016) (dismissing a complaint with prejudice is the appropriate remedy “where it is clear that amendment is impossible and where to extend leave to amend would be futile” (citation and quotation marks omitted).); *see Carlino v. Whitpain Investors*, 453 A.2d 1385, 1388–89 (Pa. 1982).

WHEREFORE, Respondent Repsol Oil and Gas USA, LLC respectfully request that the Presiding Officer assigned to the above-captioned proceeding sustain Repsol's preliminary objection for lack of capacity to sue and/or lack of standing and enter the form of Order herewith.

Failure to join necessary party/lack of jurisdiction (52 Pa. Code § 5.101(a)(1), (5))

15. Even assuming, *arguendo*, that the Commission has the capacity and standing to sue Repsol under Act 13 despite not following the procedure delineated in the statute itself, there is a separate basis to dismiss the Formal Complaint.

16. The Commission asserted as recently as February 3, 2025, that "it was, and still is, undetermined whether Rockdale or Repsol is responsible for paying the Act 13 fees for the 72 wells." (Ex. A at 12.)

17. The Commission thus claimed that "an evidentiary hearing before the Commission is necessary to establish the facts to determine the producer responsible for paying the impact and spud fees." (*Id.* at 55.)

18. Yet, on February 7, 2025, the Commission filed the Formal Complaint against Repsol only, omitting Rockdale as a named respondent.

19. Because the Commission's preliminary objection practice "is analogous to Pennsylvania civil practice regarding preliminary objections," *City of Pottsville v. Reading Blue Mtn. & N. R.R.*, PUC Docket No. C-2012-2330567, 2014 WL 7149248, at *2 n.2 (PUC Nov. 19, 2014), and since justice cannot be done in

the absence of having Rockdale as a respondent, *City of Phila. v. Commonwealth*, 838 A.2d 566, 581 (Pa. 2003), Rockdale is an indispensable—and thus, necessary—party to this proceeding. *See* 52 Pa. Code § 5.101(a)(5).

20. The Formal Complaint reinforces that point, alleging that “[a]t the outset of the 2021 calendar year, 72 unconventional gas wells were owned and operated by Rockdale,” (Compl. ¶ 15); “for the 2021 calendar year, Rockdale held a permit issued by the Pennsylvania Department of Environmental Protection (‘DEP’) allowing it to sever natural gas from its 72 unconventional gas wells for sale, profit, or commercial use,” (*id.* ¶ 16); and it was not until “[o]n or about January 19, 2022,” that “the sale between Rockdale and Repsol closed,” (*id.* ¶ 19.)

21. The Commission’s failure to join Rockdale as a named respondent deprives the Presiding Officer assigned to the above-captioned proceeding of subject matter jurisdiction and it is fatal to the Formal Complaint. *See, e.g., Bucks Cnty. Servs., Inc. v. Phila. Parking Auth.*, 71 A.3d 379, 387 (Pa. Commw. Ct. 2013) (“Failure to join an indispensable party deprives the Court of subject matter jurisdiction and is fatal to a cause of action.”).

22. This is a separate basis to dismiss the Formal Complaint.

23. The Formal Complaint should be dismissed with prejudice because Act 13 provides a three-year statute of limitations for the Commission to challenge the amount of the fee paid as calculated from the date the Act 13 report is filed, 58

Pa.C.S. § 2307(d), and Rockdale filed the Act 13 report on February 9, 2022, and therefore, the Commission cannot cure its failure to join an indispensable party. *See, e.g., Blackwood*, 147 A.3d at 598; *see Carlino*, 453 A.2d at 1388–89.

WHEREFORE, Respondent Repsol Oil and Gas USA, LLC respectfully request that the Presiding Officer assigned to the above-captioned proceeding sustain Repsol’s preliminary objection for failure to join a necessary party and lack of jurisdiction and enter the form of Order herewith.

Judicial estoppel/legal insufficiency of a pleading (52 Pa. Code § 5.101(a)(4))

24. Even if Rockdale is not a necessary party, dismissal of the Formal Complaint is still required.

25. The Commission took the position in the Rockdale bankruptcy that “[i]t is the producer who files the report with the Commission who is responsible for payment of the impact and spud fees.” (*In re: Rockdale Marcellus Holdings, LLC*, No. 21-22080 (W.D. Pa. Bankr.) (“*In re: Rockdale*”), Dkt. No. 1208, PUC’s Response in Opp’n to Plan Administrator’s Objection ¶ 12, attached hereto as “**Exhibit B.**”)¹

¹ Notably, the Commission repeats that same position here. (*See* Compl. ¶ 12 (citing the Clarification Order Regarding Chapter 23 and stating that “[t]he Commission has determined that the producer filing the annual producer report by April 1 of each year . . . is responsible for paying the impact fee of the previous calendar year.”)) The Commission, however, omits from its Formal Complaint the fact that Rockdale filed the Act 13 report with the Commission for CY 20212, ostensibly to avoid being bound by its own Clarification Order. *But see Dep’t of Homeland Sec. v. Regents of the Univ. of Cal.*, 591 U.S. 1, 24 (2020) (“[T]he Government should turn square corners in dealing with the people.”)

26. It also asserted that “it is the producer who holds the permits to the wells who is liable for payment of the fees,” and that “[t]he conduct which gives rise to liability for the Act 13 fees is holding the permits on April 1 of a particular year.” (Ex. B ¶ 13.)

27. The Commission then declared, without caveat: “*As the producer filing the report and the holder of the wells permits, Debtor [i.e., Rockdale] held itself out as the party who will be responsible for paying the Act 13 impact and spud fees as of April 1, 2022.*” (Ex. B ¶ 16 (emphasis added).)

28. The Commission maintained that position throughout the Rockdale bankruptcy, eventually entering into a settlement agreement with Rockdale’s Plan Administrator over payment of the outstanding fees. (*In re: Rockdale*, Dkt. No. 1395, Stipulation and Agreed Order Resolving Disputes Between the Rockdale Plan Administrator and Pa. Pub. Utility Comm’n, attached hereto as “**Exhibit C.**”)

29. Under that settlement, the Commission agreed to accept \$100,000 from Rockdale “in full and final satisfaction of the liabilities asserted against the estate through the PUC Impact and Spud Fees Invoices.” (Ex. C at 5.)

30. The PUC’s own website acknowledges the \$100,000 payment that Rockdale made in reporting on the 2021 CY impact fees paid by each producer, as shown below:

Impact Fees By Producer for Reporting Year 2021

Producer Name	Client ID	Vertical Count	Horizontal Count	Amount	Paid Amount
GREYLOCK PRODUCTION LLC	35-0000339595	0	125	\$2,446,600.00	\$2,446,600.00
HG ENERGY II APPALACHIA LLC	35-0000336066	0	36	\$777,600.00	\$777,600.00
HILCORP ENERGY CO	35-0000292594	0	99	\$2,149,200.00	\$2,149,200.00
HUNT MARCELLUS OPERATING CO LLC	35-0000284060	0	0	\$0.00	\$0.00
INFLECTION ENERGY (PA) LLC	35-0000313418	0	52	\$1,328,400.00	\$1,328,400.00
INR OPERATING, LLC	35-0000341759	0	7	\$270,200.00	\$270,200.00
JKLM ENERGY, LLC	35-0000308463	1	44	\$978,500.00	\$978,500.00
JOHN E. MCCOOL	35-0000119646	0	0	\$0.00	\$0.00
K PETROLEUM INC	35-0000320398	0	0	\$0.00	\$0.00
LAUREL MOUNTAIN PRODUCTION	35-0000316802	0	14	\$475,200.00	\$475,200.00
LOLA ENERGY PETROCO LLC	35-0000356154	0	48	\$1,036,800.00	\$1,036,800.00
LPR ENERGY LLC	35-0000304679	0	32	\$530,700.00	\$530,700.00
MDS ENERGY DEVELOPMENT LLC	35-0000287170	0	4	\$86,400.00	\$86,400.00
MEDINA RESOURCE DEVELOPMENT CO LLC	35-0000246293	0	0	\$0.00	\$0.00
MONONA LLC	35-0000341458	0	1	\$10,900.00	\$10,900.00
NORTHEAST NATURAL ENERGY LLC	35-0000280163	0	6	\$108,200.00	\$108,200.00
NUCOMER ENERGY, LLC	35-0000302938	0	0	\$0.00	\$0.00
OLYMPUS ENERGY	35-0000331797	0	38	\$1,684,800.00	\$1,684,800.00
OWS ENERGY LLC	35-0000355329	0	1	\$10,900.00	\$10,900.00
PA GEN ENERGY CO LLC	35-0000213205	0	158	\$2,804,200.00	\$2,804,200.00
PENN ENERGY RESOURCES	35-0000294943	0	409	\$9,681,700.00	\$9,681,700.00
PENN PRODUCTION GROUP LLC	35-0000361867	0	5	\$86,600.00	\$86,600.00
PENN VIEW EXPLORATION, INC.	35-0000037136	0	0	\$0.00	\$0.00
PENNHILLS RESOURCES LLC	35-0000306870	0	3	\$54,100.00	\$54,100.00
PIN OAK ENERGY PARTNERS LLC	35-0000337379	0	27	\$379,900.00	\$379,900.00
RANGE RESOURCES APPALACHIA LLC	35-0000141142	0	1436	\$29,654,600.00	\$29,654,600.00
REDMILL DRILLING	35-0000306334	0	0	\$0.00	\$0.00
REPSOL OIL & GAS USA, LLC	35-0000237104	1	656	\$11,308,000.00	\$11,308,000.00
ROCKDALE MARCELLUS LLC	35-0000339085	0	72	\$1,428,100.00	\$100,000.00
ROULETTE OIL & GAS CO LLC	35-0000307592	0	0	\$0.00	\$0.00
S.T.L. RESOURCES, LLC	35-0000333920	0	6	\$237,700.00	\$237,700.00

(PUC, Impact Fees By Producer for Reporting Year 2021, <https://www.act13-reporting.puc.pa.gov/Modules/Reports/ReportViewer.aspx?rptPath=/Act%2013/ProducerImpactFeeReport> (last visited Jan. 25, 2026) (highlighting added).

31. But the Commission advances a different position in this proceeding.

32. The Commission now alleges that Repsol is responsible for the CY2021 Act 13 fees. (*See* Compl. ¶¶ 33–35.)

33. Having made contrary representations to the Bankruptcy Court and entered into a settlement agreement that the Bankruptcy Court approved based on the Commission’s then-proffered interpretation of Act 13, the doctrine of judicial estoppel bars the Commission from “switching [its] legal position[] to suit [its] own ends.” *Sunbeam Corp. v. Liberty Mut. Ins. Co.*, 781 A.2d 1189, 1192 (Pa. 2001).

34. The Commission therefore cannot prosecute an enforcement action against Repsol for the CY2021 Act 13 Fees. *See* 52 Pa. Code § 5.101(a)(5).²

35. This is an additional ground to dismiss the Formal Complaint with prejudice. *See, e.g., Blackwood*, 147 A.3d at 598; *see Carlino*, 453 A.2d at 1388–89.

WHEREFORE, Respondent Repsol Oil and Gas USA, LLC respectfully request that the Presiding Officer assigned to the above-captioned proceeding sustain Repsol’s preliminary objection for judicial estoppel/legal insufficiency of a pleading and enter the form of Order herewith.

² Even assuming, *arguendo*, that the doctrine is inapplicable, the Commission’s flip-flopping conclusively proves that Repsol did not have fair and adequate prior notice of any obligation to report and remit the CY2021 fees for the Rockdale Wells, as Repsol separately argues below.

Legal insufficiency of a pleading (52 Pa. Code § 5.101(a)(4))

36. Assuming that the Commission is not estopped from flip flopping on who is responsible for the CY2021 Act 13 fees, there is yet another basis to dismiss the Formal Complaint—Repsol is not liable for the CY2021 Act 13 fees for the Rockdale Wells as a matter of law.

37. Two provisions in Act 13 make clear that Repsol is not required to report and remit those fees: (1) the definition of “producer” in Section 2301, and (2) the fee due date, reporting, and Commission-cost requirements in Section 2303(a)–(c).

38. These provisions unambiguously establish that the person who holds (or is otherwise authorized to exercise the rights granted in) the DEP permit for an unconventional gas well during the prior calendar year is the producer required to file the report for and remit the fees by the April 1 due date.

Definition of producer in Section 2301

39. Act 13 defines a “producer” as “[a] person or its subsidiary, affiliate or holding company that holds a permit or other authorization to engage in the business of severing natural gas for sale, profit or commercial use from an unconventional gas well in this Commonwealth.” 58 Pa.C.S. § 2301.

40. Starting with the text, Section 2301 refers to the “permit” for “an unconventional gas well” in defining the term “producer.” *Id.*

41. Other provisions in Act 13 establish that the “permit” referenced here is the permit issued by DEP for an unconventional gas well under Subchapter B. *E.g., id.* § 2305(a)–(b) (referring to “permit to drill unconventional gas well” in establishing duties of DEP in administering impact and spud fee provisions); *id.* § 3211(e.1)(6) (listing failure to file report for or remit unconventional gas well fees in articulating grounds for DEP to deny such permit).

42. The Commission has acknowledged that the DEP permit controls in applying the impact and spud fee provisions in Act 13.

43. The Commission has recognized, for instance, that the DEP permit dictates whether a given well qualifies as a “vertical gas well” under the definition in Section 2301, a determination that, in turn, makes the well eligible for a discounted or reduced fee under Section 2302(f). Act 13 of 2012—Implementation of Unconventional Gas Well Impact Fee Act, Clarification Order Regarding Chapter 23, PUC Docket No. M-2012-2288561, 2012 WL 6706602 at 6 (Dec. 20, 2012) (“12/2012 Implementation Order”); Act 13 of 2012—Implementation of Unconventional Gas Well Impact Fee Act, Proposed Rulemaking Order, PUC Docket No. L-2013-2375551 at 12 (Oct. 17, 2013) (“10/2013 Prop. Rulemaking Order”).

44. It has also recognized, in interpreting the definition of “spud” in Section 2301, that “[t]he actual start of drilling of an unconventional gas well” must comport

“with the permitting requirements found in Chapter 32 of Act 13 at 58 Pa.C.S. §3211(a), which prohibits any well drilling absent having first obtained a well permit from DEP.” 12/2012 Impl. Order at 6.

45. Indeed, the Commission previously acknowledged that the DEP permit controls in determining the producer required to report and remit impact and spud fees in the federal bankruptcy proceeding. (Ex. B ¶¶ 13 (“[I]t is the producer who holds the permits to the wells who is liable for payment of the fees.”), 24 (“A ‘producer’ is the holder of a permit for engaging in the business of using an unconventional gas well. 58 Pa.C.S. §2301.”)); *see also PUC v. Xtreme Energy Co.*, No. C-2017-2599145, 2019 WL 2250766, at *13 (PUC May 7, 2019) (“Xtreme Energy Company ... is a producer as defined by Act 13 in that it holds a permit issued by the [DEP] Protection to sever natural gas for sale, profit or commercial use from two unconventional gas wells in Pennsylvania.”).

46. Using the DEP permit in determining the producer for an unconventional gas well comports with the structure and purpose of Act 13.

47. DEP is required to issue a permit to authorize the drilling of an unconventional gas well, 58 Pa.C.S. § 3211(a); 25 Pa.Code § 78a.11, and these permits generally remain in effect for the life of the well, 58 Pa.C.S. § 3211(e.1)(6).

48. Permit applicants must provide detailed information about the well and, in the case of a corporation, company, or partnership, the entities involved in

ownership, control, and operation of the well. *Id.* § 3211(b)–(c); 25 Pa.Code §§ 78a.11–15; DEP, Permit Appl. to Drill and Operate an Unconventional Well, Form 8000-PM-OOGM0001bU (Rev. 5/2017); DEP, Oil and Gas Operator Ownership and Control Info., Form 8000-FM-OOGM0118 (Rev. 3/2012); DEP, Operator’s Gen. Info. Form, Form 8000-FM-OOGM0099 (Rev. 4/2012).

49. Any changes in the structure of these entities must be reported within 30 days. DEP Form 8000-FM-OOGM0099 at 1.³

50. An applicant for a DEP permit must designate the person who will serve as the well operator and, if that person is not a Pennsylvania resident, a designated agent to serve as attorney-in-fact. 58 Pa.C.S. § 3211(c); DEP Form 8000-FM-OOGM0099 at 1; *see* 58 Pa.C.S. § 3203 (defining well operator); 25 Pa.Code § 78.1 (same).

51. The well operator is assigned a DEP identification number for purposes of transacting business with DEP, *see* DEP, Instructions for Completing an Appl. for a Permit to Drill or Alter an Oil or Gas Well, Form 8000-PM-OOGM001 at 2-3, and DEP maintains a database with detailed information about each of these wells, *see* DEP, Oil & Gas Reports, <https://www.dep.pa.gov/DataandTools/Reports/Oil%20and%20Gas%20Reports/pages/default.aspx>; *see also* 58 Pa.C.S. § 2304(a)

³ These forms are available, along with additional forms cited *infra*, on DEP’s website at <https://www.dep.pa.gov/Business/Energy/OilandGasPrograms/OilandGasMgmt/Forms/Pages/default.aspx>.

(requiring DEP to provide updated monthly list of unconventional gas wells to Commission).

52. DEP requires permittees to provide written notice within 30 days of certain events, including transfers in well ownership or changes in the permittee's address. 58 Pa.C.S. § 3223.

53. DEP well permits cannot be transferred to another person without DEP's prior written approval. *Id.* § 3211(k); *see also* 25 Pa.Code § 78a.13(a) ("No transfer, assignment or sale of rights granted under a permit ... may be made without [its] prior written approval.").

54. The well operator also cannot be changed without filing an application to transfer the permit itself. 25 Pa.Code § 78a.14(b)(4).

55. And DEP's guidance explicitly states that when such an application is filed, "[t]he transferor (old operator) is held liable for the wells until DEP approves the transfer of responsibility." Form 5500-PM-OG0010 at 3.

56. In summary, the DEP permit provides a clear basis for determining the wells and producers that are subject to impact and spud fees under Act 13.

57. DEP is required to issue a permit for each unconventional gas well; the person who holds or is otherwise authorized to exercise the rights granted in that permit can be readily identified; and those rights cannot be transferred to another person without DEP's prior written approval.

58. Under the plain language of Act 13, then, the “producer” is the person who holds or is authorized to exercise the rights granted in the DEP permit for an unconventional gas well. *See* 1 Pa.C.S. § 1921(b).

The fee due date, reporting, and Commission-cost requirements in Section 2303(a)

59. The remaining question is how that principle applies to this case.

60. That answer, too, is clear from the plain text of the statute and confirmed by the statute’s purpose.

61. Turning first to the text, Section 2303(b) refers to “the previous calendar year” in describing the “producer” required “to submit payment of the fee ... and a report.” 58 Pa.C.S. § 2303(b).

62. That explicit reference supports the conclusion that the producer during that calendar year is required to submit the report and pay the fee.

63. The use of the “average annual price of natural gas” during the prior calendar year in calculating the amount of the fee supports that conclusion as well. *Id.* § 2302(b)(1)–(5) (using “average annual price of natural gas” to set thresholds for calculating amount of fee owed), (6) (“For purposes of this subsection, the fee shall be determined using the average annual price of natural gas for the calendar year in which the fee is imposed”); *see also id.* § 2301 (defining “average annual price of natural gas” with reference to NYMEX settled price for near-month

contracts “for the last trading day of each month of a calendar year for the 12-month period ending December 31”).

64. Section 2303(a)’s description of April 1 as the “due date” reinforces that conclusion.

65. The use of the phrase “due date” is consistent with a self-reporting regime that provides the producer during the previous calendar year with a three-month window for compliance.

66. That window opens January 1 (when the “average annual price of natural gas” during the previous calendar year can be determined with certainty) and closes April 1 (when the fee “become[s] delinquent if not remitted to the [C]ommission”). *Id.* § 2303(a)(1).

67. Providing the producer during the previous calendar year a three-month window to prepare the report and remit the fee makes perfect sense.

68. After all, that is the producer who possesses the required information and who “engage[d] in the business of severing natural gas for sale, profit or commercial use” from the well during the previous calendar year. *Id.* § 2301; *see also id.* § 2303(b) (describing detailed information that must be included in report).

69. What does not make sense is treating the April 1 due date as the basis for determining which producer is required to report and remit the prior year’s fee.

70. Act 13 does not create a 15-month calendar year for determining fee liability, let alone one that runs concurrently with different and overlapping periods for determining the applicability of fees to unconventional gas wells and producers.

71. Nor does Act 13 create a “hot potato” scheme for determining the liability of producers as the Commission suggested to the Bankruptcy Court. (Ex. B ¶ 26.)

72. Act 13 generated more than \$234 million in impact fees in CY2021. Press Release, PUC, PUC Details \$234 Million Distribution of Gas Drilling Impact Fees (June 17, 2022), <https://www.puc.pa.gov/press-release/2022/puc-details-234-million-distribution-of-gas-drilling-impact-fees>.

73. The notion that the General Assembly created a \$234 million hot potato for producers to “pass ... around freely” until “the music stops” is absurd.

74. Still other provisions in Act 13 support that it is the producer during the prior calendar year, not on April 1, that controls.

75. Section 2302(e), for example, provides that “[p]ayments of the fee shall cease upon certification to [DEP] by the producer that the unconventional gas well has ceased production and has been plugged according to the regulations established by [DEP].” 58 Pa.C.S. § 2302(e).

76. The Commission has said that the fee for the calendar year when a well meets the requirements in Section 2302 has already accrued and must be paid by the producer by April 1 of the following calendar year. 12/2012 Impl. Order at 8–10.

77. Because a DEP permit is no longer in force once a well is plugged, 58 Pa.C.S. § 3211(i), the producer who held that permit during the prior calendar year must be the one required to submit the report and remit the fee.

78. Finally, requiring the producer who holds the permit during the prior calendar year to report and remit the fee by the April 1 due date is consistent with the purposes of Act 13. *Snyder Bros., Inc v. PUC*, 198 A.3d 1056, 1059 (Pa. 2018) (“*Snyder Bros. I*”); 10/2013 Prop. Rulemaking Order at 16–17.

79. As the name suggests, impact fees are intended to compensate for impacts caused by drilling and operation of unconventional gas wells during the previous calendar year. *Snyder Bros. I*, 198 A.3d at 1059.

80. Requiring the producer who caused those impacts to make the payment is entirely consistent with that regime.

81. Shifting that obligation to a subsequent owner, who had no legal, financial, or other interest in the wells and did not profit from those impacts, is not. *Cf. Snyder Bros. I*, 198 A.3d at 1079 (interpretation of Act 13 that “would permit well operators who have enjoyed robust production from their wells ... to avoid paying the impact fees” was “unreasonable”).

82. It is undisputed that Rockdale held the DEP permits for the Rockdale Wells from January 1 to December 31, 2021. (Compl. ¶ 16.)

83. It is likewise undisputed that Rockdale filed the CY2021 report for the Rockdale Wells, that the Commission sent Rockdale two invoices seeking payment of the CY2021 fees, and that Rockdale did not pay those fees by the April 1 due date.

84. Nor is there any dispute that Repsol did not hold and was not otherwise authorized to exercise the rights granted in the DEP permits for the Rockdale Wells from January 1 to December 31, 2021.

85. Indeed, Repsol did not own, operate, or have any legal or financial interest whatsoever in the Rockdale Wells during CY2021. (*See* Compl. ¶ 19.)

86. For these reasons, Repsol was not the producer for the Rockdale Wells during the calendar year and, therefore, had no legal obligation to report or remit payment of the CY2021 fees for the Rockdale Wells under Act 13.

The Commission's anticipated counterarguments lack merit

87. Before the Pennsylvania Supreme Court, the Commission largely evaded Repsol's points regarding the definition of "producer" in Section 2301 and instead suggested that Section 2303(a)(2) supports its reading of Act 13. (Ex. A at 50.)

88. According to the Commission, Section 2303(a)—which states, “[f]or wells spud before January 1, 2012, a fee imposed under this chapter shall be due by September 1, 2012,” 58 Pa.C.S. § 2303(a)(2)—substantiates its theory that Repsol is retroactively liable for the CY2021 fees because “[w]hatever entity owned or operated a well in 2011 was irrelevant to who was responsible for paying the Impact and Spud Fees on September 1, 2012.” (Ex. A at 51.)

89. Ironically, this argument reinforces Repsol’s interpretation of the statute, not the Commission’s.

90. Upon enactment, Act 13 authorized counties to pass ordinances imposing unconventional gas well fees during a 60-day period following the new law’s effective date. 58 Pa.C.S. § 2302(a), (a.1).⁴

91. When counties adopted an ordinance imposing the fee, any unconventional gas well spud prior to January 1, 2012, was treated as though it had been spud during the 2011 calendar year. *Id.* § 2302(b) (“The fee adopted ... under subsection (a), (a.1) or (a.4) is imposed on every producer and shall apply to unconventional gas wells spud in this Commonwealth regardless of when spudding

⁴ If the governing body of a county failed to enact such an ordinance within the 60-day period, Section 2302(a) authorized the municipalities within that county to enact a resolution imposing the fee within the next 60 days, provided the municipalities satisfied certain threshold criteria. No municipalities used the alternative fee mechanism to impose the impact fee, and the provision only applied during the window immediately following enactment of Act 13. Act 13 of 2012—Implementation of Unconventional Gas Well Impact Fee Act, Implementation Order Regarding Chapter 23, PUC Docket No. M-2012-2288561, at *4 (May 10, 2012). Repsol therefore omits any discussion of the alternative fee mechanism from its analysis of the relevant statutory provisions.

occurred. *Unconventional gas wells spud before the fee is imposed shall be considered to be spud in the calendar year prior to the imposition of the fee for purposes of determining the fee under this subsection.*” (emphasis added)).

92. In other words, Act 13 makes clear that the county ordinances enacted during the 60-day post-enactment window imposed a fee on any well spud prior to January 1, 2012—for the 2011 calendar year, *not* the 2012 calendar year.

93. The text of Sections 2303(a) and (b) confirms this understanding.

94. Section 2303(a)(2), the provision the Commission relies upon, created an exception from the general April 1 fee due date for wells spud prior to January 1, 2012, to accommodate the enactment of ordinances imposing the 2011 calendar year fees and provide producers with time to file reports and pay those fees.

95. The plain language of Section 2303(b) supports that understanding in stating that, “[b]y September 1, 2012, ... each producer shall submit payment of the fee to the commission and a report on a form prescribed by the commission for the *previous calendar year.*” *Id.* § 2303(b) (emphasis added); *see, e.g., Greenwood Gaming & Ent., Inc. v. Dep’t of Revenue*, 306 A.3d 319, 329 (Pa. 2023) (“The best indicator of the Legislature’s intent is the plain language of a statute, and where the language is clear and unambiguous, we give effect to the plain language thereof.”).

96. The “previous calendar year” referenced in Section 2303(b) was 2011, *not* 2012. 1 Pa.C.S. § 1903(a); *see, e.g., Ieropoli v. AC&S Corp.*, 842 A.2d 919, 929

(Pa. 2004) (“A statute’s words ... are to be construed according to their common and approved meaning.”).

97. Nor does Section 2303(a)(2) support the Commission’s claim that September 1, 2012, was the relevant date for determining the producer required to report and remit the 2011 calendar year fees. (Ex. A at 51.)

98. When the counties enacted the ordinances during the initial 60-day period, the definition of producer in Section 2301 was in effect, *see* Act 13, § 9(1)(i), and as noted above, that definition clearly establishes that the producer was the person who held or was otherwise authorized to exercise the rights granted in the DEP permit for the well at that time.

99. That person is also the producer who had the obligation to report and remit the 2011 calendar year fees by the September 1, 2012 due date. 58 Pa.C.S. § 2303(a)(2), (b).

100. Stated differently, September 1, 2012, was the date when the producer of a well spud prior to January 1, 2012, had to report and remit the fee that the county ordinance imposed for the 2011 calendar year, *not* the date for determining the producer required to make the payment.

101. That is why Section 2303(a) stated that “the fee shall become delinquent if not remitted to the commission on the reporting date.” *Id.* § 2303(a)(1).

102. In short, instead of refuting Repsol’s position, the Commission’s anticipated counterarguments demonstrate the wisdom of performing a comprehensive analysis of Act 13.

103. Repsol’s analysis accounts for the specific provisions authorizing the imposition, reporting, and payment of the 2011 calendar year fees *and* is consistent with the rest of the general scheme for reporting and remitting the fees imposed for subsequent calendar years.⁵

104. The Commission’s sparse analysis, in contrast, divorces a single provision from its context to justify a reading that conflicts with the balance of Act 13, in violation of settled principles of statutory interpretation. *See, e.g., In re Tr. Under Deed of David P. Kulig Dated Jan. 12, 2001*, 175 A.3d 222, 232 (Pa. 2017) (statutory terms “must [be] read ... with reference to the context in which they appear”); *Allegheny Cnty. Sportsmen’s League v. Rendell*, 860 A.2d 10, 19 (Pa. 2004) (every word, sentence, or provision of a statute must be given meaning

⁵ Repsol notes that the provisions in Section 2302(a), (a.1), (a)(4), and (b) authorizing counties (or, alternatively, their constituent municipalities) to impose the 2011 calendar year fees on producers of wells spud prior to January 1, 2012, are unique. Those provisions explicitly authorized the 2011 calendar year fees to be imposed on producers who held the permits for those wells during the 2012 calendar year, so long as the counties (or, alternatively, their constituent municipalities) acted within the window established in Act 13. However, Section 2302(a.3) also makes clear that counties who failed to enact an ordinance within the window could not receive funds generated from the 2011 calendar year fees. Section 2302(a.3) further states that a county can enact an ordinance imposing the fee after the expiration of the 60-day window, but that funds can only “be received for the calendar year following the adoption of an ordinance imposing the fee.” 58 Pa.C.S. §2302(a.3)(2). These provisions support the understanding that fees are imposed on a calendar-year basis and that, except for the 2011 calendar year, fees are imposed prospectively.

because the Legislature presumably intended to avoid mere surplusage); *Pleasant Hills Constr. Co. v. Pub. Auditorium Auth.*, 784 A.2d 1277, 1281 (Pa. 2001) (cannot rewrite statute under guise of statutory interpretation).

105. And to the extent that the Commission contends that Repsol is liable for the CY2021 Fees because it was allegedly “authorized” to exercise producer rights before obtaining the DEP permit, (Compl. ¶ 7 (quoting Section 2301 and italicizing the phrase “or other authorization”)), “authorization” means “[o]fficial permission to do something.” *Authorization*, BLACK’S LAW DICTIONARY (11th ed. 2019), and Repsol did not have “official permission” to “sever[] natural gas for sale” from the Rockdale Wells for purposes of Section 2301 until DEP approved the application to transfer the permits.

106. The Formal Complaint should therefore be dismissed with prejudice. *See, e.g., Blackwood*, 147 A.3d at 598; *see Carlino*, 453 A.2d at 1388–89.

WHEREFORE, Respondent Repsol Oil and Gas USA, LLC respectfully request that the Presiding Officer assigned to the above-captioned proceeding sustain Repsol’s preliminary objection for legal insufficiency of a pleading and enter the form of Order herewith.

Legal insufficiency of a pleading (52 Pa. Code § 5.101(a)(4))

107. Even if the April 1 due date is the relevant period for determining the producer required to report and remit payment of the CY2021 fees, dismissal of the Formal Complaint is still warranted.

108. At the very least, a person must hold (or be otherwise authorized to exercise the rights granted in) the DEP permit for an unconventional gas well by April 1 to be the producer required to report and remit the prior calendar year's fees under Act 13.

109. Otherwise, a person who has not yet become the producer could be deemed *retroactively liable and automatically delinquent* for failing to meet these obligations.

110. Indeed, the Commission appears to be proffering that very argument here. (Compl. ¶ 22 (“On or about June 22, 2022, DEP transferred all applicable permits from Rockdale to Repsol *but backdated the effective date* of the permits to February 7, 2022.” (emphasis in original).)

111. Nothing suggests that the General Assembly intended to expose a future producer to sanctions, including additional fines, fees, penalties, and interest, as well as potential denial or suspension of DEP permits, for failing to comply with Act 13's requirements after-the-fact. 58 Pa.C.S. §§ 2307(e), 2308(a)–(c), 2310.

112. The absurdity of that result is obvious. *See* 1 Pa.C.S. § 1922(1); *see, e.g., Allegheny County v. Moon Twp. Mun. Auth.*, 671 A.2d 662, 666 (Pa. 1996) (“It is well established that when determining the meaning of a statute, we must assume that the intent of the General Assembly was not to produce an absurd or unreasonable result.”).

113. In fact, the Commission itself has specifically rejected interpretations of Act 13 that would have such impermissible retroactive effect. 12/2012 Impl. Order at 9.

114. For example, the Commission has stated that cessation of production and plugging of an unconventional gas well under Section 2302(e) do not relieve the producer of its obligation to report and remit the fees for that calendar year, because such an “interpretation would effectively make cessation retroactive, a result not envisioned by 58 Pa.C.S. § 2302(e).” *Id.*

115. That principle applies with equal force to interpretations of Act 13 that would impose retroactive reporting and payment obligations on someone who did not meet the definition of a producer on the April 1 due date.

116. Again, it is undisputed that Rockdale held and was the only person authorized to exercise the rights granted in the DEP permits for the Rockdale Wells from January 1, 2021, through April 1, 2022, the due date for the CY2021 report and fees.

117. As the holder and only person authorized to exercise the rights granted in the DEP permits at all relevant times, Rockdale was the producer required to file the report for and remit the CY2021 fees, a position the Commission itself acknowledged in the bankruptcy proceeding. (Ex. B ¶¶ 12, 13, 16.)

118. Indeed, in answering the Plan Administrator's objection to paying the CY2021 invoices for the Rockdale Wells, the Commission specifically represented to the Bankruptcy Court that "as the producer filing the report and the holder of the permits, [Rockdale] held itself out as the party who will be responsible for paying the Act 13 impact and spud fee as of April 1, 2022." (*Id.* ¶ 16.)

119. The Commission's decision to enter into a settlement agreement with Rockdale resolving payment of the outstanding invoices for CY2021, and the Bankruptcy Court's approval of that agreement, confirms the foregoing conclusions.

120. Conversely, it is equally undisputed that Repsol did not hold and was not authorized to exercise the rights granted in the DEP permits for the Rockdale Wells at any time before April 1, 2022.

121. In fact, DEP did not approve the transfer of those permits from Rockdale to Repsol until months after that date. (Compl. ¶ 22.)

122. The Commission acknowledged as much to the Bankruptcy Court. *In re: Rockdale*, Dkt. 1274 ¶18.

123. Under Pennsylvania law, Rockdale remained liable for the Rockdale Wells until the DEP approved the transfer application. 58 Pa.C.S. § 3211(k); 25 Pa.Code §§ 78a.13(a), 78a.14(b)(4); DEP Form 5500-PM-OG0010 at 3.

124. For these reasons, Repsol would still not be liable for the CY2021 Fees as a matter of law even if the April 1 due date is the relevant period for determining the producer required to report and remit payment of the CY2021 fees.

125. The Formal Complaint should thus be dismissed with prejudice. *See, e.g., Blackwood*, 147 A.3d at 598; *see Carlino*, 453 A.2d at 1388–89.

WHEREFORE, Respondent Repsol Oil and Gas USA, LLC respectfully request that the Presiding Officer assigned to the above-captioned proceeding sustain Repsol's preliminary objection for legal insufficiency of a pleading and enter the form of Order herewith.

Lack of prior notice (52 Pa. Code § 5.101(a)(4), (5))

126. The Due Process Clause of the Fourteenth Amendment to the United States Constitution requires the government to provide fair and adequate notice before imposing a potential monetary liability on regulated parties. *Snyder Bros. II*, 2020 WL 587012, at *9–13; *see Emp. Sols. Staffing Grp. II, L.L.C. v. Office of Chief Admin. Hearing Officer*, 833 F.3d 480, 487–488 (5th Cir. 2016); *ExxonMobil Pipeline Co. v. U.S. Dep't of Transp.*, 867 F.3d 564, 578–480 (5th Cir. 2017).

127. Nothing in Act 13 provides fair and adequate notice that a producer who acquires an unconventional gas well will be retroactively liable for reporting and remitting payment of the prior calendar year's fees. *Emp. Solutions*, 833 F.3d at 487 ("Statutes ... which allow monetary penalties against those who violate them must give fair warning of the conduct they prohibit or require." (cleaned up)).

128. The conduct of the parties in the Rockdale bankruptcy proceeding confirms that fair and adequate notice of any such obligation was clearly lacking here.

129. In the fall of 2021, Rockdale filed for bankruptcy. (Compl. ¶ 17.)

130. Rockdale identified the estimated impact fee for CY2021 as a liability and listed the Commission as the corresponding creditor in its filings with the Bankruptcy Court. *In re: Rockdale*, Dkt. 258.

131. Rockdale and Repsol subsequently entered into a Purchase and Sale Agreement ("PSA") that the Bankruptcy Court approved, whereby Repsol agreed to acquire the Rockdale Wells and certain other Rockdale assets. (Compl., Ex. A.)

132. Repsol did not agree to purchase any of Rockdale's liabilities. (*Id.*)

133. The sale closed on January 19, 2022, and Repsol assumed ownership of the Rockdale Wells effective January 1, 2022. (Compl. ¶ 19.)

134. On February 9, 2022, Rockdale filed an Act 13 report with the Commission for CY2021.

135. Rockdale, as the holder of and person authorized to exercise the rights granted in the DEP permits, included each of the Rockdale Wells on that report, and the Commission sent two invoices to Rockdale later that same day.

136. The invoices indicated that, for the period from January 1, 2021, through December 31, 2021, Rockdale owed \$1,428,100 in impact fees and \$3,600 in spud fees for the Rockdale Wells.

137. The Plan Administrator for the bankruptcy estate objected to Rockdale's obligation to pay the CY2021 impact fees.

138. The Administrator asserted that, among other things, the fees were not taxes entitled to priority treatment, the Commission failed to file a timely proof of claim by the March 21, 2022 bar date, and the fees should be paid as a general unsecured claim at best. *In re: Rockdale*, Dkt. 1176 ¶23.

139. The Commission responded by insisting that Act 13 required Rockdale to pay the CY2021 impact fees.

140. It noted that Rockdale filed the CY2021 report for the Rockdale Wells on February 9, 2022, and that Rockdale held the permits for each of those wells on April 1, 2022. (Ex. B ¶¶ 12, 13, 16.)

141. The Commission did not contend that Repsol had any obligation under Act 13 to pay the fees.

142. The Commission filed a motion asking the Bankruptcy Court to interpret, implement, and enforce the PSA before ruling on the objection.

143. Citing an alleged ambiguity, the Commission argued the CY2021 impact fee should be treated as an environmental obligation, rather than a tax, for purposes of the PSA. *See In re: Rockdale*, Dkt. 1274 ¶ 26.

144. It further argued that the Court should require the Plan Administrator—and, for the first time, Repsol—to pay the CY2021 impact fees in full. *Id.* ¶ 36.

145. Thus, Rockdale, Repsol, *and* the Commission all treated the CY2021 fees as a liability owed by Rockdale until September 26, 2022, when the Commission filed a motion asking the Bankruptcy Court to interpret the PSA.

146. The actions of Rockdale and Repsol—and the Commission’s months-long delay in presenting its theory of retroactive liability—confirm the absence of prior notice of the Commission’s *post hoc* view of Act 13.

147. Nor can the Commission provide fair warning of an obligation that does not exist under Act 13 by making statements in an implementing order, enforcement case, or subsequent pleading.

148. The notice must be provided in the statute itself or a regulation with the force and effect of law. *See Emp. Solutions*, 833 F.3d at 487.

149. And none of the Commission’s prior statements gave Repsol fair warning of any retroactive obligation under Act 13 to report and remit the CY2021 fees for the Rockdale Wells.

150. In addressing “[t]he issue of responsibility for payment of the impact fee ... where the producer for a particular well changes,” for example, the Commission offered only that:

Our interpretation of [58 Pa.C.S. §2303(b)] is that the producer filing the report is responsible for paying the impact fee. 58 Pa.C.S. §2303(b) provides that the liability for fee payment attaches to the producer who is responsible for filing the report. To the extent a particular producer, responsible for filing the report, acquired its interest in the well before an annual report is filed that would have included the subject well, that producer is required to include that well in its report and pay the fee for that well.

12/2012 Impl. Order at 1.

151. The Commission later observed in a footnote summarizing this guidance “that the producer filing the annual producer report by April 1 of each year is responsible for paying the impact fee.” 10/2013 Prop. Rulemaking Order at 16–17 n.23.

152. The Commission’s prior statements did not provide Repsol with fair and adequate notice of the position it has taken in this proceeding.

153. The Commission simply said that the producer “filing the report” or “responsible for filing the report” is required to pay the prior calendar year’s fees.

154. The former confirms that Rockdale, not Repsol, is the producer required to pay the CY2021 fees for the Rockdale Wells, and the latter does nothing more than beg the question.

155. Saying the producer “responsible for filing the report” is required to pay the prior calendar year fees does not provide a regulated party with fair and adequate notice of anything.

156. More importantly, the Commission’s prior statements in no way indicate that a producer who acquires an unconventional gas well is *retroactively liable* for reporting and remitting the prior calendar year fees.

157. That omission is significant as the Commission rejected other interpretations of Act 13 that would have had an impermissible retroactive effect within the very same order. 12/2012 Impl. Order at 9.

158. Nothing in the text of Section 2303(b) supports a different application of the principle of non-retroactivity, and there is certainly nothing in the Commission’s prior statements that provide fair and adequate notice of any such distinction.

159. Nor can the Commission use its *post hoc* litigation position to provide Repsol with prior notice after-the-fact.

160. Unlike DEP, which intervened in the bankruptcy proceeding before the Bankruptcy Court approved the PSA authorizing sale of the Rockdale Wells, the Commission did not intervene until months after the sale occurred.

161. If the Commission truly believed the acquisition would make Repsol liable for the CY2021 fees, it had ample opportunity to notify the parties and the Bankruptcy Court of that position by objecting to the provision in the PSA that memorialized Rockdale's liability for those fees.

162. The Commission instead chose not to participate in the bankruptcy process until after the Court approved the PSA and Repsol acquired the Rockdale Wells (and, according to the Commission's position in this litigation, purportedly became liable for paying the CY2021 fees).

163. It is well-settled that fair and adequate notice must be provided before—not after—a regulated party engages in conduct that creates a monetary liability to the government. *Snyder Bros. II*, 2020 WL 587012, at *9–13; *see Emp. Sols. Staffing Grp. II*, 833 F.3d at 487–488; *ExxonMobil Pipeline*, 867 F.3d at 478–480 (5th Cir. 2017).

164. The Commission forfeited the opportunity to provide Repsol with that notice by declining to participate on a timely basis in the bankruptcy process.

165. Finally, as the Commonwealth Court explained on remand in *Snyder Brothers II*, “the requirement of clear and adequate notice is not satisfied where the

administrative agency offers baffling and inconsistent advice.” 2020 WL 587012, at *10 (cleaned up).

166. The defining characteristic of the Commission’s current litigation position is *inconsistency*.

167. To recap:

- a. Despite previously advising that the DEP permit controls in applying the impact and spud fee provisions in Act 13, the Commission now says that principle does not apply in determining whether a person meets Section 2301’s definition of producer;
- b. Despite previously advising that Act 13 should not be applied to have impermissible retroactive effect, the Commission now says that principle does not apply in determining the producer required to report and remit the prior calendar year fees under Section 2303;
- c. Despite previously advising that the producer who files the report for a well is required to remit the prior calendar year fees under Section 2303, the Commission now says that principle does not apply if the producer who files the report held the permits for the well during the prior year, but sold it to another producer before the April 1 due date; and
- d. Despite previously advising that the DEP permit for a well controls in applying Act 13’s impact and spud fee provisions, the Commission now says a person can meet the definition of a “producer” before the DEP approves an application to transfer the rights granted in such a permit to that person.

168. In sum, the Commission’s current arguments are completely at odds with all prior guidance on implementation of Act 13.

169. Such vacillation is the antithesis of constitutionally adequate notice.

170. Accordingly, the Formal Complaint should thus be dismissed with prejudice. *See, e.g., Blackwood*, 147 A.3d at 598; *see Carlino*, 453 A.2d at 1388–89.

WHEREFORE, Respondent Repsol Oil and Gas USA, LLC respectfully request that the Presiding Officer assigned to the above-captioned proceeding sustain Repsol’s preliminary objection for legal insufficiency of a pleading/lack of capacity to sue and enter the form of Order herewith.

Respectfully submitted,

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Dated: January 26, 2026

EXHIBIT A

Repsol Oil & Gas USA, LLC v. PUC, No. 62
MAP 2024 (Pa.), Brief of Appellee

IN THE SUPREME COURT OF PENNSYLVANIA

Repsol Oil & Gas USA, LLC,	:	
Petitioner	:	
	:	
v.	:	Docket No. 62 MAP 2024
	:	
Pennsylvania Public Utility	:	
Commission,	:	
Respondent	:	

BRIEF FOR RESPONDENT
PENNSYLVANIA PUBLIC UTILITY COMMISSION

In support of the Memorandum Opinion and Order of the *en banc* Commonwealth Court of Pennsylvania entered on July 23, 2024 at Docket No. 613 MD 2022 sustaining the Pennsylvania Public Utility Commission’s Preliminary Objections.

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Dated: February 3, 2025

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<i>Pub. Util. Comm’n, Bureau of Investigation and Enforcement v. Snyder Brothers, Inc.</i> , (Commission Docket No. C-2014-2402746, filed June 11, 2015)	33

STATEMENT OF JURISDICTION

This Court has jurisdiction over this appeal pursuant to 42 Pa.C.S. § 723(a) and Pa.R.A.P. 1101, which govern appeals as of right from Orders of the Commonwealth Court.

ORDER OR OTHER DETERMINATION IN QUESTION

The order in question filed by the Commonwealth Court of Pennsylvania at Docket No. 613 MD 2022 reads as follows:

AND NOW, this 23rd day of July 2024, Respondent's preliminary objections on the basis that Petitioner has failed to exhaust administrative remedies are SUSTAINED and Petitioner's second amended petition for review is DISMISSED. Further, Respondent's remaining preliminary objections and Petitioner's application for summary relief are DISMISSED as moot.

A copy of the *Memorandum Opinion* and Order of the Commonwealth Court of Pennsylvania in the matter, *Repsol Oil and Gas, USA, LLC v. Pa. Pub. Util. Comm'n* at Docket No. 613 MD 2022 is attached as **Appendix A**.

STATEMENT OF THE SCOPE AND STANDARD OF REVIEW

Scope of review refers to “the confines within which an appellate court must conduct its examination. In other words, it refers to the *matters* (or “what”) the appellate court is permitted to examine.” *Morrison v. Commonwealth of Pa. Dep’t of Public Welfare*, 646 A.2d 565, 570 (Pa. 1994). As with all questions of law, this Court’s scope of review is plenary. *Ramich v. Worker’s Comp. Appeal Bd. (Schatz Electric)*, 770 A.2d 318, 321 (Pa. 2001).

Standard of review “refers to the *manner* (or “how”) that examination is conducted or the “degree of scrutiny” that is to be applied. *Morrison v. Commonwealth of Pa. Dep’t of Pub. Welfare*, 646 A.2d 565 (Pa. 1994). For the jurisdictional question presented here, the standard of review is *de novo*. *Blount v. Phila. Parking Auth.*, 65 A.2d 226, 229 (2009).

STATEMENT OF THE QUESTIONS INVOLVED

1. Did the Commonwealth Court correctly sustain the Commission's Preliminary Objections, finding that Repsol failed to exhaust adequate, available administrative remedies and improperly sought relief in the Commonwealth Court's original jurisdiction?

Suggested answer: Yes.

2. Did the Commonwealth Court correctly conclude that the exception to the exhaustion doctrine outlined in the *Arsenal Coal* line of cases is not applicable to Repsol's challenge to the invoice and spud fee invoices?

Suggested answer: Yes.

3. Did the Commonwealth Court correctly conclude that Act 13 and the Commission's regulations provide Repsol with an adequate and available administrative remedy?

Suggested answer: Yes.

4. Is Repsol's argument that it is the prior year producer that is responsible for payment of the Impact and Spud Fees without merit?

Suggested answer: Yes.

STATEMENT OF THE CASE

Procedural History

This matter involves the issue of who is responsible for payment of impact fees and administrative (spud) fees mandated by Chapter 23 of the Oil and Gas Act (Act 13)¹, when a gas well's owner, operator and producer changes. Repsol initiated this matter by filing with the Commonwealth Court a "Petition for Review in the Nature of a Complaint for Declaratory and Injunctive Relief" (Petition), dated December 16, 2022, against the Commission and the Pennsylvania Department of Environmental Protection (DEP). After filing the Petition, Repsol filed with the Court an Application for Relief in the Nature of a Preliminary or Special Injunction and Stay Pending Final Disposition of Related Bankruptcy Case (Application).

On February 16, 2023, the Commission filed an Answer to the Application. Also on February 16, 2023, the Commission and the DEP separately filed Preliminary Objections to Repsol's Petition. On February 24, 2023, the Commonwealth Court issued a Memorandum and Order, denying Repsol's Application.

¹ 58 Pa.C.S. §§ 2301–2318. These statutory provisions are part of the Act of February 14, 2012, P.L. 87, No. 13, which is more commonly known as "Act 13."

On March 10, 2023, Repsol filed an Application for Reconsideration of the Commonwealth Court's February 24, 2023, Memorandum and Order denying injunctive relief. On March 20, 2023, Repsol, in response to the Commission's Preliminary Objections, filed an Amended Petition for Review in the Nature of a Complaint for Declaratory and Injunctive Relief (First Amended Petition).

On March 21, 2023, Repsol filed an Application for Relief in the Nature of a Motion for Discontinuance as to Respondent DEP.

On March 23, 2023, the Commission filed an Answer to Repsol's Application for Reconsideration of the Commonwealth Court's February 24, 2023, Memorandum and Order which denied Repsol's Application.

On March 28, 2023, Repsol filed an Application for Relief in the Nature of a Motion for Leave to File, if Necessary, an Amended Application for Reconsideration of the Commonwealth Court's February 24, 2023 Memorandum and Order that had denied Repsol's request for injunctive relief.

On April 12, 2023, the Commonwealth Court issued an Order Denying Repsol's Application for Reconsideration of its February 24, 2023, Memorandum and Order denying injunctive relief.

On April 18, 2023, the Commission filed Preliminary Objections to Repsol's First Amended Petition for Review.

On April 24, 2023, the Commonwealth Court issued an Order granting Repsol's Application for Relief in the Nature of a Motion for Discontinuance as to Respondent DEP.

On May 17, 2023, in response to the Commission's second set of Preliminary Objections, Repsol filed with the Commonwealth Court a Second Amended Petition for Review in the Nature of a Complaint for Declaratory and Injunctive Relief. On or about June 13, 2023, the Commission filed a third set of Preliminary Objections to Repsol's Second Amended Petition for Review.

On or about July 13, 2023, Repsol filed a Response to the Commission's Preliminary Objections to the Second Amended Petition for Review.

On August 21, 2023, the Commission filed its Main Brief in support of its Preliminary Objections to Repsol's Second Amended Petition for Review. On September 18, 2023, Repsol filed its Main Brief in opposition to these Preliminary Objections. On October 2, 2023, the Commission filed its Reply Brief in support of its Preliminary Objections to Repsol's Second Amended Petition for Review. On October 23, 2023, after seeking relief from the Commonwealth Court for leave to file a Sur-Reply Brief, Repsol filed a Sur-Reply Brief in opposition to the Preliminary Objections.

On November 22, 2023, Repsol filed with the Commonwealth Court an Application for Summary Relief. On December 12, 2023, the Commission filed an

Answer to Repsol's Application for Summary Relief. On December 14, 2023, the Commonwealth Court issued an Order directing that the parties file briefs in support of their positions. On January 11, 2024, Repsol filed its brief in support of its Application for Summary Relief. On February 12, 2024, the Commission filed its brief in Opposition. On February 23, 2024, Repsol filed a Reply Brief.

The Commonwealth Court, sitting *en banc*, heard oral argument on the Commission's Preliminary Objections to Repsol's Second Amended Petition for Review and Repsol's Application for Summary Relief on May 8, 2024.

Subsequently, on May 20, 2024, Repsol filed an Application for Relief seeking to submit a post-argument brief on a single legal issue. The Commission filed an Answer to Repsol's Application on May 24, 2024. The Commonwealth Court granted Repsol's Application to brief an issue addressed at oral argument on May 31, 2024. Repsol then submitted its post-argument brief on the same day.

On July 23, 2024, the Commonwealth Court issued an Opinion and Order sustaining the Commission's first preliminary objection (failure to exhaust administrative remedies), dismissing Repsol's Application for Summary Relief, and declining to address the remainder of the Commission preliminary objections due to its ruling.

Factual History

Act 13 provides, *inter alia*, for an Impact Fee and an administrative Spud Fee to be paid annually by unconventional gas well producers. 58 Pa.C.S. §§ 2301, *et seq.* Act 13 became effective on February 14, 2012. Repsol or its corporate predecessor, Talisman Energy (Talisman), has been an owner and operator of unconventional gas wells since Act 13's inception.

The Impact Fee is intended to mitigate the environmental damages caused by unconventional drilling, with the primary recipients of the monies being the municipalities impacted by the drilling. *Snyder Brothers v. Pa. Pub. Util. Comm'n*, 198 A.3d 1056 (Pa. 2018) (*Snyder Brothers*). The Commission is the agency tasked with various administrative responsibilities for implementing, collecting, distributing, administering, and enforcing the Impact and Spud Fees. 58 Pa.C.S. §§ 2301–2314. The \$50 per well Spud Fee, authorized by Act 13, funds the administrative costs the Commission incurs in overseeing Act 13. 58 Pa.C.S. § 2303(c)(1). The first-year Impact and Spud fees were due on September 1, 2012. 58 Pa.C.S. § 2303(b). Thereafter, a producer must pay the Impact and Spud Fees no later than April 1st of each year. 58 Pa.C.S. § 2303(b).

Unconventional gas wells are frequently bought and sold. It is imperative that the fees be paid and not avoided through the course or timing of a sale transaction. Addressing this issue, the Commission determined in 2012, and later

affirmed in 2019, that 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. *Xtreme Energy* at *6; *Act 13 of 2012-Implementation of Unconventional Gas Well Impact Fee Act*, PUC Docket No. M-2012-2288561, (Order entered December 20, 2012) at 12, (*December 20, 2012 Implementation Order*) (emphasis added). Talisman, Repsol's corporate predecessor, as well as Amicus Pennsylvania Independent Oil & Gas Association (PIOGA) were active participants in the *December 20, 2012 Implementation Order* proceeding, and did not challenge the Commission's Order at that time.

Repsol purchased 72 wells on January 19, 2022 (retroactively effective to January 1, 2022) from two Texas companies, Rockdale Marcellus Holdings, LLC and Rockdale Marcellus, LLC (collectively, Rockdale), which had filed for Chapter 11 bankruptcy. *See Repsol Application for Relief in the Nature of a Preliminary or Special Injunction*, ¶53, Exhibit C (Sale Agreement) at Page 1 and Sections 4.3, 6.9. Therefore, Repsol owned the wells as of January 1, 2022. According to the terms of the Sale Agreement, Repsol also began acting as operator of those wells as of the execution date of the Sale Agreement, January 19, 2022. *See Repsol Application for Relief in the Nature of a Preliminary or Special Injunction*, Exhibit C (Sale Agreement) at Page 1 and Sections 4.3, 6.9. Thus, at

the very least, as of April 1, 2022, per the Sale Agreement, Repsol was both the owner and operator of the wells.

Consistent with that information, the Commission issued two invoices to Repsol for the 2022 Impact and Spud Fees for the 72 unconventional gas wells. Notwithstanding that Repsol has represented to the Commonwealth Court in its initial Petition for Review that it was familiar with the Commission's *December 20, 2012 Implementation Order* as well as with the Commission's decision in *Xtreme Energy* (Xtreme affirmed the December 20, 2012 Implementation Order), Repsol now contends that it is not responsible for paying the fees since, according to Repsol, it was not the "producer" of the wells. Repsol Original Pet. at ¶108. Instead, Repsol alleges that the prior owner and operator of the wells, Rockdale, is solely responsible for payment of the fees.

On December 16, 2022, Repsol filed Objections to the invoices, raising this issue before the Commission. On the same day, before the Commission had a chance to consider Repsol's objections Repsol filed a Petition for Review in the Nature of a Complaint for Declaratory and Injunctive Relief with the Commonwealth Court. As mentioned above, the Commission filed Preliminary Objections with the Commonwealth Court arguing, *inter alia*, that Repsol was in the wrong forum and could not bypass the statutorily established administrative

remedy. Out of deference to the Courts, the Commission held Repsol's invoice Objections in abeyance.

Rockdale Bankruptcy Proceeding

As noted, Repsol purchased the wells, effective January 1, 2022, in the context of a bankruptcy proceeding. It is uncontested that the fees for those wells were not paid as of the April 1, 2022, due date. In the Rockdale bankruptcy proceeding, the Commission raised a provisional claim against the bankruptcy estate. This claim was provisional since it was, and still is, undetermined whether Rockdale or Repsol is responsible for paying the Act 13 fees for the 72 wells.

On April 24, 2023, the Bankruptcy Court issued a Stipulation and Agreed Order Resolving Disputes Between the Rockdale Plan Administrator and the Commission, wherein the Rockdale Plan Administrator agreed to pay the Commission \$100,000 in full and final satisfaction of the *potential* liabilities asserted against the estate vis-a-vis the 2022 impact and spud fees. *In re: Rockdale Marcellus, LLC*, No. 21-22080 (Bankr. W.D. Pa.), Dkt. 1395, ¶2(a). The Bankruptcy Court's Order provided, in part:

This Agreement generally, and the Commission's acceptance of the Settlement Amount specifically, shall have no effect whatsoever on any action the PUC may pursue involving Repsol and its potential liability for payment of Impact and Spud fees, nor Repsol's defenses thereto under law and equity. The [Commission] expressly acknowledges and agrees that it is not entitled to more than one recovery. Notwithstanding this, the

Rockdale Plan Administrator waives any claim to a refund.

In re: Rockdale Marcellus, LLC, No. 21-22080 (Bankr. W.D. Pa.), Dkt. 1395, ¶6.

See PUC Brief in Support of Preliminary Objections, Attachment A.²

This matter involves the issue of who is responsible for payment of impact fees and administrative (spud) fees mandated by Act 13, when a gas well's owner, operator and producer changes. Here, Repsol's challenge to the fees is limited to its argument that it is not the "producer" responsible for payment of the fees.

While that is the substantive issue in this case, the matter before this Court is whether the Commonwealth Court correctly sustained the Commission's preliminary objection, finding that Repsol had improperly failed to exhaust adequate and available administrative remedies. Rather than availing itself of the remedies available in Act 13, Repsol attempted to bypass the administrative process, instead proceeding directly to Commonwealth Court.

² If it is ultimately determined that Repsol is responsible for payment of the Act 13 fees, the Commission will adjust the outstanding amount to reflect the \$100,000 payment from the Rockdale Plan Administrator, since the Plan Administrator waived any claim to a refund. Notwithstanding anything that occurred in the bankruptcy proceeding, it is Act 13 that dictates the entity responsible for payment of the Impact and Spud Fees. In fact, the Bankruptcy Court acknowledged that its ruling did not affect the Commission's right to seek payment of the fee from the responsible entity.

SUMMARY OF ARGUMENT

The issue before this Court is whether the Commonwealth Court correctly sustained the Commission's preliminary objection, finding that Repsol raised no argument justifying its attempt to bypass available administrative remedies under Act 13. The Court held that the validity of Repsol's challenge can be answered only by looking to Act 13 and the development of relevant facts through an administrative proceeding that should first be brought before the Commission.

Act 13 provides, *inter alia*, for an Impact Fee and an administrative Spud Fee to be paid annually by unconventional gas well producers and sets forth an administrative process regarding challenges to the imposition of those fees. 58 Pa.C.S. §§ 2301, *et seq.* Repsol's challenge to the fees is limited to its argument that it is not the "producer" responsible for payment of the fees. Consistent with Act 13, the Commission has repeatedly held that "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 [and spud] fee." *Xtreme Energy* at *6. To date, the Commission has only sent invoices to Repsol.

Challenges to the validity of those invoices can and should be heard by the Commission, consistent with the administrative process authorized by Act 13. Rather than availing itself of this administrative process and the remedies available in Act 13, Repsol attempted to bypass the statutorily-mandated administrative

process by proceeding directly to Commonwealth Court to challenge the Commission's mere issuance of invoices for the fees. However, Repsol must first exhaust available administrative remedies.

Where the legislature has provided an administrative procedure to challenge and obtain relief from an agency's action, failure to exhaust that remedy bars a court from hearing claims for declaratory or injunctive relief with respect to that agency action. While the requirement of exhaustion of administrative remedies is the general rule, a limited exception to that rule is where legal or equitable remedies are unavailable or inadequate, allowing review by a court without the necessity of exhaustion. Here, Repsol argues that exhaustion is not required and pre-enforcement review is appropriate under the *Arsenal Coal* line of cases. However, none of the factors justifying pre-enforcement review are present here.

The purpose of pre-enforcement review is to save a petitioning party, and all others similarly situated, from having to choose between two unworkable options: complying with a law of new or questionable application-at substantial cost and uncertainty going forward-or willfully violating the law to provoke enforcement so as to challenge it.

The Commonwealth Court properly found that Repsol failed to establish any of the necessary elements warranting pre-enforcement review. Repsol is not under threat of extensive penalties for ongoing violations during pendency of necessary

administrative litigation. To the contrary, the impact “fee is already known and fixed, and subject only to interest and a statutory penalty of, at most, 25% of the fee.” *Memorandum Opinion* at 17. Further, the Commission would not impose discretionary penalties where there is a good faith challenge to the fee. *Id.*

Additionally, Repsol’s challenge contains material issues of fact that must first be resolved by the Commission, including when and how Repsol began to hold a permit or other authorization to **engage in the business of severing natural gas for sale**, which controls its status as a *producer* and thus its liability.

Memorandum Opinion at 18.

Likewise, this case contains issues of law that are unique and call for the Commission’s expertise as the administrator of Act 13 to resolve, subject to appellate review.³ Furthermore, Act 13 explicitly provides an administrative process for handling disputes involving the impact fee. Repsol can, and has, initiated administrative action to review its objections, which has been placed on hold during this litigation. Additionally, Repsol’s concerns in this matter are unique to Repsol and do not have immediate industry wide implications that would

³ While Repsol incorrectly alleges that this case involves solely a question of law, that alone is not sufficient to warrant bypassing the available administrative process. This was precisely the case in *Snyder Brothers*, which involved a pure question of law: i.e., whether Act 13 requires marginally producing wells to pay the Impact Fee when those wells meet or exceed production requirements in at least one month in a calendar year. *Snyder Brothers* proceeded through the administrative process authorized by Act 13. As in *Snyder Brothers*, it is valuable to have the agency’s insight which is tasked with administration of a statute, with its concomitant expertise.

justify bypassing the available administrative process. Finally, as the Commonwealth Court held, to date, the only action taken by the Commission is to send Repsol an invoice for the fees, and Repsol has already commenced a concurrent challenge with the Commission. *Memorandum Opinion* at 18-19.

Under these circumstances, Repsol has failed to establish any viable reason to bypass Act 13's prescribed administrative process to adjudicate its dispute. The Commonwealth Court properly held that Act 13 provides an adequate, available administrative process for Repsol to pursue its challenge to the impact and spud fees. Accordingly, the Commonwealth Court properly granted the Commission's first preliminary objection and dismissed Repsol's complaint in its original jurisdiction.

ARGUMENT

I. The Commonwealth Court Correctly Sustained The Commission's Preliminary Objections, Finding That Repsol Failed To Exhaust Adequate, Available Administrative Remedies And Improperly Sought Relief In The Commonwealth Court's Original Jurisdiction

The sole question presented in this case is whether the Commonwealth Court, *en banc*, properly sustained the Commission's first Preliminary Objection⁴ when it concluded, unanimously, that Repsol failed to exhaust available and adequate administrative remedies. Repsol has raised no viable justification for bypassing administrative remedies explicitly authorized by Act 13. The Commonwealth Court thwarted Repsol's attempt to bypass the statutorily established administrative process to challenge Impact Fees by rejecting Repsol's request for immediate relief in that Court's original jurisdiction. The Commonwealth Court properly determined that Repsol must pursue, before the Commission, the objections to the Impact and Spud Fees that it had already filed with the Commission. Therefore, the Commission submits that the Commonwealth Court's July 23, 2024 Order sustaining the Commission's first Preliminary Objection should be affirmed.

⁴ The Commission filed six (6) preliminary objections to Repsol's Second Amended Petition for Review. However, the Commonwealth Court considered only the first preliminary objection, deeming the remainder irrelevant in light of the Court's ruling.

A. Doctrine Of Exhaustion Of Administrative Remedies

Exhaustion of statutory remedies and administrative remedies are related legal doctrines, which require petitioners such as Repsol to fully utilize all other avenues before seeking relief from a Court. If a statutory remedy is provided, it must be “strictly pursued.” 1 Pa.C.S. § 1504; *Lillian v. Commonwealth*, 354 A.2d 250, 252 (1976); *City of Phila., v. Sam Bobman Dep’t Store Co.*, 149 A.2d 518, 521 (Pa. Super. 1959). Likewise, the doctrine of exhaustion of administrative remedies requires a party to exhaust all available administrative remedies before seeking judicial review. *The Marstellar Cmy. Water Auth. v. Commonwealth of Pa., Dep’t of Env’tl. Res.*, 519 A.2d 1112, 1113 (Pa. Cmwlth.1987); *Funk v. Com., Dep’t of Env’tl. Prot.*, 71 A.3d 1097, 1101 (Pa. Cmwlth. 2013).

The purposes of this exhaustion requirement are to prevent premature judicial intervention in the administrative process and to ensure that claims will be addressed by the body with expertise in the area. *Id.* 519 A.2d at 1114. Thus, where the legislature has provided an administrative procedure to challenge and obtain relief from an agency’s action, failure to exhaust that remedy bars a Court from hearing claims for declaratory or injunctive relief with respect to that agency action. *Id.*

B. Administrative Remedy Authorized Under Act 13

Here, Act 13 provides Repsol the ability to pursue the relief it seeks. Specifically, Act 13 directs that Repsol must pursue its dispute before the Commission for issuance of a Final Order. 58 Pa.C.S. §§ 2307–2310. Act 13 further provides that a person aggrieved *by an order of the Commission* may appeal to the Commonwealth Court under 42 Pa.C.S. § 763 (relating to direct appeals from government agencies). 58 Pa.C.S. § 2309(a). Under the explicit provisions of Act 13, the Commission is the agency tasked with various administrative responsibilities for implementing, collecting, distributing, administering, and enforcing the Impact and Spud Fees imposed by Act 13, and has exclusive jurisdiction to adjudicate Repsol’s objections to the payment of Impact and Spud Fees. 58 Pa.C.S. §§ 2301, *et seq.*; *Snyder Brothers*, 198 A.3d at 1077-1078 (Pa. 2018). In fact, Section 2310(d), entitled “Procedure,” expressly provides that a penalty under Chapter 23 is subject to the Commission's investigation and hearing procedures under 66 Pa.C.S. Ch. 3 Subch. B (Public Utility Code). Pursuant to that statutory authorization, the Commission has promulgated extensive regulations governing administrative practice and the conduct of hearings. 52 Pa. Code Chapters 1, 3, and 5. Finally, in its *December 20, 2012 Implementation Order of Act 13*, the Commission clearly advised the industry that it would follow these regulations in disputes involving Impact and Spud fees. Repsol’s predecessor,

Talisman, as well as PIOGA were active participants to the *December 20, 2012 Implementation Order* proceeding.

Thus, Act 13 provides an administrative process to address Impact and Spud Fee challenges and Repsol has presented no reason to bypass this statutory directive. Under the procedure provided by Act 13, Repsol may challenge the issuance of an invoice, proceed with an administrative hearing before the Commission's Office of Administrative Law Judge (OALJ), seek review by the Commission of any OALJ ruling, and seek judicial (appellate) review of a final Commission Order. This procedure is provided by Act 13.

The Commission is charged with administering Act 13. This authority includes interpreting and enforcing Act 13 and determining the reasonableness and lawfulness of the imposition of Impact and Spud Fees. *See generally*, 58 Pa.C.S. §§ 2307–2310. This Honorable Court has previously determined that the Commission should be afforded deference in its interpretation of Act 13 where ambiguity exists. *Snyder Brothers*, 198 A.3d at 1077-1079 (Pa. 2018).⁵ Repsol offers no valid reason for deviating from the procedure available and authorized by Act 13, as utilized in *Snyder Brothers*.

⁵ *Snyder Brothers* involved a pure question of law: whether Act 13 requires marginally producing wells to pay the Impact Fee when those wells meet or exceed production requirements in at least one month in a calendar year.

Glaringly absent from both Repsol's and PIOGA's briefs is any citation to Section 2307(a) of Act 13. 58 Pa.C.S. § 2307(a). As the Commonwealth Court correctly stated, Section 2307 authorizes the Commission "to make all inquiries and determinations necessary to calculate and collect the fee" and "issue a notice of the amount due and demand for payment." 58 Pa.C.S. § 2307(a)-(b).

Memorandum Opinion at 10. In its *December 20, 2012 Implementation Order*, the Commission EXPRESSLY stated that it would address Act 13 Impact and Spud fee challenges using its rules of administrative practice and procedure. That Order provided:

To the extent there is a dispute regarding the accuracy of the producer's report, the Commission will address that dispute via the dispute mechanism established at Sections 2307-2313 of Act 13, 58 Pa.C.S. §§ 2307-2313. **These provisions will be enforced consistent with our general rules of practice and procedures found at 52 Pa. Code Chapters 1, 3, and 5.** We note that we will utilize formal proceedings only after informal efforts reveal that a dispute cannot be resolved. Under these circumstances, we believe that an adequate mechanism is already in place to account for well reclassification.

December 20, 2012 Implementation Order at *7 (emphasis added).⁶

As was stated by this Honorable Court of Pennsylvania in *Feingold v. Bell of Pa.*, 383 A.2d 791, 793 (Pa. 1977):

⁶ While this language deals with the issue of well reclassification, it is equally applicable to other disputes, such as Repsol's or Snyder Brothers', as the Commission explained in the *December 20, 2012 Implementation Order*.

This Court has long recognized and applied the general rule requiring a petitioner to exhaust all available administrative remedies before seeking judicial redress for an alleged wrongdoing by a public utility. The rationale behind this rule is clear. When the Legislature has seen fit to enact a pervasive regulatory scheme and to establish a governmental agency possessing expertise and broad regulatory and remedial powers to administer that statutory scheme, a court should be reluctant to interfere in those matters and disputes which were intended by the Legislature to be considered, at least initially, by the administrative agency. Full utilization of the expertise derived from the development of various administrative bodies would be frustrated by indiscriminate judicial intrusions into matters within the various agencies' respective domains (citations omitted).

While Act 13 producers are not public utilities, the same legal principle espoused in *Bell, supra*, is applicable here. Repsol must first exhaust the administrative remedies authorized by Act 13 and the Commission's regulations and its Act 13 Implementation Orders, before seeking relief, if necessary, in the Commonwealth Court's appellate jurisdiction. The doctrine of exhaustion of administrative remedies is intended to prevent the premature interruption of the administrative process, which would restrict the agency's opportunity to develop an adequate factual record, limit the agency in the exercise of its expertise, and impede the development of a cohesive body of law in that area. *Bucks Cnty. Servs., Inc. v. Phila. Parking Auth.*, 71 A.3d 379, 388 (Pa. Cmwlth. 2013).

Challenges to the validity of those invoices can and should be heard by the Commission, consistent with the administrative process available under Act 13.

However, rather than availing itself of this administrative process and the remedies made available in Act 13, Repsol attempted to bypass the statutorily-mandated administrative process before the Commission by proceeding directly to Commonwealth Court to challenge the Commission's mere issuance of invoices for the fees.

The Commonwealth Court correctly sustained the Commission's preliminary objection, finding that Repsol had provided no valid reason for failing to exhaust all adequate and available administrative remedies under Act 13.

II. The Commonwealth Court Correctly Concluded That The Exception To The Exhaustion Doctrine Outlined In The *Arsenal Coal* Line Of Cases Is Not Applicable To Repsol's Challenge

While the requirement of exhaustion of administrative remedies is the general rule, there are three exceptions to this rule that would allow a party to avoid exhaustion. Specifically, where "the jurisdiction of an agency is challenged," "the constitutionality of a statutory scheme or its validity is challenged," or "legal or equitable remedies are unavailable or inadequate," a party may seek immediate judicial review without first proceeding before an agency.

Keystone ReLeaf LLC v. Dep't of Health, 186 A.3d 505, 514 (Pa. Cmwlth. 2018) (*en banc*) (quoting *Empire Sanitary Landfill, Inc. v. Dep't of Env'tl. Res.*, 684 A.2d 1047, 1054 (Pa. 1996)). The Commonwealth Court noted that "pre-enforcement

review is an exception to the general rule of exhaustion, its application is limited.”

Memorandum Opinion at 15.

Repsol argues that its Second Amended Petition qualifies for pre-enforcement review pursuant to the *Arsenal Coal* line of cases. These cases allow a party to proceed directly to court for declaratory relief without exhausting an administrative remedy, but only if certain designated requirements are met. See *Arsenal Coal Co. v. Dep’t of Env’tl. Res.*, 477 A.2d 1333, 1338 (Pa. 1984); *Bayada Nurses, Inc. v. Dep’t of Labor & Indus.*, 8 A.3d 866, 874-76 (Pa. 2010); *EQT Prod. Co. v. Dep’t of Env’tl. Prot.*, 130 A.3d 752, 758 (Pa. 2015) (EQT); *Pa. Indep. Oil & Gas Ass’n v. Dep’t of Env’tl. Prot.*, 135 A.3d 1118, 1128 (Pa. Cmwlth. 2015) (*en banc*) (PIOGA). The purpose of pre-enforcement review is to save a petitioning party, and all others similarly situated, from having to choose between two unworkable options: complying with a law of new or questionable application—at substantial cost and with uncertainty going forward—or willfully violating that law to provoke enforcement to challenge it. *Firearm Owners Against Crime v. Papenfuse*, 261 A.3d 467, 486 n.14 (Pa. 2021). In *Arsenal Coal*, this Honorable Court found that pre-enforcement review is sometimes appropriate, even necessary, holding that “[w]here the effect of the challenged regulations **upon the industry regulated is direct and immediate**, the hardship thus presented suffices to establish the justiciability of the challenge in advance of enforcement.” *Arsenal*

Coal Co. v. Dept. of Env'tl. Res., 477 A.2d 1333, 1339 (Pa. 1984) (emphasis added).

In *Arsenal Coal*, the Environmental Quality Board (EQB) adopted regulations governing the anthracite coal industry in Pennsylvania. Prior to the enforcement of those regulations, coal mine operators filed a petition for review, invoking the Commonwealth Court's original jurisdiction and seeking to enjoin the Department of Environmental Resources (DER) from implementing or enforcing the EQB regulations. The Commonwealth Court dismissed the complaint on preliminary objections, concluding that the pre-enforcement challenge of the regulations was not ripe because the coal mine operators failed to exhaust their administrative remedies. The coal mine operators appealed, and this Court reversed, holding that the Commonwealth Court clearly has the authority under its original equitable jurisdiction to review a substantial challenge to the validity of a regulatory scheme pre-enforcement, **unless there is an adequate statutory remedy**. *Id.* at 1338. With respect to the validity of the EQB regulations, this Court held that the Environmental Hearing Board (EHB) lacked the authority to entertain pre-enforcement challenges; instead, the only "administrative remedy" available to the coal mine operators was an appeal to the EHB of DER's enforcement of the allegedly invalid regulatory scheme. This Court did not believe

that the "opportunity for review upon piecemeal application and enforcement . . . [was] an adequate remedy." *Id.* at 1339.

In *Arsenal Coal*, this Court stated:

We believe that the asserted impact of the regulations in the instant case is sufficiently direct and immediate to render the issue appropriate for judicial review; the lengthy process by which the validity of the regulations will be addressed on a basis of application to the litigant **would result in ongoing uncertainty in the day-to-day business operations of an industry which the General Assembly clearly intended to protect from unnecessary upheaval.**

Arsenal Coal, 477 A.2d at 1339-40 (emphasis added). In short, this Court found that the administrative alternative, *i.e.*, willful noncompliance followed by enforcement followed by appeal, was inadequate in comparison to pre-enforcement review of the challenged regulatory scheme in the Commonwealth Court's original equitable jurisdiction. In explaining *Arsenal Coal*, this Court held that statutory, post-enforcement review is adequate unless the regulation itself causes actual, present harm. *Neshaminy Water Res. Auth. v. Dep't of Env'tl. Res.*, 513 A.2d 979, 980 (Pa. 1986) (explaining *Arsenal Coal*).

Repsol argues that the present case is controlled by *EQT Prod. Co. v. Dep't Env'tl. Prot.*, 130 A.3d 752 (Pa. 2015) (*EQT*). However, *EQT* is readily distinguishable from the present case and Repsol's reliance on *EQT* is misplaced.

In *EQT*, EQT Production Company (EQT), owned and operated natural gas wells in the Commonwealth. In May 2012, EQT notified the Department of Environmental Protection (DEP) that it had discovered leaks in one of its subsurface impoundments containing water that had been contaminated during hydraulic fracturing operations. Subsequently, EQT cleared the site of impaired water and sludge and commenced a formal cleanup process.

The DEP took the position that the discharge of contaminated water implicated civil penalties under the Clean Streams Law.⁷ The DEP tendered to EQT a proposed "Consent Assessment of Civil Penalty," seeking to settle the penalty question via a payment demand of \$1,270,871, which included approximately \$900,000 in daily ongoing violations. The claim of continuing violations was based on DEP's position that each day in which contaminants remain in the subsurface soil and passively enter groundwater and/or surface water constitutes a violation, thus implicating serial, aggregating penalties. *EQT*, 130 A.3d at 753 (Pa. 2015).

EQT disputed the DEP's approach, maintaining that penalties cannot exceed those that accrue during the time in which contaminants actually were discharged from the impoundment. EQT commenced an original jurisdiction action in the Commonwealth Court per the Declaratory Judgments Act, asserting that it lacked

⁷ Act of June 22, 1937, P.L. 1987 (as amended 35 P.S. §§ 691.1–691.1001).

any viable administrative remedy and asserting that the DEP had, in a separate case, advanced its continuing-violation interpretation. EQT averred that the legal question that it posed was adequately developed and ripe for judicial review; that it would suffer direct, immediate, and substantial hardship if review was delayed; and that the action would settle controversies otherwise indicative of immediate and inevitable litigation. *Id.* at 754-55. A few weeks later, the DEP lodged a “Complaint for Civil Penalties” at EHB, seeking more than \$4,500,000 from EQT, supplemented by continuing levies of up to \$10,000 per day. The DEP filed preliminary objections to EQT’s petition, alleging that the action was not properly before the court.

In denying DEP’s preliminary objections, this Court held that the impact of the DEP’s threat of multi-million-dollar assessments against the company, comprised mostly by daily ongoing fines, was sufficiently *direct, immediate, and substantial* to create a case or controversy that justified pre-enforcement judicial review via a declaratory judgment proceeding, and that the exhaustion of administrative remedies relative to the issue of statutory interpretation, was unnecessary. *Id.* at 759. This Court noted that it was treating EQT’s inability, in its own right, to implicate the sole avenue available for quasi-judicial administrative review as a factor favoring original jurisdiction judicial review.

This Court reasoned that EQT should be permitted to pursue its substantial challenge to DEP's continuing-violation interpretation in the Commonwealth Court, given the company's potential exposure to potent, ongoing civil penalties for which DEP maintains the company is liable. *Id.* at 758. Additionally, this Court stated:

Our decision might be different had the Department advanced a persuasive case that there are material factual dynamics involved in evaluating the validity of its continuing-violation interpretation, or that the application of the specialized expertise of the Hearing Board is essential to a full and fair understanding of it.

Id. at 759. Thus, in addition to the significant ongoing civil penalties, the DEP failed to contradict EQT's assertion that its challenge to the agency's continuing-violation interpretation presents only questions of law, not exclusively within the expertise of the EHB, amenable to judicial review.

Thus, the majority's rationale in *EQT* for permitting immediate judicial review, that allowed the company to bypass the well-established requirements that courts should yield to administrative tribunals and litigants should exhaust administrative remedies, was based on three factors: (1) the agency's threat of the assessment of multi-million dollar penalties for ongoing violations, (2) the lack of material facts in dispute or unique questions of law under the purview of the EHB, and (3) the inability of EQT to initiate administrative review. In a subsequent case involving pre-enforcement review, the Commonwealth Court held that *an actual*

violation must occur for a “current hardship” to exist.⁸ No violation has occurred in this case, and none of the *EQT* factors justifying pre-enforcement review are present here. First, Repsol is not under threat of the Commission imposing a multi-million-dollar civil penalty if this matter continues at the Commission.⁹ In fact, the opposite is true as the Commission has repeatedly stated that it will follow the Commonwealth Court’s ruling in *Snyder Brothers. v. Pa. Pub. Util. Comm’n*, 2020 Pa. Commw. Unpub. LEXIS 91, 224 A.3d 450 (Pa. Cmwlth. 2020) (*Snyder Brothers Remand*) regarding mandatory ongoing interest and fixed

⁸ The Commonwealth Court declined to allow a pre-enforcement challenge in *Marcellus Shale Coalition v. Dep’t of Env’tl. Prot. of Pa.*, 216 A.3d 448 (Pa. Cmwlth. 2019). In that case, the Marcellus Shale Coalition initiated an original jurisdiction action seeking pre-enforcement review of regulations related to unconventional well operations found in Title 25, Chapter 78a of the Pennsylvania Code. 25 Pa. Code Ch. 78a. In declining to rule on the validity of the spill remediation regulation, the Commonwealth Court distinguished *EQT* stating:

The Arsenal Coal line of cases, which recognizes an exception to our general rule disfavoring pre-enforcement judicial intervention, requires some immediate obligation or threat posed by the challenged agency action. Here, absent a regulated spill, no immediate obligation flows to the industry to comply with the spill remediation regulation and thus no current hardship is evident. Moreover, unlike the facts in *EQT I*, where the petitioner seeking pre-enforcement review was operating under an immediate threat by the Department of a multi-million-dollar penalty assessment, beyond the mere existence of the spill remediation regulation . . . we do not perceive any current threat to the industry that would justify pre-enforcement intervention.

Id. at 498 (citing *EQT*, 130 A.3d at 759 (Pa. 2015)). The Commonwealth Court recognized that an actual violation must first occur for a “current hardship” to exist warranting pre-enforcement challenge. *Id.* In the instant matter, there has been no determination that a violation of the law or a regulation has occurred.

⁹ The Commission notes that Repsol has filed objections to the impact and spud fees with the Commission. The objections are being held in abeyance pending resolution of this matter.

penalties. Therefore, there is no imminent threat of “continuing-violation” interest and penalties that was the pivotal factor not only in *EQT*, but also in *Arsenal Coal* and *Bayada Nurses*.¹⁰

In *EQT*, the amount of the penalties imposed was open-ended and growing continuously by at least \$10,000 per day. Here, the amount of the fee is already known and fixed, subject only to interest and a statutory penalty of, at most, 25% of the fee. *Memorandum Opinion* at 17. Repsol references the potential daily ongoing \$2,500 administrative penalties under Section 2310(a), 58 Pa.C.S. § 2310(a), as supporting its position that the *Arsenal Coal* line of cases is applicable.¹¹ However, Repsol ignores Section 2310(d), 58 Pa.C.S. § 2310(d), which SPECIFICALLY states, “Procedure.--**A penalty under this chapter is subject to 66 Pa.C.S. Ch. 3 Subch. B (relating to investigations and hearings)**.” Thus, by the explicit terms of Act 13, penalties under Chapter 23 are subject to the Commission’s administrative practice and procedure for investigations and hearings. Penalties cannot be imposed by the Commission absent a party being afforded due process via an administrative hearing.¹² A person aggrieved by a Commission order under Act 13 may appeal to the Commonwealth Court under

¹⁰ *Arsenal Coal*, *supra*, 477 A.2d at 1339-40 (Pa. 1984); *Bayada Nurses*, *supra*, 8 A.3d at 876 (Pa. 2010).

¹¹ Repsol M. BR. at 28, 36.

¹² The Commission notes that if Repsol had pursued its objections filed with the Commission, it is highly likely that this case would have resolved by this time, administratively.

42 Pa.C.S. § 763 (relating to direct appeals from government agencies).¹³ To allow pre-enforcement review based on Repsol’s argument would, in effect, allow pre-enforcement review of any case where there is a potential ongoing penalty for continued violations.

Moreover, the Commission has repeatedly averred throughout this proceeding that it would not impose discretionary penalties where there is a good faith challenge to impact and spud fees. *See Pub. Util. Comm’n, Bureau of Investigation and Enforcement v. Snyder Brothers, Inc.*, (Commission Docket No. C-2014-2402746, filed June 11, 2015), slip op. at 59, 67.¹⁴ The fixed nature of the amount in dispute here is distinguishable from the ever-growing, substantial penalties in *EQT*, and unlike *EQT*, Act 13 does provide an express statutory remedy for determining whether to impose administrative penalties, and if so, how

¹³ 58 Pa.C.S. § 2309(a).

¹⁴ The Commission takes exception to Repsol’s false narrative, that the Commission has somehow pre-judged the good-faith nature of Repsol’s objections. Repsol M. Br. at 38. Counsel for the Commission has maintained throughout this proceeding that Repsol “might be” the responsible producer and that an administrative hearing before the Commission is necessary to resolve legal and factual questions. The Commission’s use of the terms “nonsensical,” “strained” and “desperate” clearly refer to Repsol’s characterization of the 2022 fees as 2021 fees and refer to Repsol’s use of statutory construction principles to support its argument for summary relief. Statutory construction is an unnecessary academic exercise where one’s right to relief is clear and free from doubt. None of these statements speak to whether Repsol’s objections are, or are not, in good faith. In fairness, the Commission was left without any other option but to address Repsol’s legal question on the merits, because Repsol filed an Application for Summary Relief. The Commonwealth Court addressed both the Commission’s Preliminary Objections and the Application for Summary Relief simultaneously. If the Commission did not address Repsol’s Summary Relief arguments on the merits, and the Commonwealth Court had denied the Commission’s Preliminary Objections, then the Commission would possibly have waived any argument on the merits for Summary Relief.

much. *Cf.* 58 Pa.C.S. § 2310(a) ([i]n determining the amount of the penalty, the Commission shall consider the willfulness of the violation and other relevant factors).

Significantly, in *EQT* the proposed multi-million-dollar ongoing penalties dwarfed the penalties that accrued during the period in which contaminants were discharged from the impoundment. Here, the threat of ongoing and continuing violations and penalties is not just speculative, it is non-existent, and therefore the rationale for the majority's decision in *EQT* is not applicable to this case.¹⁵ In fact, the Commission has previously acknowledged that payment of a disputed impact fee and spud fee is not due until the dispute has been resolved and only if it has been resolved in the Commission's favor. *Pub. Util. Comm'n v. Xtreme Energy Corp.*, Initial Decision, PUC Docket No. C-2017-2599145, 2019 WL 2250766, at *7, Finding of Fact No. 11 (PUC May 7, 2019). Also, penalties under Section 2308(b) of Act 13 are capped at 25% of the delinquent fee. 58 Pa.C.S. § 2308(b).

Second, unlike *EQT*, here, there are material facts at issue regarding Repsol's status as the responsible producer, as well as possible questions of law that would implicate the Commission's expertise, as in *Snyder Brothers*.¹⁶ *EQT*

¹⁵ Repsol apparently has abandoned the argument made in its prior Petitions for Review that it faces uncertain penalties and interest if it pursues a challenge before the Commission. This is a tacit recognition that the Commission's repeated claims that it intends to follow *Snyder Brothers Remand* means that there is no "continuing violation" issue here.

¹⁶ *Snyder Brothers* involved solely a question of law. The Commission's expertise in administering Act 13 was valuable in resolving that issue.

involved only questions of law and no factual development was necessary to answer those questions. Here, the Commission identified several factual questions that must be determined about when and how Repsol began to “hold[] a permit or other authorization” **to engage in the business of severing natural gas for sale**, which controls its status as a producer and thus its liability. 58 Pa.C.S. § 2301. It appears that the legislature intentionally did not make holding a permit dispositive of producer status, because it included the language “or other authorization,” which must be given statutory meaning. *Id.* Did Repsol receive “other authorization” from the DEP **to engage in the business of severing natural gas for sale** before formally acquiring a permit from DEP? Why were Repsol’s employees on-site at well pads responding to DEP infractions as early as January 2022? Who received profits from the gas extracted from these 72 wells between January 1, 2022 and June 22, 2022, the date that DEP issued operator permits? Why were well transfer documents backdated to February 9, 2022, and which date controls for establishing “producer” status? As the Commonwealth Court correctly concluded, these questions are “legally relevant” and “require development of a factual record.” *Memorandum Opinion* at 18.

Third, unlike *EQT*, the Commonwealth Court found that the Commission had issued the invoices and Repsol filed objections to the invoices. Repsol already

commenced an administrative challenge by filing written objections to the invoices. Repsol did this prior to filing its action in Commonwealth Court.

Thus, Repsol has failed to establish any reason to justify pre-enforcement review. Repsol is **not** challenging a new statute or a new agency interpretation of that statute. Act 13 has been in place since February 14, 2012. Repsol's challenge comes after, not before, the Commission took action to apply Act 13 to Repsol. To date, the Commission has simply sent Repsol Impact and Spud Fee invoices, *which Repsol timely challenged with the Commission.*¹⁷ Repsol is not subject to the type of significant ongoing fines and penalties as was EQT. Further, there are material facts at issue that are relevant and essential to resolution of this matter. This matter is fact intensive, and it is not tantamount to an industry-wide challenge to Commission action.¹⁸ Finally, Repsol has an adequate administrative remedy, to which it has already availed itself, but has chosen not to pursue, yet.

¹⁷ On December 16 2022, the same day Repsol filed its Petition for Review with the Commonwealth Court, it also filed Objections to the invoices with the Commission. Those objections are pending at the Commission. Out of deference to the Commonwealth Court, the Commission did not advance the objections so as not to have identical litigation progressing in two separate forums.

¹⁸ In *Pa. Ass'n of Rehab. Facilities v. Foster*, 608 A.2d 613 (Pa. Cmwlth. 1992) the Court held that "administrative remedies are inadequate when they involve lengthy enforcement and review processes, and when hardship and uncertainty are visited upon the affected industry if those in the industry were to comply, or refuse to comply, with the regulation and then seek review before the agency.") *Id.* at 617 (citing *Arsenal Coal*, 477 A.2d at 1339-40).

Repsol has presented no viable reason to bypass the administrative process. The Commonwealth Court properly found that Repsol has failed to establish that this matter warrants pre-enforcement review. *Memorandum Opinion* at 18-19.

III. The Commission's Administrative Practice And Procedures, As Provided By Act 13, Are An Adequate Remedy Of Which Repsol Must Avail Itself

Repsol contends that it has no ability under Act 13 to object to the invoices (to which it already filed objections). Repsol argues that the only remedy available under Act 13 is an enforcement order issued by the Commission under Section 2309(a) of Act 13, 58 Pa.C.S. § 2309(a). Repsol argues that this leaves it at the whim of the Commission's enforcement power, with no ability to challenge the invoices. 58 Pa.C.S. § 2309. Repsol is mistaken.

Both Act 13 and the Commission's regulations and Implementation Orders provide the very administrative remedy that Repsol has already initiated by filing objections to the invoices. Those objections will provide a vehicle for Repsol to challenge the invoices before the Commission, obtain a final determination of that challenge from the Commission, and then seek appellate review of that determination in Commonwealth Court. Sections 2307–2313 of Act 13, 58 Pa.C.S.

§§ 2307–2313, provide not only an adequate administrative remedy, but actually provide, explicitly, *the remedy Repsol alleges is adequate*.¹⁹

Section 2307(a) of Act 13 authorizes the Commission “**to make all inquiries and determinations necessary to calculate and collect the fee**” and “**issue a notice of the amount due and demand for payment.**” 58 Pa.C.S.

§ 2307(a)-(b). For the Commission to “make all inquiries and determinations” it necessarily follows that the Commission must utilize rules of administrative practice and procedures.²⁰ To make it clear to the industry, the Commission, *expressly* stated in its *December 20, 2012 Implementation Order*, that it would address Act 13 Impact and Spud fee issues using its rules of administrative practice and procedure. The *December 20, 2012 Implementation Order* provided, in part:

To the extent there is a dispute regarding the accuracy of the producer’s report, the Commission will address that dispute via the dispute mechanism established at Sections

¹⁹ On page 25 of Repsol’s Main Brief, Repsol alleges that “[t]he proper administrative filing for obtaining [a declaration that it has no obligation or legal duty to file the report and remit payment of the CY2021(sic) impact and spud feed for the Rockdale Wells] is a petition for declaratory order under 52 Pa. Code § 5.42, not a petition for relief under 52 Pa. Code § 5.41.” Then Repsol goes on to argue that the Commission is not authorized to issue a declaratory order under Act 13. However, Section 331(f) of the Public Utility Code, 66 Pa.C.S. § 331(f), provides that the Commission is authorized to issue declaratory orders. Significantly, Section 2310 of Act 13, 58 Pa.C.S. § 2310, specifically refers to 66 Pa.C.S. Ch. 3 Subch. B (relating to investigations and hearings), *which includes section 331(f)*, as the procedure to follow for issuance of enforcement orders. This issue will be discussed in more detail *infra*.

²⁰ As noted earlier, both Repsol and PIOGA failed to cite to Section 2307(a) of Act 13, 58 Pa.C.S. § 2307(a), nor did either discuss the implications of such broad statutory authority. Neither Repsol nor PIOGA can seriously contend that the Commission’s broad statutory authority to “make all inquiries and determinations necessary to calculate and collect the fee,” somehow does not include the authority to hold administrative hearings to determine a responsible producer.

2307-2313 of Act 13, 58 Pa.C.S. §§ 2307-2313. **These provisions will be enforced consistent with our general rules of practice and procedures found at 52 Pa. Code Chapters 1, 3, and 5.** We note that we will utilize formal proceedings only after informal efforts reveal that a dispute cannot be resolved. Under these circumstances, we believe that an adequate mechanism is already in place to account for well reclassification.

Id. at *7 (emphasis added).

Section 2307(b) of Act 13 states, “Notice.-- If the **commission determines** that the unconventional gas well fee has not been paid in full, it may issue a notice of the amount due and demand for payment **and shall set forth the basis for the determination.**” 58 Pa.C.S. § 2307(b) (emphasis added). The Commission cannot make such “determination” until after conducting an inquiry, which would be through the Commission’s administrative process. And this provision requires the Commission to set forth the basis for the determination, which can only be done after affording the affected party an administrative proceeding. Only AFTER that process is complete will the Commission have all relevant information to make a well-reasoned determination and issue a demand for payment.

Section 2308(c) of Act 13 states, “Timely payment.-- If the **commission determines** that a producer has not made a timely payment of the fee, the commission shall send written notice of the amount of the deficiency to the producer within 30 days from the date of determining the deficiency. . . .” 58 Pa.C.S. § 2308(c). Once again, the Commission cannot make any such

“determination” until AFTER conducting an inquiry, which is done through the Commission’s administrative process.

Section 2309(a) of Act 13 grants the Commission authority to issue orders as necessary to enforce Act 13, and specifically states that “[a] person aggrieved by an order under this section may appeal to Commonwealth Court under 42 Pa.C.S. § 763 (**relating to direct appeals from government agencies**).” 58 Pa.C.S. § 2309(a). Thus, Act 13 expressly states that the Commonwealth Court’s authority to review Commission determinations under Act 13 **is in its appellate jurisdiction**. Similarly, Section 2309(b) provides the Commission with the authority to seek redress from the Commonwealth Court “[i]f a producer fails to proceed diligently to comply with an order within the time required. . . .” 58 Pa.C.S. § 2309(b). Specifically, the Commission “shall apply to Commonwealth Court, which shall have jurisdiction over matters relating to contempt,” and “the producer shall be guilty of contempt and shall be punished by the court in an appropriate manner.” *Id.*

Section 2310(a) of Act 13 allows the Commission to impose a civil penalty of \$2,500 per violation, and in imposing the penalty, “**the commission shall consider the willfulness of the violation and other relevant factors.**” 58 Pa.C.S. § 2310(a). The Commission cannot consider the willfulness or any other relevant factors absent an administrative fact-finding proceeding.

While Repsol appears to allege that it has no administrative remedy available to it to challenge the invoice, it nonetheless admits that it may have an administrative remedy available to it by way of seeking a declaratory order from the Commission. However, Repsol appears to argue that the Commission has no authority to issue a declaratory order under Act 13, and therefore it has no practical remedy. Repsol is simply wrong. The Public Utility Code authorizes the Commission to issue declaratory orders. 66 Pa.C.S. § 331(f). As does Act 13. 58 Pa.C.S. §2310(d).

Specifically, Section 2310(d) of Act 13 provides “**Procedure.--A penalty under this chapter is subject to 66 Pa.C.S. Ch. 3 Subch. B (relating to investigations and hearings).** Title 66, Chapter 3, Subchapter B contains section 331(f), which provides: “**The commission, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty.**” 66 Pa.C.S. § 331(f). Thus, contrary to Repsol’s claim, Act 13 provides Repsol with an adequate and available statutory remedy to seek a declaratory order from the Commission.

Of similar importance, Title 66, Chapter 3, Subchapter B provides for the complete administrative process used to determine penalties under Section 2310(d) of Act 13. The Commission cannot make a determination that a penalty is appropriate against a particular producer without first ascertaining that the

producer is responsible for paying the impact and spud fee. Making all these legal and factual determinations, as broadly provided for under Section 2307(a) of Act 13, 58 Pa.C.S. § 2307(a), necessarily occurs in an administrative proceeding before the Commission, as dictated by Act 13.

Finally, Section 2313 of Act 13 grants the Commission broad authority to access and examine relevant books, papers and records, to examine any employee of a producer under oath, and compel the production of relevant books, papers and records in accordance with Title 66. *See* 66 Pa.C.S. §§ 331–334. This broad grant of authority to the Commission necessarily requires that the Commission will utilize the administrative process authorized under Chapter 3 of the Public Utility Code to conduct hearings and investigations. Act 13 clearly grants the Commission broad administrative authority over Act 13 and provides adequate administrative procedures, ensuring producers receive all required due process. This is evidenced by *Snyder Brothers* and was reiterated in the Commission’s *December 20, 2012 Implementation Order*.

How the administrative process is initiated, be it by a producer challenging the invoices (as Repsol did here), by formal complaint filed by the Commission’s Bureau of Investigation and Enforcement, or by seeking declaratory or other relief with the Commission under 52 Pa. Code §§ 5.41, 5.42, or 66 Pa.C.S. § 331(f) is immaterial to the fact that the process exists, it affords adequate due process, and

in the end results in a hearing before the Commission's Office of Administrative Law Judge (OALJ).

The Commonwealth Court properly dismissed Repsol's false narrative that Repsol had no adequate administrative remedy available to it. Specifically, the Commonwealth Court stated:

It is not hard to imagine how that administrative remedy would proceed. The Commission would ordinarily be subject to the General Rules of Administrative Practice and Procedure (GRAPP) applicable to administrative agencies generally. See 1 Pa. Code Part II. But the Commission has promulgated its own procedural rules that displace GRAPP in Part I, Subpart A of the Commission's regulations. See 52 Pa. Code §§ 1.1-5.633. Those procedural rules apply by their terms to "practice and procedure before the Commission," *id.* § 1.1(a), and a petition for relief may be filed under Chapter 5 of the regulations with respect to "the [Public Utility Code] or other statute that the Commission administers," *id.* § 5.41(a). Act 13 expressly obligates the Commission to administer it, so a party may, per the Commission's procedural rules, file a petition for relief before the Commission under Act 13. The Commission would hold a hearing on that petition (under Chapter 5, Subchapter B of its regulations, 52 Pa. Code §§ 5.201-5.254) from which exceptions or an appeal could be taken (under Chapter 5, Subchapter H, 52 Pa. Code §§ 5.531-5.539) within the Commission.

In addition to these procedural rules, the Commission is governed by the Administrative Agency Law, which requires that "no adjudication of a Commonwealth agency shall be valid as to any party unless he shall have been afforded reasonable notice of a hearing and an opportunity to be heard." 2 Pa.C.S. § 504. The Commission has not yet afforded a hearing, nor has Repsol formally requested

one. If the Commission finally denies Repsol a hearing on the objections Repsol has already filed, Repsol could challenge that denial of a hearing in this Court's appellate jurisdiction. 42 Pa.C.S. § 763(a)(1); *O'Brien v. State Employees' Ret. Sys.*, 469 A.2d 1008, 1011 (Pa. 1983) (holding that an action to compel an agency to hold an administrative hearing is properly in Commonwealth Court's appellate, not original, jurisdiction).

That structure—initial agency action, hearing before the agency, final agency action, and appeal to Commonwealth Court—prevents unnecessary filings in this Court's original jurisdiction that would allow as-of-right appeals to the Supreme Court. *Simmons v. Cohen*, 534 A.2d 140, 145 (Pa. Cmwlth. 1987), *aff'd sub nom. Simmons v. White*, 574 A.2d 600 (Pa. 1990). “Of course, if an agency refuses to act on a request for hearing in an effort to avoid a final decision that allows appeal, [we are] certainly not . . . powerless to proceed originally under Section 761 [of the Judicial Code, 42 Pa.C.S. § 761].” *O'Brien*, 469 A.2d at 1011 n.8. But here, the Commission has not refused to afford a hearing. Instead, it stayed agency action out of deference to the action Repsol filed in this Court.

* * *

As we have discussed, unlike the open-ended fee in *EQT Production*, there is minimal risk to Repsol during an administrative remedy. There is no indication the Commission would proceed to enforce or collect the fixed fees during administrative proceedings on Repsol's objections. If the Commission does initiate such enforcement, Repsol has a remedy there too, which would also culminate in our appellate, not original, review. That is essentially what occurred in *Snyder Brothers*—the agency filed a complaint to collect past-due Act 13 fees, the matter was heard before a Commission administrative law judge, that judge's order was appealed to the Commission, and then this Court heard the appeal from the Commission's decision. 198 A.3d at 1059. If the

Commission does not initiate enforcement, the administrative proceeding on Repsol's objections will, as discussed, afford a hearing and opportunity for the Commission to determine whether Repsol is liable for the fees assessed. That determination could come out in Repsol's favor. If it does not, and if the Commission determines that interest and penalties should accrue for Repsol's not having paid the invoiced fees in the interim, all of those determinations are reviewable on appeal to this Court.

Memorandum Opinion at 19-21. Repsol has been aware of each and every one of these remedies through the plain language of Act 13 itself, or through the Commission's various Implementation Orders clearly stating that disputes will be resolved consistent with our general rules of practice and procedures found at 52 Pa. Code Chapters 1, 3, and 5.

As recognized by the Commonwealth Court, an adequate administrative remedy is available to Repsol. Whether that remedy is adequate for purposes of exhaustion depends on whether it "allow[s] for adjudication of the issues raised" and minimizes "irreparable harm to . . . the [petitioner] during the pursuit of the . . . remedy." *Keystone ReLeaf*, 186 A.3d at 517. To overcome the requirement for exhaustion, the petitioner must make a clear showing that the remedy is somehow inadequate. *Id.* Repsol has failed to make such a showing. Following *Snyder Brothers Remand*, the Commission has repeatedly indicated that it will not proceed to enforce or collect the interest or fixed fees during administrative proceedings on Repsol's objections. If the Commission determines that Repsol did not make a

good-faith challenge to the impact and spud fees, and imposes interest and penalties, Repsol has a remedy there too, which would culminate in the Commonwealth Court's appellate jurisdiction under Section 2309(a). Even if the Commission did not initiate enforcement through a formal complaint, the Commission would nonetheless proceed to an administrative proceeding to resolve Repsol's objections by treating it as a Petition for Relief and will afford a hearing and opportunity for the Commission to determine whether Repsol is liable for the fees assessed. 58 Pa.C.S. § 2310(d). As counsel for the Commission has repeatedly asserted throughout this proceeding, it is possible that any determination could come out in Repsol's favor. If it does not, however, and if the Commission determines that interest and penalties should accrue for Repsol's not having paid the invoiced fees in the interim, all determinations are reviewable on appeal to the Commonwealth Court. 58 Pa.C.S. § 2309(a).

Finally, Repsol cries foul by alleging that the Commission brought to Repsol's attention, for the first time at oral argument, a different available remedy of which it was previously unaware. The Commonwealth Court properly found that Repsol's argument is meritless. Remedies available to Repsol to dispute an invoice have been known, or should have been known, to Repsol for over 12 years. It is disingenuous to maintain otherwise. Simply reading Sections 2307–2310 of Act 13, 58 Pa.C.S. §§ 2307–2310, as well as the Commission's Implementation

Orders, provided Repsol, and any other producer with all the information needed to pursue an administrative remedy. Being aware of *Snyder Brothers* and *Xtreme Energy* evidence Repsol’s knowledge of the existence of an available administrative remedy.

Repsol argues that, because during oral argument, counsel for the Commission suggested to the Commonwealth Court that the Commission **could**, *sua sponte*, treat Repsol’s objections to the Impact and Spud Fees as a petition for relief under 52 Pa. Code §5.41, that the Commission has somehow identified a “newly proffered administrative remedy.” Repsol M. Br. at 11. Repsol is simply wrong. In addressing this argument, the Commonwealth Court stated in its

Memorandum Opinion:

Repsol essentially argues . . . that the Commission waived reliance on this procedural regulation [52 Pa. Code § 5.41) by failing to cite it before oral argument. But the Commission’s preliminary objections and argument have clearly contemplated further Commission action on Repsol’s written objections to the invoices, and the question of the procedure applicable to that action is fairly encompassed within that issue.

Memorandum Opinion at 12, Fn. 3.

IV. Repsol’s Argument That It Is The Prior Year Producer That Is Responsible For Payment Of The Impact And Spud Fees Is Without Merit

While the Commission maintains, and the Commonwealth Court agreed, that the question of Repsol’s “producer” status is a fact-intensive one, Repsol maintains

that its producer status hinges *solely* on whether it had an ownership interest in the 72 wells in 2021 as a prerequisite to being the responsible “producer” for the 2022 Impact and Spud Fees. Repsol M. Br. at 14. Repsol is misguided.

Repsol argues in its brief that summary relief is warranted because Act 13 “unambiguously establish[es] that the person who holds (or is otherwise authorized to exercise the rights granted in) the DEP permit for an unconventional gas well during the prior calendar year is the producer required to file the report for and remit the fees by the April 1 due date.” Repsol M. Br. at 40-41. However, throughout this case, Repsol has not promoted its own interpretations of Act 13 consistently, which belies its assertion that Act 13 is “unambiguous.” Repsol originally alleged in its request for a declaratory judgment that “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.” Repsol Original Pet. at ¶108. It appears Repsol has now abandoned this position, advocating that holding (or exercising the rights) of a DEP permit in the previous calendar year is the only way to be the “responsible producer.” Curiously, Repsol cites to statutory construction to support its new reading of Act 13. This highlights the fact that Repsol’s right to relief is not clear and that summary judgment and declaratory relief is not warranted. Repsol’s resort to statutory construction to establish that its right to

relief is clear is counterintuitive, as statutory construction analysis is applied only after it is determined that the statutory language is ambiguous.

Regardless, contrary to Repsol's assertion, even if this case presents only a pure question of law, which we don't concede, that alone does not warrant bypassing the administrative process. In fact, *Snyder Brothers* involved a pure question of law. No material facts were in dispute. Yet, *Snyder Brothers* proceeded through the proper administrative channels provided for in Act 13. Only after hearing, briefing, and a Commission decision, was the matter appealed to the Commonwealth Court, and ultimately to this Court. Both the Commonwealth Court and this Court had the benefit of the Commission's expertise in considering that case.

In support of its argument that this case involves only a pure question of law,²¹ Repsol alleges that "a person must hold the permit for an unconventional gas well during the calendar year when the impact or spud fees accrue to be the producer required under Act 13 to file the Act 13 report and remit payment of

²¹ The Commission notes that it will address the *merits* of Repsol's argument that this case involves solely a question of law, even though it is the Commission's position that even if that is the case, this matter should be before the Commission for adjudication. The arguments presented here are arguments in support of the Commission's position set forth in its *December 20, 2012 Implementation Order* and *Xtreme Energy*. Repsol certainly can challenge those orders at the Commission. Simply because the Commission here defends those orders, does not mean that the Commission has prejudged this case, as Repsol alleges. Rather, by Repsol attempting to bypass the Commission and proceed directly to Commonwealth Court, the Commission is forced to defend its orders. Again, Repsol can challenge those orders before the Commission.

those fees to the Commission by April 1 of the following year.” Repsol Application for Summary Relief at ¶14. Repsol goes on to allege that “because Repsol was not the person holding the DEP permits for the Rockdale Wells during the 2021 calendar year, Repsol was not the producer required under Act 13 to file the Act 13 report and remit payment of the 2021 Impact Fees and 2021 Spud Fees for those wells.” Repsol Application for Summary Relief at ¶70. Repsol argues that it “cannot be deemed retroactively liable and automatically delinquent for failing to file that report and remit payment of the fees for the 2021 CY.” Repsol Brief, p.15 (emphasis omitted). Repsol’s argument is without merit.

Repsol relies heavily on statutory construction to support this faulty assertion. Repsol M. Br. at 25.²² However, Repsol ignores Section 2303(a)(2) of Act 13, 58 Pa.C.S. § 2303(a)(2), which undermines Repsol’s argument. Repsol M. Br. at 24-25. Specifically, that provision provides:

§ 2303. Administration.

(a) Fee due date.--

(1) Except as provided under paragraph (2), the fee imposed under this chapter shall be due by April 1, 2013, and each April 1 thereafter. The fee shall become delinquent if not remitted to the commission on the reporting date.

²² The Commission notes that summary judgment is only appropriate where there are no material issues of fact, and the movant is clearly entitled to relief as a matter of law. Repsol’s strained resort to the rules of statutory construction appear to undermine its argument that it is clearly entitled to summary judgment.

(2) For wells spud before January 1, 2012, a fee imposed under this chapter shall be due by September 1, 2012.

(b) Report.--By September 1, 2012, and April 1 of each year thereafter, each producer shall submit payment of the fee to the commission and a report on a form prescribed by the commission for the previous calendar year.

58 Pa.C.S. § 2303(a) and (b) (emphasis added).

Act 13 became effective February 14, 2012, and the first well reports and impact and spud fees were due September 1, 2012, for the 2011 reporting year. Whatever entity owned or operated a well in 2011 was irrelevant to who was responsible for paying the Impact and Spud Fees on September 1, 2012. Indeed, an entity that owned a well in 2011 could have sold its interest prior to the effective date of Act 13, or an entity could have purchased wells in 2011 and sold those wells at any time prior to the effective date of Act 13. In such cases, it would be nonsensical to seek payment from an entity that has no viable interest in the well on the date the fees are due. This is why the responsibility in the first year of implementation fell upon the authorized “producer” on September 1, 2012, for the 2011 reporting year. An entity need not have been an owner or operator in 2011 to be liable for the impact and spud fees in September 2012.²³ In short, the legislature

²³ In fact, an entity in 2011 could not have been considered a “producer” because that term did not exist until the effective date of Act 13, which created the definition of “producer.”

ensured that Act 13 liability *attached to the well* and it was the producer as of September 1, 2012, that was the actual entity that had a timely, viable nexus to the well, that was responsible for fee payment.

Contrary to Repsol's theory, the first year of the Act 13 fee was NOT a "2011" fee. Rather, it was a "2012" fee. Act 13 was not in existence in 2011. Moving to 2022, the result is the same. On April 1, 2022, the producer as of that time was responsible for filing a report and paying the 2022 impact and spud fees for the 2021 reporting year, regardless of whether that producer had an interest in the well in 2021. Act 13 requires the Commission to use data from the prior year to determine the impact fee for the current year. *See* 58 Pa.C.S. § 2302(b), (c). It would be nonsensical to seek payment of the fee from an entity that may no longer have any interest in the well, especially where the fee attaches to the well.²⁴

The Commission's position is clearly supported by the explicit language of Act 13 and its purpose. The Commission's interpretation of Act 13 in 2012, namely that it is the producer on April 1 of a given calendar year that is responsible for filing the well report and paying the fees, is the correct interpretation. Act 13

²⁴ Apparently, Repsol acknowledges this pragmatic concern. Repsol Commonwealth Court Summary Judgment Brief, at p. 32. Repsol states, "[n]othing in Act 13 suggests that the General Assembly wanted prior CY fees to become delinquent as to a person who was not producer [sic] for an unconventional gas well on the April 1 due date. The General Assembly clearly expected that the fees would be paid by someone who actually was the producer at that time." Repsol seemingly admits that the General Assembly intended for the producer on April 1 to pay the fee. This interpretation is consistent with Repsol's position in its original Petition for Review. Repsol Original Pet. at ¶108.

provides that “each producer shall submit payment of the fee to the commission and a report on a form prescribed by the commission for the previous calendar year.” 58 Pa.C.S. § 2303(b). Nothing in Act 13 states that the “producer” responsible for filing the report and paying the fee must have been the producer for the wells at any given time in the previous calendar year. In fact, looking at how the legislature structured the first year’s fees based upon the previous calendar year, it is clear that ownership or operator status in 2011 was *irrelevant* to a producer’s obligation to file a well report and pay the Impact and Spud fees in September 2012. An owner may have sold the well on January 1, 2012, and had no interest in the well as of the effective date of Act 13, February 14, 2012. It would be nonsensical to look to that prior owner or operator for payment.

This is the very reason the Commission addressed the question of well transfers between January 1 and April 1, finding that “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 [and spud] fee.” *December 20, 2012 Implementation Order* at 12; *Xtreme Energy* at *20, Conclusion of Law No. 10.²⁵

²⁵ Repsol’s allegation that it had no actual notice of the Commission’s interpretation of Act 13 regarding the entity responsible for fee payment when there is a producer change is meritless. Talisman (Repsol’s predecessor), and PIOGA, were active participants in the *December 20, 2012 Implementation Order* proceeding and Repsol was admittedly aware of the *Xtreme Energy* case. Repsol cannot seriously argue that the Commission was anything but transparent.

Each year, on or before April 1, the authorized “producer” at that time must file a well production report and pay the impact and spud fees accordingly.

Repsol’s argument that the Commission “is asserting that impact and spud fees that accrue during a calendar year *re-accrue* during the next calendar year, thus making a new producer *retroactively liable and automatically delinquent* for any outstanding impact and spud fees from the preceding calendar year,” is incorrect. Repsol Application for Summary Relief at ¶ 96 (emphasis in the original). The Commission has never asserted such an interpretation. The liability for the wells stays with the wells irrespective of operator or producer status in the previous calendar year.²⁶ The only significant fact that matters is who the responsible “producer” is on April 1 of a given calendar year; a material fact and legal question in this case that must first be determined by the Commission.

Finally, keeping in mind that a “producer” is defined as “[a] person or its subsidiary, affiliate or holding company that holds a permit or other authorization to engage in the business of severing natural gas for sale, profit or commercial use from an unconventional gas well in this Commonwealth,” if any evidence exists that Repsol severed natural gas from these 72 wells for “sale, profit or commercial

²⁶ This interpretation is further evidenced by Section 2309(c) of Act 13, which states, “[i]f the producer does not have a pending appeal related to payment of the fee in process, **the department shall suspend the permit for that well until the fee has been paid.**” 58 Pa.C.S. § 2309(c) (emphasis added). Suspending the permit for the well is punitive only for the current owner/operator. After well ownership has transferred, the seller, having been paid for the well, suffers no consequences if the permit for that well is later suspended.

use” prior to April 1, 2022, then Repsol either (1) held a permit or other authorization to sever gas from those wells, or (2) Repsol was acting as the producer for those wells unlawfully. 58 Pa.C.S. § 2301. This is why an evidentiary hearing before the Commission is necessary to establish the facts to determine the producer responsible for paying the impact and spud fees.²⁷

²⁷ Again, it appears that Repsol has not promoted its recent interpretation of Act 13 consistently. *See infra* pages 48-49.

CONCLUSION

WHEREFORE, for the foregoing reasons, the Pennsylvania Public Utility Commission requests that this Honorable Court affirm the *en banc* decision of the Commonwealth Court sustaining the Commission's Preliminary Objection and dismissing Repsol's Second Amended Petition for Review in the Nature of a Complaint for Declaratory and Injunctive Relief and to refer this matter to the Commission for further administrative action as necessary.

Respectfully submitted,

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Dated: February 3, 2025

**CERTIFICATE OF COMPLIANCE
WITH WORD COUNT LIMITATION REQUIREMENT**

This brief complies with the word count limitation requirement of Pa. Rule of Appellate Procedure 2135(d) because this brief contains 12,986 words, excluding the parts of the brief exempted by Pa. Rule of Appellate Procedure 2135(b) as shown by the word processing system used to prepare the brief.

CERTIFICATE OF COMPLIANCE WITH PUBLIC ACCESS POLICY

I hereby certify that this filing complies with the provisions of the *Case Records Public Access Policy of the Unified Judicial System of Pennsylvania* that require filing confidential information and documents differently than non-confidential information and documents.

/s/ Adam D. Young
Adam D. Young
Assistant Counsel
Attorney ID No. 91822

Date: February 3, 2025

APPENDIX A

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Repsol Oil & Gas USA, LLC,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 613 M.D. 2022
	:	
Pennsylvania Public Utility	:	
Commission,	:	
	:	
Respondent	:	Argued: May 8, 2024

BEFORE: HONORABLE RENÉE COHN JUBELIRER, President Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE MICHAEL H. WOJCIK, Judge
HONORABLE CHRISTINE FIZZANO CANNON, Judge
HONORABLE LORI A. DUMAS, Judge
HONORABLE STACY WALLACE, Judge
HONORABLE MATTHEW S. WOLF, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
JUDGE WOLF

FILED: July 23, 2024

The Unconventional Gas Well Impact Fee Act of 2012 (Act 13 or Act), 58 Pa.C.S. §§ 2301-2318, creates an administrative process for levying impact fees on extraction of natural gas from unconventional wells. In our original jurisdiction, Petitioner Repsol Oil & Gas USA, LLC (Repsol) asks the Court to declare who must pay those fees. The Pennsylvania Public Utility Commission (Commission) has sent Repsol invoices demanding payment of the Act 13 fees due in 2022 for 72 unconventional wells Repsol recently acquired. Repsol argues that its predecessors in interest—Rockdale Marcellus Holdings, LLC and Rockdale Marcellus, LLC (collectively, Rockdale)—are solely responsible to pay the fees. Now before the

Court are the Commission’s preliminary objections to Repsol’s second amended petition for review requesting declaratory and injunctive relief (Petition) and Repsol’s application for summary relief. Because we conclude that Repsol has failed to exhaust an available administrative remedy before the Commission, we sustain in part the Commission’s preliminary objections, dismiss the Petition, and dismiss as moot the remaining preliminary objections and Repsol’s application for summary relief.

I. BACKGROUND

A. Statutory Framework

The Petition challenges the Commission’s application of Chapter 23 of Act 13, which the General Assembly enacted in 2012. Section 2302 of the Act allows municipalities to impose a fee on all unconventional gas wells within their borders. 58 Pa.C.S. § 2302(a), (a.1), (a.4). The Commission calculates the amount of the fee and collects the fee. *Id.* §§ 2302(b)-(c), 2307(a). The fee imposed under these provisions has two components. “Impact fees” are calculated “on an annual flat, per-well basis . . . using the average annual price of natural gas” during the relevant calendar year, and are intended to offset the environmental impacts of unconventional gas production. *Snyder Bros., Inc. v. Pa. Pub. Util. Comm’n*, 198 A.3d 1056, 1059, 1075 (Pa. 2018); *see also* 58 Pa.C.S. § 2302(b)-(c) (establishing method of calculating impact fee). “Spud fees” are a small per-well fee authorized by Section 2303(c) of the Act to fund the Commission’s administration of the fee program. 58 Pa. C.S. § 2303(c). This matter involves a dispute over who is responsible to pay impact and spud fees.

The fee under the Act “is imposed on every producer” of an unconventional gas well. 58 Pa.C.S. § 2302(b). A *producer* is

[a] person or its subsidiary, affiliate or holding company *that holds a permit or other authorization* to engage in the business of severing natural gas for sale, profit or commercial use from an unconventional gas well in this Commonwealth

58 Pa.C.S. § 2301 (definitions) (emphasis added). On April 1 of each year, each producer must perform two actions: (1) pay the fee imposed, and (2) file a report with the Commission “for the previous calendar year” counting that producer’s wells in each municipality that has imposed a fee. *Id.* § 2303(b).

The Commission has, through adjudication, clarification, and proposed rules, stated that it interprets Section 2302 as requiring that “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 [and spud] fee [due at that same time].” *Pa. Pub. Util. Comm’n v. Xtreme Energy Corp.* (Commission, Docket No. C-2017-25999145, filed May 7, 2019), slip op. at 20, 2019 WL 2250766, Conclusion of Law No. 10 (citing *Act 13 of 2012—Implementation of Unconventional Gas Well Impact Fee Act, Clarification Order Regarding Chapter 23*, (Commission, Docket No. M-2012-2288561, filed Dec. 20, 2012), slip op. at 11-12); *see also Act 13 of 2012—Implementation of Unconventional Gas Well 10 Impact Fee Act, Proposed Rulemaking Order*, (Commission, Docket No. L-2013-2375551, filed Oct. 17, 2013) slip op. at 16-17 n.23.

B. Factual Background

Against that statutory and administrative backdrop, the Petition alleges the following facts. Rockdale owned and operated the wells at issue through the entirety of 2021. In addition, Rockdale held a permit issued by the Pennsylvania Department of Environmental Protection (DEP) allowing it to sever natural gas for sale, profit, or commercial use from the unconventional wells; thus, Rockdale was a

“producer” as defined by Section 2301 of Act 13, 58 Pa.C.S. § 2301, and was subject to the annual impact and spud fees. Pet. ¶¶ 45-49. Rockdale paid the impact and spud fees in April 2018, 2019, 2020 and 2021. *Id.* ¶¶ 50-51.

In September of 2021, Rockdale filed a bankruptcy petition in the United States Bankruptcy Court for the Western District of Pennsylvania (Bankruptcy Court). Pet. ¶ 52. Rockdale filed with the Bankruptcy Court a motion for the approval of bidding procedures for the sale of substantially all of its assets, including the 72 unconventional gas wells at issue here. *Id.* ¶ 53. Repsol and Rockdale entered into a purchase and sale agreement (Sale Agreement) whereupon Repsol would acquire substantially all of Rockdale’s assets, including the unconventional gas wells. *Id.* ¶ 54. In a December 29, 2021 order, the Bankruptcy Court granted Rockdale’s motion for approval of bidding procedures and the Sales Agreement. *Id.* ¶ 55. The sale closed on January 19, 2022, and Repsol assumed ownership of the unconventional gas wells effective January 1, 2022. *Id.* ¶¶ 56-57. Transfer of all applicable permits from Rockdale to Repsol did not occur until June 22, 2022. *Id.* ¶ 58.

On February 9, 2022, Rockdale filed an Act 13 report for the subject wells with the Commission. Pet. ¶ 61. On that same day, the Commission issued Rockdale an Impact Fee Statement in the amount of \$1,428,100 for the period of January 1 through December 31, 2021 (2021 Impact Fees), along with a Spud Fee Statement in the amount of \$3,600 for the same period (2021 Spud Fees). *Id.* ¶¶ 62-63. Rockdale’s bankruptcy plan administrator, however, objected to Rockdale’s obligation to pay the 2021 Impact Fees because the impact fees were not taxes entitled to priority under bankruptcy law, the Commission failed to file a timely

proof of claim in the bankruptcy proceedings, and the impact fees should be paid as a general unsecured claim. *Id.* ¶ 69.

Meanwhile, the Commission filed with the Bankruptcy Court a motion to interpret, implement, and enforce the sale transaction. Pet. ¶ 72. It sought a determination by the Bankruptcy Court as to which party was obligated to pay the 2021 impact fees. *Id.* The motion did not address the 2021 spud fees. *Id.* ¶ 73. On October 28, 2022, the Bankruptcy Court issued an order finding that Rockdale and Repsol “specifically and unambiguously” defined impact fees in the Sales Agreement as taxes, and that the payment of taxes attributable to the period before January 19, 2022 (the date of closing of the sale), was allocated to Rockdale. *Id.* ¶¶ 72-74.

On November 30, 2022, the Commission sent an Impact Fee Statement to Repsol for the wells at issue in the amount of \$1,428,100 for the period of January 1, 2021, through December 31, 2021. Pet. ¶ 75. For the same period, the Commission also sent Repsol a Spud Fee Statement in the amount of \$3,600. *Id.* ¶ 76. Both statements were backdated to February 9, 2022 (the day Rockdale filed its 2021 Act 13 report and the Commission issued the 2021 Impact Fee and Spud Fee Statements to Rockdale). *Id.* ¶ 78. Further, both Statements were marked “PAST DUE”.¹ *Id.* ¶ 80.

On December 6, 2022, the Commission filed a motion for leave to file proof of claim in the Bankruptcy Court. In the motion, the Commission stated that it had “begun the process to initiate state court proceedings against Repsol for the 2021 Impact Fees and asked the Court to consider its proof of claim for those fees timely filed pending the result of [the] state court proceedings against Repsol.” Pet.

¹ Act 13 provides a producer 30 days from the Commission’s notice to remit payment. 58 Pa.C.S. § 2303(c)(2).

¶¶ 81-82 (internal quotation marks omitted). Repsol avers that it has advised the Commission that Repsol remains opposed to the imposition of the 2021 Impact and Spud Fees. *Id.* ¶ 83.

The Bankruptcy Court scheduled a hearing on the motion to file proof of claim for May 24, 2023. Pet. ¶ 113. Prior to the hearing, the Plan Administrator and the Commission reached a settlement agreement that was entered as an order of the Bankruptcy Court. Pursuant to the order, Rockdale agreed to pay the Commission \$100,000 in full satisfaction of the liabilities asserted against the estate through the Commission’s impact and spud fee invoices. *Id.* ¶ 119. In exchange, the Commission agreed to waive its right to seek any further payment or distribution under the Rockdale Plan, the Rockdale Debtors’ bankruptcy estates, or from the Rockdale Plan Administrator on account of the Commission Impact and Spud Fee Invoices. *Id.* ¶ 120. Further the Commission reserved “any and all rights it may have against Repsol in connection with the impact and spud fees pursuant to Act 13 associated with Repsol’s acquisition of assets, the Sale Agreement and/or the Sale Order and the Commission Impact and Spud Fees Invoices.” *Id.* ¶ 121 (internal quotation marks omitted). The agreement also indicated that it would not impact any action the Commission may pursue involving Repsol and Repsol’s liability for payment of impact and spud fees. *Id.*

Repsol maintains it initiated this action because it was “[f]aced with the prospect of remitting payment to the Commission for fees it does not owe without the possibility of a refund [] or withholding payment and risking incurring significant sanctions (and indefinite threat of an enforcement action).” Pet. ¶ 104.

C. Procedural History

In December of 2022, Repsol filed a petition for review in the nature of a complaint for declaratory and injunctive relief against the Commission and DEP. Thereafter, Repsol filed an application for relief in the nature of a preliminary or special injunction and stay pending final disposition of a related bankruptcy case. By order dated February 24, 2023, the Court denied that application. The Court also denied Repsol's application for reconsideration of that order.

Repsol amended its petition for review in response to the Commission's first set of preliminary objections. Thereafter, Repsol filed an application for relief seeking to discontinue its action as to DEP, which the Court granted. The Commission then filed new preliminary objections to Repsol's amended petition for review. In response, on May 17, 2023, Repsol further amended by filing the present Petition.

The Petition seeks declaratory and injunctive relief against the Commission only, in four counts. Count I seeks a declaration that a producer *actually* filing an Act 13 report on April 1 of a calendar year is the person liable to pay the impact and spud fees then due. In support, the Petition alleges that the Commission is misapplying Act 13, and Repsol is not the liable producer, because Rockdale owned, operated, and held permits for the wells for the entirety of 2021; Repsol did not obtain a permit until June 22, 2022 (after the report and fees were due) and it was Rockdale, not Repsol, that actually filed the annual report for the wells in February 2022 and originally received the Commission's invoice for the impact fee. Pet. ¶¶ 147-52. Count II seeks a declaration that, if an entity other than the producer actually filing the annual report must pay the impact fee (i.e, if the producer *responsible for* filing the report must pay) this interpretation by the

Commission would violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution by failing to provide Repsol with fair and adequate notice that it would be liable for the impact fee due in 2022. Pet. ¶¶ 154-65. Counts III and IV mirror Counts I and II, respectively, but regarding spud fees as distinct from impact fees.

II. ISSUES

The Commission raises six preliminary objections. First, it asserts that Repsol has failed to exhaust available administrative remedies, and that the Commission is best situated to develop a factual record via administrative adjudication at this time, such that declaratory relief in our original jurisdiction is improper. Second, the Commission demurs to all counts on the basis that Repsol lacks standing to seek declaratory relief because it is not aggrieved absent a final adjudication of liability for the fees by an administrative law judge and/or the Commission. Third, the Commission demurs to all counts on the basis that Repsol's claims are not ripe, and will not be ripe until an administrative hearing on which findings of fact can be made. Fourth, as to Counts I and III, the Commission demurs for failure to state a claim, based on putative inconsistency between what Repsol has conceded is the Commission's controlling interpretation of Act 13 (that the producer *responsible for* the report must pay the impact fee) and the declaratory relief Repsol requests (that the producer *actually filing* the report must pay). Fifth, as to Counts II and IV, the Commission asserts essentially the same demurrer for failure to state a claim as it did for Counts I and III, but with respect specifically to spud fees. Lastly, the Commission objects that the Petition includes scandalous or impertinent matter in the form of references to preliminary injunctive relief, which the

Commission argues is impertinent because the Court had already denied Repsol's request for preliminary injunction before it filed the present version of the Petition.

Repsol's application for summary relief, which is also before the Court, raises the issue of whether Repsol is clearly entitled to the relief it seeks and whether there is any issue of material fact in dispute. *See Leach v. Turzai*, 118 A.3d 1271, 1277 n.5 (Pa. Cmwlth. 2015), *aff'd*, 141 A.3d 426 (Pa. 2016). Repsol argues it is undisputed that Repsol did not hold a permit to operate the wells at issue until after the April 1, 2022 filing deadline. Thus, in Repsol's view, it is undisputed that Repsol was not a "producer" subject to Act 13 fee liability for the 2021 calendar year as of April 1, 2022, the date those fees were due.

III. DISCUSSION

When deciding preliminary objections, we accept as true all well-pleaded material facts and all reasonable inferences from those facts. *Phantom Fireworks Showrooms, LLC v. Wolf*, 198 A.3d 1205, 1214 n.6 (Pa. Cmwlth. 2018) (*en banc*). We need not accept unwarranted factual inferences, conclusions of law, arguments, or opinions. *Id.* To sustain preliminary objections, it must be clear that the law will permit no recovery, even resolving doubts in favor of the non-movant. *Id.*

Further, we will grant a Pa.R.A.P. 1532(b) application for summary relief in our original jurisdiction only if there are no disputes of fact. *Phantom Fireworks Showroom*, 198 A.3d at 1220. Summary relief "is appropriate where a party asserts a challenge to the constitutionality of a statute *and* no material facts are in dispute." *Id.* (emphasis added).

A. Preliminary Objection 1—Exclusive Jurisdiction and Failure to Exhaust Administrative Remedies

The Commission first argues that Repsol has failed to exhaust an available and adequate administrative remedy provided in Chapter 23 of Act 13, citing 58 Pa.C.S. §§ 2307-2309. Those sections describe the process for imposing and collecting Act 13 impact and spud fees. Section 2307 authorizes the Commission “to make all inquiries and determinations necessary to calculate and collect the fee” and “issue a notice of the amount due and demand for payment.” 58 Pa.C.S. § 2307(a)-(b). Section 2308 provides consequences of nonpayment. It imposes interest and a penalty (capped at 25% of the fee) for delinquent fees. *Id.* § 2308(a)-(b). It also provides that for any delinquent fee, “[i]f the producer does not have a pending appeal^[2] related to payment of the fee in process, [DEP] shall suspend the permit for that well until the fee has been paid.” *Id.* § 2038(c). Section 2309 authorizes the Commission to enforce its own orders entered pursuant to Act 13. *Id.* § 2309. The Commission’s enforcement orders are immediately effective upon entry and subject the ordered party to a contempt proceeding in this Court’s jurisdiction. *Id.*

The Commission points to that statutory authorization as showing that it is the agency tasked with administering Act 13. Its position is that the fee invoices

² Act 13 does not further provide for or discuss the nature of any “appeal” from the Commission’s initial imposition of impact and spud fees. The term *appeal* appears at only one other place in Act 13: when providing for appeal to this Court from the Commission’s later order enforcing a fee previously imposed. *See* 58 Pa.C.S. § 2309(a). Act 13 provides for an administrative challenge before the Commission of certain assessments (to offset the Commission’s cost of administering Act 13), which challenge proceeds pursuant to a section of the Public Utility Code, 66 Pa.C.S. §§ 101-3316, relating to assessment of regulatory expenses upon public utilities. *Id.* § 2303(c)(3) (referencing 66 Pa.C.S. § 510). That type of assessment is not at issue here.

it issued were produced by Commission staff and do not represent a final order of the Commission regarding liability for fees (as would be produced by the Commission's adjudication of a challenge to the fee invoices). And the Commission identifies at least one issue that Act 13 requires be resolved to finally determine Repsol's liability for the fees: whether Repsol was the *producer* of the wells as of April 1, 2022, and therefore liable for payment under the Commission's interpretation of Act 13.

The Commission emphasizes that determining whether Repsol was a producer at the relevant time is a fact-intensive inquiry. Repsol applied to DEP for well-operator permits on February 7, 2022, for the wells it purchased in January 2022. Although DEP did not approve the permit application until June 22, 2022—which is the date Repsol identifies as the trigger for *producer* status—DEP backdated the effective date of the permit to February 7, 2022, before the April 1 date relevant under Act 13. Further, the Commission notes that Repsol's emergency response plans filed with DEP were backdated to April 1, 2022, and that Repsol employees were communicating with DEP enforcement officials regarding outstanding violations as early as January 2022. Finally, the Commission notes that prior to April 1, 2022, Repsol became the owner of, and in reality was operating, the wells in question. It points out there has been no hearing or other factual development to allow the Commission to resolve these factual issues and then apply the Commission's interpretation of Act 13 to this specific dispute.

Tellingly, the Commission argues, Repsol began to engage in the proper administrative remedy before initiating this action. Repsol filed an objection to the impact and spud fee invoices with the Commission. But Repsol then immediately petitioned this Court for declaratory and injunctive relief, and the

Commission responded by ceasing action on Repsol's written objection to avoid acting inconsistently with this Court's exercise of original jurisdiction. The Commission argues it should hold a hearing on those objections and could then review (and, if needed, modify) its interpretation of Act 13 in ruling on the objections. At oral argument, the Commission represented that it would consider Repsol's written objections to be a petition for relief filed under Chapter 5 of the Commission's procedural regulations. *See* 52 Pa. Code § 5.41(a) (authorizing petitions for relief).³ It also represented that it would render a final determination on those written objections after a hearing.

Finally, the Commission disputes Repsol's characterization of this matter as a pre-enforcement challenge to Act 13, because this matter does not involve a new statute or rule, does not affect the industry as a whole, and does not immediately affect Repsol because its liability for the fee is still subject to dispute before the Commission, which dispute the Commission could resolve in Repsol's favor.

In response, Repsol argues that Act 13 does not itself provide an administrative remedy that is available as of right to a producer. The only remedy Act 13 sets up, and the one the Commission says Repsol must exhaust, is a Commission-initiated enforcement action under Section 2309 of the Act. *See* 58 Pa.C.S. § 2309. Repsol cannot initiate an enforcement action, so it would be indefinitely subject to the Commission's enforcement discretion. In Repsol's view,

³ Repsol essentially argues in its post-argument brief regarding the briefs of *amici curiae* that the Commission waived reliance on this procedural regulation by failing to cite it before oral argument. But the Commission's preliminary objections and argument have clearly contemplated further Commission action on Repsol's written objections to the invoices, and the question of the procedure applicable to that action is fairly encompassed within that issue. Thus, the Court will consider these procedural regulations in addressing the legal question of whether an adequate remedy is available.

that renders Act 13's enforcement process inadequate as a statutory remedy under *EQT Production Co. v. Department of Environmental Protection*, 130 A.3d 752, 759 (Pa. 2015) (holding that a petitioner's "inability in its own right to implicate the sole avenue available for quasi-judicial administrative review" supported this Court's acting in its original jurisdiction). Repsol adds that the Commission's general procedural regulations do not create an administrative remedy. It argues that the Commission established those regulations by authority granted in the Public Utility Code, and that Act 13 references the Code only once in relation to an administrative assessment not at issue here. *See* 58 Pa.C.S. § 2303(c)(3) (referencing 66 Pa.C.S. § 510).

Repsol also maintains that no exhaustion is required because this is a pre-enforcement challenge. Repsol argues that the Commission's proposed interpretation of Act 13, which gives the Commission the authority to make a producer who acquires an unconventional gas well retroactively liable for reporting paying fees, is of fundamental import to the way Act 13 liability operates. Repsol argues that interpretation puts it and other producers at risk of incurring substantial monetary sanctions for failing to comply with Act 13, and so justifies declaratory relief prior to exhaustion of administrative remedies.

Finally, Repsol asserts that no factual development is needed, so an administrative proceeding would be unnecessary. Repsol argues that all of the factual questions surrounding Repsol's involvement with operating the wells in 2022 are irrelevant because DEP did not formally issue Repsol an operator permit until June 2022, after the April 1 deadline for the producer to file the Act 13 report, which the Commission has stated is also the entity who must pay the fees. In Repsol's

view, it was indisputably not a *producer* until June 2022, and thus cannot be liable to pay fees that were due April 1, 2022.

It is well established that before invoking this court's original jurisdiction, a party must exhaust any adequate statutory or administrative remedy.⁴ *Canonsburg Gen. Hosp. v. Dep't of Health*, 422 A.2d 141, 144 (Pa. 1980); *Funk v. Dep't of Env't Prot.*, 71 A.3d 1097, 1101 (Pa. Cmwlth. 2013); *Keystone ReLeaf LLC v. Dep't of Health*, 186 A.3d 505, 513 (Pa. Cmwlth. 2018) (*en banc*). If there is another adequate remedy available, courts must refrain from exercising equity jurisdiction to adjudicate declaratory relief. *Keystone ReLeaf*, 186 A.3d at 513-14. This requirement prevents premature judicial intervention in the administrative process and ensures claims will be addressed by the body with expertise in the area. *Funk*, 71 A.3d at 1101. Inextricably linked with the agency's exercise of expertise and discretion is the need to develop an adequate factual record so that the agency's decision is not made in the abstract. *See Keystone ReLeaf*, 186 A.3d at 518.

There are three conventional exceptions to this rule, allowing a party to avoid exhausting the remedy where “the jurisdiction of an agency is challenged,” “the constitutionality of a statutory scheme or its validity is challenged,” or “legal or equitable remedies are unavailable or inadequate.” *Id.* at 514 (quoting *Empire Sanitary Landfill, Inc. v. Dep't of Env't Res.*, 684 A.2d 1047, 1054 (Pa. 1996)).

Our courts have thoroughly developed a more specific exception to the exhaustion doctrine for pre-enforcement challenges to statutes or regulations, which Repsol invokes here. This *Arsenal Coal* line of cases, as it is commonly called,

⁴ “The terms ‘exhaustion of statutory remedies’ and ‘exhaustion of administrative remedies’ are at times used interchangeably in our decisional law.” *Off. of Governor v. Donahue*, 98 A.3d 1223, 1231 n.6 (Pa. 2014). The latter term more often refers to an administrative appeals process created by agency rule or regulation. *Id.*

allows a party to come straight to court for declaratory relief without exhausting an administrative remedy, but only under certain conditions. *See Arsenal Coal Co. v. Dep't of Env't Res.*, 477 A.2d 1333, 1338 (Pa. 1984); *Bayada Nurses, Inc. v. Dep't of Labor and Indus.*, 8 A.3d 866, 874-76 (Pa. 2010); *EQT Prod. Co.*, 130 A.3d at 758; *Pa. Indep. Oil & Gas Ass'n v. Dep't of Env't Prot.*, 135 A.3d 1118, 1128 (Pa. Cmwlth. 2015) (*en banc*) (*PIOGA*). The purpose of pre-enforcement review is to save a petitioning party, and all others similarly situated, from having to choose between two unworkable options: complying with a law of new or questionable application—at substantial cost and with uncertainty going forward—or willfully violating that law to provoke enforcement so as to challenge it. *Firearm Owners Against Crime v. Papenfuse*, 261 A.3d 467, 486 n.14 (Pa. 2021).

Because pre-enforcement review is an exception to the general rule of exhaustion, its application is limited. First, if the third option of an administrative adjudication exists which the petitioner could pursue without any “immediate obligation or threat posed by the challenged agency action,” the petitioner must pursue the administrative remedy first. *Marcellus Shale Coal. v. Dep't of Env't Prot.*, 216 A.3d 448, 498 (Pa. Cmwlth. 2019) (*en banc*). Second, where the petitioner’s concerns are not industry-wide, but are instead about “application of the statute or regulation in a particular case,” courts typically require exhaustion and disfavor pre-enforcement review. *Keystone ReLeaf*, 186 A.3d 505, 514; *see also Marcellus Shale Coal.*, 216 A.3d at 498 (denying relief in part based on failure to exhaust remedy where the Court did “not perceive any current threat to the industry that would justify pre-enforcement intervention”); *Pocono Manor Invs., LP v. Dep't of Env't Prot.*, 212 A.3d 112, 118 (Pa. Cmwlth. 2019) (noting that pre-enforcement review requires “industry-wide concerns”); *PIOGA*, 135 A.3d at 1128 (allowing pre-

enforcement challenge that was “essentially[] an industry-wide challenge to [the agency’s] permitting process” that “will affect th[e] entire industry,” and citing *Bayada Nurses*). Third, it is *pre*-enforcement review, so the regulation is typically immediately effective and self-executing absent any agency action to apply or enforce it. *PIOGA*, 135 A.3d at 1126.

Addressing the *Arsenal Coal* exception to exhaustion first, we note that none of the usual aspects of a pre-enforcement challenge appear here. Repsol is not challenging a new statute or a new agency interpretation of that statute. Its challenge comes after, not before, the Commission took action to apply Act 13 to Repsol. Repsol’s challenge is thus not brought in the hypothetical or abstract as is typical of pre-enforcement review. It is concrete and laden with distinctive facts—a bankruptcy, agreements allocating ownership and liability for the wells, the transfer of ownership and operation to varying factual degrees over time, and Repsol’s acquiring an operating permit that was then back-dated to a point that arguably makes Repsol liable under Act 13. This matter is fact intensive; it is not tantamount to an industry-wide challenge to action by the Commission. *Cf. PIOGA*, 135 A.3d at 1128. Moreover, administrative review that the petitioner can initiate is adequate unless the statute or regulation itself causes actual, present harm. *Cf. Bayada Nurses*, 8 A.3d at 876 (holding that change to interpretation of regulation resulted in a direct and immediate impact on the home health care industry in general).

EQT Production does not support Repsol’s argument for pre-enforcement review such that no exhaustion is necessary. 130 A.3d at 759. There, an unconventional well operator inadvertently discharged contaminated water, triggering potential statutory civil penalties of more than \$4.5 million, plus an open-ended increase of \$10,000 per day based on ongoing violations. DEP initially

proposed that the operator enter into a consent agreement to pay the penalties. *Id.* at 754. The operator then filed a declaratory judgment action in this Court's original jurisdiction. After that action was filed, DEP filed a complaint before the Environmental Hearing Board to collect those penalties (including the ongoing amounts). A single judge of this Court dismissed the action on preliminary objections as to justiciability. The Supreme Court reversed, and for three reasons concluded that no exhaustion was required. Each reason is distinguishable from the case now before us.

First, in *EQT Production*, the amount of the penalties imposed was open-ended and growing continuously by at least \$10,000 per day. *Id.* at 755. Here, the amount of the fee is already known and fixed, subject only to interest and a statutory penalty of, at most, 25% of the fee. Further, the Commission would not impose discretionary penalties where there is a good faith challenge to impact and spud fees. *See Pub. Utility Comm'n, Bureau of Investigation and Enf't v. Snyder Brothers, Inc.*, (Commission, Docket No. C-2014-2402746, filed June 11, 2015), slip op. at 59, 67. And if the administrative process results in a finding that Repsol is not responsible for the fees, then the Commission could not impose interest or penalties. The fixed nature of the amount in dispute here is distinguishable from the ever-growing fees in *EQT Production*.

Second, *EQT Production* involved only questions of law and no factual development was necessary to answer those questions. There, our Supreme Court noted that its

decision might be different had the [agency] advanced a persuasive case that there are material factual dynamics involved in evaluating the validity of its [statutory] interpretation Here, however, [the agency] has limited its argument . . . [to] a conclusory pronouncement of a

need to develop a full factual record This presentation offers little to contradict [the petitioner’s] assertion that its challenge to the agency’s [statutory] interpretation presents only questions of law presently amenable to judicial review.

EQT Prod., 130 A.3d at 759. Here, the Commission has gone far beyond a boilerplate statement that a record is needed. It identifies several factual questions that must be determined about when and how Repsol began to “hold[] a permit or other authorization” to operate the wells, which controls its status as a *producer* and thus its liability. 58 Pa.C.S. § 2301. Did Repsol receive “other authorization” from Rockdale to operate the wells before formally acquiring a permit from DEP? And which permit date controls—the effective date, which was back-dated to the date of application, or the date the permit was actually issued? Unlike the agency in *EQT Production*, the Commission has persuasively argued that these questions require development of a factual record. And contrary to Repsol’s position, those questions are legally relevant. A party’s *producer* status is not a pure question of law; per Act 13’s controlling text, it turns on whether and when that party was authorized, by permit or otherwise, to sever natural gas. The Act does not obviously make the date of issuance of an operation permit by another agency (here, DEP) dispositive of liability for Act 13 fees.

Third, the petitioner in *EQT Production* could not initiate any administrative remedy because of that matter’s procedural history. There, the declaratory judgment action was filed before any action by the agency beyond negotiation with the producer. The Supreme Court reasoned that even if the after-filed action before the Environmental Hearing Board afforded some after-filing remedy, it was not enough to alleviate the petitioner’s hardships. *EQT Prod.*, 130 A.3d at 759. Here, by contrast, the Commission has issued the invoices first, and

Repsol had already commenced that challenge by filing written objections to the invoice before filing this action. Given these differences, *EQT Production* and the other *Arsenal Coal* cases are distinguishable, and we conclude that this matter does not warrant pre-enforcement review.

We turn, then, to whether the available administrative remedy is adequate such that Repsol must exhaust it. Repsol's main contention is that the only remedy the Commission has identified is Act 13's authorization for enforcement orders by the Commission, which would leave Repsol at the whim of the Commission's enforcement power. But that is not the only remedy the Commission has identified for exhaustion. The remedy Repsol can seek, and has essentially already begun to seek, is to challenge the fee invoices before the Commission, obtain a final determination of that challenge from the Commission (which would also encompass a denial or effective denial of the challenge) and then seek appellate review of that determination in this Court.

It is not hard to imagine how that administrative remedy would proceed. The Commission would ordinarily be subject to the General Rules of Administrative Practice and Procedure (GRAPP) applicable to administrative agencies generally. *See* 1 Pa. Code Part II. But the Commission has promulgated its own procedural rules that displace GRAPP in Part I, Subpart A of the Commission's regulations. *See* 52 Pa. Code §§ 1.1-5.633. Those procedural rules apply by their terms to "practice and procedure before the Commission," *id.* § 1.1(a), and a petition for relief may be filed under Chapter 5 of the regulations with respect to "the [Public Utility Code] or *other statute that the Commission administers*," *id.* § 5.41(a). Act 13 expressly obligates the Commission to administer it, so a party may, per the Commission's procedural rules, file a petition for relief before the Commission

under Act 13. The Commission would hold a hearing on that petition (under Chapter 5, Subchapter B of its regulations, 52 Pa. Code §§ 5.201-5.254) from which exceptions or an appeal could be taken (under Chapter 5, Subchapter H, 52 Pa. Code §§ 5.531-5.539) within the Commission.

In addition to these procedural rules, the Commission is governed by the Administrative Agency Law, which requires that “no adjudication of a Commonwealth agency shall be valid as to any party unless he shall have been afforded reasonable notice of a hearing and an opportunity to be heard.” 2 Pa.C.S. § 504. The Commission has not yet afforded a hearing, nor has Repsol formally requested one. If the Commission finally denies Repsol a hearing on the objections Repsol has already filed, Repsol could challenge that denial of a hearing in this Court’s appellate jurisdiction. 42 Pa.C.S. § 763(a)(1); *O’Brien v. State Employees’ Ret. Sys.*, 469 A.2d 1008, 1011 (Pa. 1983) (holding that an action to compel an agency to hold an administrative hearing is properly in Commonwealth Court’s appellate, not original, jurisdiction).

That structure—initial agency action, hearing before the agency, final agency action, and appeal to Commonwealth Court—prevents unnecessary filings in this Court’s original jurisdiction that would allow as-of-right appeals to the Supreme Court. *Simmons v. Cohen*, 534 A.2d 140, 145 (Pa. Cmwlth. 1987), *aff’d sub nom. Simmons v. White*, 574 A.2d 600 (Pa. 1990). “Of course, if an agency refuses to act on a request for hearing in an effort to avoid a final decision that allows appeal, [we are] certainly not . . . powerless to proceed originally under Section 761 [of the Judicial Code, 42 Pa.C.S. § 761].” *O’Brien*, 469 A.2d at 1011 n.8. But here, the Commission has not *refused* to afford a hearing. Instead, it stayed agency action out of deference to the action Repsol filed in this Court.

Thus, an administrative remedy is available, even apart from the Commission's entry of an enforcement order under Section 2309 of the Act or a proceeding for contempt thereon. Whether that remedy is adequate for purposes of exhaustion depends on whether it "allow[s] for adjudication of the issues raised" and minimizes "irreparable harm to . . . the [petitioner] during the pursuit of the . . . remedy." *Keystone ReLeaf*, 186 A.3d at 517. To overcome the requirement for exhaustion, the petitioner must make a clear showing that the remedy is inadequate. *Id.* As we have discussed, unlike the open-ended fee in *EQT Production*, there is minimal risk to Repsol during an administrative remedy. There is no indication the Commission would proceed to enforce or collect the fixed fees during administrative proceedings on Repsol's objections. If the Commission does initiate such enforcement, Repsol has a remedy there too, which would also culminate in our appellate, not original, review. That is essentially what occurred in *Snyder Brothers*—the agency filed a complaint to collect past-due Act 13 fees, the matter was heard before a Commission administrative law judge, that judge's order was appealed to the Commission, and then this Court heard the appeal from the Commission's decision. 198 A.3d at 1059. If the Commission does not initiate enforcement, the administrative proceeding on Repsol's objections will, as discussed, afford a hearing and opportunity for the Commission to determine whether Repsol is liable for the fees assessed. That determination could come out in Repsol's favor. If it does not, and if the Commission determines that interest and penalties should accrue for Repsol's not having paid the invoiced fees in the interim, all of those determinations are reviewable on appeal to this Court.

IV. CONCLUSION

The legal issues the Petition raises are complex and should be decided on a concrete factual record—a record which has not yet been developed in this case. An administrative remedy exists to allow that development, and to allow the Commission to consider how it will apply Act 13 to these facts. That remedy is adequate because it allows Repsol to pursue it, including through judicial review, without immediate risk of further increasing its liability. We hold that Repsol must continue to pursue and exhaust that remedy before it can proceed on the Petition, and we thus sustain the Commission’s first preliminary objection to the Petition and dismiss the Petition.⁵

/s/ Matthew S. Wolf

MATTHEW S. WOLF, Judge

⁵ Given this conclusion, we dismiss as moot the Commission’s remaining preliminary objections without deciding them, and we dismiss Repsol’s application for summary relief as moot.

EXHIBIT B

In re: Rockdale Marcellus Holdings, LLC,
No. 21-22080 (W.D. Pa. Bankr.), Dkt. No.
1208, PUC's Response in Opp'n to Plan
Administrator's Objection

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

In re:	:	
	:	Chapter 11
ROCKDALE MARCELLUS	:	
HOLDINGS, LLC and ROCKDALE	:	
MARCELLUS, LLC	:	Case No. 21-22080-GLT
Debtors.	:	(Jointly Administered)

	:	
ALFRED T. GUILIANO, SOLELY	:	Document No:
IN HIS CAPACITY AS PLAN	:	
ADMINISTRATOR FOR	:	Related to Document No: 1176, 1177
ROCKALE MARCELLUS	:	
HOLDINGS, LLC and	:	Hearing Date: July 21, 2022
ROCKDALE MARCELLUS, LLC,	:	
Movant,	:	
	:	
v.	:	
	:	
PENNSYLVANIA PUBLIC UTILITY	:	
COMMISSION,	:	
Respondent	:	

**PENNSYLVANIA PUBLIC UTILITY COMMISSION RESPONSE IN
OPPOSITION TO PLAN ADMINISTRATOR’S OBJECTION**

Pursuant to section 502 of title 11 of the United States Code, 11 U.S.C. § 101 *et seq.* (the “Bankruptcy Code”) and Rules 9006 and 9014 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”) as a governmental unit the Pennsylvania Public Utility Commission (PUC or Commission) files this

Response in Opposition to the Objection of Alfred T. Guiliano, Plan Administrator (Plan Administrator) requesting that this Court deny the Plan Administrator's request for this Court to issue an Order to disallow and expunge a debt issued by an invoice issued by the Commission to Rockdale Marcellus LLC (Rockdale or Debtor) for post-petition debt which only became due after the filing of Petitioner's case. 11 U.S. Code § 502(b)(9)(A), in support thereof, the Commission states the following:

1. Admitted.
2. The allegations in Paragraph No. 2 of the Objection do not require a response. To the extent a response is required, the Commission denies that the Plan Administrator's request for relief is warranted. By way of further answer, the Commission asserts that its claim constitutes a post-petition debt which was not due at the time of the filing of the bankruptcy petition and cannot be discharged in this proceeding.
3. Admitted.
4. Admitted.
5. The allegations in Paragraph No. 5 of the Objection do not require a response. To the extent a response is required, the Commission submits that the record speaks for itself.
6. Admitted.

7. Admitted.

8. Admitted. By way of further answer, the Commission notes that the Plan Administrator's reference to the Commission as "Claimant" is incorrect. The Commission has not filed a proof of claim in this matter because the Commission seeks payment of a post-petition debt.

9. Admitted.

10. Admitted.

11. Admitted.

12. Admitted in part. By way of further Answer, the Commission notes that the Plan Administrator's reference to the Commission as "Claimant" is incorrect. The Commission has not filed a proof of claim in this matter because the Commission seeks payment of a post-petition debt. The impact and spud fees invoiced by the Commission are post-petition liabilities which did not arise until April 1, 2022.

Here, Debtor only filed its annual report on February 9, 2022, *after* its bankruptcy petition was filed. It was upon the filing of that report that payment of the fees was incurred and attached to the Debtor. It is the producer who files the report with the Commission who is responsible for payment of the impact and spud fees. 58 Pa.C.S. § 2303(b). Here, the impact and spud fees clearly qualify as a post-petition debt and the

Commission has properly, accurately, and consistently treated such fees as a post-petition liability. To date, no action by the Commission could be reasonably interpreted as qualifying it as a ‘claimant’ in this proceeding.

13. Admitted in part; Denied in part. It is denied that the impact and spud fees owed to the Commission are a pre-petition debt for which the Commission could have filed a proof of claim by the bar dates. By way of further response, the Commission could not file a proof of claim by the governmental bar date (March 21, 2022) in this proceeding because the Debtor did not have actual liability under Act 13 of 2012 (Act 13) until April 1, 2022. As a “producer” under 58 Pa.C.S. § 2301, Debtor is required to submit annual impact fee payments to the Commission by April 1 of each year. “The impact fee is based on the number of unconventional gas wells, which each producer must report to the Commission annually. Moreover, the producer is required to pay only the amount as calculated by the annual report filed by the producer. As such, the producer self-reports [the amount and existence of] its financial liability under Act 13.”¹

¹ *Clarification Order Regarding Chapter 23*, Docket No. M-2012-2288561, at 7 (Order entered Dec. 20, 2012).

Debtor filed its annual report with the Commission on February 9, 2022.² Upon filing this report, the impact and spud fees attach to Debtor and are calculated, but payment is not due, until April 1, 2022. 58 Pa.C.S. § 2302(b). These calculations are based on the Consumer Price Index (CPI) and the New York Mercantile Exchange (NYMEX) average annual price of natural gas, which are not released until after the end of the producer's reporting year. It is impossible to calculate the impact fee associated with a well until: (1) the CPI for the 2021 reporting year has been released; (2) the NYMEX for 2021 has been released; and (3) the producer files its annual report with the Commission. Upon filing its annual report with the Commission, the producer receives an automatically generated invoice that calculates its impact and spud fees for the reporting year. Payment of these invoiced impact and spud fees are not due until April 1. Prior calendar year ownership of the wells is irrelevant as to whether the producer incurs the obligation to pay the fees; rather, it is the producer who holds the permits to the wells who is liable for payment of the fees.

A debt is incurred when a person is exposed to a product or conduct giving rise to an injury that underlies a right to payment under the

² The annual report filed for 2022 uses a reporting year of January 1, 2021 through December 31, 2021 to determine which wells will have fees due on April 1, 2022. The report cannot be filed prior to January 1, 2022.

Bankruptcy Code. *Wright v. Owens Corning*, 679 F.3d 101, 107 (3rd Cir. 2012). The conduct which gives rise to liability for the Act 13 fees is holding the permits on April 1 of a particular year. The balance is due April 1, 2022, which is consistent with Commission orders implementing Act 13.³

Debtor's liability for payment of the fees arose as of April 1, 2022.⁴ As indicated on the invoices Debtor received for its impact and spud fees, *the balance is due by April 1, 2022*, as such, the Commission could not have filed a proof of claim before this date as the Debtor had no liability for the fees and was under no obligation to make any payments prior to that time.

The Commission did not file a claim with the Court for payment of the impact and spud fees as administrative expenses because such fees do not qualify as administrative expenses under 11 U.S. Code § 503. Rather, these fees constitute a post-petition liability which arose on April 1, 2022.

14. Denied. As discussed in paragraph 13 above, claims for the impact and spud fees could not be filed by the applicable bar dates because

(1) Debtor was not liable for the fees until April 1, 2022, which was after the

³ See 58 Pa.C.S. § 2303(a) and (b) and *Implementation Order Regarding Chapter 23*, Docket No. M-2012-2288561, at 9 (Order entered May 10, 2012).

⁴ For instance, if a producer transfers ownership of its wells on or before April 1, the new owner would be responsible for payment of the fees.

March 21, 2022 governmental bar date, and (2) the fees do not qualify as administrative expenses under the Bankruptcy Code.

Further, the Commission never pursued these claims against the Debtor in this bankruptcy matter or otherwise.

15. Admitted in part and denied in part. As discussed in paragraph 13 impact and spud fees are calculated pursuant to a detailed formula set forth in Act 13 and “shall apply to unconventional gas wells spud in this Commonwealth regardless of when spudding occurred. Unconventional gas wells spud before the fee is imposed shall be considered to be spud in the calendar year prior to the imposition of the fee for purposes of determining the fee under this subsection.” 58 Pa.C.S. § 2302(b). Debtor’s 2022 liability is calculated using information that Debtor itself submits to the Commission under Debtor’s complete control. Debtor reported its liability in February 2022, and it was this report that generated the invoice for impact and spud fees. The invoice is an auto-generated document immediately available to Debtor upon submission of its Act 13 reporting obligations to the Commission. As such, the Plan Administrator cannot claim that such liabilities arose prior to April 1, 2022, the date Debtor was legally obligated to pay such fees. 58 Pa.C.S. § 2303(b).

16. Denied. By way of further response, on March 24, 2022, Commission staff spoke with an attorney representing Debtor to discuss payment of post-petition fees. During that conversation, Commission staff relayed to Debtor's attorney that Debtor did not owe the Commission any money prior to Debtor's bankruptcy filing. Commission staff also confirmed with Debtor's attorney that Debtor is a debtor-in-possession throughout the bankruptcy and that Debtor would be responsible for any post-petition liabilities. Commission staff never made any assertions regarding the invoice and specifically did not assert that the impact fee is an administrative expense. Further, Commission staff indicated that the Commission would not be filing a proof of claim because Debtor was not liable for payment of the impact and spud fees prior to the government bar date.

Under Act 13, well spudding⁵ triggers future impact fees *for a well*. Producers may transfer their interests in their unconventional gas wells to other producers. However, liability for payment of the impact and spud fees arises as of April 1 of each year. 58 Pa.C.S. § 2302(b).

Debtor filed its bankruptcy petition on September 21, 2021. Debtor subsequently filed its annual well report with the Commission on February

⁵ 58 Pa.C.S. § 2301 defines spudding as “the actual start of drilling of an unconventional oil and gas well.”

9, 2022. The invoices for spud and impact fees were automatically generated at the time Debtor filed its annual report. Both invoices clearly indicate that the balance for the fees is due by April 1, 2022.⁶ As the producer filing the report and the holder of the well permits, Debtor held itself out as the party who will be responsible for paying the Act 13 impact and spud fees as of April 1, 2022. However, as of the date of this filing, Debtor has not made any payment towards its impact or spud fee liabilities and its allegations regarding a pre-petition claim are disingenuous.⁷

17. The allegations in Paragraph No. 17 of the Objection do not require a response.

18. Denied. The Commission never filed a proof of claim nor an administrative claim for the impact and spud fees for the reasons set forth in paragraphs 13, 14 and 15. The Plan Administrator attempts to portray the impact and spud fee invoices as an “informal proof of claim,” however, this is a mischaracterization. *In re Am. Classic Voyages Co.*, 405 F.3d 127, 131

⁶ 58 Pa.C.S. § 2303(a)

⁷ Commission records indicate that Debtor has transferred all its horizontal wells subject to Act 13 impact and spud fees to another entity. Debtor did this with full knowledge of the Commission’s position regarding payment of the fees. Those fees were not paid as part of the transfer. The Commission is not aware if any measure was taken, such as an escrow, to ensure payment of the fees. Nor is the Commission aware whether Debtor advised the well-purchaser of the outstanding fees.

(3rd Cir. 2005), outlines a five-part test to determine whether an informal proof of claim exists:

- a. The informal proof of claim must be in writing;
- b. The writing must contain a demand by the creditor on the debtor's estate;
- c. The writing must express an intent to hold the debtor liable for the debt;
- d. The informal proof of claim must be filed with the Bankruptcy Court; and
- e. Based on the facts of the case, it would be equitable to all the amendment.

Under this test, the invoice does not constitute an informal proof of claim as the Commission never filed any documents with the Bankruptcy Court indicating that it intended to collect on the invoices in bankruptcy.

The invoice that the Plan Administrator claims is an informal proof of claim is no claim at all; it is simply a request to pay a post-petition debt.

19. Denied. *See* Response No. 18 above.

20. Denied as stated. The incomplete citation and quotation provided by the Plan Administrator provides little information relevant to this dispute initiated by the Plan Administrator. For a more complete discussion of Act 13, *see* Response Nos. 13, 14 and 15 above.

21. Admitted in part. It is admitted that the quotes the Plan Administrator cites are correct however, such quotes are irrelevant to the current dispute.

22. Admitted in part. *See* Response No. 21 above.

23. Admitted in part; Denied in part. The Commission acknowledges that an impact fee under Act 13 is not a tax under state law but denies that it was required to file a proof of claim. *See* Response No. 18 above.

24. Denied. The post-petition debt at issue arose on April 1, 2022. As discussed in Response No. 13, a debt is incurred when a person is exposed to conduct giving rise to an injury that underlies a right to payment under the Bankruptcy Code. *Wright*, 679 F.3d at 107. On April 1 of each year, each producer must submit payment of the Act 13 impact and spud fees for well permits the producer reports to the Commission. 58 Pa.C.S. § 2303(b). A “producer” is the holder of a permit for engaging in the business of using an unconventional gas well. 58 Pa.C.S. § 2301. Thus, the conduct underlying liability for the impact and spud fee payments is the reporting and holding of the permits on April 1 of a particular year. Prior to April 1, 2022, the Debtor had no liability, and the Commission had no authority to collect, these fees until the April 1 statutory due date had passed. For example, had Debtor transferred the wells on February 1, 2022, to a new owner, the new owner would be responsible for impact fee payment on April 1, 2022. Here, Debtor filed the Bankruptcy petition in September of 2021. There were no Act 13 fee obligations at that point. Also, it is important to distinguish a generic obligation that attaches and follows a particular unconventional well,

and an obligation that a particular well owner is responsible for. As is clear in Act 13 and the Commission's Implementation Orders, a well owner's liability for the impact and spud fees only arises on April 1.

25. Admitted. The Plan Administrator admits that "a debt is incurred when a debtor becomes legally obligated to pay."⁸ The Plan Administrator further admits that the relevant inquiry is when "*the Debtors* became legally obligated to pay any claim for the Impact Fee for 2021."⁹ As 58 Pa.C.S. § 2303(b) makes clear, producers shall submit payment of Act 13 fees as of April 1 of the following year. As stated previously, had Debtor transferred its wells on February 1, 2022, Debtor would have had *no obligation to pay the fees*. Again, the Commission emphasizes that it is important to distinguish a generic obligation that attaches and follows a particular unconventional well, and a liability that a particular well owner is responsible for. As is clear in Act 13 and the Commission's Implementation Orders, a well owner's liability for Act 13 fees only attaches on April 1.

26. Denied. While the impact and spud fees accrued as *to each well* on January 1, 2021, such accrual did not attach *to a specific producer* until April 1, 2022. The Plan Administrator quotes the order of the Commission

⁸ Objection, paragraph 25, citing *In re Kahn & Assoc., Inc.*, 135 B.R. 251, 253 (Bankr. W.D. Pa. 1991) (emphasis added).

⁹ Objection, paragraph 25 (emphasis added).

that “For a horizontal gas well, the impact fee accrues upon spudding or at the beginning of a calendar year for wells spud previously.”¹⁰ In proper context, the Commission was discussing when an unconventional well would count in the impact fee calculation in the following year. The “accrual” refers only *to the well*, not to any liability of a particular producer, which would constitute a debt under the Bankruptcy Code. For a liability to exist, *a debtor* must be legally obligated to pay. On January 1, 2021, neither the amount of the fee, *nor who owed it*, was known. As a result, payment liability did not exist until April 1, 2022. Again, the Commission stresses that it is important to distinguish a generic obligation that attaches and follows a particular unconventional well, and an obligation that a particular well owner is responsible for. As is clear in Act 13 and the Commission’s Implementation Orders, a well owner’s liability for Act 13 fees only attaches on April 1.

Elsewhere in the same order cited by the Plan Administrator, the Commission makes clear that the producer becomes liable under 58 Pa.C.S. § 2303(b). The Commission discussed the situation where the wells transferred before the April 1 reporting date.¹¹ The Commission concluded

¹⁰ *Clarification Order Regarding Chapter 23*, Docket No. M-2012-2288561, at 7 (Order entered December 20, 2012).

¹¹ *Id.* at 11-12.

that “the liability for fee payment attaches to the producer who is responsible for filing the report.”¹² From January 1, 2021, to December 31, 2021, wells which are spud become subject to a fee. They become like hot potatoes, and owners can pass the wells around freely without ever becoming liable for the impact fee. However, on April 1 of the following year, the music stops, and whoever is holding the wells and the permits to operate them becomes liable for the debt/fee.

Here, the Debtor was liable as of April 1, 2022, because it made the report to the Commission and held the permits to operate the wells as of that date.

27. Denied. *See* Response Nos. 16, 24, 25 and 26 above. Again, the Commission stresses that it is important to distinguish a generic obligation that attaches and follows a particular unconventional well, and an obligation for which a particular well owner is responsible. As is clear in Act 13 and the Commission’s Implementation Orders, a well owner’s liability for the Impact Fee only attaches on April 1.

28. Admitted in part. By way of further answer, the characterization of the impact fee as an administrative expense is incorrect. Further, the Commission made no attempt to characterize this debt as such.

¹² *Id.* at 12.

29. Admitted in Part and denied in part. The Commission admits that the impact fee is not an administrative claim. However, it is denied that the liability of the Debtor for the impact fee arose on January 1, 2021. *See* Responses above.

30. Denied.

31. Denied.

32. The allegations in Paragraph No. 32 of the Objection do not require a response.

33. The allegations in Paragraph No. 33 of the Objection do not require a response.

34. The allegations in Paragraph No. 34 of the Objection do not require a response.

WHEREFORE, the Pennsylvania Public Utility Commission respectfully requests that the Plan Administrator's Objection to Informal Claim of Pennsylvania Public Utility Commission be denied.

Respectfully Submitted,

/s/ Erin N. Tate

Erin N. Tate (PA ID 308297)

Assistant Counsel

etate@pa.gov

Counsel For:

Pennsylvania Public Utility

Commission

P.O. Box 3265

Harrisburg, PA 17105-3265

717-787-5000

Dated: July 14, 2022

Exhibit A

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

In re:	:	
	:	Chapter 11
ROCKDALE MARCELLUS HOLDINGS, LLC and ROCKDALE MARCELLUS, LLC	:	
Debtors.	:	Case No. 21-22080-GLT (Jointly Administered)
	:	
ALFRED T. GUILIANO, SOLELY IN HIS CAPACITY AS PLAN ADMINISTRATOR FOR ROCKDALE MARCELLUS HOLDINGS, LLC and ROCKDALE MARCELLUS, LLC,	:	Document No:
Movant,	:	Related to Document No: 1176, 1177
	:	Hearing Date: July 21, 2022
	:	
v.	:	
	:	
PENNSYLVANIA PUBLIC UTILITY COMMISSION,	:	
Respondent	:	

**ORDER DENYING THE PLAN ADMINISTRATOR’S OBJECTION TO
INFORMAL CLAIM OF PENNSYLVANIA PUBLIC UTILITY
COMMISSION**

Upon the *Pennsylvania Public Utility Commission’s Response in Opposition to the Plan Administrator’s Objection* (Response), and the Court having reviewed the Response; and having heard the statements of counsel at the hearing; and the Court finding that the legal and factual bases set forth in this Response establish just cause for the relief granted herein;

IT IS HEREBY ORDERED THAT:

1. The Plan Administrator's Objection to Informal Claim of Pennsylvania Public Utility Commission is denied.
2. This Order shall be immediately effective and enforceable upon its entry.

Prepared by:
PENNSYLVANIA PUBLIC UTILITY COMMISSION
By: Erin N. Tate
Erin N. Tate (P.A. I.D. 308297)
Assistant Counsel

Dated: July 14, 2022

GREGORY L. TADDONIO
UNITED STATES BANKRUPTCY JUDGE

EXHIBIT C

In re: Rockdale Marcellus Holdings, LLC,
No. 21-22080 (W.D. Pa. Bankr.), Dkt. No.
1395, Stipulation and Agreed Order Resolving
Disputes Between the Rockdale Plan
Administrator and Pa. Pub. Utility Comm'n

**UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

IN RE:

ROCKDALE MARCELLUS HOLDINGS,
LLC and ROCKDALE MARCELLUS, LLC,

Debtors.

Chapter 11

Case No. 21-22080-GLT

(Jointly Administered)

ALFRED T. GIULIANO, SOLELY IN HIS
CAPACITY AS PLAN ADMINISTRATOR
FOR ROCKDALE MARCELLUS
HOLDINGS, LLC and ROCKDALE
MARCELLUS, LLC,

Document No. _____

Related to Doc. Nos. 1176, 1208, 1287, 1305
and 1358

Movants and
Respondents,

Hearing Date and Time: May 24, 2023, at
1:30 p.m. (prevailing Eastern Time)

v.

PENNSYLVANIA PUBLIC UTILITY
COMMISSION,

Respondent and

Movant. .

**STIPULATION AND AGREED ORDER RESOLVING DISPUTES
BETWEEN THE ROCKDALE PLAN ADMINISTRATOR
AND PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Alfred T. Guiliano (the "Rockdale Plan Administrator"), solely in his capacity as Plan Administrator for Rockdale Marcellus Holdings, LLC ("RMH") and Rockdale Marcellus, LLC ("Rockdale" and, together with RMH, the "Rockdale Debtors"), and Pennsylvania Public Utility Commission (the "PUC" and together with the Rockdale Plan Administrator, the "Parties" and each a "Party"), respectfully submit this stipulation (the "Stipulation") and agreed order to resolve all disputes as between the Parties as a global resolution and settlement, including those

disputes between the Parties arising from and relating to the *Plan Administrator's Objection to Informal Claim of Pennsylvania Public Utility Commission* as reflected in Doc. Nos. 1176, 1208 and 1287, and the *Motion for Leave to File Proof of Claim* filed by the PUC against the Debtors' estates, as reflected in Doc. Nos. 1305 and 1358, as well as resolving all other claims as between the Parties.

WHEREAS, on September 21, 2021 (the "Petition Date"), each of the Rockdale Debtors filed a voluntary petition for relief under chapter 11 of title 11 of the United States Code, 11 U.S.C. §§ 101, *et seq.*, in the United States Bankruptcy Court for the Western District of Pennsylvania (the "Court");

WHEREAS, on October 22, 2021, the Rockdale Debtors filed the *Debtors' Motion for Entry of an Order (I) Establishing Bar Date for Submitting Proofs of Claim, (II) Approving Procedures for Submitting Proofs of Claim, and (III) Approving Notice Thereof* [Doc. No. 238] (the "Bar Date Motion");

WHEREAS, on November 9, 2021, the Court entered an order [Doc. No. 375] (the "Bar Date Order") granting the relief requested in the Bar Date Motion and establishing certain deadlines for persons or entities holding claims against the Rockdale Debtors to file claims, including a General Bar Date of December 13, 2021, and a Governmental Bar Date of March 21, 2022 for claims arising prior to the Petition (as such terms are defined in the Bar Date Order);

WHEREAS, on November 12, 2021, the Rockdale Debtors caused the Bar Date Notice (as defined in the Bar Date Order) to be served in accordance with the procedures outlined in the Bar Date Order, including service upon the PUC;

WHEREAS, on December 29, 2021, the Court entered an order [Doc. No. 617] (the “Sale Order”) approving a December 22, 2021 Purchase and Sale Agreement (the “Sale Agreement”) between the Debtor and Repsol Oil & Gas, LLC (“Repsol”);

WHEREAS, under the terms of the Sale Agreement, *inter alia*, Repsol purchased from Rockdale 72 unconventional gas wells subject to the Impact and Spud Fees established pursuant to 58 PA.C.S. §§2301 *et. seq.*, (Act 13). Repsol became owner and operator of the wells under the terms of the Sale Agreement.

WHEREAS, on January 31, 2022, The Court entered an order [Doc. No. 741] establishing March 4, 2022 as the deadline for claimants to file administrative expense claims arising from the Petition Date through January 31, 2022 (the “Initial Administrative Expense Claims Bar Date”);

WHEREAS, the final administrative claims bar date was set by the Confirmation Order and Plan. *See* Confirmation Order ¶ 29. Holders of administrative claims that arose between the Initial Administrative Expense Claims Bar Date and the Effective Date were required to file their administrative expense claims within the first business day that is thirty days after the Effective Date, or May 31, 2022 (the “Final Administrative Expense Claims Bar Date”). *Id.*

WHEREAS, the PUC was served with notices of both the Initial Administrative Expense Claims Bar Date and the Final Administrative Expense Claims Bar Date (which was set forth in the notice advising creditors of the occurrence of the Effective Date). *See* Docket No. 769 at 28; Docket No. 1124 at 18;

WHEREAS, the PUC did not file a proof of claim or administrative expense claim against the Rockdale Debtors’ estates;

WHEREAS, on or about February 9, 2022, the Debtor Rockdale submitted via an online portal, an annual Act 13 impact fee report for reporting year January 1, 2021 through December 31, 2021; and on that same date, the PUC’s computer system automatically generated invoices to Debtor Rockdale for an impact fee of \$1,428,100 for 72 horizontal gas wells and a spud fee of \$3,600 for 72 horizontal gas wells, for an aggregate amount of \$1,431,700 (collectively the “PUC Impact and Spud Fee Invoices”);

WHEREAS, On April 14, 2022, the Court entered the Rockdale Confirmation Order¹ confirming the Rockdale Plan.² The Rockdale Plan became effective by its terms on April 29, 2022 [Doc. No. 1122] (the “Effective Date”);

WHEREAS, upon the Effective Date, the Rockdale Plan Administrator was appointed to serve as the Rockdale Debtors’ representative in accordance with section 1123 of the Bankruptcy Code, and has all powers, authority, and responsibilities specified in the Rockdale Plan, including, without limitation, the authority to object to claims. *See* Plan § 14.1;

WHEREAS, on or about June 13, 2022, the Rockdale Plan Administrator filed his *Plan Administrator’s Objection to Informal Claim of Pennsylvania Public Utility Commission* [Doc. No. 1176] (the “Claim Objection”), objecting to the PUC Impact and Spud Fee Invoices as informal claims, to which the PUC filed a Response in Opposition [Doc. No. 1208] as to which the Rockdale Plan Administrator filed a Reply [Doc. No. 1287];

¹ The “Rockdale Confirmation Order” is the *Findings of Fact, Conclusions of Law, and Order (I) Approving the Second Amended Combined Disclosure Statement and Plan of Liquidation of Rockdale Marcellus Holdings, LLC and Rockdale Marcellus, LLC Under Chapter 11 of the Bankruptcy Code on a Final Basis, and (II) Confirming the Second Amended Combined Disclosure Statement and Plan of Liquidation of Rockdale Marcellus Holdings, LLC and Rockdale Marcellus, LLC Under Chapter 11 of the Bankruptcy Code* [Doc. No. 1070].

² The “Rockdale Plan” is the *Second Amended Combined Disclosure Statement and Plan of Liquidation of Rockdale Marcellus Holdings, LLC and Rockdale Marcellus, LLC Under Chapter 11 of the Bankruptcy Code* [Doc. No. 920].

WHEREAS, on or about December 6, 2022, the PUC filed a *Motion for Leave to File Proof of Claim* [Doc. No. 1305] (the “Motion for Leave”) so as to assert a general unsecured claim based upon and in the amount of the PUC Impact and Spud Fee Invoices, as to which the Rockdale Plan Administrator filed an Objection [Doc. No. 1358];

WHEREAS, on or about December 1, 2022, the PUC also sent Repsol an invoice for the Impact and Spud Fees. Repsol filed objections to the invoice with the PUC and concurrently filed an action in the Commonwealth Court of Pennsylvania challenging the fee. The objection and the court proceeding are pending; and

WHEREAS, after good-faith, arms’-length negotiations, the Parties desire to resolve all of their disputes, including those arising from and relating to the Claim Objection and the Motion for Leave upon the terms set forth in this Stipulation.

NOW, THEREFORE, the Parties hereby stipulate and agree, subject to Court approval, as follows:

1. The above recitals are incorporated by reference into this Stipulation with the same force and effect as if fully set forth herein.
2. The Parties have agreed to resolve their disputes as follows:
 - a. Within ten (10) days of the approval of this Stipulation by the Court, the Rockdale Plan Administrator shall pay \$100,000.00 (the “Settlement Amount”) to the PUC in full and final satisfaction of the liabilities asserted against the estate through the PUC Impact and Spud Fee Invoices which are the subject of the Claim Objection and Motion for Leave.
 - b. Upon receipt of the Settlement Amount, the PUC agrees that it is not entitled to any further payment or distribution under the Rockdale Plan, from the Rockdale

Debtors' bankruptcy estates, or from the Rockdale Plan Administrator on account of the PUC Impact and Spud Fee Invoices or on any other basis, whatever or at all.

3. By executing this Stipulation, each Party represents and warrants that (i) it is the sole owner and holder of the claims and defenses asserted against each other, and (ii) it has not sold, assigned, or transferred any such claims or defenses. Any liabilities of Rockdale to the PUC are exclusively resolved through this Stipulation and any additional claims, administrative or judicial proceedings filed by either Party or each of its successors or assigns, against the other Party with respect to the liabilities asserted in the PUC Impact and Spud Fee Invoices shall be deemed null, void, and of no effect.

4. By executing this Stipulation, the Rockdale Plan Administrator, without further action, but except in connection with the satisfaction of the obligations under this Stipulation, shall be deemed to have irrevocably and unconditionally, fully, finally, and forever waived and released any and all claims, manner of actions, causes of action, suits, costs, debts, liabilities, obligations, dues, sums of money, accounts, reckonings, bonds, bills, specialties, covenants, contracts, controversies, agreements, promises, variances, trespasses, damages, judgments, executions and demands whatsoever, of whatever kind or nature, and other rights that the Rockdale Debtors' bankruptcy estates possess, and/or may possess, whether known or unknown and whether matured, contingent or disputed, in law or equity, against the PUC and against each of its attorneys, representatives, agents, financial advisors, directors, employees, officers, agents, subsidiaries, affiliates, successors, assigns and insurers, individually and collectively; the PUC, without further action, but except in connection with the satisfaction of the obligations under this Stipulation, shall be deemed to have waived and released any and all claims, manner of actions, causes of action, suits, costs, debts, liabilities, obligations, dues, sums of money,

accounts, reckonings, bonds, bills, specialties, covenants, contracts, controversies, agreements, promises, variances, trespasses, damages, judgments, executions and demands whatsoever, of whatever kind or nature, and other rights that it possesses, and/or may possess, whether known or unknown and whether matured, contingent or disputed, against the Rockdale Debtors and their bankruptcy estates, the Plan Administrator, and as against each of their attorneys, representatives, agents, successors, assigns and insurers, individually and collectively.

5. Upon clearance of the Settlement Payment, the Rockdale Administrator shall withdraw the Claim Objection and the PUC will withdraw its Motion for Leave, each withdrawal to be with prejudice.

6. The PUC expressly reserves any and all rights it may have against Repsol in connection with the (i) impact and spud fees pursuant to Act 13 associated with Repsol's acquisition of assets, the Sale Agreement and/or the Sale Order, (ii) the PUC Impact and Spud Fee Invoices, and (iii) the PUC's rights preserved under the Court's October 28, 2022 order [Doc. No. 1292]. This Agreement generally, and the PUC's acceptance of the Settlement Amount specifically, shall have no effect whatsoever on any action the PUC may pursue involving Repsol and its potential liability for payment of Impact and Spud fees, nor Repsol's defenses thereto under law and equity. The PUC expressly acknowledges and agrees that it is not entitled to more than one recovery. Notwithstanding this, the Rockdale Plan Administrator waives any claim to a refund. The Parties agree that each of the Parties hereto shall bear its own attorneys' fees and costs in connection with the matters resolved hereby.

7. Each of the undersigned represents that he/she is authorized to execute this Stipulation on behalf of the applicable Party.

8. This Stipulation may be executed in multiple counterparts which, together, shall constitute one and the same fully executed agreement.

9. This Stipulation shall be binding upon and inure to the benefit of the Parties' successors and assigns.

10. This Stipulation may not be modified, altered, or changed except in writing and signed by both Parties wherein specific reference is made to this Stipulation.

11. This Stipulation shall be construed and interpreted in accordance with the laws of the Commonwealth of Pennsylvania. For purposes of construing this Stipulation, neither of the Parties shall be deemed to have been the drafter of this Stipulation.

12. This Stipulation sets forth the entire agreement between the Parties hereto, and fully supersedes any prior agreement or understandings between the Parties.

13. This Stipulation and Agreed Order is a final order within the meaning of 28 U.S.C. § 158(a)(1) and is effective immediately upon entry.

14. The Court shall retain jurisdiction over the terms and conditions of this Stipulation, and any and all disputes, claims, or actions based upon this Stipulation shall be heard exclusively by the Court.

[The remainder of this page is intentionally left blank.]

Prepared by: Daniel Schimizzi, Whiteford Taylor & Preston, LLP and Christopher L. Perkins, Eckert Seamans Cherin & Mellott, LLC.

Dated: April 24, 2023

AGREED TO AND ACCEPTED BY:

<p>WHITEFORD, TAYLOR & PRESTON, LLP</p> <p>By: <u>/s/ Daniel R. Schimizzi</u> Daniel R. Schimizzi, Esq. (PA I.D.: 311869) 11 Stanwix Street, Suite 1400 Pittsburgh, PA 15222 Tel: (412) 275-2401 Fax: (412) 275-2404 Email: dschimizzi@wtplaw.com</p> <p>PACHULSKI STANG ZIEHL & JONES LLP Bradford J. Sandler (PA ID No. 77463) 780 Third Avenue, 34th Floor New York, NY 10017 Telephone: 212-561-7700 Facsimile: 212-561-7777 Email: bsandler@pszjlaw.com</p> <p><i>Counsel to Alfred T. Giuliano, Plan Administrator for Rockdale Marcellus Holdings, LLC, and Rockdale Marcellus, LLC</i></p>	<p>Nicholas F. Borsuk, Esq. Jacob Hanley, Esq. ECKERT SEAMANS CHERIN & MELLOTT, LLC 600 Grant Street, 44th Floor Pittsburgh, PA 15219 Telephone: (412) 566-2016 Facsimile: (412) 566-6099 Email: nborsuk@eckertseamans.com</p> <p>By: <u>/s/ Christopher L. Perkins</u> Christopher L. Perkins, Esq. (<i>admitted pro hac vice</i>) ECKERT SEAMANS CHERIN & MELLOTT, LLC 919 East Main Street, Suite 1300 Richmond, VA 23219 Telephone: (804) 788-9636 Facsimile: (804) 698-2950 Email: cperkins@eckertseamans.com</p> <p><i>Counsel to Pennsylvania Public Utility Commission</i></p>
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AND APPROVED BY THE COURT THIS 24th Day of April , 2023.



GREGORY L. TADDONIO
CHIEF UNITED STATES BANKRUPTCY
JUDGE

CERTIFICATE OF SERVICE

I hereby certify that, on this 26th day of January, 2026, I caused a true and correct copy of the foregoing PRELIMINARY OBJECTIONS TO FORMAL COMPLAINT to be served upon all parties of record via electronic filing with the Commission, as authorized by and in accordance with 52 Pa. Code § 1.54(b)(3)(ii), which filing constitutes service.

/s/ Casey Alan Coyle

Casey Alan Coyle, Esquire