**PENNSYLVANIA**

**PUBLIC UTILITY COMMISSION**

**Harrisburg, PA 17105-3265**

Public Meeting held June 11, 2015

Commissioners Present:

Gladys M. Brown, Chairman

John F. Coleman, Jr., Vice Chairman

James H. Cawley

Pamela A. Witmer

Robert F. Powelson

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| Pennsylvania Public Utility Commission, |  |

Bureau of Investigation and Enforcement

v. C-2014-2402746

Snyder Brothers, Inc.

**OPINION AND ORDER**

**BY THE COMMISSION:**

Before the Pennsylvania Public Utility Commission (Commission) for consideration and disposition are the Exceptions and the Request for Oral Argument of Snyder Brothers, Inc. (Respondent or SBI) filed on March 13, 2015, to the Recommended Decision (R.D.) of Administrative Law Judge (ALJ) David A. Salapa issued on February 23, 2015, in the above-captioned proceeding. The Pennsylvania Independent Oil and Gas Association (PIOGA) filed Exceptions to the Recommended Decision on March 16, 2015. On March 26, 2015, the Bureau of Investigation and Enforcement (I&E) filed Replies to Exceptions. For the reasons discussed below, we shall (1) deny the Respondent’s Exceptions, in part and grant them, in part; (2) deny PIOGA’s Exceptions, in part and grant them, in part; (3) modify the Recommended Decision; and (4) deny the request for oral argument.

1. **History of the Proceeding**

Chapter 23 of Act 13 of 2012, pertaining to the Unconventional Gas Well Impact Fee (Act 13), 58 Pa. C.S. §§ 2301 to 2318, authorizes the Commission to collect, administer and distribute fees collected from unconventional gas well producers.[[1]](#footnote-1) This matter involves an interpretation of Act 13 and the definition of a “stripper well.” A “stripper well” is defined, in relevant part, as an “unconventional gas well incapable of producing more than 90,000 cubic feet [(cf)] of gas per day during any calendar month….” *Id.* Lower producing wells classified as “stripper wells” are not subject to impact fees and administrative charges under Act 13.

On January 17, 2014, I&E filed a Complaint alleging that in calendar year 2011, SBI failed to identify twenty-four of its unconventional vertical gas wells and pay impact fees and administrative charges on those wells. In addition, I&E alleged that for calendar year 2012, SBI failed to identify twenty-one of its unconventional vertical gas wells and pay impact fees and administrative charges on those wells. In its Complaint, I&E requested that the Commission order SBI to pay the past due impact fees plus a statutory penalty, interest and administrative charges totaling $507,586 and a civil penalty of $50,000.

On February 5, 2014, SBI filed an Answer and New Matter requesting that the Commission dismiss I&E’s Complaint with prejudice. In its Answer, SBI denied that it failed to identify any unconventional vertical gas wells or to pay any impact fees or administrative charges for calendar years 2011 and 2012.

In its New Matter, SBI averred that it submitted annual reports to the Commission for calendar years 2011 and 2012 as required by Act 13. According to SBI, it accurately identified all of its unconventional vertical gas wells and correctly paid the impact fees and administrative charges on those wells as required by Act 13.

On February 11, 2014, PIOGA filed a petition to intervene in this proceeding, pursuant to Sections 5.72 to 5.75 of our Regulations, 52 Pa. Code §§ 5.72-5.75.

On February 27, 2014, I&E filed a Reply to SBI’s New Matter. By Order dated March 24, 2014, ALJ Salapa granted PIOGA’s Petition to Intervene.

I&E filed an initial Petition for Interlocutory Review on June 4, 2014 (Petition).[[2]](#footnote-2) On June 9, 2014, SBI filed a Response to the Petition requesting that the Commission deny the Petition or, alternatively, afford SBI the opportunity to fully address the merits of I&E’s material question. Response at 8. Thereafter, on June 13, 2014, PIOGA filed a brief in opposition to the Petition requesting that the Commission reject I&E’s Petition as improper and return the matter to the ALJ for disposition. Alternatively, PIOGA argued that the Commission should answer the material question in the negative and enter an order dismissing the prosecution. PIOGA Brief in Opposition at 8.

On June 17, 2014, I&E filed a Brief in Support of its Petition. On June 19, 2014, SBI filed a Motion for Summary Judgment (Motion) and brief in support of the Motion. Attached to the Motion was a joint stipulation of facts by SBI, I&E and PIOGA (Joint Stipulation).

On June 20, 2014, I&E filed a Petition for Stay, requesting that ALJ Salapa stay the deadlines established in the proceeding until the Commission rendered a final decision on the Petition. Petition for Stay at 3.

By Order dated July 7, 2014, ALJ Salapa granted I&E’s Petition for Stay and suspended the proceedings and litigation schedule pending a Commission decision on the Petition. On July 24, 2014, we issued an Order declining to answer I&E’s Petition (*July 2014 Order*)[[3]](#footnote-3) and returning the matter to the Office of Administrative Law Judge (OALJ).

On July 28, 2014, I&E filed an Answer and Brief in Support in response to SBI’s Motion. I&E argued that SBI owes the outstanding impact fees, interest and administrative charges and requested the denial of the Motion. I&E’s Answer to Motion at 1-3.

On August 27, 2014, ALJ Salapa issued an Order (*S.J. Order*) denying SBI’s Motion requesting summary judgment and directing that hearings be conducted to produce evidence limited to whether the amount of impact fees, interest, penalties and administrative charges was correctly calculated. Additionally, the hearings would address whether the requested civil penalty was appropriate.

On September 11, 2014, I&E, SBI and PIOGA filed a Joint Petition for Interlocutory Review and Answer to Material Questions (Joint Petition).[[4]](#footnote-4) On September 22, 2014, I&E and PIOGA filed briefs in support of the Joint Petition. SBI did not file a supporting brief.

On October 2, 2014, we issued an Order (*October 2014 Order*)declining to answer the Material Questions and again returned the matter to the OALJ.[[5]](#footnote-5) Thereafter, the OALJ scheduled hearings for December 4-5, 2014.

The Initial Hearing convened as scheduled on December 4, 2014. I&E, SBI and PIOGA appeared and were represented by counsel. At the start of the hearing, the Parties presented the Joint Stipulation and six joint exhibits, which were admitted into the record. Additionally, counsel for I&E presented an oral stipulation in which SBI and PIOGA concurred. I&E presented testimony from one witness and one exhibit, which was admitted into the record. SBI presented testimony from one witness. The hearing concluded on December 4, 2014, and generated a transcript comprising eighty-six pages.

Subsequently, the Parties requested and received extensions of time to file briefs and reply briefs. The Parties filed main briefs on January 16, 2015. I&E and SBI filed reply briefs on January 27, 2015. On January 30, 2015, PIOGA filed its reply brief at which time the record was closed.

In the Recommended Decision issued on February 23, 2015, ALJ Salapa sustained the Complaint and directed SBI to pay the unpaid impact fees and administrative charges, interest, penalty and civil penalty for its failure to comply with Act 13. As previously indicated, SBI filed Exceptions and a Request for Oral Argument on March 13, 2015. PIOGA filed Exceptions on March 16, 2015. On March 26, 2015, I&E filed Replies to Exceptions.

1. **Background**

On August 15, 2012, SBI submitted to the Commission an Annual Report for the year 2011 as required by Act 13. The 2011 Annual Report listed each well operated by SBI that was potentially subject to the administrative and impact fees imposed by Act 13. SBI’s annual report accurately set forth the total gas produced by each well in each month of the 2011 reporting period. Joint Stipulation at 2-3.

On August 29, 2012, SBI received a 2011 Impact Fee Statement from the Commission stating that SBI owed impact fees in the amount of $170,000 for the period January 1, 2011, through December 31, 2011, based upon production from seventeen vertical gas wells.[[6]](#footnote-6) Additionally, on August 29, 2012, SBI received a 2011 Spud Fee Statement from the Commission stating that it owed administrative fees in the amount of $850 for seventeen wells.[[7]](#footnote-7) On August 30, 2012, SBI paid the Commission the amounts stated on the 2011 Impact Fee and Spud Fee Statements. Joint Stipulation at 3.

On March 27, 2013, SBI submitted to the Commission an annual report for the year 2012. The 2012 annual report listed each well operated by SBI that was potentially subject to the spud and impact fees imposed by Act 13 for the 2012 reporting period. In its 2012 annual report, which accurately set forth the production for each well for the 2012 reporting period, SBI stated that it operated twenty-eight vertical gas wells for which spud and impact fees were due. *Id.* at 3-4.

In an e-mail dated April 12, 2013, an employee of the Commission’s Bureau of Administration, stated that a vertical well is not a stripper well, as defined in Section 2301 of Act 13, if it has reported production in excess of 90,000 cf in any one month of a reporting period. In response, SBI advised the Commission that it disagreed with the Commission’s interpretation and stated that each well listed as a stripper well in the 2011 and 2012 annual reports qualified as stripper wells by virtue of the reported monthly production histories for each year. *Id.* at 4.

On April 8, 2013, SBI received the 2012 Impact Fee Statement from the Commission stating that SBI owed impact fees in the amount of $236,000 for 2012. In addition, SBI received a Spud Fee Statement for 2012 in the amount of $1,400.[[8]](#footnote-8) SBI paid the impact and spud fees identified in the 2012 statements. *Id.*

During the hearing, I&E presented the testimony of a Commission witness who explained that after receiving SBI’s 2012 annual report on March 27, 2013, the witness realized that SBI and the Commission interpreted the term “vertical well” differently. Tr. at 63. The witness later calculated that SBI owed a total of $241,200 in impact and spud fees for 2011 based upon production from an additional twenty-four wells. For 2012, the witness calculated that SBI owed a total of $149,050 in impact and spud fees for 2012 based upon production from an additional twenty-one wells and the information was conveyed to SBI. Tr. at 65-67.

There is no mechanism in Act 13 whereby SBI could have paid under protest the amount of any impact or spud fees that it disputed. Similarly, Act 13 contains no mechanism by which the Commission could refund any impact or spud fees that were paid and disbursed to a municipality, but thereafter determined not to be due and owing or otherwise to have been erroneously paid.[[9]](#footnote-9) Joint Stipulation at 5.

1. **Discussion**
2. **Legal Standards**

Section 2310(d) of Act 13, 58 Pa. C.S. § 2310(d), states that a penalty under Act 13 is subject to 66 Pa. C.S. Ch. 3, Subch. B, relating to investigations and hearings. Section 332(a) of the Public Utility Code (Code), 66 Pa. C.S. § 332(a), provides that the party seeking relief from the Commission has the burden of proof. Because I&E, as the Complainant, is seeking relief from the Commission it must establish its case by a preponderance of the evidence. *Samuel J. Lansberry, Inc. v. Pa. PUC*, 578 A.2d 600 (Pa. Cmwlth. 1990), *alloc. denied,* 529 Pa. 654, 602 A.2d 863 (1992). That is, I&E’s evidence must be more convincing, by even the smallest amount, than that presented by the Respondent. *Se-Ling Hosiery, Inc. v. Margulies*, 364 Pa. 45, 70 A.2d 854 (1950).

Before addressing the Exceptions, we note that any issue or Exception that we do not specifically address shall be deemed to have been duly considered and denied without further discussion. The Commission is not required to consider expressly or at length each contention or argument raised by the parties. [*Consolidated Rail Corp. v. Pa. PUC,* 625 A.2d 741 (Pa. Cmwlth. 1993);](file://C:\research\buttonTFLink?_m=69761b6202cb4178e2a6e6fe02f5751b&_xfercite=%3ccite%20cc=%22USA%22%3e%3c!%5bCDATA%5b2000%20Pa.%20PUC%20LEXIS%2067%20%5d%5d%3e%3c\cite%3e&_butType=3&_butStat=242&_butNum=5&_butInline=1&_butinfo=%3ccite%20cc=%22USA%22%3e%3c!%5bCDATA%5b625%20A.2d%20741%5d%5d%3e%3c\cite%3e&_fmtstr=FULL&docnum=5&_startdoc=1&_startchk=1&wchp=dGLSzS-lSlbz&_md5=ad2b02d95c2a9216e83b92a3570d4785) *also see, generally,* [*University of Pennsylvania v. Pa. PUC*, 485 A.2d 1217 (Pa. Cmwlth. 1984).](file://C:\research\buttonTFLink?_m=69761b6202cb4178e2a6e6fe02f5751b&_xfercite=%3ccite%20cc=%22USA%22%3e%3c!%5bCDATA%5b2000%20Pa.%20PUC%20LEXIS%2067%20%5d%5d%3e%3c\cite%3e&_butType=3&_butStat=242&_butNum=6&_butInline=1&_butinfo=%3ccite%20cc=%22USA%22%3e%3c!%5bCDATA%5b485%20A.2d%201217%5d%5d%3e%3c\cite%3e&_fmtstr=FULL&docnum=5&_startdoc=1&_startchk=1&wchp=dGLSzS-lSlbz&_md5=9b1cc8319afd12440738bb82d74455ef)

1. **Summary Judgment Order**

In its Motion, SBI argued that the definition of stripper well under Section 2301 of Act 13, 58 Pa. C.S. § 2301, is sufficiently clear and unambiguous. As such, it is unnecessary to consider other methods of statutory construction.[[10]](#footnote-10) As noted above, “stripper well” is defined, in relevant part, as an “unconventional gas well incapable of producing more than 90,000 [cf] of gas per day during any calendar month….” 58 Pa. C.S. § 2301.

SBI contended that the definition plainly states that a stripper well cannot produce 90,000 cf of gas per day in any month during the reporting period. According to SBI, a well that produces less than 90,000 cf of gas per day in any single month during the reporting period is a stripper well. SBI S.J. Brief at 5-6.

Alternatively, SBI argued that an impact fee under Act 13 is a tax and the language of a statute imposing or exempting the imposition of a tax must be strictly construed pursuant to 1 Pa. C.S. § 1928(b)(3). According to SBI, all reasonable doubt as to the interpretation of the language must be construed in favor of the taxpayer and against the assessing or taxing body. SBI S.J. Brief at 10-11 (citing *In re Estate of Ross*, 815 A.2d 30 (Pa. Cmwlth. 2002)). SBI asserted that any reasonable doubt as to the meaning of the term stripper well, which is part of the definition of what is taxable, must be strictly construed in its favor and against the Commission. SBI S.J. Brief at 11.

I&E countered that the use of the word “any” in the definition of stripper well renders the definition ambiguous because “any” can mean either “one or another taken at random” or “every.” In support of its argument, I&E noted that the Commission received numerous inquiries from natural gas producers asking how to determine which vertical wells qualified as stripper wells. In response, the Commission issued orders addressing the questions.[[11]](#footnote-11) I&E argued that if the statute was free from ambiguity, the natural gas producers would not have filed their inquiries. Thus, I&E asserted that because the definition is ambiguous, the Commission must examine the statutory construction factors under 1 Pa. C.S. § 1921(c).[[12]](#footnote-12) I&E S.J. Brief at 8-9.

In applying the factors, I&E contended that the objective of Act 13 is to provide relief to municipalities impacted by unconventional gas wells. I&E warned that this objective would be frustrated by exempting active producing wells from paying impact fees because their production falls below 90,000 cf of gas per day for one month out of twelve. Next, I&E claimed that SBI’s interpretation of the definition would favor SBI’s private interest of increased revenue over the public interest of providing relief to municipalities affected by drilling. *Id.* at 9-10.

Further, I&E argued that the legislative history of Act 13 supports its interpretation of the definition of a stripper well. An earlier version of the bill defined stripper well as a well “incapable of producing more than 90,000 cubic feet of gas per day during *a* calendar month….” H.B. 1950, Session of 2011, Printer’s No. 2837 (Pa. 2011) (H.B. 1950 (P.N. 2837)). The bill was later amended to substitute “any” for “a” in the definition. H.B. 1950, Session of 2011, Printer’s No. 3048 (Pa. 2012) (H.B. 1950 (P.N. 3048)). According to I&E, if the General Assembly had intended the definition of stripper well proffered by SBI, it would have retained the word “a” in the definition. Instead, I&E contends the General Assembly, by changing “a” to “any,” intended a stripper well to be one in which production falls below 90,000 cf per day in each calendar month in the reporting period. I&E S.J. Brief at 9-10.

Finally, I&E stated that the Commission’s interpretation of stripper well supports I&E’s position. For example, I&E cited to the *Reconsideration Order* and *Act 13 of 2012-Implementation of Unconventional Gas Well Impact Fee Act, Proposed Rulemaking Order*, Docket No. L-2013-2375551 (Order entered October 17, 2013) (*Rulemaking Order*), in which the Commission stated that if production exceeds 90,000 cf per day in any calendar month during a calendar year, that well is subject to fees under Act 13. I&E S.J. Brief at 11-12.

I&E disagreed with SBI’s contention that the impact fee is a tax and argued that the term stripper well should not be construed in favor of SBI. In support, I&E cited to Section 2318 of Act 13, 58 Pa. C.S. § 2318, which requires the Secretary of the Commonwealth, upon imposition of a severance tax on unconventional gas wells in Pennsylvania, to publish notice in the *Pennsylvania Bulletin*. I&E argued that this demonstrates that the General Assembly intended to differentiate between the impact fee imposed by Act 13 and a tax. In addition, I&E asserted that the purpose of imposing impact fees under Act 13 is to offset the impact on municipalities in which drilling is taking place and not to generate revenue. I&E S.J. Brief at 12-13.

In his *S.J. Order*, ALJ Salapa agreed with SBI that there is no factual dispute as to the amount of gas produced by SBI’s wells and therefore no dispute as to the material facts of the case. The ALJ concluded, however, that SBI was not entitled to judgment as a matter of law. *S.J. Order* at 16.

The ALJ agreed with I&E’s arguments that the definition of stripper well was ambiguous and noted that that ambiguity was the reason why the Commission issued not only the *Implementation Order* and *Reconsideration Order*, but also a third order, *Act 13 of 2012-Implementation of Unconventional Gas Well Impact Fee Act*, Docket No. M-2012-2288561 (Clarification Order entered December 20, 2012) (*Clarification Order*), in order to implement the provisions of Act 13. This, according to the ALJ, indicated there was a substantial disagreement regarding the interpretation and implementation of Act 13. *Id.*

The ALJ also found relevant the fact that the Commission had to interpret the terms stripper well and vertical gas well in the *Reconsideration Order* after various entities, including PIOGA, filed petitions for reconsideration of the *Implementation Order*. In the *Reconsideration Order*, the Commission determined that if a vertical gas well produced more than 90,000 cf per day in any calendar month in a calendar year, that well would be subject to the impact fee. Additionally, in the *Rulemaking Order*, the Commission clarified that if a vertical gas well produced gas in quantities greater than a stripper well in only one month of a calendar year, that well would be subject to the impact fee for that year. *S.J. Order* at 16. According to the ALJ, these Commission pronouncements are entitled to deference:

As the entity charged with implementing and enforcing the provisions of Act 13, the Commission’s interpretation of the provisions of Act 13 is entitled to great deference. The Commonwealth Court of Pennsylvania has held that the Commission’s interpretation of the Public Utility Code, for which it has enforcement responsibility is entitled to great deference and should not be reversed unless clearly erroneous. *Energy Conservation Council of Pa. v. Pa. Pub. Util. Comm’n*, 995 A.2d 465 (Pa. Cmwlth. 2010); *1-A Realty v. Pa. Pub. Util. Comm’n*, 63 A.3d 480 (Pa. Cmwlth. 2013). Since the Commission is charged with implementing and enforcing the provisions of Act 13 and its interpretations of the terms “stripper well” and “vertical gas well” are not clearly erroneous, its interpretations of these terms are entitled to similar deference.

*Id.* at 16-17.

The ALJ agreed with I&E that the impact fee is not a tax. First, the ALJ stated that the mere fact that the impact fee generates revenue does not render it a tax. Noting that not every fee levied by a Commonwealth agency is a tax, the ALJ cited to the Commission’s authority to impose a civil penalty under Section 3301 of the Code, 66 Pa. C.S. § 3301. Although the civil penalty generates revenue for the Commonwealth, no one would characterize the civil penalty as a tax solely on the basis that it generates revenue, according to the ALJ. Further, the ALJ stated that the impact fee does not raise revenue for the general fund of the Commonwealth or its municipalities. Instead, the money raised is distributed to the municipalities to offset the impact of drilling within the municipalities. Because the impact fee does not raise money for the general welfare or contribute to the general fund of either the Commonwealth or the municipalities, the ALJ determined that the impact fee is not a tax.[[13]](#footnote-13) Thus, the ALJ concluded that any ambiguity in the term stripper well should not be strictly construed in favor of SBI. *S.J. Order* at 17-18.

Accordingly, the ALJ denied SBI’s Motion. However, the ALJ explained that he could not enter judgment in favor of I&E because it did not file a Motion for Summary Judgment. As indicated above, the ALJ scheduled evidentiary hearings to address the calculation of impact fees, interest, penalties and administrative charges and whether a civil penalty should be imposed. *S.J. Order* at 18-19.

1. **ALJ’s Recommended Decision**

ALJ Salapa made fifty-four Findings of Fact and reached eleven Conclusions of Law. R.D. at 10-16, 42-43. The Findings of Fact and Conclusions of Law are incorporated herein by reference and are adopted without comment unless they are either expressly or by necessary implication rejected or modified by this Opinion and Order.

The ALJ first addressed the main issue in the Complaint proceeding: whether the gas wells that SBI failed to identify in its annual reports are vertical gas wells subject to Act 13’s impact and administrative fees or stripper wells not subject to impact and administrative fees. In order to provide a complete decision for review, the ALJ summarized the positions of the Parties with respect to this issue and his Order denying SBI’s Motion, discussed above.

Additionally, the ALJ considered the arguments of SBI and PIOGA disagreeing with the conclusion in the *S.J. Order* that the impact fees are not taxes. In its Main Brief, PIOGA argued that the impact fees are taxes for purposes of statutory construction. PIOGA noted that the impact fees are deposited into the Unconventional Gas Well Fund established by Act 13. Afterwards, the funds are distributed to various state entities, counties and municipalities for various restricted uses and to the Marcellus Legacy Fund. PIOGA argued that the impact fees are distributed for more purposes than allowing counties and municipalities to offset the impacts of drilling. PIOGA contended that the uses of the impact fees are for the general welfare and contribute indirectly to the general fund. PIOGA Main Brief at 8-9.

Furthermore, PIOGA asserted that *Wheeling* is not persuasive in this proceeding because the decision involved a federal court interpretation of a federal statute under federal statutory construction and preemption principles. Instead, PIOGA cited to *City of Philadelphia v. Pa. PUC*, 676 A.2d 1298 (Pa. Cmwlth. 1996) (*City of Philadelphia*) as persuasive authority. PIOGA Main Brief at 9-10.

In its reply to I&E’s Main Brief, SBI also argued that the fees are taxes. According to SBI, in the case *Building Indus. Ass’n v. Manheim Twp.*, 710 A.2d 141 (Pa. Cmwlth. 1998) (*Building Ass’n*) the court held that an impact fee is a government charge or fee used to generate revenue and is, therefore, a tax. SBI stated that the fee at issue in *Building Ass’n* was levied against developers based in part on the amount of vehicular traffic that would be generated by a new development. As such, SBI contended that the impact fees in this case are indistinguishable from the fees at issue in *Building Ass’n*. Further, SBI argued that the Act 13 impact fees can be used by municipalities to reduce taxes and for purposes that bear no relation to offsetting the costs or burdens caused by gas drilling activities. SBI Reply Brief at 1-5.

In response to PIOGA’s argument pertaining to the deposit of the impact fees into the Unconventional Gas Well Fund and the Marcellus Legacy Fund, the ALJ found that this mechanism reinforces the conclusion that the impact fees do not contribute to the general funds of either the Commonwealth or the municipalities. Also, the ALJ explained that the Third Circuit in *Wheeling* distinguished an impact fee from a tax on the basis that a fee does not contribute to the general fund for the general support of the government. R.D. at 29.

Moreover, the ALJ refuted PIOGA’s contention that the *Wheeling* decision is an incorrect standard to apply because it involved a federal court interpretation of a federal statute using federal statutory construction principles in determining whether a state imposed fee is a tax. The ALJ stated that, although PIOGA argued that the *City of Philadelphia* decision applied the correct standard, PIOGA failed to point out that the *City of Philadelphia* decision also involved an interpretation of a federal statute using federal statutory construction and preemption principles. Also, the ALJ noted, the portion of the *City of Philadelphia* decision quoted by PIOGA actually cited to federal court decisions using federal statutory construction principles in determining whether a particular charge was a tax or a fee. R.D. at 29.

The ALJ concluded that, substantively, both *Wheeling* and *City of Philadelphia* reached the same conclusion. In both cases, the courts determined that the Commission’s allocation of costs at a rail-highway crossing, pursuant to 66 Pa. C.S. §§ 2702 and 2704, was not a tax. The ALJ found that the impact fee in this case is similar to the fees at issue in *Wheeling* and *City of Philadelphia* because it does not raise money for the general welfare or contribute to the general fund of either the Commonwealth or the municipalities. Accordingly, the ALJ rejected PIOGA’s argument that the impact fee is a tax. R.D. at 30.

The ALJ also considered SBI’s argument pertaining to the *Building Ass’n* decision. In *Building Ass’n*, the Commonwealth Court reversed a lower court decision that a trade association lacked standing to challenge a municipal tax authorized by the Municipalities Planning Code (MPC) imposed on developers and based, in part, on the amount of vehicular traffic a proposed development would generate. The Commonwealth Court also observed that the MPC defined the impact fee in that proceeding as a charge to generate revenue for funding the costs of transportation capital improvements. The ALJ found that the definition of impact fee in the MPC in *Building Ass’n* was inapplicable to this case. R.D. at 30.

Additionally, the ALJ determined that SBI’s argument that the Act 13 impact fees can be used by municipalities to offset or reduce taxes was not persuasive. According to the ALJ, any non-tax source of revenue received by a municipality could be considered an offset or reduction of taxes. The ALJ concluded that the mere fact that funds are available to reduce or offset general revenue taxes does not convert those revenues to taxes. Accordingly, the ALJ determined that PIOGA and SBI failed to persuade him to change the conclusion in the *S.J. Order* which found that the impact fees were not taxes and that SBI was not entitled to have the definition of stripper well strictly construed in its favor. *Id.*

Next, the ALJ addressed I&E’s request to direct SBI to pay additional impact and administrative fees, interest and penalties for the years 2011 and 2012 for the unreported wells. The ALJ explained that I&E presented evidence establishing that SBI owed $390,250 in additional impact and administrative fees for 2011 and 2012. According to the ALJ, neither SBI nor PIOGA presented any evidence challenging the accuracy of I&E’s calculations. As such, the ALJ concluded that I&E met its burden of proof with respect to this outstanding amount owed. R.D. at 31.

Moving to I&E’s request that SBI pay interest on the additional $390,250 impact and administrative fees for 2011 and 2012, the ALJ concluded that I&E met its burden of showing that SBI owed interest in the amount of $11,996 on the additional fees owed.

To support the claim for interest, I&E cited to Section 2308(a) of Act 13, 58 Pa. C.S. § 2308(a).[[14]](#footnote-14) According to its witness, I&E used a rate of three percent in assessing the interest that SBI owed on the unpaid impact and administrative fees. For 2011, I&E calculated the interest based on the unpaid amount of $241,200, which accrued from September 1, 2012. For 2012, it based the interest on the unpaid amount of $149,050, which accrued from April 1, 2013. According to I&E’s witness, I&E did not compound the interest. R.D. at 32.

The ALJ referenced I&E’s explanation that Act 13 required the Commission to assess interest, but did not provide any guidance as to what rate should be assessed. Accordingly, I&E used the three percent interest rate established by the Pennsylvania Department of Revenue. *Id.*

SBI contended that the use of the word “shall” in Section 2308(a) of Act 13 is not mandatory and that the assessment of interest is not required.

The ALJ disagreed with SBI and explained that the word "shall" has ordinarily been interpreted as being mandatory and not discretionary. According to the ALJ, it is only in rare cases that the word “shall” has been construed as creating a discretionary or directory duty. R.D. at 33 (citing [*Roush v. Department of Transportation*, 690 A.2d 1278 (Pa. Cmwlth. 1997)](https://www.lexis.com/research/buttonTFLink?_m=e2af6fd95fd89696e2a6a5874769548c&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b829%20A.2d%201273%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=72&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b690%20A.2d%201278%2c%201282%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=15&_startdoc=11&wchp=dGLbVzB-zSkAA&_md5=91b21c7c883ad080d028bc2506b3004f), [*Turner v. Department of Transportation, Bureau of Driver Licensing*, 682 A.2d 903 (Pa. Cmwlth 1996)](https://www.lexis.com/research/buttonTFLink?_m=7caf17794fdcc7953d9a7316400632d5&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b690%20A.2d%201278%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=55&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b682%20A.2d%20903%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLbVzB-zSkAA&_md5=76cf78c58fe2755c398c6d929e5d3c9c); [*James F. Oakley, Inc. v. School District of Philadelphia*, 464 Pa. 330, 346 A.2d 765 (1975)](https://www.lexis.com/research/buttonTFLink?_m=7caf17794fdcc7953d9a7316400632d5&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b690%20A.2d%201278%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=56&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b464%20Pa.%20330%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLbVzB-zSkAA&_md5=7a535f34fbcb3a18bc63cc200ca47b7b); and [*Department of Transportation, Bureau of Traffic Safety v. Wagner*, 330 A.2d 867 (Pa. Cmwlth. 1975)](https://www.lexis.com/research/buttonTFLink?_m=7caf17794fdcc7953d9a7316400632d5&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b690%20A.2d%201278%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=57&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b17%20Pa.%20Commw.%2026%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=1&_startdoc=1&wchp=dGLbVzB-zSkAA&_md5=b24dd489de4329f6beab932b72b7b643)).

The ALJ determined that the General Assembly established an interest penalty in Act 13 that the Commission is obligated to impose. This is in contrast to the provision at 58 Pa. C.S. § 2310(a), which states that the Commission may impose an additional civil penalty. The ALJ explained that, if the General Assembly wanted to give the Commission the discretion not to impose interest on the unpaid amount, it could have used the word “may” instead of “shall.” The fact that the General Assembly refrained from using “may” in the provision at 58 Pa. C.S. § 2308(a), but used “may” at 58 Pa. C.S. 2310(a), indicates that it intended to make this provision mandatory not discretionary. [[15]](#footnote-15) The ALJ concluded that the Commission must impose the interest penalty under 58 Pa. C.S. § 2308(a) for the delinquent fees owed by SBI. R.D. at 33.

Additionally, the ALJ found that neither SBI nor PIOGA presented any evidence challenging I&E’s use of the three percent interest rate. Thus, the ALJ concluded that the application of the rate established by the Department of Revenue, in the absence of any other guidance in Act 13, was legal and reasonable. The ALJ calculated the interest due on the additional $390,250 up to the date I&E filed its Complaint on January 17, 2014.[[16]](#footnote-16)

Next, the ALJ addressed I&E’s request for SBI to pay a penalty on the $390,250 in impact and administrative fees for 2011 and 2012, pursuant to 58 Pa. C.S. § 2308(b).[[17]](#footnote-17) The ALJ referenced the testimony of I&E’s witness that the statute required the Commission to assess this penalty and that I&E had no discretion to refrain from imposing it. I&E contended that it calculated a twenty-five percent penalty consistent with Section 2308(b) of Act 13. R.D. 34-35.

SBI disagreed with the conclusion that the statute requires the Commission to assess a penalty on the amounts due. Rather, SBI argued that the word “shall” contained in Section 2308(b) was not mandatory but discretionary. The ALJ rejected this argument for the same reasons he set forth in the discussion of the mandatory interest provision above. According to the ALJ, neither SBI nor PIOGA presented any evidence challenging I&E’s calculation of the amount of the penalty that SBI owed on the unpaid impact and administrative fees. Thus, the ALJ calculated the penalty due on the additional $390,250 based on the twenty-five percent maximum set forth in 58 Pa. C.S.

§ 2308(b). This resulted in a penalty of $97,562. R.D. at 35.

Lastly, the ALJ considered I&E’s request that SBI pay a civil penalty of $50,000 for violating Act 13, pursuant to 58 Pa. C.S. § 2310.[[18]](#footnote-18)

Additionally, I&E cited to the Commission’s policy guidelines for civil penalties set forth at 52 Pa. Code § 69.1201. Pursuant to these guidelines, the Commission considers the following factors and standards to determine if a fine for violating a Commission Order, Regulation or Statute is appropriate:

(1) Whether the conduct at issue was of a serious nature. When conduct of a serious nature is involved, such as willful fraud or misrepresentation, the conduct may warrant a higher penalty. When the conduct is less egregious, such as administrative filing or technical errors, it may warrant a lower penalty.

(2) Whether the resulting consequences of the conduct at issue were of a serious nature. When consequences of a serious nature are involved, such as personal injury or property damage, the consequences may warrant a higher penalty.

(3) Whether the conduct at issue was deemed intentional or negligent. This factor may only be considered in evaluating litigated cases. When conduct has been deemed intentional, the conduct may result in a higher penalty.

(4) Whether the regulated entity made efforts to modify internal practices and procedures to address the conduct at issue and prevent similar conduct in the future. These modifications may include activities such as training and improving company techniques and supervision. The amount of time it took the utility to correct the conduct once it was discovered and the involvement of top-level management in correcting the conduct may be considered.

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

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

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

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

(9) Past Commission decisions in similar situations.

(10) Other relevant factors.

52 Pa. Code § 69.1201(c).

After concluding that SBI violated Act 13 by failing to pay the impact and administrative fees due for 2011 and 2012 for the additional wells, the ALJ considered the amount of the civil penalty that the Commission should impose under the policy guidelines. R.D. at 37.

The ALJ summarized SBI’s argument that the Commission should exercise its discretion and refrain from imposing a civil penalty. SBI contended that it has the right to dispute the Commission’s interpretation of Act 13 without having discretionary civil penalties imposed on it. SBI argued that imposing a civil penalty on it burdens its constitutional right to appeal an action of a Commonwealth agency and that the factors under Section 69.1201(c) of our Regulations are not applicable in this proceeding. R.D. at 38.

The ALJ applied the first factor pertaining to the whether the conduct at issue was of a serious nature. He concluded that upon review of the allegations and the evidence presented, the conduct was not of a serious nature as defined by the Commission’s policy statement. Further, the ALJ found there was no indication that SBI engaged in willful fraud, intentional misconduct or misrepresentation. Accordingly, the ALJ concluded that SBI’s conduct should result in a lesser penalty. *Id.*

Next, the ALJ considered the second factor addressing the consequences of the conduct at issue. The ALJ found no allegations or evidence indicating serious consequences, such as personal injury or property damage resulting from the violations. I&E’s witness indicated that municipalities would receive less in impact fee revenue to offset the impact of drilling wells in those municipalities due to SBI’s failure to pay the impact fees. However, I&E failed to cite any Commission decisions holding that monetary loss is a serious consequence that justifies a larger penalty. *Id.* at 39.

The ALJ cited to the Commission’s order promulgating the policy statement which stated that, in considering the second factor, the Commission will focus on actual harm sustained as opposed to speculating about the potential for harm.[[19]](#footnote-19) As to this factor, the ALJ viewed the possibility of monetary loss of impact fee revenue by the municipalities as speculation about potential harms as opposed to actual harm sustained. Thus, the ALJ concluded that the lack of any consequences resulting from SBI’s conduct should result in a lesser penalty. R.D. at 39.

Upon review of the third factor, addressing whether the conduct was negligent or intentional, the ALJ concluded that the allegations in the Complaint and evidence presented indicated negligent conduct. The ALJ referenced the testimony of SBI’s witness, Mr. O’Hara, who stated that he read the definition of “stripper well” contained in Act 13 and concluded that a “stripper well” was a well that is not capable of producing more than 90,000 cf of natural gas in one month in a calendar year. However, on cross examination, Mr. O’Hara indicated that that he did not seek any guidance on interpreting the term “stripper well.” Concluding that such conduct was negligent as opposed to intentional, the ALJ found that the application of the third factor should result in a lesser penalty. *Id.*

As to the fourth factor pertaining to any remedial actions taken, the ALJ noted that I&E did not present any evidence of SBI failing to take any remedial actions. Rather, I&E argued that SBI did not read the Commission’s *Implementation Order* regarding Act 13 and, thus, it is likely that SBI will engage in similar conduct in the future. In response, SBI argued that imposing a civil penalty will not cause it to change any of its procedures because its only action has been to disagree with the Commission’s interpretation of Act 13. Finding no evidence concerning SBI’s actions to modify its internal practices and procedures, the ALJ did not consider this factor to be applicable. R.D. at 39-40.

The ALJ did not consider the fifth factor because I&E did not present evidence that any customers were affected. *Id.* at 40.

Under the sixth factor, the ALJ determined that SBI had no compliance history with the Commission and that SBI’s violation in this proceeding was of an isolated nature. As such, the ALJ found that the factor supports a lesser penalty. *Id.*

Regarding the seventh factor, the ALJ found that SBI cooperated with the Commission and that a lesser penalty should be imposed. *Id.*

As to the eighth factor involving deterrence of future violations, I&E contended that the civil penalty of $50,000 is less than ten percent of the past due amounts. However, I&E argued that the proposed penalty would be sufficient to deter SBI from future violations. SBI responded that imposing a civil penalty will not deter future violations but will only serve to potentially coerce entities from foregoing their constitutional right to dispute a state agency’s claim. The ALJ concluded that the circumstances of this proceeding do not warrant a civil penalty larger than I&E’s request. *Id.*

Under the ninth factor pertaining to past Commission decisions in similar situations, I&E stated that this proceeding is a case of the first impression and there are no decisions with which to compare it. Accordingly, the ALJ did not consider this factor. *Id.* at 41.

Under the tenth factor, which examines other relevant factors, the ALJ considered I&E’s request of a $50,000 civil penalty to be reasonable. The ALJ acknowledged that I&E could have requested a penalty of up to $2,500 for each day SBI failed to make timely payments. A penalty of $2,500 per day would have resulted in a civil penalty request of $912,000 per year. However, given SBI’s cooperation and that there was no evidence of fraud, I&E believed a lesser penalty of $50,000 was appropriate. The ALJ agreed noting that the penalty for one year amounted to $137 per day. *Id.*

Additionally, the ALJ agreed with SBI that the Commission could exercise its discretion and impose no civil penalty under 58 Pa. C.S. § 2310. However, he concluded that a minimal civil penalty is warranted based on his review of the policy factors. Accordingly, he ordered SBI to pay the following: a civil penalty of $50,000 for the violations set forth in the complaint; $390,250 in impact and administrative fees for 2011 and 2012; $11,996 interest due on the additional $390,250 in impact and administrative fees for 2011 and 2012; and a $97,562.50 penalty due on the additional $390,250 in impact and administrative fees for 2011 and 2012. The ALJ ordered that the total amount due from Snyder was $549,808.50.

1. **Exceptions, Replies and Disposition**

SBI filed nine Exceptions with several subparts to the Exceptions. Essentially, SBI objects to the ALJ’s interpretation of the term “stripper well” and the determination that the Respondent violated Act 13 by failing to pay the disputed impact fees. SBI further contends that the ALJ incorrectly concluded that SBI’s conduct justified the imposition of any interest or penalty charges. PIOGA filed six Exceptions arguing, in part, that the ALJ misapplied the rules of statutory construction and improperly imposed civil penalties upon SBI. I&E filed Replies to the Exceptions arguing that the ALJ’s decision was proper and should be adopted in its entirety.

1. **Finding of Fact No. 54 is not supported by the record and is inconsistent with other findings (SBI Exc. No. 1 and PIOGA Exc. No. 6).**
2. **Exceptions**

Finding of Fact (FF) No. 54 provided: “[i]t is possible to lower the amount of gas produced by a gas well or to shut down a gas well for maintenance.” R.D. at 16. The Respondent objects to this finding to the extent that it implies that SBI sought or took steps to lower production. Additionally, SBI argues that FF No. 54 is inconsistent with other findings that stated that during calendar years 2011 and 2012 SBI’s wells were operated to maximum levels of production.[[20]](#footnote-20) SBI Exc. at 3-4.

PIOGA also contends that FF No. 54 is immaterial and must be stricken or vacated. Although PIOGA admits that this finding correctly restates testimony, PIOGA argues that the testimony of SBI’s witness that its wells were producing at maximum capacity was uncontradicted. Further, PIOGA asserts that I&E made no allegation and introduced no evidence that SBI produced less than maximum capacity.

1. **Replies to Exceptions**

In its reply to SBI’s Exc. No. 1, I&E argues that FF No. 54 directly reflects the testimony of SBI’s witness who stated that it was possible for production to be lowered or for a well to be shut down for maintenance. Further, I&E contends that FF Nos. 50 and 51 do not preclude the possibility that the production of a well can be lowered or shut down for maintenance. R. Exc. at 3-4.

Regarding PIOGA’s Exc. No. 6, I&E argues that the fact whether it is possible to lower a well’s production or to shut it down for maintenance is relevant to the interpretation of the term “stripper well.” According to I&E, this is relevant to determining the mischief to be remedied by a statute and the consequences of a particular interpretation. As such, I&E requests that SBI’s Exc. No. 1 and PIOGA’s Exc. No. 6 be denied.

1. **Disposition**

There has been no allegation, or any evidence to suggest, that SBI lowered production in any manner. Nonetheless, the admission of SBI’s witness that it is possible to lower gas production or to shut down a gas well for maintenance is significant for purposes of considering the intent of the General Assembly in crafting Act 13 as it did. As discussed more fully below in the disposition of exceptions related to the interpretation of stripper wells, unscrupulous producers might lower the vertical well production slightly in one month in order to avoid Act 13’s fees. Thus, we agree with I&E that FF No. 54 is relevant for purposes of determining the consequences of the interpretation of Act 13 by SBI and PIOGA. We find no error in the ALJ’s inclusion of this Finding of Fact, which is supported by the record evidence.

Accordingly, we shall deny SBI’s Exc. No. 1 and PIOGA’s Exc. No 6.

1. **The ALJ incorrectly interpreted the term “stripper well” and improperly assessed impact fees, interest and penalties for the years 2011 and 2012 (SBI Exc. Nos. 2 and 2(a) and PIOGA Exc. Nos. 1-3).**

1. **Exceptions**

Conclusion of Law (CL) No. 10 held that “[i]f a gas well’s production exceeds 90,000 cf per day in any month during a calendar year, that well is subject to Act 13’s fees.” R.D. at 43 (citing the *Reconsideration Order*). In its Exception Nos. 2 and 2(a), SBI argues that the ALJ reached this conclusion after misapplying the rules of statutory construction, which are governed by 1 Pa. C.S. § 1901. SBI Exc. at 5.

First, SBI contends that if the language of a statute is clear and unambiguous it is unnecessary to resort to other methods of statutory interpretation. Here, SBI argues that the clear and unambiguous meaning of the term stripper well is a well that “could not, during *any* of the several months of the multiple month reporting period, produce a daily average of more than 90,000 [cf] of gas.” SBI Exc. at 5 (emphasis in original). According to the Respondent, if the General Assembly had intended a different result, it could have replaced the word “any” with “every month,” “each month” or “all months.” Instead, the General Assembly used the word “any” which, SBI contends, commonly means “one.” *Id.* Additionally, SBI argues that the Commission in the *Rulemaking Order* has conceded that the word “any” commonly means “one.”[[21]](#footnote-21) SBI Exc. at 5-6.

Next, SBI argues that the ALJ’s interpretation ignores the rule of statutory construction, pursuant to 1 Pa. C.S. § 1921(a), that each word used in a statute has meaning. According to SBI, the ALJ read the term stripper well to mean any well that is “capable” of producing a certain amount of gas in “any” month is not a stripper well. SBI Exc. at 6. But, SBI contends, the ALJ gave no meaning to the term “incapable” which appears in the definition of a stripper well. *Id.*

Additionally, SBI argues that the ALJ incorrectly found a presumption in the definition of a stripper well that capability to produce gas at a certain level in any one month establishes this ability to produce at the same or higher level for all other months of the year. SBI avers that there is no factual basis for this presumption. Contending there was no proof that a well’s production in one month will indicate its production in every other month, SBI contends that the ALJ’s construction of the term stripper well is without merit. *Id.* at 7.

SBI also argues that the ALJ misapplied other rules of statutory construction. According to the Respondent, the ALJ improperly relied on the interpretation of the Commission in the *Rulemaking Order*. SBI argues that this reliance was improper because an agency’s interpretation of a statute when advanced during litigation is not entitled to deference. SBI Exc. at 7 (citing *ARIPPA v. Pa. PUC*, 792 A.2d 636, 660 (Pa. Cmwlth. 2002) (*ARIPPA*)). Further, the Respondent states that there has been an inconsistent interpretation of the term stripper well because the Commission originally required an “annualized” approach.[[22]](#footnote-22) SBI Exc. at 7.

Lastly, SBI claims that the ALJ improperly characterized the legislative history of Act 13 and a prior draft of the legislation that defined stripper well as an unconventional well “incapable of producing more than 90,000 [cf] of gas per day during *a* calendar month.” *Id.* at 7-8 (emphasis in original). According to SBI, the change of the word “a” to “any” in the final version does not indicate legislative intent to support the interpretation of I&E. The Respondent contends that the published reports of the General Assembly do not contain a reference to this change. Without any legislative commentary, SBI believes it would be pure speculation to assign any meaning to such a minor word change. *Id.* at 7-8.

In its Exception Nos. 1-3, PIOGA argues that the Commission has correctly found no ambiguity in the meaning of the word “any” in the stripper well definition and has consistently and correctly interpreted this word to mean “one.” In support, PIOGA cites to our interpretation of the meaning of a vertical gas well in the *Rulemaking Order* as the first publicly expressed interpretation of this meaning. According to PIOGA, the ALJ provided no reason for the Commission to change this consistent interpretation or the legal conclusion that the term “any” is clear and not ambiguous. PIOGA Exc. at 4-6.

PIOGA also argues that the ALJ erred by rejecting the general rules of statutory construction to determine the proper meaning of the stripper well definition. PIOGA contends that the Commission previously made plain language interpretations of provisions within Act 13 in the *Reconsideration Order*. Specifically, PIOGA cited to our interpretation of Sections 2302(f) and 2303(c) of Act 13, 58 Pa. C.S. §§ 2302(f) and 2303(c), in the *Reconsideration Order*. PIOGA Exc. at 7-8.

Additionally, PIOGA asserts that the ALJ erred in finding that SBI’s interpretation of the term stripper well would favor the private interest of increased revenue to SBI over the public interest of providing relief to municipalities affected by drilling. PIOGA contends that the ALJ improperly credited I&E’s argument that going beyond the plain meaning of the statutory language is necessary to avoid absurd or unreasonable results. PIOGA argues that it is only in rare circumstances that courts go beyond the plain meaning of a statute such as in cases involving multiple statutes and complicated issues. PIOGA Exc. at 9 (citing *Mercury Trucking, Inc. v. Pa. PUC*, 55 A.3d 1056 (Pa. Cmwlth. 2012) (*Mercury Trucking*); and *Com. v. Shiffler*, 583 Pa. 478, 879 A.2d 185 (2005)).

Here, PIOGA contends that the definition of a stripper well is not complicated, citing the testimony of SBI’s witness that the Respondent read and applied the definition that it considered to be straightforward. PIOGA Exc. at 10; Tr. at 128, 131. According to PIOGA, I&E is essentially arguing that any interpretation that would reduce impact fees paid to the Commonwealth would be an absurd result. PIOGA counters that this argument – that any statutory interpretation that reduces taxes or fees is *per se* contrary to legislative intent, unreasonable and absurd – could be made in any similar case. Thus, PIOGA argues that it was error to go beyond the plain language of the statute and consider factors such as the avoidance of absurd or unreasonable results. PIOGA Exc. at 10.

Furthermore, PIOGA avers that the ALJ erred in finding that the stripper well definition was ambiguous by virtue of the Commission’s needing to issue multiple Orders in its implementation process. PIOGA argues that the orders were necessary because the Commission erroneously interpreted the plain language of some provisions. However, PIOGA asserts that the orders never concluded that the provisions were ambiguous. *Id.* at 11.[[23]](#footnote-23)

Finally, PIOGA cites to its Reply Brief in support of its claims that the Commission’s implementation of the definition of stripper well is not entitled to deference because: (1) Chapter 23 of Act 13 is a new, *sui generis* statute, and the Commission has no particular expertise in interpreting its provisions; (2) the meaning of a statute is a question of law for the court and, when an agency’s interpretation does not track the meaning of the statute, or is violative of legislative intent, the court disregards the regulatory interpretation; and (3) unlike Chapter 33 of Act 13, there is no express authority or directive that the Commission promulgate regulations to implement Chapter 23. PIOGA Exc. at 13; PIOGA R. Briefat 13-14.

1. **Replies to Exceptions**

In its Replies to SBI Exc. Nos. 2 and 2(a) and PIOGA’s Exc. Nos. 1-3, I&E argues that the ALJ correctly applied the rules of statutory construction and properly relied on the legislative history to interpret the term stripper well. I&E asserts that the ALJ’s interpretation was consistent with multiple Commission Orders interpreting the stripper well definition. R. Exc. at 6 (citing the *Reconsideration Order* and the *Implementation Order*).

I&E also contends that the ALJ properly relied on the legislative history of Act 13, which can be found by reviewing the readily-available session information. According to I&E, SBI’s argument, that the ALJ cannot use prior versions of the bill without published commentary on language changes, attempts to rob the ALJ of his judicial discretion. R. Exc. at 7.

I&E objects to PIOGA’s Exc. No. 3, characterizing the majority of the arguments as an impermissible reply to I&E’s Reply Brief. I&E argues that, under 52 Pa. Code § 5.533, Exceptions are permitted to be filed to an Initial, Tentative or Recommended Decision but not to make reply arguments to a Reply Brief.[[24]](#footnote-24) R. Exc. at 7.

I&E argues that the statute is not clear or unambiguous, which necessitates an examination of the principles of statutory construction under 1 Pa. C.S. § 1921(c). In support, I&E notes the Commission’s receipt of multiple questions and requests for clarification during the implementation of Act 13, including questions from producers of how to determine which vertical wells qualified as stripper wells. According to I&E, the Commission received at least six inquiries from producers about the classification of stripper wells, which required the Commission to issue clarification and explanations in the *Implementation Order*, the *Reconsideration Order* and the *Clarification Order*. I&E Main Brief at 10-11.

As a further example of the ambiguity of the statute, I&E argues that the word “any” in the definition of stripper well is unclear as evidenced by the multiple dictionary definitions of the term. I&E cites to the Merriam-Webster definition of “any” as “one or some indiscriminately of whatever kind: a: one or another taken at random, b: every.” I&E Main Brief at 11.

Because of the ambiguity in the definition, I&E asserts that it is necessary to consider other principles of statutory interpretation beginning with an examination of the purpose and necessity for the statute. According to I&E, one of the primary purposes of Act 13 is to collect impact fees and provide disbursements to municipalities affected by unconventional gas wells. I&E contends that an interpretation of the stripper well definition that would reduce the amount of impact fees and distributions would clearly frustrate the purpose of the statute. *Id.* at 12.

I&E also argues that with respect to the definition of stripper well, the object to be obtained by Act 13 is to provide relief to municipalities affected by unconventional wells. Adopting the interpretation of SBI would, according to I&E, exempt active and producing wells from paying impact fees merely because production falls below 90,000 cf per day in one calendar month out of twelve. Thus, I&E proffers, the object of Act 13 in providing relief to municipalities would be thwarted. *Id.* at 12-13.

Next, I&E argues that the legislative history supports its interpretation. I&E reiterates its prior arguments that the General Assembly initially defined stripper well as a well “incapable of producing more than 90,000 cubic feet of gas per day during *a* calendar month….”; it later substituted “any” for “a.”[[25]](#footnote-25) By changing “a” to “any,” I&E contends that the General Assembly intended a stripper well to be one in which production falls below 90,000 cf per day in each calendar month in the reporting period. If it wanted to define a stripper well in which production fell below 90,000 cf per day in one calendar month, it would have retained the word “a” in the definition, according to I&E. I&E Main Brief at 13.

In addition, I&E proffers that the Commission’s administrative interpretation of the definition of stripper well is in line with I&E’s interpretation. In support I&E cites the *Reconsideration Order* and the *Rulemaking Order*. Moreover, I&E argues that the Commission is the administrative agency tasked with implementing Chapter 23 of Act 13 and its interpretation of the term is entitled to great deference and should not be reversed unless clearly erroneous. I&E Main Brief at 14 (citing *Energy Conservation Council of Pa. v. Pa. PUC*, 995 A.2d 465 (Pa. Cmwlth. 2010), *appeal denied*, 621 Pa. 675, 74 A.3d 1033 (2013); and *1-A Realty v. Pa. PUC,* 63 A.3d 480 (Pa. Cmwlth. 2013) (*1-A Realty*)).

Alternatively, I&E argues that even if the definition of stripper well were not ambiguous, SBI’s interpretation would create a result favoring the private interest over the public interest. According to I&E, it would allow a private entity to withhold impact fees that Act 13 intended to be dispersed to affected municipalities in violation of the rules of statutory construction. Furthermore, I&E contends that SBI’s interpretation would create an absurd result by allowing a company that produces over 90,000 cf of gas per day in eleven months of the year to avoid paying any impact fees if it falls below the threshold, either intentionally or unintentionally, in only one month.[[26]](#footnote-26) I&E Brief at 14-15.

1. **Disposition**

Upon review, we find that the ALJ properly applied the rules of statutory construction and correctly interpreted the definition of a stripper well in Act 13.

“When the words of a statute are clear and free from ambiguity, the letter of it is not to be disregarded under the pretext of pursuing the spirit.” 1 Pa. C.S. § 1921(b). However, when the language is not explicit or is ambiguous, the intention of the General Assembly may be ascertained by considering the various factors under 1 Pa. C.S.

§ 1921(c). *Ario v. Ingram Micro, Inc.*, 600 Pa. 305, 317-18, 965 A.2d 1194, 1201 (2009). Furthermore, a statute is ambiguous or unclear if its language is subject to two or more reasonable interpretations. *Com. of Pa., Office of the Governor v. Donahue*, 59 A.3d 1165, 1168 (Pa. Cmwlth. 2013).

Act 13 defines a stripper well as an “unconventional gas well incapable of producing more than 90,000 [cf] of gas per day during *any* calendar month….” 58 Pa. C.S. § 2301 (emphasis added). “Any” is not further defined in Act 13 or the Statutory Construction Act; therefore, we must consult secondary sources.[[27]](#footnote-27) In Black’s Law Dictionary, the term “any” is defined as follows:

Some; one out of many; an indefinite number. One indiscriminately of whatever kind or quantity. “Any” does not necessarily mean only one person, but may have reference to more than one or to many.

*Word “any” has a diversity of meaning and may be employed to indicate “all” or “every” as well as “some” or “one” and its meaning in a given statute depends upon the context and the subject matter of the statute.*

It is often synonymous with “either,” “every,” or “all.” Its generality may be restricted by the context; thus, the giving of a right to do some act “at any time” is commonly construed as meaning within a reasonable time; and the words “any other” following the enumeration of particular classes are to be read as “other such like,” and include only others of like kind or character.

Black’s Law Dictionary 94 (6th ed. 1990) (citations omitted) (emphasis added).[[28]](#footnote-28)

Given the diversity of meanings for the word “any,” we believe that its use in the definition of a stripper well subjects the statute to two or more possible interpretations. For example, it could be interpreted to mean, as I&E argues, “every” or “all,” in which case the statute would read an “unconventional gas well incapable of producing more than 90,000 cf of gas per day during *every* calendar month.” Alternatively, it could be read under SBI’s interpretation as an “unconventional gas well incapable of producing more than 90,000 cf of gas per day during *one* calendar month.”

Both I&E and the ALJ correctly observed that we issued multiple orders pertaining to Act 13 because there was substantial disagreement as to the interpretation and implementation of its provisions. In the *Implementation Order*, the *Reconsideration Order*, the *Clarification Order*, and the *Rulemaking Order*, we addressed the issue of production levels for vertical gas wells and the impact of the stripper well definition under 58 Pa. C.S. § 2301. Our commentary was necessary to address questions about the interpretation of the stripper well definition and alternate applications requested by producers. *See, e.g.*, *Implementation Order* at 7. Accordingly, we find that the definition of stripper well is ambiguous, which requires consideration of the aids to statutory construction set forth in 1 Pa. C.S. § 1921(c).

Before considering these factors, however, we address the claims by SBI and PIOGA that the Commission applied a plain language interpretation of the term “any” in the stripper well definition to mean “one” in the *Rulemaking Order*. Their claims are inaccurate and disregard the context in which the term appears. In the *Rulemaking Order*, we explained the production levels necessary to qualify as a vertical gas well. *Id.* at 8. We clarified that if a vertical well produces gas in quantities greater than that of a stripper well in only one month of a calendar year, that vertical well will be subject to Act 13 fees. However, the term “any” is not included in the definition of a “vertical well.” Rather, “any” only appears in the definition of a stripper well. Furthermore, a vertical well is defined by what it is not – a stripper well. Therefore, our interpretation of “any” in the *Rulemaking Order* was in the context of the vertical gas well (*i.e.*, if the well failed to produce at a certain level in *any* month of a calendar year it would not qualify as a stripper well, but if it produced in excess of the production level for *one* month of the calendar year it would qualify as a vertical well). As indicated above by the diversity of meaning of the word “any,” context is important. Thus, the potential for more than one possible meaning of the word requires consideration of the principles of statutory construction in this proceeding.

Among the factors to be considered are: (1) the occasion and necessity for the statute; (2) the circumstances under which the statute was enacted; (3) the mischief to be remedied; (4) the object to be obtained; (5) the consequences of a particular interpretation; (6) the contemporaneous legislative history; and (7) the legislative and administrative interpretations of the statute. *Mercury Trucking,* 55 A.3d at 1068 (citing 1 Pa. C.S. § 1921(c)).

One of the primary purposes of Act 13 is to collect impact fees and provide disbursements to the municipalities affected by unconventional gas wells. Adopting the interpretation of SBI and PIOGA would tend to impede the object of Act 13 under circumstances in which a vertical well is producing significant levels of gas. For example, if a well produces gas in excess of an average of 90,000 cf per day for eleven months of the year, but falls below the threshold in the twelfth month, the well would be exempt from the Act 13 impact and administrative fees. As a result, the community impacted by the significant levels of drilling, collection and distribution of gas from that well might not receive financial disbursements as Act 13 had intended. Thus, we view the arguments of SBI and PIOGA as being a potential impediment to fulfilling the intent of Act 13.

Additionally, we note that, under the interpretation of SBI and PIOGA, unscrupulous producers might lower the vertical well production slightly in one month and claim the well was incapable of producing at greater levels in order to avoid the fees under Act 13. Here, there was no allegation, nor any evidence to suggest, that SBI lowered its production of any of its wells. Nonetheless, under the application of the stripper well definition advanced by SBI, the potential exists for manipulation of production levels. Thus, upon review of the consequences of this particular interpretation we believe that the General Assembly intended the interpretation advanced by I&E.

More importantly, we believe that the General Assembly revealed its intent regarding the interpretation of the stripper well definition in the legislative history of Act 13. Clearly, a prior version of the bill defined a stripper well as being “incapable of producing more than 90,000 [cf] of gas per day during *a* calendar month….” H.B. 1950 (P.N. 2837). Significantly, it amended the definition to replace “a” with “any” in the final version of the bill. H.B. 1950 (P.N. 3048).[[29]](#footnote-29)

SBI attempts to dismiss the amendment as a minor word change. In doing so, SBI essentially suggests that the word “a” in the prior version was insignificant. We must reject this contention because it conflicts with the statutory construction principle that every statute shall be construed, if possible, to give effect to all its provisions. 1 Pa. C.S. § 1921(a). Moreover, if H.B. 1950 (P.N. 2837) had been enacted into law, SBI could have undoubtedly argued that the word “a” in the context of the definition meant “one.” Here, we agree with the ALJ that if the General Assembly had intended the definition advanced by SBI it would have left the word “a” in the definition. Upon consideration of the contemporaneous legislative history pursuant to 1 Pa. C.S.

§ 1921(c)(7), we consider the amendment to indicate an intent that supports the arguments of I&E.

Additionally, we find no error in the ALJ’s application of the Commission’s administrative interpretation of Act 13, pursuant to 1 Pa. C.S.

§ 1921(c)(8). We previously addressed the issue of the interpretation and application of the term stripper well in the *Reconsideration Order* and the *Rulemaking Order* and the ALJ properly applied those rulings. We see no basis for changing our previous decisions.

We also dispute SBI’s argument that the Commission is not entitled to deference because the interpretation was advanced during litigation. In *ARIPPA*, the Commonwealth Court stated that: “[n]ormally, no deference is given when an agency interprets a statute to justify its position in litigation, as in a brief filed in court…. Only when an agency is acting in its expert capacity, either in issuing a regulation or acting in an adjudicative capacity, is an agency given deference in its interpretation of a statute.” *ARIPPA*, 792 A.2d at 660 (citations omitted). As discussed above, the Commission’s interpretation of the definition of stripper well was advanced or discussed in the *Implementation Order*, the *Reconsideration Order*, the *Clarification Order*, and the *Rulemaking Order.* Clearly, the Commission’s interpretation was asserted several times both before and during the period of issuing regulations related to the implementation of Act 13. It was not presented for the first time as an adversarial position during this litigated proceeding or on appeal, a posture that distinguishes it from that of the Commission in *ARIPPA*.

Accordingly, we shall deny the Exceptions related to the ALJ’s interpretation of the term stripper well.

1. **The ALJ erred in concluding that Act 13 impact fees are not taxes for purposes of statutory construction (SBI Exc. No. 3 and PIOGA Exc. No. 4).[[30]](#footnote-30)**
2. **Exceptions**

Alternatively, SBI argues that if there is any ambiguity in the stripper well definition, the ambiguity should be resolved in its favor. SBI avers that the Act 13 impact fees are taxes; and the provisions imposing the impact fees therefore must be strictly construed in its favor pursuant to the statutory construction provision under 1 Pa. C.S. § 1928(b)(3). By failing to strictly construe the stripper well definition against the Commonwealth, SBI asserts that the ALJ erred. SBI Exc. at 8.

SBI cites to *Building Ass’n*, 710 A.2d at 145, in which the Commonwealth Court found that an impact fee was a government charge or fee used to generate revenue, and was, therefore, a tax for purposes of standing by a taxpayer to challenge a municipal tax. The Respondent contends that the impact fee in *Building Ass’n* – a levy on developers based in part on the amount of vehicular traffic a proposed development would generate – is indistinguishable from most of the Act 13 impact fee uses. According to SBI, *Building Ass’n* considered the substance of a levy to be controlling for determining whether it is a tax as opposed to the fund in which the levy is placed. SBI Exc. at 9.

SBI also argues that the ALJ improperly relied upon the federal court decision in *Wheeling*, to resolve an issue of state law. The Respondent asserts that the question of whether a levy is a tax for purposes of a federal law is not germane to whether the levy is a tax for state law purposes. As such, SBI contends that the ALJ erred by relying on the nonbinding precedent of the *Wheeling* decision. SBI Exc. at 9.

Furthermore, SBI argues that the substance of a law rather than the name given by a legislative body is controlling. Thus, the Respondent avers that the General Assembly’s label of revenue generated under Act 13 as impact fees rather than taxes is not controlling. SBI Exc. at 9-10 (citing *Sterling v. Philadelphia*, 106 A.2d 793, 795 (Pa. 1954)). Next, SBI states that a tax, unlike a true user or license fee, is a revenue producing measure characterized by large income relative to the costs of collection and supervision. *Id.* at 10 (citing *Simpson v. City of New Castle*, 740 A.2d 287 (Pa. Cmwlth. 1999) (*Simpson*)). Here, SBI believes that the impact fee collected in excess of the modest administrative fee of $50 per well is a device to generate revenue. The Respondent argues that the impact fees can be used for many purposes other than offsetting the costs of drilling. As examples, SBI cites to the following permissible uses of impact fees by municipalities: the reduction of taxes, 58 Pa. C.S. § 2314(g)(6); the delivery of social services, 58 Pa. C.S. § 2314(g)(7); and for judicial services, 58 Pa. C.S. § 2314(g)(10). SBI Exc. at 11. According to SBI, all reasonable doubt as to the meaning of a stripper well should have been construed in its favor and against the Commonwealth. *Id.* at 12.

In its Exceptions, PIOGA also argues that the ALJ erred in concluding that the impact fees are not taxes for purposes of statutory construction. According to PIOGA, the ALJ’s decision was based, in part, on an incorrect understanding of the use of the fees. PIOGA asserts that only sixty percent of the collected impact fees is distributed to municipalities to offset the impacts of drilling after approximately $20 million is taken “off the top” for statewide initiatives.[[31]](#footnote-31) PIOGA Exc. at 13-14. PIOGA avers that the ALJ ignored the fact that the remaining funds are disbursed for various statewide and local purposes. It proffers that the Commission should apply a common sense understanding that this form of government spending is for the general welfare and contributes, indirectly, to the General Fund. PIOGA also reiterates the argument of SBI that the impact fees provide funds well in excess of any legitimate fee and are, therefore, a form of revenue akin to a tax. *Id.* at 14.

1. **Replies to Exceptions**

I&E replies that the ALJ properly distinguished the fee in *Building Ass’n*. In *Building Ass’n*, the fee was defined under the MPC as a charge to generate revenue for funding the costs of transportation capital improvements. I&E contends that the ALJ correctly determined that the MPC definition rendered comparison to this case inapplicable. As such, I&E argues that the ALJ properly analyzed the facts of this case using the standards articulated in *Wheeling.*  I&E also distinguishes the decision in *Simpson* as being inapplicable because it involved a registration fee for a rental unit, which the court characterized as a licensing fee. Here, unlike in *Simpson*, I&E argues that Act 13 impact fees are not licensing or user fees. Thus, I&E proffers that an analysis of whether the proportion of income collected relative to the costs of collection and supervision is irrelevant. R. Exc. at 8-9.

Further, I&E asserts that the ALJ correctly found that Act 13 impact fees do not contribute to the general fund or raise money for the general welfare. Instead, they are distributed to municipalities to offset the impacts of drilling. Because the impact fees are not taxes, I&E contends that the ALJ properly refrained from construing any ambiguities in favor of SBI. Additionally, I&E again argues that PIOGA is attempting to use its Exceptions as a reply to I&E’s Reply Brief, which is impermissible under our Regulations. *Id.* at 9.

1. **Disposition**

In *Dechert LLP v. Com.*, 606 Pa. 334, 998 A.2d 575 (2010) (*Dechert*), the Pennsylvania Supreme Court noted that under 1 Pa. C.S. § 1928(b) the provisions of some classes of statutes, including those imposing taxes, are to be strictly construed. However, the Court clarified that the rule of strict construction does not preclude consideration of legislative intent. “[W]hile any doubt or uncertainty as to the imposition of a tax must be resolved in favor of the taxpayer, such doubt is only implicated after our efforts at statutory construction yield no definitive conclusion.” *Dechert*, 998 A.2d at 584 (citations and internal quotations omitted).

We believe that the legislative intent supports I&E’s interpretation of the definition of a stripper well, as discussed more fully above in the disposition of the Exceptions related to the interpretation of stripper wells based on production. Thus, under *Dechert, supra,* any doubt or uncertainty about the interpretation of a stripper well would be resolved against the Respondent.

Even if we did not reach this conclusion, we would not find that the Act 13 impact fee is a tax. In *City of Philadelphia v. Pa. PUC*, 676 A.2d 1298 (Pa. Cmwlth. 1996) (*City of Philadelphia*), the Commonwealth Court described as follows the attributes of a tax:

The classic tax is “imposed by a legislature upon many, or all citizens [,] raises money contributed to a general fund, and spent for the benefit of the entire community.” *San Juan Cellular Telephone Co. v. Public Service Commission of Puerto Rico*, 967 F.2d 683 (1st Cir. 1992). A tax is an “enforced contribution to provide for the support of the government.” *United States v. LaFranca*, 282 U.S. 568, 51 S.Ct. 278, 75 L.Ed. 551 (1931). Where a charge is imposed by a state or municipality not in its capacity as a sovereign but rather under a voluntary, contractual relationship, it has been held not to be a tax. *United States v. City of Columbia, Missouri*, 914 F.2d 151, 156 (8th Cir. 1990).

*Id.* at 1307-08.

The Commonwealth Court also distinguished a tax from a fee. “A ‘fee’ is paid to a public agency for bestowing a benefit which is not shared by the general members of the community and is paid by choice.” *Id.* at 1308.

Upon consideration of the attributes of taxes and fees, we believe that the impact fees under Act 13 are not taxes as contended by SBI and PIOGA. First, the impact fees are not imposed on all or many citizens. Rather, only some producers are required to pay the impact fees as a condition and privilege for the extraction of natural gas in local municipalities using unconventional wells. For producers utilizing vertical wells, the impact fees are only imposed if the production levels exceed the amounts set forth in the stripper well definition. Second, the impact fees are not imposed for the purposes of raising revenue directly for the general fund of the Commonwealth or even for the general use by the affected municipalities. Instead, the funds raised by the impact fees are distributed to offset the impacts of drilling in municipalities as demonstrated by the restrictions on the use of the funds legislated in Act 13.

Specifically, the impact fees are deposited in the Unconventional Gas Well Fund and are then disbursed as follows pursuant to Sections 2314 to 2315 of Act 13, 58 Pa. C.S. §§ 2314 and 2315:

|  |  |  |
| --- | --- | --- |
| **Section** | **Description** | **Amount** |
| 2314(c) | County Conservation Districts/State Conservation Commission | $7,500,000 |
| 2314(c.1)(1) | PA Fish and Boat Commission | $1,000,000 |
| 2314(c.1)(2) | PA Public Utility Commission | $1,000,000 |
| 2314(c.1)(3) | PA Department of Environmental Protection | $6,000,000 |
| 2314(c.1)(4) | PA Emergency Management Agency | $ 750,000 |
| 2314(c.1)(5) | Office of State Fire Commissioner | $ 750,000 |
| 2314(c.1)(6) | PA Department of Transportation | $1,000,000 |
| 2314(c.2) | Natural Gas Energy Development | $2,500,000 |
| 2314(d) | Counties and Municipalities (and Housing Fund); Funds in excess of the Municipality Restriction in Section 2314(e) are reallocated to the Housing Affordability & Rehabilitation Enhancement Fund | 60% of the remaining funds in the Unconventional Gas Well Fund |
| 2315(a.1) | Marcellus Legacy Fund | 40% of the remaining funds in the Unconventional Gas Well Fund |

Counties and municipalities receiving funding pursuant to Section 2314(d) of Act 13 must use the funds for “purposes associated with natural gas production from unconventional wells within the county or municipality”; and Act 13 provides a list of permissible categories of usage. 58 Pa. C.S. § 2314(g).

As stated above, in *Building Ass’n,* a trade association sought taxpayer standing to challenge the imposition of an impact fee imposed on developers under the MPC. Although the fee in *Building Ass’n* was based in part on the amount of vehicular traffic a proposed development would generate, distinctions between these fees and those imposed under Act 13 are sufficiently substantial to warrant a different conclusion.

First, the Commonwealth Court in *Building Ass’n* noted that the statutory provision in the MPC defining the impact fee specifically described it as a “charge or fee imposed by a municipality against a new development *in order to generate revenue* for funding the costs of transportation capital improvements necessitated by and attributable to new development.” *Id.*, 710 A.2d at 145 (emphasis added). Because the impact fee was a government charge or fee defined as having the purpose of generating revenue, the Court concluded it was a tax. *Id.*

Second, the MPC definition in *Building Ass’n* contemplated the generation of revenue directly to the municipality imposing the fee. Under Act 13, however, the impact fees are collected by the Commission and then deposited in the Unconventional Gas Well Fund. The Act 13 funds are not revenues directly distributed to the affected municipalities. Rather, any available funds are only disbursed pursuant to the very specific directions contained in Section 2314 of Act 13. Under this distribution formula, it is possible for municipalities not to receive any significant funding depending on the amount collected by the Commission. Moreover, as stated, the use of the funds is legislatively restricted. Thus, in our view, the Act 13 impact fees are not funds available for the general welfare of the Commonwealth or municipalities, and on these grounds are distinguishable from the Court’s holding in *Building Ass’n* .[[32]](#footnote-32)

SBI and PIOGA also argue that the impact fees can be used by municipalities to offset taxes. We agree with the ALJ that this argument is not persuasive. The possibility that funds may be used to reduce or offset general revenue taxes does not convert the funds into taxes. For example, fines levied by a Commonwealth agency – such as the civil penalties imposed under Section 3301 of the Public Utility Code, 66 Pa. C.S. § 3301 – do not become taxes simply because they raise funds for the Commonwealth.

Furthermore, we believe that the General Assembly clearly did not intend for such a construction. Section 2318 of Act 13, 58 Pa. C.S. § 2318, provides that, if the Commonwealth imposes a severance tax on unconventional gas wells, Chapter 23 of Act 13 shall expire upon publication of a notice in the *Pennsylvania Bulletin*. This provision appears to be a definitive statement by the General Assembly that it considered an impact fee to be separate and distinct from a severance tax to the extent that if a severance tax were enacted, the entire framework for imposing and collecting impact fees would expire.

Accordingly, we do not consider the impact fees to be taxes or that the Respondent is entitled to a strict interpretation of the definition of stripper well in its favor.

Upon review, we shall deny the Exceptions of SBI and PIOGA as to this issue.

1. **The ALJ incorrectly interpreted the interest and statutory penalty provisions of Section 2308 of Act 13, 58 Pa. C.S. § 2308 (SBI Exc. Nos. 4-5, 7).**
2. **Exceptions**

SBI objects to those Conclusions of Law, CL Nos. 8-9, that the Commission must assess interest on any delinquent gas well fee, pursuant to 58 Pa. C.S. § 2308(a), and a five percent penalty per month (not to exceed twenty-five percent), pursuant to 58 Pa. C.S. § 2308(b). SBI contends that the ALJ’s conclusions are at odds with our determination regarding sanctions in the *Rulemaking Order*. SBI Exc. at 12.

SBI cites to the following excerpt in the *Rulemaking Order* as indicative of our intention to treat the interest and penalty provision of Section 2308 of Act 13 as discretionary:

Based on the foregoing, the Commission *may* assess interest and penalties on untimely or delinquent impact fee payments *as permitted* by Sections 2307-2313 of the Act if (1) the producer fails to pay the delinquent impact fee in full in compliance with the Notice of Amount Due, (2) the producer fails to file a timely response with the Commission if no payment is made, or (3) after hearing, the Commission sustains the amount due by a final order. 58 Pa. C.S.

§§ 2307-2313.

SBI Exc. at 13 (emphasis added) (quoting *Rulemaking Order* at 18). Additionally, SBI cites to proposed Section 131.6(b)(2) of the Regulations, 52 Pa. Code 131.6(b)(2), set forth in Appendix A of the *Rulemaking Order* in support of its argument that sanctions are not mandatory. SBI Exc. at 13.

SBI argues that in some circumstances the term “shall” has been interpreted to be discretionary. *Id.* at 13-14 (citing *Tyler v. King*, 496 A.2d 16, 19-20 (Pa. Super. Ct. 1985), and *Com. v. Ferguson*, 552 A.2d 1075, 1079 (Pa. Super. Ct. 1988)). Additionally, the Respondent contends that the failure to treat the sanctions provisions as discretionary would raise serious constitutional issues. According to SBI, mandatory interest and penalty provisions would violate its constitutional rights to appeal a governmental action and to due process of law. SBI Exc. at 14.

SBI argues that it has a constitutional right to challenge I&E’s claim pertaining to the additional impact fees owed. However, SBI asserts that the General Assembly failed to provide any direct appeal mechanism under Act 13 to challenge a claim that additional impact fees are owed. Rather, Act 13 provides that unpaid and disputed impact fees would be recovered under the Commission’s rules of practice and procedure relating to complaints and enforcement. Further, SBI contends that the General Assembly set up a system requiring the Commission to promptly distribute all impact fees collected, but did not provide a refund mechanism for any overpaid impact fees after the funds are distributed. *Id.* at 14-15.

The lack of a refunding mechanism, SBI asserts, creates a dilemma for the Respondent: it must either pay the impact fees and, if successful in challenging the payment, be deprived of a refund; or it must withhold the impact fees and pay a substantial automatic interest and penalty if the challenge is unsuccessful. The Respondent argues that the risk of an unsuccessful appeal resulting in a mandatory imposition of sanctions would impose an unconstitutional condition. *Id.* at 16, 20 (citing *Com. v. Quarles*, 324 A.2d 452, 460-62 (Pa. Super. Ct. 1974) (*Quarles*); *Com. v. Littlejohn*, 250 A.2d 811 (Pa. 1969) (*Littlejohn*); *Koontz v. St. John’s River Water Management Dist.*, 133 S.Ct. 2586, 2594 (2013) (*Koontz*); and *Memorial Hospital v. Maricopa County*, 94 S.Ct. 1076 (1974) (*Memorial Hospital*)).

1. **Replies to Exceptions**

In reply, I&E asserts that SBI’s arguments ignore the plain language of Sections 2308(a) and (b) of Act 13, which clearly state that the Commission “shall” assess interest and penalties. R. Exc. at 10. I&E incorporates the arguments from its Main and Reply Briefs in support of its Replies to Exceptions. *Id.*

I&E argues that the term “shall” in Sections 2308(a) and (b) must be considered mandatory when comparing them with other sections in Act 13 that utilizes discretionary language. As an example, I&E cites to Section 2310 of Act 13, 58 Pa. C.S. § 2310, which provides that the Commission “may” assess civil penalties. I&E R. Brief at 5.

Regarding SBI’s claim that mandatory sanctions would impose an unconstitutional condition, I&E contends that this argument is misplaced. I&E states that, in general, an unconstitutional condition can arise when the government conditions the provision of a discretionary benefit on a requirement that a person give up a constitutionally protected right. Here, however, I&E argues that no one has asked or required SBI to give up its constitutionally protected right to appeal a governmental action. I&E also asserts that Act 13’s requirement that interest and penalties be imposed for untimely payments does not rise to a level of depriving SBI of a right to appeal. According to I&E, if SBI successfully challenges the claims it will not owe any additional fees, interest or penalties. *Id.* at 6-7.[[33]](#footnote-33)

Further, I&E criticizes SBI’s claim that the mandatory sanction constitutes a due process violation. I&E argues that in order to trigger due process protections, the government must take a person’s life, liberty or property without due process of law. I&E argues that in this proceeding the Commission has afforded SBI an administrative process with notice and a hearing before an ALJ. Thus, I&E contends that SBI has no valid due process claim. I&E R. Brief at 8.

1. **Disposition**

It is well established that the word “shall” is mandatory for purposes of statutory construction when a statute is unambiguous. *1-A Realty*, 63 A.3d at 484; *see also* *Oberneder v. Link Computer Corp.,* 548 Pa. 201, 205, 696 A.2d 148, 150 (1997) (by definition, the word “shall” is mandatory).

Here, the General Assembly used the mandatory term “shall” in both the interest provision under Section 2308(a) of Act 13 and the penalty provision under Section 2308(b) of Act 13, 58 Pa. C.S. §§ 2308(a) and 2308(b). In contrast, the General Assembly employed the term “may” in describing the Commission’s authority to impose civil penalties under the nearby Section 2310 of Act 13, 58 Pa. C.S. § 2310. Clearly, if the General Assembly desired to afford the Commission the discretion to refrain from imposing interest and penalties under Sections 2308(a) and (b), it could have used the word “may” instead of “shall.” It is apparent that the General Assembly’s choice of the word “shall” under these interest and penalty provisions while using “may” for the civil penalty provision of Section 2310 indicated an intent to make the provisions under Sections 2308(a) and (b) mandatory.

SBI contends that the Commission intended for the interest and penalty provision under Sections 2308(a) and (b) to be discretionary and cites to the *Rulemaking Order* at 18. The language quoted by SBI speaks broadly about Sections 2307 to 2313 of Act 13; it is not a specific interpretation of Section 2308. Further, there is no question that one of the cited provisions (Section 2310) contains a discretionary penalty. Moreover, there may be circumstances or enforcement actions in which Section 2308 may not be at issue but in which the Commission would have the authority to seek civil penalties under Section 2310 (*e.g.*, for violations of Chapter 23 unrelated to delinquent payment of impact or administrative fees). Thus, the “may” language is appropriate in the context of the quoted language in the *Rulemaking Order*. In summary, we did not intend for that isolated statement to suggest that all of the cited provisions are always discretionary.[[34]](#footnote-34)

Lastly, we consider SBI’s claims that the mandatory sanction provisions are unconstitutional. These arguments are without merit. As evidenced by this administrative litigation itself and the opportunities of the Parties to present their very thorough advocacy, SBI has not been hindered in any manner from advancing its arguments or challenging I&E’s claims pertaining to the additional fees owed. If we had accepted SBI’s interpretation of the stripper well definition, I&E’s Complaint, including all of the requested sanctions, would have been dismissed. Further, the fact that we are rejecting SBI’s interpretation does not impede appellate review or foreclose SBI’s claims that no sanctions should be imposed.[[35]](#footnote-35)

Thus, we shall dismiss SBI’s Exceptions as to this issue.

1. **The ALJ erred in finding that SBI violated Act 13 (SBI Exc. No. 6).**
2. **Exceptions**

SBI states that under Section 2310(a) of Act 13, 58 Pa. C.S. § 2310(a), the Commission may impose a civil penalty for a violation of Act 13. In this proceeding, SBI argues that I&E has failed to prove a violation warranting a penalty under Section 2310(a). Rather, SBI contends that in 2011 it timely paid the amount of Act 13 fees it believed in good faith were due and were not in dispute. Likewise, SBI claims that in 2012 it paid the amount of Act 13 fees it did not dispute. Although there was a good faith dispute about how much SBI owed for 2011 and 2011, SBI asserts that there was no evidence offered that SBI acted in bad faith or refused to pay fees it knew should have been paid. Additionally, SBI explains that the only mechanism available to dispute the amount of Act 13 fees claimed by I&E was to await an I&E enforcement action. SBI Exc. at 17.

Moreover, SBI contends that the Commission acknowledged that Act 13 does not provide a dispute mechanism. Instead, the *Rulemaking Order* directs that “if a producer is disputing whether particular wells are subject to the impact fee, the producer should not pay the corresponding impact fee for those ‘disputed’ wells unless and until the dispute has been resolved. This practice will prevent over-payment issues from arising.” *Rulemaking Order* at 18. SBI argues that it followed the Commission’s directions in the *Rulemaking Order* and otherwise paid the undisputed fees. Under these circumstances, SBI avers that I&E failed to establish a violation and absent a violation no penalties should be imposed. SBI Exc. at 18-19.

1. **Replies to Exceptions**

I&E replies that Act 13 requires full payment of administrative and impact fees by the dates stated in the Act. Because there are no exceptions for good faith or cooperation, I&E argues that SBI’s nonpayment of the disputed amounts constituted violations of Act 13. Furthermore, I&E states that it proved SBI did not timely pay the required impact fees and administrative charges. R. Exc. at 11.

1. **Disposition**

As discussed above, we have determined that SBI’s interpretation of the stripper well is not supportable. Thus, we are sustaining I&E’s Complaint regarding SBI’s failure to properly identify the additional vertical wells and to timely pay the resulting impact and administrative fees pursuant to 58 Pa. C.S. § 2303. Because I&E has met its burden of proof that SBI committed a violation of Act 13, we shall deny SBI’s Exception. SBI’s argument that Act 13 provides no refund mechanism and that the Commission encouraged producers to refrain from paying disputed impact fees will be addressed in the discussion of the discretionary civil penalty sections below.

1. **The ALJ erred in imposing a discretionary civil penalty of $50,000 (SBI Exc. No. 8 and PIOGA Exc. No. 5).**
2. **Exceptions**

According to the Respondent, it was I&E’s burden to establish that SBI’s conduct merited a civil penalty. This requires I&E to offer proof that one or more of the factors under 52 Pa. Code § 69.1201 justified the sanction. SBI argues that I&E failed to meet its burden with respect to any of the policy guidelines under Section 69.1201. Further, the Respondent asserts that many of the guidelines have no application to this proceeding and that the ALJ clearly misapplied some of the criteria. SBI Exc. at 21-22.[[36]](#footnote-36)

PIOGA also argues that the ALJ erred in applying the Commission’s policy guidelines and incorporates the arguments from its Reply Brief. PIOGA Exc. at 14. PIOGA states that I&E conceded that some of the factors either do not support penalties or are not applicable. Additionally, PIOGA contends that the factors I&E asserts are applicable are not supported by substantial evidence. Rather, the only justification for the penalty advanced at the hearing was that a $50,000 penalty is reasonable in relation to the maximum penalties the Commission could have imposed under Section 2310(a). Because the policy guidelines must be strictly construed in litigated cases pursuant to 52 Pa. Code § 69.1201(b), PIOGA proffers that the evidence fails to support a civil penalty award. PIOGA R. Brief at 16. In addition, PIOGA argues that the ALJ erred by failing to consider whether any penalty is reasonable and appropriate under these circumstances. PIOGA Exc. at 14.

1. **Replies to Exceptions**

In its replies, I&E reiterates that the interest and penalty provisions under Sections 2308(a) and (b) are mandatory and that no analysis of conduct is required or permitted in assessing those sanctions. Further, I&E argues that the ALJ carefully considered each of the policy guidelines over three pages of his Recommended Decision in accepting I&E’s recommended penalty under Section 2310(a). I&E contends that SBI’s disagreement with the ALJ’s analysis does not mean that the ALJ misapplied the guidelines. R. Exc. at 12.

1. **Disposition**

Section 2310(a) of Act 13, 58 Pa. C.S. § 2310(a) provides in part that “[i]n determining the amount of the penalty, the [C]omission shall consider the willfulness and other relevant factors.” Further our policy guidelines at 52 Pa. Code § 69.1201(a) clarify that the factors and standards of the guidelines will be used to determine if a fine for violating a Statute, Regulation or Commission Order is appropriate. Thus the policy guidelines are not only used to determine if a higher or lower civil penalty should be imposed but also whether any civil penalty should be rendered.

For the reasons discussed more fully below, in the section applying the Commission’s policy guidelines, and for the reasons that this matter is a case of first impression and there has been no evidence of bad faith, we find that a discretionary civil penalty is not warranted in the proceeding. Therefore, we shall grant SBI Exc. No. 8 and PIOGA Exc. No. 5.

1. **Application of the Commission’s policy guidelines under 52 Pa. Code**

**§ 69.1201 (SBI Exc. Nos. 10a.-10g.).**

1. **I&E did not prove that SBI’s conduct was of a serious nature and the ALJ misapplied 52 Pa. Code § 69.1201(c)(1).**
2. **Exception**

SBI argues that there was no evidence that its conduct was of a serious nature or involved fraud or misrepresentation. SBI asserts that it cooperated with the Commission and I&E’s only witness testified as to having no basis to believe SBI did anything intentionally wrong or acted fraudulently. SBI Exc. at 22.

Rather, SBI contends it was exercising its right to challenge the Commission’s claim about the amount of impact fees owed. Additionally, the Respondent paid the amount that it believed was owed in a timely manner and withheld the disputed amounts pending resolution of the dispute as recommended by the Commission in the *Rulemaking Order*. According to the Respondent, SBI’s conduct did not justify any penalty. *Id.*

1. **Reply to Exception**

I&E replies that, even though there was no evidence of fraud or misrepresentation, the policy guideline states that less egregious conduct may warrant a lower civil penalty. Here, I&E contends, the ALJ properly weighed 52 Pa. Code

§ 69.1201(c)(1), in favor of SBI and found that its requested civil penalty was appropriate. R. Exc. at 12-13.

1. **Disposition**

We agree with SBI that there was no evidence of willful misconduct. Rather, SBI’s actions evidence an attempt to resolve its conflicting interpretation of Act 13 coupled with a willingness to pay the undisputed impact and administrative fees. Furthermore, we acknowledge the direction in our *Rulemaking Order* suggesting that producers withhold payments until a dispute is resolved in order to avoid overpayment issues from arising. This factor supports a finding that a lower or no civil penalty be imposed.

1. **I&E did not prove that any injury resulted from SBI’s conduct and the ALJ misapplied 52 Pa. Code § 69.1201(c)(2).**
2. **Exception**

SBI claims there was no physical injury of any type to either person or property. It disputes I&E’s contention that local municipalities might have been harmed by SBI’s withholding of impact fees pending resolution of the dispute. SBI argues that I&E offered no concrete evidence that a county or other entity suffered any harm as a result of not receiving SBI’s disputed fees. Additionally, SBI proffers that the Commission’s advice to producers not to pay funds until a dispute is finalized would have been the cause of any harm and not SBI’s conduct. The Respondent argues that the ALJ erred by finding the potential for harm was present under this factor and by imposing any penalty. SBI Exc. at 23.

1. **Reply to Exception**

According to I&E, SBI inaccurately states that the ALJ found the existence of any potential harm under this factor. Rather, I&E argues that the ALJ rejected this notion and weighed the factor in favor of SBI. I&E contends that the ALJ correctly found that consideration of this factor should result in a lesser penalty. R. Exc. at 13.

1. **Disposition**

The ALJ correctly determined that a higher penalty under this factor is unwarranted. However, the absence of any injury also supports a finding that this factor is inapplicable. Thus, we conclude that this factor tends to support a finding that no civil penalty should be imposed.

1. **SBI’s conduct was not negligent and the ALJ misapplied 52 Pa. Code § 69.1201(c)(3).**
2. **Exception**

The Respondent argues that the ALJ committed error by concluding that SBI was negligent for failing to familiarize itself with the Commission’s various interpretations of a stripper well. SBI contends that even if it had been familiar with the Commission’s interpretation, it would have disputed and appealed the final interpretation. SBI Exc. at 24.

SBI also states that it submitted the 2011 Annual Report about the production of its wells before Commission staff advised about its differing interpretation of the term stripper well. In fact, SBI contends, the Commission did not notify SBI of its interpretation until after the Respondent submitted its 2012 Annual Report. SBI asserts that the Commission was negligent in failing to promptly notify SBI about the meaning of the statutory term, which I&E now claims is ambiguous, until just a few weeks before the deadline to submit the initial Annual Report. The Commission waited even longer to directly notify operators of the interpretation of this important term. Furthermore, SBI proffers that the Commission compounded its “misfeasance” by sending the Respondent a statement requesting payment consistent with the amount SBI believed it owed. *Id.* at 24-25.

1. **Reply to Exception**

In reply, I&E avers that the ALJ properly applied the relevant criteria, in particular SBI’s admission that it had never read any of the Commission’s Orders regarding the interpretation of the definition of stripper well. According to I&E, the ALJ weighed this factor in favor of SBI, finding its conduct was negligent as opposed to intentional and imposing I&E’s lesser civil penalty. Additionally, I&E argues that SBI’s claims that the Commission was negligent is misplaced because this factor only examines the conduct of the Respondent, not the Commission. R. Exc. at 14.

1. **Disposition**

This factor contemplates imposition of a higher penalty if there is evidence that the Respondent’s actions were intentional. Because the ALJ found SBI’s actions to be negligent rather than intentional, he concluded that a penalty well below the maximum permitted by Act 13 was appropriate. We agree with the ALJ that SBI’s failure to review and become familiar with the Commission’s Orders interpreting and implementing the impact fees for vertical gas wells suggested negligent practice particularly for an entity engaged in unconventional gas well activity. SBI’s claim, that even if it had known and read the Orders it would have not acted any differently, further supports a finding of negligence. If SBI had been diligent in understanding the Commission’s pronouncements with respect to vertical well fees and had contacted the Commission about its differing interpretation, the dispute might have been resolved at an earlier time and in a different fashion. Accordingly, we agree that this factor would support a lower or no civil penalty.

1. **The ALJ misapplied the compliance history factor under 52 Pa. Code § 69.1201(c)(6).**
2. **Exceptions**

SBI asserts that it has no prior history of violating any statute or regulation administered by the Commission. The Respondent also argues that there was no evidence of its violating any other type of Statute or Regulation. Additionally, SBI states that its conduct in the present proceeding could not be considered a violation of law or Regulation because it was simply disputing the Commission’s claims. SBI concludes that, despite the ALJ’s concession that SBI did not have any prior compliance problems, the ALJ misapplied 52 Pa. Code § 69.1201(c)(6) by imposing a lower civil penalty instead of no penalty at all. SBI Exc. at 25.

1. **Replies to Exceptions**

I&E contends that the ALJ weighed this factor in SBI’s favor finding that the Respondent did not have compliance problems and that the present violation was isolated in nature. According to I&E, the ALJ correctly concluded that the factor warranted a lesser penalty. R. Exc. at 14.

1. **Disposition**

Upon review, we find that the absence of any previous compliance problems by SBI supports a finding that this factor weighs against the imposition of a civil penalty.

1. **The ALJ misapplied the cooperation factor under 52 Pa. Code**

**§ 69.1201(c)(8).**

1. **Exceptions**

SBI argues that the record evidence supported a finding that it fully cooperated with the Commission. As such, SBI asserts that this factor should be deemed as being non-applicable or mitigating against any penalty. According to the Respondent, the ALJ improperly determined that the factor warrants a lesser civil penalty. SBI Exc. at 26.

1. **Replies to Exceptions**

I&E responds that the ALJ properly applied the factor related to SBI’s cooperation with the Commission. However, I&E argues that SBI’s claims are without merit and contrary to the structure of the Commission’s policy guidelines, which set out specific factors to be weighed in determining a civil penalty. Also, I&E questions why SBI would argue against the application of this factor because it weighs in favor of a lesser civil penalty. R. Exc. at 14-15.

1. **Disposition**

The evidence that SBI cooperated with the Commission supports a finding that this factor weighs against the imposition of a civil penalty.

1. **I&E failed to prove that a civil penalty would deter future violations and the ALJ misapplied 52 Pa. Code § 69.1201(c)(9) and the “other factors” analysis under 52 Pa. Code § 69.1201(c)(10).**
2. **Exceptions**

SBI reiterates that it has fully cooperated with the Commission and argues there is no reason to doubt its future cooperation regardless of the ultimate outcome of this proceeding. Further, the Respondent asserts that imposing a civil penalty will do nothing to deter future violations. However, SBI states that it may deter the Respondent from exercising challenges to future Commission claims related to Act 13 fees, which might be improperly sought. SBI Exc. at 26.

SBI contends that I&E simply provided testimony that a $50,000 civil penalty would be reasonable when compared with a maximum penalty in excess of

$1 million. However, SBI asserts that I&E offered no evidence in support of other factors that would merit a $50,000 civil penalty. SBI argues that the ALJ apparently considered a $50,000 civil penalty to be reasonable when a producer unsuccessfully appeals an Act 13 fee dispute. SBI Exc. at 26-27.

SBI proffers that imposing a civil penalty upon a person for unsuccessfully exercising a right to appeal an agency action was inappropriate. Further, the Respondent states that the ALJ failed to consider SBI’s actions as a legitimate dispute about the statutory definition of the term stripper well. Lastly, SBI avers that imposing penalties and interest under Section 2308 of Act 13, 58 Pa. C.S. § 2308, should be a factor weighing against an additional discretionary civil penalty of $50,000 under Section 2310(a). SBI Exc. at 27.

1. **Replies to Exceptions**

I&E states that the ALJ considered its argument that a $50,000 civil penalty is less than ten percent of the past due amounts and sufficient to deter future violations. The ALJ also weighed SBI’s argument that the penalty would not deter future violations, but would potentially coerce entities from raising disputes. According to I&E, the ALJ properly analyzed this factor and found that an amount larger than $50,000 was unnecessary to deter future violations. R. Exc. at 15.

I&E also states that the ALJ correctly considered the other relevant factors and found that a $50,000 civil penalty was reasonable as compared with a potential civil penalty of $912,000 per year. I&E also argued that the ALJ considered whether any civil penalty should be imposed and concluded that on review of all the relevant civil penalty factors a civil penalty was warranted.

1. **Disposition**

Upon review, we agree with SBI that imposition of the $50,000 civil penalty under Section 2310(a) is unnecessary for deterrence purposes in this case. There is nothing in the record or SBI’s compliance history to indicate that the Respondent will refuse to comply with any future Commission Orders or that the civil penalty in addition to the mandatory penalty and interest sanctions under Section 2308 will serve as a necessary added deterrent. Because this is a case of first impression and in light of the Respondent’s good faith effort to cooperate with the Commission and pay undisputed amounts owed, we find that these factors support a finding that no civil penalty be imposed.

In considering all of the policy guideline factors, we conclude that the discretionary civil penalty is unwarranted. Thus, we shall grant SBI’s Exceptions as to this issue and modify the Recommended Decision to eliminate the $50,000 civil penalty.

1. **Request for Oral Argument**

SBI requests that the Commission grant it the opportunity to orally argue its Exceptions, pursuant to 52 Pa. Code § 5.538. SBI Exc. at 27.

I&E responds that SBI’s request should be denied because it has not provided any reasons, let alone compelling reasons, for its request. I&E also argues that the majority of SBI’s Exceptions have been extensively addressed by the Parties and the ALJ throughout this proceeding. According to I&E, granting the request when there is sufficient evidence to make a determination without oral argument would be an unnecessary strain on already limited administrative resources. R. Exc. at 16.

We shall deny the Respondent’s request for an oral argument in this case. Decisions regarding whether to grant a request for oral argument are within the Commission’s discretion. *Application of Pennsylvania Suburban Water Company and Eagle Rock Utility Corporation*, Docket No. A-210104F0023 (Order entered March 8, 2004), at 5. Although the Respondent followed the proper procedure for requesting an oral argument, the Respondent did not provide any basis or reasons for the request. We have thoroughly considered the positions that the Respondent articulated in its Exceptions, and we see no need for oral argument to elaborate on those positions.

**IV. Conclusion**

Based upon the foregoing discussion, we shall (1) deny the Respondent’s Exceptions, in part and grant them, in part; (2) deny PIOGA’s Exceptions, in part and grant them, in part; (3) modify the Recommended Decision; and (4) deny the request for oral argument; all consistent with this Opinion and Order; **THEREFORE,**

**IT IS ORDERED:**

1. That the Exceptions of Snyder Brothers, Inc., filed on March 13, 2015, are denied, in part, and granted, in part, consistent with this Opinion and Order.
2. That the Exceptions of the Pennsylvania Independent Oil and Gas Association, filed on March 16, 2015, are denied, in part, and granted, in part, consistent with this Opinion and Order.
3. That the Recommended Decision of Administrative Law Judge David A. Salapa, issued on February 23, 2015, is adopted, as modified, consistent with this Opinion and Order.
4. That the Formal Complaint filed by the Bureau of Investigation and Enforcement against Snyder Brothers, Inc., at Docket No. C-2014-2402746 is sustained, in part, and denied, in part.
5. That Snyder Brothers, Inc., shall pay $390,250 in impact and administrative fees for 2011 and 2012, $11,707.50 in interest, and a penalty of $97,562.50, for a total of $499,520, and that, within twenty (20) days of the entry of this Opinion and Order, Snyder Brothers, Inc., shall remit $499,520 payable by certified check or money order, to “Commonwealth of Pennsylvania” and sent to:

Secretary

Pennsylvania Public Utility Commission

P.O. Box 3265

Harrisburg, PA, 17105-3265

1. That a copy of this Opinion and Order shall be served upon the Financial and Assessment Chief, Office of Administrative Services.
2. That the Request for Oral Argument of Snyder Brothers, Inc., is denied.
3. That after Snyder Brothers, Inc., remits $499,520 as required by Ordering Paragraph No. 5, the Secretary’s Bureau shall mark this proceeding closed.

**BY THE COMMISSION**

Rosemary Chiavetta

Secretary

ORDER ADOPTED: June 11, 2015

ORDER ENTERED: June 11, 2015

(SEAL)

1. An “unconventional gas well” is a “bore hole drilled or being drilled for the purpose of or to be used for the production of natural gas from an unconventional formation.” 58 Pa. C.S. § 2301. An “unconventional formation” is a “geological shale formation … where natural gas generally cannot be produced at economic flow rates or in economic volumes except by vertical or horizontal well bores stimulated by hydraulic fracture treatments or by using multilateral well bores or other techniques to expose more of the formation to the well bore.” *Id.* [↑](#footnote-ref-1)
2. I&E’s Petition requested that the Commission answer the following material question in the affirmative:

   Whether an unconventional gas well that produces more than 90,000 [cf] average per day in any given month during a calendar year is properly subject to the impact fees and administrative charges applicable to said well under Act 13? [↑](#footnote-ref-2)
3. For a discussion of the disposition of the Petition, see the *July 2014 Order*. [↑](#footnote-ref-3)
4. The Parties sought interlocutory Commission review and answer to the following material questions:

   1. Whether an unconventional gas well which produces less than a daily average of 90,000 [cf] of gas in only one month of a calendar year is a stripper well within the meaning of that term as set forth in 58 Pa. C.S. § 2301, and not subject to the impact fee for that year?
   2. Whether Act 13 impact fees are fees or “taxes”?

   SBI and PIOGA requested the Commission to answer the first material question in the affirmative. I&E requested the Commission to answer the question in the negative. As for the second material question, SBI and PIOGA requested the Commission to find that Act 13 impact fees are taxes; I&E requested an answer that the impact fees are fees and not taxes. Joint Petition at 1-2. [↑](#footnote-ref-4)
5. For a discussion of the disposition of the Joint Petition, see the *October 2014 Order*. [↑](#footnote-ref-5)
6. Each unconventional gas well that meets the definition of a “vertical gas well” is subject to an annual impact fee. 58 Pa. C.S. § 2302. A “vertical gas well” is defined as an “unconventional gas well which utilizes hydraulic fracture treatment through a single vertical well bore and produces natural gas in quantities greater than a stripper well.” *Id.* at § 2301. [↑](#footnote-ref-6)
7. Each unconventional gas well that is “spud” and not plugged is subject to an administrative fee. 58 Pa. C.S. § 2303. “Spud” is defined as the “actual start of drilling of an unconventional gas well.” *Id.* at § 2301. [↑](#footnote-ref-7)
8. The 2012 Impact Fee Statement provided that the impact fee for forty-nine vertical gas wells was $409,000. However, the Commission subtracted the impact fees for twenty-one disputed vertical gas wells in the amount of $173,000. Thus, the 2012 Impact Fee Statement listed the amount owed as $236,000 based on twenty-eight vertical wells. Likewise, the 2012 Spud Fee Statement stated that the spud fee for forty-nine vertical gas wells was $2,450. However, the Commission subtracted the spud fees for twenty-one disputed vertical gas wells in the amount of $1,050. Thus, the 2012 Spud Fee Statement listed the amount owed as $1,400 based on twenty-eight vertical wells. Joint Exh. 6. [↑](#footnote-ref-8)
9. In addition, the Parties stipulated during the hearing that for reporting years 2011, 2012 and 2013, no fees were due for wells permitted at 005-30329, 005-30392, 005-30635 and 005-30944. These wells never utilized hydraulic fracturing during the 2011, 2012 or 2013 reporting periods and assessments were timely and successfully disputed by SBI. Tr. at 55-57. [↑](#footnote-ref-9)
10. SBI cited to 1 Pa. C.S. § 1921(b), which provides: “When the words of a statute are clear and free from ambiguity, the letter of it is not be disregarded under the pretext of pursuing its spirit.” [↑](#footnote-ref-10)
11. *See Act 13 of 2012-Implementation of Unconventional Gas Well Impact Fee Act, Implementation Order Regarding Chapter 23*, Docket No. M-2012-2288561 (Order entered May 10, 2012) (*Implementation Order*); and *Act 13 of 2012-Implementation of Unconventional Gas Well Impact Fee Act, Reconsideration Order Regarding Chapter 23*, Docket No. M-2012-2288561 (Order entered July 19, 2012) (*Reconsideration Order*). [↑](#footnote-ref-11)
12. That section provides as follows:

    (c)  Matters considered in ascertaining intent.**--**When the words of a statute are not explicit, the intention of the General Assembly may be ascertained by considering, among other matters:

    (1)  The occasion and necessity for the statute.

    (2)  The circumstances under which it was enacted.

    (3)  The mischief to be remedied.

    (4)  The object to be attained.

    (5)  The former law, if any, including other statutes upon the same or similar subjects.

    (6)  The consequences of a particular interpretation.

    (7)  The contemporaneous legislative history.

    (8)  Legislative and administrative interpretations of such statute. [↑](#footnote-ref-12)
13. In support, the ALJ cited to *Wheeling and Lake Erie Railway Co. v. Pa. PUC*, 141 F.3d 88 (3d Cir. 1998) (*Wheeling*). [↑](#footnote-ref-13)
14. Section 2308(a) provides as follows: “Assessment.**--**The commission shall assess interest on any delinquent fee at the rate determined under section 2307(a) (relating to commission).”

    Section 2307(a) provides:

    Powers.-- The commission shall have the authority to make all inquiries and determinations necessary to calculate and collect the fee, administrative charges or assessments imposed under this chapter, including, if applicable, interest and penalties. [↑](#footnote-ref-14)
15. In the Recommended Decision, the ALJ stated that the General Assembly used the word “may” in Section 2308(b). R.D. at 33. This appears to be an error in that word “may” does not appear in Section 2308(b) but is found in Section 2310(a). We use the correct cite in this summary. [↑](#footnote-ref-15)
16. The ALJ found that the interest rate of three percent on the $241,200 unpaid amount for 2011, accruing from September 1, 2012, to January 17, 2014, was $9,045. For 2012, he calculated the interest on the $149,050 unpaid amount accruing from April 1, 2013, to January 17, 2014, as $2,951. Thus, the total interest due on the additional $390,250 in impact and administrative fees for 2011 and 2012 was $11,996. R.D. at 34. The interest calculations contain some errors. Three percent interest on $241,200 for 2011 should be $7,236. Three percent interest on $149,050 for 2012 should be $4,471.50. Thus, the total corrected interest due on the additional $390,250 should be $11,707.50. [↑](#footnote-ref-16)
17. Section 2308 (b) provides as follows:

    (b)  Penalty.**--**In addition to the assessed interest under subsection (a), if a producer fails to make timely payment of the fee, there shall be added to the amount of the fee due a penalty of 5% of the amount of the fee if failure to file a timely payment is for not more than one month, with an additional 5% penalty for each additional month, or fraction of a month, during which the failure continues, not to exceed 25% in the aggregate. [↑](#footnote-ref-17)
18. Section 2310 of Act 13 pertains to administrative penalties and provides the following:

    (a)  Civil penalties.**--**In addition to any other proceeding authorized by law, the commission may assess a civil penalty not to exceed $2,500 per violation upon a producer for the violation of this chapter. In determining the amount of the penalty, the commission shall consider the willfulness of the violation and other relevant factors.

    (b)  Separate offense.**--**Each violation for each separate day and each violation of this chapter shall constitute a separate offense.

    (c)  Limitation of actions.**--**Notwithstanding any limitation in 42 Pa. C.S. Ch. 55 Subch. B (relating to civil actions and proceedings), an action under this section must be brought within three years of the violation.

    (d)  Procedure.**--**A penalty under this chapter is subject to 66 Pa. C.S. Ch. 3 Subch. B (relating to investigations and hearings). [↑](#footnote-ref-18)
19. *Final Policy Statement for Litigated and Settled Proceedings Involving Violations of the Public Utility Code and Commission Regulations*, Docket No.

    M-00051875 (Order entered November 30, 2007). [↑](#footnote-ref-19)
20. FF No. 50 stated that “[d]uring 2011 and 2012, [SBI] operated its wells so that the wells would produce the maximum volume of gas.” FF No. 51 provided that “[i]f [SBI’s] production figures for 2011 and 2012 indicated that a well produced less than 90,000 cf of natural gas, that well was not capable of producing more.” [↑](#footnote-ref-20)
21. SBI cites to the *Rulemaking Order* in which we stated as follows:

    All vertical gas wells … will be subject to a fee … unless the producer verifies to the Commission that a particular well did not produce natural gas in quantities greater than that of a stripper well *during any calendar month* in the reporting year. This means that even if a vertical gas well produces natural gas in quantities greater than that of a stripper well in only *one* month of a calendar year, that vertical well will be subject to the fee for that year.

    *Rulemaking Order* at 8 (emphasis in original) (internal citations omitted). [↑](#footnote-ref-21)
22. In support of this argument, SBI cites to the *Implementation Order* which provided, in part, that “for purposes of calculating production from a stripper well, the Commission expects producers to simply divide the well’s monthly production by the number of days the well is in production in the *relevant calendar month*.” *Implementation Order* at 7 (emphasis added). In its Exceptions, SBI incorrectly quoted the emphasized term as “relevant calendar year.” SBI Exc. at 7. [↑](#footnote-ref-22)
23. PIOGA also addressed arguments that were presented in I&E’s Brief that inquiries from six producers concerning the classification of stripper wells shows that the definition was ambiguous. PIOGA claims that only a small number of producers made inquiries and a majority of those inquiries related to producers having the same plain language interpretation as PIOGA and SBI. PIOGA Exc. at 12. [↑](#footnote-ref-23)
24. Further, I&E notes that it is unclear why PIOGA identifies Conclusion of Law No. 11 because it does not address it under its Exc. No. 3. Regarding the remainder of PIOGA’s arguments, I&E states that it “incorporates by reference its position set forth in its Brief and Reply Brief.” R. Exc. at 7-8. [↑](#footnote-ref-24)
25. I&E cites to the initial version in H.B. 1950 (P.N. 2837). [↑](#footnote-ref-25)
26. I&E cites to 1 Pa. C.S. § 1922(1) and (5), which provide as follows:

    In ascertaining the intention of the General Assembly in the enactment of a statute the following presumptions, among others, may be used:

    That the General Assembly does not intend a result that is absurd, impossible of execution or unreasonable.

    \* \* \*

    (5) That the General Assembly intends to favor the public interest as against any private interest. [↑](#footnote-ref-26)
27. To determine the meaning of a term, the hierarchy of sources is: first, the definition section in which the term appears; second, the definition section of the Statutory Construction Act, 1 Pa. C.S. § 1991; third, a legal dictionary; and fourth, a standard dictionary. *Matthews v. Konieczny*, 515 Pa. 106, 115-16, 527 A.2d 508, 513 (1987) (plurality opinion). [↑](#footnote-ref-27)
28. It appears that the term “any” last appeared in the Sixth Edition of Black’s Law Dictionary and has not been included in subsequent editions which seem to be more abridged versions. In reviewing the definition of “any” in a standard dictionary, we determined that the term also contains varied meanings. For example, the Merriam-Webster definition of “any” provides “1: one or some indiscriminately of whatever kind: a: one or another taken at random…; b: every – used to indicate one selected without restriction…; 2: one, some, or all indiscriminately of whatever quantity: a: one or more – used to indicate an undetermined number or amount…; b: all – used to indicate a maximum or whole; c: a or some without reference to quantity or extent ….” *Merriam-Webster.com,* http:// [www.meriam-webster.com/dictionary/any](http://www.meriam-webster.com/dictionary/any) (last visited June 1, 2015). [↑](#footnote-ref-28)
29. Although we could locate no discussion of this amendment in the legislative journals, such an explanation is not required when ascertaining the legislative intent of the General Assembly. *See, e.g.*, *Rossiter v. Twp. of Whitpain*, 404 Pa. 201, 204, 170 A.2d 586, 587 (1961) (In ascertaining legislative intent, “a consideration of an act’s contemporaneous legislative history for guidance is proper.”). [↑](#footnote-ref-29)
30. SBI appears to have misidentified its third Exception as its fourth Exception. We will, therefore, consider SBI’s arguments in this section to be its third Exception. [↑](#footnote-ref-30)
31. PIOGA explains that all impact fees are deposited into the Unconventional Gas Well Fund. For 2011, $22 million of the deposited funds was distributed to the following entities: County Conservation Districts; the Fish & Boat Commission; the Department of Environmental Protection; the Emergency Management Authority; the Office of State Fire Commissioner; and the Department of Transportation. Sixty percent of the remaining funds was distributed to counties and municipalities for various restricted uses and to the Housing and Rehabilitation Enhancement Fund. Forty percent of the remaining funds was distributed to the Marcellus Legacy Fund for redistribution to various funds and entities. PIOGA Brief at 8-9. [↑](#footnote-ref-31)
32. Furthermore, the Commonwealth Court in *Building Ass’n* determined that the fee was a tax for purposes of evaluating whether the trade association had standing to challenge the tax on behalf of its members. The case did not involve a question of statutory construction of a tax provision and did not discuss or apply any of the attributes of a tax as set forth in *City of Philadelphia*. Thus, we believe the case is distinguishable from *City of Philadelphia* and is not determinative of this proceeding. [↑](#footnote-ref-32)
33. I&E also distinguishes the *Quarles* and *Littlejohn* cases cited by SBI contending that they were death penalty cases in which the defendants were subjected to a greater sanction, the death penalty, after exercising their rights to appeal. Here, I&E argues that the stakes are much lower and there was no increase in sanction. The interest and penalty remained the same whether SBI would have challenged or otherwise failed to timely pay the amount due. I&E further differentiates the *Koontz* and *Memorial Hospital* cases claiming they did not involve a corporation disputing fees and corresponding interest and penalties related to corporate activities. I&E R. Brief at 7-8. [↑](#footnote-ref-33)
34. Moreover, the *Rulemaking Order* is a proposed Order. Thus, based on comments received, it is possible that the quoted language will be further clarified if necessary. [↑](#footnote-ref-34)
35. Additionally, there was no evidence of a due process violation. The Commission afforded SBI full administrative process with notice and a hearing before an ALJ. [↑](#footnote-ref-35)
36. SBI also argues that if the Commission accepts the Respondent’s argument that the interest and penalty provisions under Sections 2308(a) and (b) of Act 13 are discretionary, I&E has the burden of proving whether sanctions are permissible upon application of the Commission’s policy guidelines under 52 Pa. Code § 69.1201. SBI Exc. at 21. [↑](#footnote-ref-36)