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Jan 10 2024

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
COURT OF APPEALS

APPEAL FROM THE ADMINISTRATIVE LAW COURT

The Honorable Ralph King Anderson, III
Administrative Law Judge

Appellate Case No. 2023-001351

BLUE RIDGE ENVIRONMENTAL DEFENSE LEAGUE, APPELLANT,

v.

SOUTH CAROLINA DEPARTMENT OF HEALTH AND ENVIRONMENTAL
CONTROL AND DOMINION ENERGY, RESPONDENTS.

**SUR-REPLY OF RESPONDENT DOMINION ENERGY TO APPELLANT'S
EMERGENCY PETITION FOR WRIT OF SUPERSEDEAS AND MOTION FOR
EXPEDITED HEARING**

January 10, 2024

Respondent Dominion Energy South Carolina, Inc. (Dominion), through counsel, respectfully submits this Sur-Reply to the Emergency Petition for Writ of Supersedeas and Motion for Expedited Hearing filed by Appellant Blue Ridge Environmental Defense League (“BREDL”). This Sur-Reply addresses only the new matter raised in BREDL’s Reply: that Dominion failed to advise the court of a relevant court order, and that the existence of this court order invalidated Dominion’s argument for mootness.

Background

BREDL’s appeal challenges the Final Order of the Administrative Law Court affirming the decision of the South Carolina Department of Health and Environmental Control (“DHEC”) to issue Dominion a Clean Water Act Section 401 Water Quality Certification (401 Certification). In its Return to BREDL’s Emergency Petition, Dominion argued, *inter alia*, that BREDL’s appeal was moot because the US Army Corps of Engineers has already issued the Clean Water Act Section 404 permit (404 Permit), which is the document that authorizes the pipeline construction proposed by Dominion. In support of this proposition, Dominion cited the reported decision of *S.C. Coastal Conservation League v. S.C. Dep’t of Health and Env’t Control*, Docket No. 15-ALJ-07-0404-CC, 2016 SC ENV LEXIS 33, Order Denying Stay (Oct. 10, 2016), as well as cases from other jurisdictions.

In its Reply, BREDL accuses Dominion of either ignoring or being unaware that the Court of Appeals later issued a supersedeas order while the *S.C. Coastal Conservation League* case was on appeal. Dominion was in fact unaware of the later supersedeas order at the time of filing its Return, as the subsequent order could not be found by Shepardizing the ALC decision. Had Dominion been aware of the subsequent order, it would have advised the court of the existence of the order. However, Dominion would also have advised the court of other relevant orders in the

case, including (1) an order lifting the supersedeas, with conditions, issued just over a month after issuing the supersedeas order; and (2) an order denying the appellant’s motion to reconsider the order lifting the supersedeas.

**The Unpublished Supersedeas Order Does Not Invalidate
Dominion’s Argument for Mootness**

The appellate history of the *S.C. Coastal Conservation League* case, at least as reflected in the documents available in the Court’s C-track system, illustrates the wisdom of Rule 268(d)(2), SCACR, which states that memorandum opinions and unpublished orders have no precedential value and should not be cited except in proceedings in which they are directly involved. If an unpublished order is cited, however, certainly all of the relevant orders should be disclosed.

In the *S.C. Coastal Conservation League* case, Appellants moved for a supersedeas order, arguing not only that the ALC had made specific errors, but also that the case involved both a 401 Certification and a Coastal Zone Management Certification, the latter being required by state law independent of the federal 404 Permit.¹ After considering the motion, the return, and the reply, the Court of Appeals issued a brief order imposing a stay “to prevent contested issues from becoming moot.” The order, which was issued on December 15, 2016, contained no additional analysis.

Just over a month later, on January 20, 2017, the court of appeals lifted the stay over the objection of Appellants and imposed certain conditions. (Order attached as Exhibit A.) Both the motion to lift the stay and the return to the motion recited case-specific facts in support of their respective positions. Appellants moved for reconsideration of the order lifting the stay, which the court denied on February 6, 2017. (Order attached as Exhibit B.) The case later settled.

It is impossible to know, based on the available record, whether the Court of Appeals in

¹ Unlike 401 Certifications, which exist only because federal law requires that states either certify permits or waive certification, Coastal Zone Management Certifications have an independent state-law basis in the Coastal Zone Management Act. S.C. Code Ann. §§ 48-39-10 *et seq.*

the *S.C. Coastal Conservation League* case imposed a stay because it disagreed with the ALC's analysis of the mootness issue based on the Coastal Zone Management Certification, disagreed with the ALC's analysis entirely, or had some other reason to conclude that a stay was necessary to prevent the issues in the case from becoming moot. It is also impossible to know the Court's reasoning for lifting the stay, with conditions, a month later. The Court's brief unpublished orders simply do not tell us.

Dominion contends that the mootness analysis of the ALC in the cited case was sound and that the subsequent orders by the Court of Appeals do not invalidate the ALC's conclusion that issuance of a 404 Permit renders an appeal of the 401 Certification moot.

Dated: January 10, 2024

Respectfully submitted,

DOMINION ENERGY, INC.

By: /s/ Elizabeth B. Partlow
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Counsel for Respondent Dominion Energy, Inc.

EXHIBIT A

(Order dated January 20, 2017)

The South Carolina Court of Appeals

South Carolina Coastal Conservation League and South
Carolina Wildlife Federation, Appellants,

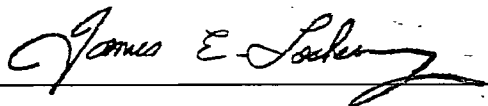
v.

South Carolina Department of Health and Environmental
Control and Horry County Public Works, Respondents.

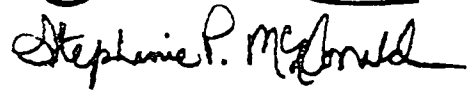
Appellate Case No. 2016-001758

ORDER

Respondents have filed a motion to vacate the stay imposed by this court. After careful consideration and based on the representations made by the parties since this court's initial issuance of the stay, we no longer believe a stay "is necessary to preserve jurisdiction of the appeal or to prevent a contested issue from becoming moot." *See* Rule 241(c)(2), SCACR. Accordingly, Respondents' motion to vacate the stay is granted under the condition that the road will only be used for emergency vehicles and Horry County will not connect the road to adjacent properties until the remittitur has been sent down in this case.

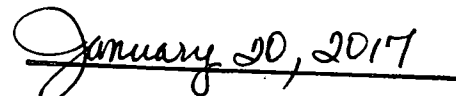
 C.J.

 J.

 J.

Columbia, South Carolina

FILED



cc:

Amy Elizabeth Armstrong, Esquire

Jessie Allison White, Esquire

Amelia Ann Thompson, Esquire

Nathan Michael Haber, Esquire

Michael Smoak Traynham, Esquire

Stanley E. Barnett, Esquire

EXHIBIT B

(Order dated February 6, 2017)

The South Carolina Court of Appeals

South Carolina Coastal Conservation League and South
Carolina Wildlife Federation, Appellants,

v.

South Carolina Department of Health and Environmental
Control and Horry County Public Works, Respondents.

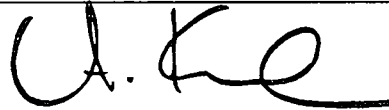
Appellate Case No. 2016-001758

ORDER

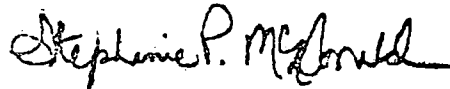
Appellants have filed a motion requesting this court to reconsider our order vacating the issuance of a stay. After careful consideration of the motion, the court is unable to discover that any material fact or principle of law has been either overlooked or disregarded. Accordingly, the motion to reconsider is denied.



C.J.



J.



J.

Columbia, South Carolina

cc:

Amy Elizabeth Armstrong, Esquire
Jessie Allison White, Esquire
Amelia Ann Thompson, Esquire

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February 6, 2017

Nathan Michael Haber, Esquire
Michael Smoak Traynham, Esquire
Stanley E. Barnett, Esquire

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CERTIFICATE OF SERVICE

The undersigned certifies that on January 10, 2024, she served Respondent Dominion Energy's Motion to File Sur-Reply and attached proposed Sur-Reply via electronic mail upon the following counsel:

For Appellant Blue Ridge Environmental Defense League:

Jesse Sanchez, Esq. (jesse@jessesanchezlaw.com)

Stephen A. Spitz, Esq. (stephenspitz994@gmail.com)

For Respondent South Carolina Department of Health and Environmental Control:

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/s/ Elizabeth B. Partlow

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Via email to ctappfilings@sccourts.org

The Honorable Jenny Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

RE: *Blue Ridge Environmental Defense League v. SCDHEC and Dominion Energy*
Appellate Case No. 2023-001351

Dear Ms. Kitchings:

Enclosed for filing on behalf of Dominion Energy are the following documents:

1. Dominion Energy's Motion for Leave to File Sur-Reply to Appellant's Emergency Petition;
2. Dominion Energy's Sur-Reply to Appellant's Emergency Petition; and
3. Proof of Service by Electronic Means.

We are putting in today's mail a copy of this letter with our check in the amount of \$50.00 for the filing fee. If you have any questions, please contact me. With kind regards, I am

Sincerely,

s/ Elizabeth B. Partlow

Enclosures

cc: Jesse Sanchez, Esq. (via email)
Stephen A. Spitz, Esq. (via email)
Bennett Smith, Esq. (via email)
Christopher P. Whitehead, Esq. (via email)
Sara Volk Martinez, Esq. (via email)