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SC Court of Appeals

STATE OF SOUTH CAROLINA
In the 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.

REPLY TO RESPONDENT DOMINION ENERGY'S
RETURN TO PETITION FOR WRIT OF SUPERSEDEAS

Pursuant to Rule 241, SCACR, Appellant Blue Ridge Environmental Defense League (herein, "BREDL" or "Petitioner"), through its undersigned counsel, hereby respectfully submits this Reply to Respondent Dominion Energy's Return.¹

I. The Corps' Issuance of the Section 404 Permit Does Not Moot the Issues in this Appeal. A Writ of Supersedeas is, however, Essential to Prevent a Contested Issue from Becoming Moot.

As validated by DHEC's Return, issuance of a federal permit by the Army Corps does not moot this appeal. Petitioner hereby adopts and incorporates by reference the well-reasoned

¹ The instant Reply address two arguments presented by Dominion, which merit further reply. All other arguments raised by Dominion are fully addressed in the principle Petition itself.

arguments and supporting case law set forth under Section II of DHEC's Return and respectfully requests that this Honorable Court grant the Petition for Supersedeas. (DHEC Return, pp. 5-11).

As highlighted in DHEC's Return, the Section 401 Water Quality Certification is a State-level prerequisite to issuance of a Section 404 permit by the Army Corps. If the Section 401 Certification is revoked as a result of this appeal, there is a significant possibility that the Corps would modify, retract, or suspend its permit. As DHEC notes, with a supporting affidavit from its very own Manager of Water Quality Certification and Wetlands, "there is a significant possibility that the Corps would give effect to a decision of this Court affecting the validity or conditions of the Certification issued to Dominion." (DHEC Return, p. 7, Emphasis added).

The Section 401 Water Quality Certification is also not just a prerequisite, it also serves a second purpose of assuring that the pipeline expansion project complies with the requirements of R. 19-450 applicable to construction activities affecting the State's navigable waters. As DHEC's Return notes, "This second purpose is based exclusively in state law, rather than stemming from the requirements of the federal Clean Water Act." (DHEC Return, p. 8). "A decision of this Court could provide effectual relief if it were to identify substantive problems pertaining to R. 19-450 and reverse, remand, or modify ALC's Final Order on that basis." (Ibid.)

Finally, the Corps may give effect to a decision of this Court should it decide to rule against Respondents and grant relief to BREDL. The fact that the Corps would have legal discretion in deciding how to respond to such a ruling does not point to this case being moot.

For these reasons, as well as the reasons set forth in the Petition itself, Petitioner respectfully requests that this Honorable Court grant its Petition for a Writ of Supersedeas. Because the gas pipeline expansion project calls for permanent fill impacts and permanent clearing impacts to South Carolina wetlands and streams, a stay is necessary to prevent a

contested issue from becoming moot. Contrary to Dominion’s representations, and as set forth in the Petition, these permanent environmental impacts cannot be reversed simply by abandoning the project, especially once excavation, filling, and clearing has commenced.

II. A Bond Would be an Inappropriate Imposition on Petitioner and Thwart the Administration of Justice.

Dominion’s request for a multi-million-dollar bond should be denied for each of the reasons already enumerated in BREDL’s petition. (Petition, pp. 15-16).

Additionally, Dominion’s bond request should be denied on the grounds that even their own witness, Mr. Zachary West, could not testify as to any of the calculations on which he based his opinion. Specifically, Mr. West acknowledge that he did not perform any of the calculations on which he based his opinion, that his opinion was based on the calculations of other undisclosed persons within the organization, who were not identified or made available for examination. (Transcript, Exhibit A, pp. 54:6-57:25). Mr. West also acknowledged that he lacked the requisite knowledge or qualifications to render opinions as to expected population growth, weather, transportation costs, or even statistics. (Ibid). More importantly, as even the ALC acknowledged, Mr. West did not offer a professional opinion to any degree of reasonable certainty, stating, “[H]e didn’t give is opinion to a reasonable degree of professional certainty as an engineer. What say—I mean, he had a shot of doing it.” (Transcript, Exhibit A, p. 60:2-8; argument at pp. 72:25 to 74:10). As Dominion’s counsel acknowledged, “[H]e’s not here as an expert witness.” (Transcript, Exhibit A, p. 60:6-8). Accordingly, this Court should not give undue weight to the testimony of an admittedly unqualified witness who failed to offer any testimony to any degree of professional certainty as to the bond, which Dominion requests.

CONCLUSION

For each of the foregoing reasons, as well as those reasons set forth in the Petition itself, Petitioner Blue Ridge Environmental Defense League respectfully requests that this Honorable Court grant its Petition for a Writ of Supersedeas. Because the gas pipeline expansion project calls for permanent fill impacts and permanent clearing impacts to South Carolina wetlands and streams, a stay is necessary to prevent a contested issue from becoming moot. Contrary to Dominion's representations, and as set forth in the Petition, these permanent environmental impacts cannot be reversed simply by abandoning the project, especially once excavation, filling, and clearing has commenced. Additionally, as set forth in DHEC's Return, issuance of a federal permit by the Army Corps does not moot this appeal and, therefore, has no bearing on the instant Petition for a Writ of Supersedeas. Finally, Dominion's request for bond should be denied as their own expert did not offer an opinion to any degree of professional certainty, did not perform the calculations on which he based his opinion, and was admittedly unqualified to offer an opinion as to population growth, weather, transportation costs, or even statistics.

[Signature on following page]

Respectfully submitted,

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April 30, 2024

EXHIBIT A

OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT DIVISION
Docket No. 22-ALJ-07-0131-CC

Blue Ridge Environmental Defense)
League,)
)
Petitioners,)
)
v.)
)
South Carolina Department of Health)
and Environmental Control and)
Dominion Energy,)
)
Respondents.)
-----)

ADMINISTRATIVE HEARING

Tuesday, March 19, 2024
1:57 p.m. - 3:31 p.m.

The hearing before the Honorable Ralph King Anderson, III was taken at the Edgar A. Brown Building, 1205 Pendleton Street, Columbia, South Carolina, on the 19th day of March, 2024 before Nadine A. Garrett, Court Reporter and Notary Public in and for the State of South Carolina.



CREEL COURT REPORTING, INC.
1230 Richland Street / Columbia, SC 29201
(803) 252-3445 / contact@creelreporting.com

APPEARANCES

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Attorney for the Respondent SC DHEC

Also Present:

Zachary West



1 MS. PARTLOW: Sure.

2 THE COURT: Do you have any questions?

3 MR. SMITH: No, Your Honor.

4 THE COURT: I'm thinking he didn't, but ...

5 MR. WEST - CROSS-EXAMINATION BY MR. SANCHEZ:

6 Q: Mr. West, you're a professional engineer,
7 correct?

8 A: Yes.

9 Q: And you are not an accountant, correct?

10 A: I am not.

11 Q: You're not a financial expert, correct?

12 A: No.

13 Q: You're not an economist, correct?

14 A: No.

15 Q: You're not a weather forecaster or a
16 meteorologist, correct?

17 A: No.

18 Q: And you are not a statistician on population
19 growth; is that correct?

20 A: Correct.

21 Q: Okay. Now, we've got a number of figures here
22 on this exhibit that's been put up. One of
23 them is dealing with projected annual load
24 growth. I believe you meant that was based off
25 of the increasing population. Is that correct?



1 A: Correct.

2 Q: Did you do the calculations yourself or how the
3 population is going to grow?

4 A: I did not. We have a group, a resource
5 planning group, internal to Dominion South
6 Carolina that is statisticians and look at
7 historical growth in the area.

8 Q: But they're not here in the courtroom today,
9 correct?

10 A: Correct.

11 Q: And did they complete this chart or did you
12 complete this chart?

13 A: I computed this chart based off their data.

14 Q: Okay. Average daily temperature when
15 supplemental LNG is required. Now, I believe
16 the term you used was expected weather
17 conditions. Now, you didn't perform any
18 analysis that would lead you to believe what
19 the expected weather conditions would be,
20 correct?

21 A: Correct.

22 Q: And in terms of LNG transport, I believe that
23 refers to liquid natural gas. Correct?

24 A: Correct.

25 Q: And you filled an affidavit saying that



1 essentially -- that is paragraph three of your
2 affidavit, that essentially this LNG is
3 transported by truck. And that's been the way
4 that they're doing it for a number of years,
5 correct?

6 A: Since 2019.

7 Q: Okay. So, that's part of the operating costs
8 that have been incurred by Dominion on a
9 regular basis, correct?

10 A: As part of this -- yes. Since this project's
11 been delayed, yes.

12 Q: Now, you said a couple of things you speculated
13 in your earlier testimony ---

14 **MS. PARTLOW:** I'm going to object to the
15 characterization that he was speculating.

16 **MR. SANCHEZ:** I would like to finish the statement.
17 I'll rephrase.

18 Q: You stated in your earlier testimony that there
19 was an expectation that population would grow,
20 correct?

21 A: Correct.

22 Q: But you stated earlier in your testimony that
23 there was expectation as to a certain number of
24 weather events, correct?

25 A: Correct.



1 Q: But you did not present the underlying -- you
2 did not compute any of that in your assessment,
3 correct, you relied on information that was
4 provided to you from elsewhere?

5 A: Correct.

6 Q: I have a question. There was -- in this chart
7 you've got -- you know, in the previous -- I'll
8 represent to you that previously back in
9 January, the amount that Dominion had requested
10 for a bond was 2.8 million dollars. Do you
11 recall that?

12 A: Yes.

13 Q: And in this current motion, it's now three
14 months later and the bond has gone up to 5.3
15 million dollars, correct?

16 A: Correct.

17 Q: But your affidavit is essentially the same,
18 correct?

19 A: Correct.

20 Q: And the charts are essentially the same,
21 correct?

22 A: Well, the -- this chart has 2026 on it, the
23 cost of 2026.

24 **MR. SANCHEZ:** Your Honor, I have no further
25 questions.



1 more realistic. And that's why ---

2 **THE COURT:** Well, I see your point on that. I will
3 say, they've raised two issues. One, is he
4 didn't give his opinion to a reasonable degree
5 of professional certainty as an engineer. What
6 say -- I mean, he had a shot of doing it.

7 **MS. PARTLOW:** And he's not here as an expert
8 witness. He's here as a guy who puts this
9 together, and he's telling the Court this is
10 what he has put together, based on Dominion's
11 actual operating experience, the model that
12 they've used for more than ten years, and some
13 of the findings of the Court in the original
14 ALC order, that population growth was going to
15 grow. You know, we did all of that in the
16 hearing, talking about what we expected for
17 population. And so, what he did was say,
18 here's what it cost and this is it.

19 **THE COURT:** All right. I interrupted you. Go
20 ahead.

21 **MS. PARTLOW:** That was actually the end of it.
22 We're asking for a bond to cover what it's
23 going to cost Dominion Energy if this thing
24 gets delayed for three years.

25 **THE COURT:** All right. So, my understand is what



1 **THE COURT:** Well, I thought it was somewhat
2 speculative since they were -- they're building
3 away. As they were going down the path of
4 constructing the roadway, it would be kind of
5 hard to say, okay, well, we've revisited this.
6 Then the roads already been built.

7 **MR. SMITH:** Certainly. I'm raising this as a point
8 of consistency with positions we've taken in
9 the past, which is that Corp -- you know, if
10 the question's whether this is a practical
11 legal effect that could stem from the Court of
12 Appeal's review of this matter, then there is
13 at least Federal authority to reopen its
14 authorization. It's speculative, it's
15 uncertain, but it is a relevant point in
16 deciding whether this entire matter is moot at
17 the time.

18 **THE COURT:** But do I know that that exists in the
19 case?

20 **MR. SMITH:** Your Honor, that is in the Nationwide
21 permit letter. And that's exhibit A of
22 Dominion's return.

23 **THE COURT:** All right. Mr. Sanchez.

24 **REPLY FROM THE PETITIONER BY MR. SANCHEZ:**

25 **MR. SANCHEZ:** Thank you, Your Honor. I'd like to



1 address some points that were raised by Ms.
2 Partlow and her argument that we hadn't had an
3 opportunity to respond to just yet. As Your
4 Honor noted, Mr. West's testimony, he did not
5 offer an opinion to any degree of professional
6 certainty. He based his opinion on
7 calculations that he did not compute that were
8 provided to him by undisclosed people within
9 the organization.

10 And as far as the bond is concerned, we
11 would point out that, under the Rule of 241,
12 there is no bond requirement for supersedeas
13 under the Appellant Court rules. Of course,
14 the Court can impose a bond if it deems it
15 necessary, but that is not a requirement.

16 I would note that our client is not a for-
17 profit organizations, composed of members of
18 the community in Florence County. Whereas
19 Dominion Energy is a conglomerate, multibillion
20 dollar entity, because there are a hundred
21 billion dollars in assets.

22 I would also point out that, as Mr. West
23 mentioned in his testimony, the transporting of
24 liquified natural gas is part of the normal
25 operating costs that they have, they transport



1 gas on trucks. He is not an expert to indicate
2 whether or not there would, in fact, be
3 population growth. He's not a meteorologist
4 that can tell us what the weather events are
5 going to be. He is not a statistician that can
6 provide testimony on any of those issues. And
7 even if he could, he did not provide an opinion
8 to any degree of professional certainty. So,
9 we would ask that the bond request be denied
10 for that purpose.

11 As far as DHEC's position, we take the
12 position, Your Honor, that, if you write the
13 Court of Appeals and say you take no position
14 and you write this Court and say you take no
15 position, then you walk into this courtroom,
16 you don't have a position. And I understand
17 Your Honor wanting them to issue a memorandum
18 in the past in a different case, asking them to
19 provide an opinion, but we were not provided
20 any notice. And under Rule 19 of the
21 Administrative Law Court rules, there's a
22 specified schedule as to when motions are
23 filed, when returns are filed, and when replies
24 are filed. We did not receive any return to
25 our Motion for Supersedeas, other than the

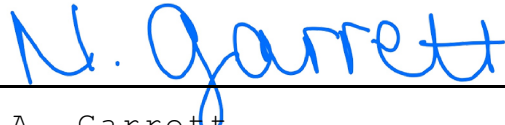


CERTIFICATE

This is to certify that the within hearing consisting of eighty-two (82) pages, is a true and correct transcript of the testimony given by said witnesses after being duly sworn; said hearing was reported by the method of Stenowriter with Backup.

I further certify that I am neither employed by nor related to any of the parties in this matter or their counsel; nor do I have any interest, financial or otherwise, in the outcome of same.

IN WITNESS WHEREOF I have hereunto set my hand and seal on April 10, 2024.



Nadine A. Garrett
Court Reporter

Notary Public for South Carolina
My Commission Expires: August 16, 2026



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PROOF OF SERVICE

I, the undersigned, certify that I have served Appellant Blue Ridge Environmental Defense League's Reply to Respondent Dominion Energy's Return to the Petition for Writ of Supersedeas via electronic mail on Counsel for Respondent Dominion Energy, Elizabeth B. Partlow, Esq. at her AIS-designated email address (beth@partlowlaw.com) and Brooks M. Smith, Esq. at his designated email address (brooks.smith@troutman.com), and Counsel for Respondent South Carolina Department of Health and Environmental Control, Bennet W. Smith, Esq. (smithbw@dhec.sc.gov), Christopher Patrick Whitehead, Esq. (whitehcp@dhec.sc.gov), and Sara Volk Martinez, Esq. (martinsv@dhec.sc.gov) at their respective AIS-designated email addresses on April 30, 2024.

[Signature on following page]

Respectfully submitted,

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s/Jesse Sanchez

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April 30, 2024

April 30, 2024

VIA EMAIL (ctappfilings@sccourts.org)

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



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SC Court of Appeals

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

Dear Ms. Kitchings:

Attached for filing with the Court, please find the following:

1. Appellant Blue Ridge Environmental Defense League's Reply to Respondent Dominion Energy's Return to Petition for Writ of Supersedeas; and
2. Proof of Service, evidencing service on all counsel of record.

Thank you for your assistance with this matter. Should you have any questions or wish to discuss the filing, please do not hesitate to contact me directly.

Sincerely,

s/Jesse Sanchez

Jesse Sanchez (SC Bar No. 101906)

Cc: Elizabeth B. Partlow, Esq. (Via email only)
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