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SC Court of Appeals

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

THE HONORABLE RALPH KING ANDERSON, III, ADMINISTRATIVE LAW JUDGE

ALC Case No. 18-ALJ-0443-/cc
Appellate Case No. 2021-000219

South Carolina Department of Revenue, Abbeville County, Anderson County, Greenville County, Aiken County, Laurens County, and York County..... Appellants,

v.

Colonial Pipeline Company ..... Respondent.

RESPONDENT'S PETITION FOR REHEARING

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INTRODUCTION

Pursuant to Rule 221(a) of the South Carolina Appellate Court Rules, Respondent Colonial Pipeline Company ("Respondent" or "Colonial") seeks a rehearing of the Court of Appeals' order filed on July 17, 2024. The Court incorrectly held that Respondent's facilities were not an industrial plant. As explained below, the Court relied on an inapposite federal statute, which actually supports Respondent's position, and the Court misapprehended or overlooked key points about the nature of Respondent's business.

To that end, Colonial prevailed before the Administrative Law Court ("ALC") with the Administrative Law Judge properly finding that Colonial qualified for the pollution control exemption as an industrial plant. Appellants appealed, and this Court reversed holding that industrial plants were limited to manufacturers. *See South Carolina Department of Revenue, et al. v. Colonial Pipeline Company*, No. 2021-000219, (S.C. Ct. App. July 17, 2024). .

ARGUMENT

1. The Court of Appeals Erred In Holding That Colonial's Facility Was Not An Industrial Plant.

All sides concede (and presumably agree with the Court of Appeal's Order) that the relevant exemption under both the statutory (section 12-37-220(A)(8)) and constitutional provision (S.C. Const. Art X, §3(h)) is limited to an "industrial plant," and that there is no statutory or regulatory definition of "industrial plant."

Is a transportation facility composed of 515 miles of pipelines, 2 tank farms with 44 tanks, one delivery facility next to a truck offloading site, 3 main line booster stations, injection equipment, the processing and sale of transmix, the removal of sting, and 32 full time employees that ships 185,000 barrels of gasoline, diesel, jet fuel and kerosene a day through South Carolina an "industrial plant?" The Department concedes that it is "industrial." *(see* Amended Final Order

at p. 15 and Motions Hearing, January 6, 2020, Tr. p. 37, lines 13-23; R. pp. 0095, 1363.) Accordingly, the sole issue before the Court was whether this combined facility constitutes a "plant." Significantly, the Department's witness who was in control of granting exemptions did not dispute that Colonial operated an industrial plant. *See* Testimony of Taylor Ingram, Tr. p. 323, lines 18-25; R. p. 1764. In fact, he granted the exemption to Colonial for other pollution control equipment during the same tax years at issue.[1]

Although Respondent is not aware of any South Carolina case that defines "industrial plant," that term is cited in several South Carolina cases. *See Mayfield v. Southern Ry. Co.*, 85 S.C. 165 (1910) (industrial plant consisted of gin house, seed house and gins and other machinery); *Magill v. Southern Ry. Co.*, 95 S.C. 306 (1913) (brick mill); and *Allison v. Ideal Laundry & Cleaners*, 215 S.C. 344 (1949) (cannery and glass factory). Several of these do not appear to be manufacturers.

Further, while Title 31, Chapter 24 of the SC Code does not use the exact term "industrial plant," it does use the term "industrial facility," which is instructive. This statute prohibits "Nuisance Suits Related to Manufacturing *and* Industrial Uses of Real Property" (emphasis added) against industrial facilities. Section 31-24-110 provides the following definitions of what constitutes an industrial facility:

> (A) "Manufacturing sector" means establishments engaged in the mechanical, physical, or chemical transformation of materials, substances, or components into new products, including, but not limited to, plants, factories, or mills, and characteristically use power-driven machines and materials-handling equipment.
>
> (B) "Transportation and warehousing sector" means industries providing transportation of passengers and cargo, warehousing and storage for goods, scenic and sightseeing transportation, and support activities related to modes of transportation by air, rail, water, road, and pipeline.

[1] Specifically, in 2017 and 2018, the Department granted the exemption for wastewater and storm water pollution control, secondary containment, and tank floating roofs (but denied the application for pipe coatings, cathodic protection and automatic shut-off valves as DHEC had not then ruled they qualified as pollution control exemption devices.)

(C) "Manufacturing or industrial facility" means any facility that operates in a manufacturing sector or transportation and warehousing sector, including, but not limited to, any land, building, structure, pond, impoundment, appurtenance, machinery, or equipment used for manufacturing, processing, distribution, warehousing, and technology intensive operations. . . .

Under this Act, an "industrial facility" includes "industries providing transportation of . . . cargo," specifically including "pipeline[s]." These definitions support a finding that Colonial qualifies as an "industrial plant" under the pollution control exemption.

2. The Court Of Appeals Erred In Holding That A "Plant" Is Limited To Manufacturers.

As stated above, the Department concedes that Colonial's operations were industrial. The Court of Appeals erred in holding that only a manufacturer can constitute an industrial plant.

The General Assembly does not agree. It limited the pollution control sales tax exemption to include only manufacturers. The pollution control sales tax exemption is found in §12-36-2120(17). It exempts pollution control "machines used in manufacturing, processing, recycling, compounding, mining and quarrying." By contrast, the S.C. Const. Art. X § 3(h) property tax pollution control exemption exempts "all facilities or equipment of "industrial plants."

The ALC rejected this contention as follows:

> First, the language of the exemption statute itself signifies the exemption is not limited to manufacturers. In relevant part, section 12-37-220(A)(8) instructs DHEC to investigate "the property of any manufacturer or company." (emphasis added). In construing a statute, we presume that no word is superfluous or without meaning. *Sweat,* 379 S.C. at 377, 665 S.E.2d at 651 ("A statute should be so construed that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous...." (citation omitted)). Therefore, the words "or company" must refer to a company that is separate and distinct from a "manufacturer" or the terms would be redundant.

Amended Final Order at p. 16; R. p. 97.

And, indeed, when looking at the language of the exemption itself, it indicates the exemption is not limited to manufacturers. In relevant part, the exemption statute instructs DHEC

to investigate "the property of any manufacturer *or company.*" S.C. Code Ann. § 12-37-220(A)(8) (emphasis added). If the General Assembly had wished to limit the pollution control exemption to manufacturers, then it certainly knows how to do so – *i.e.*, it could have omitted the word "company" entirely and just referred to "any manufacturer" or it could have used narrower, more specific terminology than "company" similar to the language it has used in other tax statutes. *See* S.C. Code Ann. § 12-36-2120(17) (exempts pollution control "machines used in manufacturing, processing, recycling, compounding, mining or quarrying"); S.C. Code Ann. § 12-43-220(a)(1) (classifying and assessing ad valorem property taxation of "[a]ll real and personal property owned by or leased to manufacturers and utilities and used by the manufacturer or utility in the conduct of the business" at ten and one-half percent of the fair market value of the property); and S.C. Code Ann. § 12-36-2120(9) (2014 & Supp. 2020) (exempting, for example, the gross proceeds of sales, or sales price of "coal, or coke or other fuel sold to manufacturers, electric power companies, and transportation companies" for certain enumerated uses).

The Court of Appeals erred in limiting the application of the pollution control exemption to only "manufacturers" as the plain language of S.C. Code Ann. § 12-37-220(A)(8) establishes that the General Assembly intended to statute to apply more broadly.

3. The Court Misconstrued 42 U.S.C. § 6326(5) To Limit Industrial Plants To Manufacturers.

The Court of Appeals held that 42 U.S.C. § 6326(5) "provides a plain and ordinary meaning for the term 'industrial plant' in that it contemplates some production or output." This statute defines "industrial plant" as "any fixed equipment or facility which is used in connection with, or as part of, any process or system for industrial production *or output.*" 42 U.S.C. § 6326(5) (emphasis added.) This Code section comes from the Federal State Energy Security Plans, which provides federal financial assistance for the development of state energy and security plans to

secure the energy infrastructure of the state against physical and cybersecurity threats. *See* 42 U.S.C. § 6326.

As stated above, the Department concedes, and the ALC Order found, that Colonial's operations were industrial. Did those operations have any "output?" Massive amounts.

Colonial is a pipeline company that transports refined petroleum products, including jet fuel, gasoline, diesel, heating oil, and kerosene (collectively, "Refined Petroleum Products"). Tr. p. 95, line 22; p. 96, line 7; R. p. 1536. Colonial receives these Refined Petroleum Products from approximately 30 refineries in the Gulf Coast region of the United States and has approximately 250 customers who ship through its pipelines. ALC Amended Final Order, Findings of Fact (hereinafter "Findings of Fact") at pp. 5-6; Tr. 121: 1-19; R. pp. 0085-86, 1562. In South Carolina specifically, Colonial ships gasoline, ultra-low sulfur diesel, heating oil, marine diesel, jet fuel, and kerosene. Ultra-low sulfur diesel and jet fuel are shipped as finished products. Tr. p. 95, line 25-p. 96, line 4; R. p. 1536.

Colonial ships over 255 million barrels of Refined Petroleum Products per day nationally of which 185,000 barrels per day are delivered into South Carolina for distribution within the state. One barrel contains 42 gallons, which means Colonial ships just under 8 million gallons of Refined Petroleum Products into South Carolina *per day*. Simply put, this is a massive amount of "output."

To the extent unrelated federal law is relevant, see C.F.R. § 1910.106 Flammable liquids. The CFR's section on flammable liquids includes language using the term "industrial plant." While the term is not directly defined within the regulation, the section notes that "industrial plants" include areas "[w]here flammable liquids are handled or used only in unit physical operations such as mixing, drying, evaporating, filtering, distillation, and similar operations which do not involve

chemical reaction." *See* 29 C.F.R. § 1910.106. Colonial ships some 8 million gallons of flammable liquid per day. It certainly meets CFR § 1910.106's definition of "industrial plant."

4. The Court Of Appeals Is Setting A Dangerous Precedent In Holding That "Industrial Plant" In Limited To Manufacturers

The Court of Appeal's decision holds that a large oil distribution facility is not an "industrial plant" because industrial plants are limited to manufacturers. While the term "industrial plants" may appear only one time in the tax code, "industrial" and perhaps "industrial plants" appear numerous other places in state law, local ordinances, and contracts. Obvious examples include environmental, zoning, local business license taxes, and insurance contracts.

One environmental example is the federal Clean Water Act, which is primarily enforced by the former DHEC. Under the Environmental Protection Agency's (EPA) Industrial Stormwater Rule, the term "associated with industrial activity" covers only discharges "from any conveyance that is used for collecting and conveying storm water and that is directly related to manufacturing, processing or *raw materials storage* areas at an industrial plant." 40 C.F.R. § 122.26(b)(14) (emp added).

Neither Congress nor the EPA has defined "industrial plant" in the Clean Water Act. Under the Court of Appeals' ruling, the successor to DHEC (South Carolina Department of Environmental Services (SCDES)), which has the responsibility to enforce the Clean Water Act in South Carolina, is going to be faced with a new defense in environmental actions brought against any entity that is not a traditional manufacturer. Specifically, defendants to Clean Water Act enforcement actions can now argue that they are not a manufacturer, and according to the Colonial decision they are not an "industrial plant" and thus not subject to the Clean Water Act. The battle will now start with SIC (now NAICs) codes which define "manufacturers". Persons cited for violation of the Clean Water Act will respond that their NAICs Code does not include them as a

manufacturer. See the U.S. Supreme Court decision, *Decker v. Northwest Environmental Defense Center*, 568 U.S. 597 (2013), which cites (but, alas does not define) industrial plant at length in its Clean Water Act decision.

As another example, zoning ordinances routinely cite – either allowing or barring – industrial activity and some may use the term "industrial plant." Under the Court of Appeals' decision, anyone not a manufacturer will now argue it can locate in areas within which local zoning ordinances prohibit industrial activity. (Again, the fight will start with NAICs codes). In one zoning case, *Momeier v. John McAlister, Inc.*, 203 S.C. 353, 27 S.E. 2d 504 (1943), at issue was whether a funeral home violated zoning ordinances in an area zoned residential and commercial. The concurring opinion states that "large numbers of normal citizens in many States are convinced that the maintenance of business enterprises, of whatever nature they may be, whether funeral homes or foundries, grocery stores or cafes, *industrial plants* or mercantile establishments, should be in districts removed from those occupied by the homeowners of the nation." (emphasis added.) The narrow definition of "industrial plants" promulgated by the Court of Appeals' decision will have direct adverse impacts on these types of zoning disputes.

The holding will also impact the insurance industry, among others. Insurance policies routinely exclude industrial activity and some may reference industrial plants. An insured who is not a traditional manufacturer based on its NAICs code will argue the exclusion does not apply to its industrial activity, again creating more potential strife in areas beyond just taxation.

In summary, ruling that an industrial plant only includes manufacturers goes far beyond the pollution control exemption and creates adverse impacts on a myriad of other industries, laws, regulations, and local ordinances.

5. **The Court Of Appeals Erred In Reversing The ALC Decision In That The ALC's Decision That Colonial's Facility Was An Industrial Plant Was A Finding Of Fact.**

The ALC, after reviewing the considerable testimony and the Department's admission that Colonial's operation was "industrial," held as a finding of fact that Colonial's facilities constituted an industrial plant. There was no evidence – not a single witness testified – it was not an industrial plant, and the Department by granting partial exemptions the prior two years had previously held it was an industrial plant. Clearly, the ALC's factual determination was not an abuse of discretion.

In *Trident Medical Center, LLC v. SC DHEC*, 412 S.C. 341, 772 S.E.2d 177, 181 (2015) the Court of Appeals stated: "An abuse of discretion occurs when the ruling is based on an error of law or a factual conclusion that is without evidentiary support. Further, this court may not substitute its judgment for the judgment of the ALC as to the weight of the evidence on questions of fact." (citations omitted). In *Charleston County Assessor v. University Ventures, LLC*, 421 S.C. 194, 805 S.E.2d 216, 223 (2017) the Court of Appeals stated: "In reaching a decision in a contested violation matter, the ALC serves as the sole finder of fact in the de novo contested case proceeding. The Rules of Procedure for the Administrative Law Judge Division require that the AL[C] make independent findings of fact in contested case hearings. When the evidence conflicts on an issue, the [c]ourt's substantial evidence standard of review defers to the findings of the fact-finder." (citations omitted). In *The Original Blue Ribbon Taxi Corp v. SC DMV*, 380 S.C. 600, 670 S.E.2d 674, 676-77 (2008), the Court of Appeals stated: "Substantial evidence, when considering the record as a whole, would allow reasonable minds to reach the same conclusion as the Administrative Law Court and is more than a mere scintilla of evidence. The mere possibility of drawing two inconsistent conclusions from the evidence does not prevent a finding from being supported by substantial evidence." (citations omitted). Lastly, in *DIRECTTV Inc. v. SC DOR*, 421 S.C. 59, 804 S.E.2d 633, 643 (2018) the Court of Appeals stated: "ALC serves as the sole

finder of fact in the de novo contested case proceeding. The Rules of Procedure for the Administrative Law Judge Division require that the AL[C] make independent findings of fact in contested case hearings, and the [APA] clearly contemplates that the AL[C] will make [its] own findings of fact in a contested case hearing. When conflicting evidence on an issue exists, the appellate court defers to the findings of the fact-finder in accordance with the substantial evidence standard of review." (citations omitted).

There simply was no conflicting evidence that Colonial's significant operation was not an industrial plant. To that end, by granting the exemption for certain pollution control equipment, the Department twice held Colonial did qualify as an industrial plant. Furthermore, not a single witness testified that Colonial's facilities were not an industrial plant. As such, the ALC made a correct finding of fact that Colonial was a industrial plant. That finding of fact cannot be disturbed on appeal, particularly where those facts are clearly supported by the evidence. *See Trident Medical Center*, 772 S.E.2d at 181 ("[The Court of Appeals] may not substitute its judgment for the judgment of the ALC as to the weight of the evidence on questions of fact.").

6. Dictionary Definitions Of Industrial Plant Also Contradict The Court Of Appeals' Ruling.

The Court has been previously provided numerous dictionary definitions of "industrial plants." A few new ones below are instructive:

Google defines "industrial plant" as "Industrial facility: A fixed facility or equipment used in an industrial production *or output process or system*. Some examples of industrial plants include factories, breweries, distilleries, refineries, and assembly plants. Other types of industrial plants include chemical plants, lumbermills, paper mills, and metal manufacturing plants." (emphasis added.) Under Google's definition, Colonial would qualify as an industrial plant as Colonial's business involves an "output . . . system" – *i.e.* a pipeline *system* that delivers (*output*) Refined

Petroleum Products in South Carolina. S.C. law, section 31-24-110 specifically includes transportation of cargo as an industrial facility.

Another definition: "[I]ndustrial plant means any plant or equipment used for the generation of power, or for any industrial use (/dictionary/industrial-use), or for the operation of vessels (/clause/operation-of-vessels), aircraft, locomotives, cranes, internal combustion engines or other machines (/clause/other-machines) using any combustible material (/dictionary/combustible-material) for their operation." Industrial plant means any plant or equipment used for the generation of power, or for any industrial use, or for the operation of vessels, aircraft, locomotives, cranes, internal combustion engines or other machines using any combustible material for their operation." (Ex. A)

Another definition: "[I]ndustrial plant means a combination of machines, apparatus, appliances, equipment, instruments and materials which together make up large-scale, stationary units producing goods or providing services." (emphasis added.) "Industrial plant" means a combination of machines, apparatus, appliances, equipment, instruments and materials which together make up a large-scale stationary units producing goods or providing services." (Ex. B) This definition explicitly recognizes that industrial plants are not limited to manufacturers who produce goods (as the Court of Appeals' ruling would suggest), instead, it recognizes that the term can also include facilities that provide services, which in the case of Colonial, would include transportation services of Refined Petroleum Products.

Not surprisingly, virtually all definitions of an "industrial plant" include manufacturing. But importantly, none of these definitions limit industrial plant to only manufacturing, and neither did the General Assembly in the plain language of Section 12-37-220(A)(8).

7. **The Court of Appeals erred by allowing the DOR to amend its prehearing statement so as to challenge three types of property it had previously found to be exempt.**

This case (as all cases under the Revenue Procedures Act) started with the DOR issuing a Final Agency Determination (FAD). The FAD issued in this case included four types of property but not three for which the Department held were exempt. After Colonial pointed out on numerous occasions that the Department conceded Colonial was an industrial plant in granting the exemption for three properties the Department moved to amend its prehearing statement for the second time to claim the other three properties were not exempt. SCALC Rule 18 allows a document to be amended at any time unless the amendment would prejudice any other party.

Incredibly the Court of Appeals held this amendment would not prejudice Colonial. The effect of the court order is to subject these properties to property taxation even though the Department had twice granted the exemption and did not include them as non-exempt in the FAD!

CONCLUSION

For the above reasons, Colonial Pipeline Company respectfully requests that its Petition for Rehearing be granted and that the Court rehear and amend its decision reversing the ALC Order.

July 31, 2024

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industrial plant means any plant or equipment used for the generation of power, or for any industrial use (/dictionary/industrial-use), or for the operation of vessels (/clause/operation-of-vessels), aircraft, locomotives, cranes, internal combustion engines or other machines (/clause/other-machines) using any combustible material (/dictionary/combustible-material) for their operation;

Sample 1 (http://images.policy.mofcom.gov.cn/flaw/201007/90dddf5a-a953-4cc4-bbb4-14a25522f108.pdf)

Sample 2 (http://extwprlegs1.fao.org/docs/pdf/sin86441.pdf) Sample 3 (https://faolex.fao.org/docs/pdf/sin86441.pdf) 14

Exhibit A

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industrial plant means a combination of machines, apparatus, appliances, equipment, instruments and materials which together make up large-scale, stationary units producing goods or providing services (/clause/providing-services);

Sample 1 (https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:02010R0113-20161223&rid=2)

Sample 2 (https://www.legislation.gov.uk/eur/2020/1197/annex/V/2020-12-31/data.pdf)

Sample 3 (https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:02010R0113-20161223&from=MT) 4

Exhibit B

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PROOF OF SERVICE

I certify that I have served **Respondent's Petition for Rehearing** on Appellants by sending a copy of said documents to Appellants' counsel via e-mail on July 31, 2024, as follows:

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