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S.C. SUPREME COURT

STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM THE ADMINISTRATIVE LAW COURT
The Honorable Ralph King Anderson, III
Chief Administrative Law Judge

Appellate Case No. 2025-000181

Blue Ridge Environmental Defense League, Appellant,
v.
South Carolina Department of Environmental Services
and Dominion Energy, Respondents.

APPELLANT'S RETURN TO RESPONDENT DOMINION ENERGY'S MOTION REGARDING THE EFFECT OF CERTIFICATION ON STAY OR, IN THE ALTERNATIVE, MOTION TO VACATE

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Appellant Blue Ridge Environmental Defense League ("BREDL"), through counsel, respectfully submits this Return in opposition to Respondent Dominion Energy's Motion Regarding the Effect of Certification on Stay or, In the Alternative, Motion to Vacate.

A BRIEF SUMMARY OF APPELLANT'S POSITION

This Return opposes Dominion Energy's Motion on three primary grounds: (1) binding South Carolina Supreme Court precedent establishes that stays continue throughout appellate proceedings until specifically lifted or until remittitur is issued, regardless of certification to this Court; (2) Dominion has failed to meet its burden of demonstrating changed circumstances that would warrant lifting the stay, particularly given that its evidence of economic harm rests on unreliable testimony from an unqualified witness who explicitly disclaimed expertise in economics, finance, weather forecasting, and population growth; and (3) the public interest overwhelmingly favors maintaining the stay to prevent permanent environmental damage to wetlands and streams in predominantly minority, low-income communities that are already disproportionately burdened by industrial pollution.

Dominion's questionable timing in filing this motion—over a year after the stay was granted and just weeks before oral argument—reflects tactical maneuvering designed to evade judicial review by commencing construction before this Court can address the substantive regulatory violations at issue. This tactical approach is further evidenced by Dominion's improper submission of sixteen new affidavits that were never presented to the Administrative Law Court or the Court of Appeals, contain inadmissible hearsay, and offer opinions from individuals whose qualifications have never been established or tested through cross-examination.

Additionally, Dominion Energy's motion represents a transparent attempt to circumvent judicial review by rushing to commence pipeline construction before this Court can address the

serious regulatory violations and environmental justice concerns at the heart of this appeal. By seeking to nullify the stay on procedural grounds rather than addressing the substantive merits, Dominion aims to irreversibly alter protected wetlands, streams, and habitats—rendering BREDL's appeal functionally moot despite oral argument being scheduled for June 24, 2025. This Court should reject Dominion's tactical maneuver, which contravenes binding South Carolina precedent, undermines judicial economy, and threatens irreparable environmental damage to vulnerable communities and protected waters of this State.

RELEVANT BACKGROUND

This appeal challenges the South Carolina Administrative Law Court's ("ALC") affirmation of a Section 401 Water Quality Certification issued to Dominion for the River Neck to Kingsburg 16-inch natural gas main project (the "Project"). The Project would permanently impact 32 separate wetlands and waters, including permanent fill impacts to 0.0041 acres of wetlands and 22 linear feet of stream, and permanent clearing impacts to 2.986 acres of wetlands and 21 linear feet of stream (R. pp. 8-9). These impacts would occur in a predominantly minority (57%) and low-income (56%) community already burdened with industrial pollution above the 75th percentile (Ex. 77, 79:10-24 at R. p. 891).

On May 13, 2024, the Court of Appeals granted BREDL's Petition for Writ of Supersedeas after carefully weighing the evidence and arguments from all parties. Then-Judge Verdin (now Justice Verdin) participated in this decision, which found a stay necessary to prevent the contested issues from becoming moot. (Order, Exhibit A).[1] On March 11, 202, the appeal was certified to this Court pursuant to Rule 204(b), SCACR.

[1] The Court of Appeal's May 13, 2024 Order granting Appellant's Petition for Supersedeas and Denying Dominions Request for a Bond is attached hereto as Exhibit A. For the Court's

Notably, Dominion waited over a full year after the Court of Appeals granted the stay to file the present motion—only now seeking to lift the stay when oral argument is less than two months away. This suspicious timing is indicative of tactical maneuvering rather than genuine urgency, particularly given that Dominion has managed its operations with existing infrastructure since 2019 (R. p. 1568:25-1569:6).

ARGUMENT

I. Rule 241, SCACR, and South Carolina Supreme Court Precedent Establish That the Stay Remains in Effect Throughout the Appeal.

A. Rule 241, *Stokes-Craven*, *Lancaster*, and *Graham* Unambiguously Confirm That Stays Continue Throughout the Appellate Process.

Rule 241(a), SCACR, explicitly states that "[t]his automatic stay continues in effect for the duration of the appeal unless lifted by order of the lower court, the administrative tribunal, appellate court, or judge or justice of the appellate court."

This Court's precedent unequivocally establishes that stays remain in effect throughout the appellate process until specifically lifted or until the remittitur is issued. In *Stokes-Craven Holding Corp. v. Robinson*, 416 S.C. 517, 533, 787 S.E.2d 485, 493 (2016), this Court articulated the governing principle: "As a general rule, the service of a notice of appeal in a civil matter acts to automatically stay matters decided in the order, judgment, decree or decision on appeal, and to automatically stay the relief ordered in the appealed order, judgment, or decree or decision. *This automatic stay continues in effect for the duration of the appeal* unless lifted by order of the lower court, the administrative tribunal, appellate court, or judge or justice of the appellate court." (Quoting Rule 241(a), SCACR, Emphasis added).

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convenience, all other exhibits referenced in this Return are contained in the Record on Appeal, of which 10 paper copies and one electronic copy have already been filed with this Court.

The Rule's language, as expressly quoted by this Court, is definitive: stays continue "for the duration of the appeal" absent a specific lifting order. The rule draws no distinction between different stages of appellate review and contains no exception for certification to the Supreme Court or transfer between appellate courts.

This Court's decision in *Lancaster v. Georgia-Pacific Corp.* further clarifies when appellate jurisdiction concludes: "Pursuant to Rule 205, SCACR, upon the service of a notice of appeal, the appellate Court has exclusive jurisdiction over the appeal, with the exception of matters not affected by the appeal. The appellate court retains jurisdiction until the remittitur is sent to the lower court." 403 S.C. 136, 137 742 S.E.2d 867, 868 (2013).

Lancaster explicitly confirms that appellate jurisdiction—and by extension, any stays tied to that jurisdiction—continues until the remittitur is issued after all appellate proceedings are complete. The *Lancaster* Court took the extraordinary step of "remind[ing] the bench and bar" that no action may be taken contrary to an appellate stay "while the matter is pending before this Court." This admonition directly refutes Dominion's assertion that it may proceed with construction despite the stay.

In *Graham v. Graham*, this Court explained the fundamental purpose of supersedeas: "[T]he purpose ... of a supersedeas ... is to ... stay proceedings in the trial court, to preserve the status quo pending the determination of the appeal ..., and to preserve to appellant the fruits of a meritorius appeal where they might otherwise be lost to him." 390 S.E.2d 469, 470, 301 S.C. 128, 130 (1990) (quoting 4A C.J.S. Appeal & Error § 662 at 494-95 (1957)) (ellipses in original).

This bedrock purpose of supersedeas—to maintain the status quo throughout the entire appellate process—directly contradicts Dominion's argument that certification automatically

dissolves a stay. Such an interpretation would defeat the very purpose of staying proceedings in the first place by allowing the status quo to be disrupted before final resolution of the appeal.

B. Rule 204(b) Transfers Jurisdiction But Does Not Nullify Existing Orders.

Rule 204(b), SCACR, provides, "The effect of such certification shall be to transfer jurisdiction over the case to the Supreme Court for all purposes." This rule transfers jurisdiction; it does not nullify or invalidate orders already issued during the appellate process. When the Court of Appeals granted the stay, it acted within its jurisdiction. The resulting stay order became part of the case that was transferred to this Court.

The certification rule must be read in conjunction with *Stokes-Craven*'s explicit holding that stays continue "for the duration of the appeal unless lifted" and *Lancaster*'s confirmation that appellate jurisdiction continues "until the remittitur is sent." Reading these authorities together with Rule 241, SCACR, yields only one reasonable conclusion: the stay remains in effect following certification unless specifically lifted by this Court.

This State's well-established precedent promotes judicial efficiency by preventing the needless relitigation of stays each time a case changes courts. It also prevents forum shopping and tactical maneuvering by parties seeking to exploit jurisdictional transfers to evade unfavorable rulings.

C. Additional Principles Support Maintaining the Stay.

The principle of comity further supports maintaining the stay. The Court of Appeals, with now-Justice Verdin participating, carefully evaluated the evidence and arguments before issuing the stay. Absent extraordinary circumstances—which Dominion has failed to demonstrate—this Court should defer to that considered judgment.

Furthermore, Rule 241(c)(2) provides that in determining whether to lift a stay, a court "should consider whether such an order is necessary to preserve jurisdiction of the appeal or to prevent a contested issue from becoming moot." Here, the Court of Appeals carefully weighed these factors when granting the stay, finding, "After careful consideration of the petition, SCHEC's return, Dominion's return, and the reply, we find supersedeas is necessary to prevent contested issues from becoming moot. Thus, the petition for supersedeas is granted." (Order, Exhibit A). Dominion has presented no new evidence or changed circumstances that would warrant disturbing that reasoned conclusion, especially given the irreversible environmental damage that would result from allowing construction to proceed before this Court can address the serious regulatory violations alleged in BREDL's appeal.

II. Dominion Bears the Burden of Proving Grounds for Modifying the Court of Appeals' Prior Decision and Has Failed to Meet That Burden.

As the party seeking to modify or overturn a prior judicial decision, Dominion bears the burden of demonstrating compelling reasons why this Court should disturb the Court of Appeals' carefully reasoned stay order. This follows from the well-established principle that a party challenging an existing judicial determination must present sufficient grounds to justify its modification or reversal, particularly when the original order was issued after full consideration of the evidence and arguments from all parties.

A. Dominion Has Failed to Present New Evidence or Changed Circumstances Warranting Reconsideration of the Stay.

Dominion has identified no material change in circumstances since the Court of Appeals granted the stay. The same considerations that justified the stay initially—preventing irreparable environmental harm and preserving the Court's ability to provide meaningful relief—remain

equally valid today. If anything, these considerations have grown stronger as construction season approaches.

The only "changed circumstance" is the certification of the case to this Court—a routine procedural development that occurs in many appeals. Accepting Dominion's argument would effectively nullify every stay whenever a case is certified to this Court, creating an unworkable system that encourages forum shopping and tactical maneuvering.

B. The Balance of Harms Continues to Favor Maintaining the Stay.

The balance of equities strongly favors maintaining the stay. BREDL and the affected communities will suffer permanent, irreparable harm if Dominion proceeds with construction of the Project. These harms include:

1. Permanent destruction of wetland ecosystems through the filling of 0.0041 acres of wetlands and 22 linear feet of stream (R. pp. 8-9);
2. Permanent elimination of critical habitat through clearing of 2.986 acres of wetlands and 21 linear feet of stream (R. pp. 8-9);
3. Irreversible alteration of hydrological systems upon which local communities depend for clean water (R. p. 111-112);
4. Potential contamination of well water in communities where wastewater discharges are already above the 75th percentile (R. p. 9; Exh. 77, Shier Design. 80:7-19 at R. p. 891); and
5. Disruption of habitats for rare, threatened and endangered species identified by DNR, including the American Eel, Ironcolor Shiner, Flat Bullhead, and Fieryback Shiner (DNR Comment Letter, R. pp. 903-905).

C. The Project's Permanent Environmental Impacts Cannot Be Reversed and Warrant Maintaining the Stay.

Contrary to Dominion's representations, the permanent environmental impacts of this project cannot simply be undone by later abandoning it. The pipeline project specifically calls for "permanent fill impacts" and "permanent clearing impacts" to South Carolina wetlands and streams—terms taken directly from the ALC's Final Order that is under appeal (R. pp. 8-9). By their very definition, these "permanent impacts" are irreversible alterations to protected aquatic resources.

Dominion's now thrice-repeated contention that these impacts are "not irreparable" because it could "abandon or remove installed segments of the Project and restore any affected areas" is specious at best. Once wetlands are filled, trees are cleared, and the natural hydrology is disrupted, full restoration becomes scientifically impossible. Even Dominion's witness, Mr. Darrell Shier, testified that HDD would avoid stream and wetland impacts (Ex. 77, Shier Desig, 51:11-16 at R. p. 884), yet Dominion chose not to employ this less environmentally damaging alternative for most stream crossings.

Despite its claims, Dominion offers no evidence that it has the ability to "restore any affected areas" once these permanent impacts are realized. To the contrary, Dominion Energy's safety record demonstrates that this project poses serious risks to the environment and citizens. In 2018, Dominion was cited for failing to control sediment near a 55-mile pipeline it built in the upstate of South Carolina.[2] Sediment washing off the pipeline's construction sites wound up in creeks that feed into the South Tyger River, where the Woodruff-Roebuck Public Water District has an intake pipe. The runoff from Dominion's construction also worked its way into the river

[2] https://abcnews4.com/news/local/south-carolina-fines-dominion-energy-for-polluting-drinking-water

and clogged the pipe, causing the Woodruff-Roebuck system to buy water from another utility for more than 10,000 customers south of Spartanburg.[3]

This incident is particularly concerning here, as the City of Florence's drinking water is produced at a surface water treatment facility that withdraws water from the Great Pee Dee River, which runs along the proposed pipeline route (R. p. 110). The Court should not rely on unsubstantiated claims that Dominion can simply undo any harm caused by construction of the pipeline project. The pipeline poses a real, permanent threat to affected wetlands, waters, and surrounding communities.

It is also important to note that the express goal of the Clean Water Act is to preserve "fishable and swimmable waters." As recognized in *Friends of the Earth, Inc. v. Gaston Copper*, 204 F.3d 149 (4th Cir. 1999), "One of the well-recognized aims of the Act is to ensure that the nation's waterways are 'fishable and swimmable.' [...] Congress proclaimed this goal to provide 'for the protection and propagation of fish, shellfish, and wildlife and provide for recreation in and on the water.' 33 U.S.C. 1251(a)(2)." Allowing Dominion Energy to proceed with construction of a gas pipeline along these waterways during the pendency of this appeal would undermine the purpose of the Clean Water Act and effectively render BREDL's appeal meaningless.

The permanent nature of these environmental impacts is precisely why the Court of Appeals granted BREDL's petition for a writ of supersedeas, finding a stay "necessary to prevent contested issues from becoming moot." Allowing construction to proceed now would render meaningful judicial review impossible, as the wetlands, streams, and habitats at issue would be

[3] https://www.greenvilleonline.com/story/news/2018/05/25/dominion-energy-under-scrutiny-after-mud-clogs-water-system-near-utilitys-sc-project/645320002/

irreversibly altered before this Court could address the serious regulatory violations alleged in BREDL's appeal.

Once wetlands are filled, trees are cleared, and the natural hydrology is disrupted, full restoration becomes scientifically impossible. Even Dominion's witness, Mr. Darrell Shier, testified that HDD would avoid stream and wetland impacts (Ex. 77, Shier Desig, 51:11-16 at R. p. 884), yet Dominion chose not to employ this less environmentally damaging alternative for most stream crossings.

D. Dominion's Evidence of Economic Harm Is Unreliable and Based on Unqualified Testimony.

In contrast, any harm to Dominion from maintaining the stay is temporary and purely economic. Dominion has managed its operations using its existing 8-inch pipeline supplemented by LNG since 2019 (R. p. 1568:25-1569:6). These economic concerns are speculative, unsupported by qualified expert testimony, and can be remedied if Dominion ultimately prevails. Dominion's claims of economic harm rest entirely on the testimony of Mr. Zachary West, who admitted under oath that he lacked the qualifications to offer opinions on the very subjects underlying Dominion's claims. Specifically, at the hearing on Appellant's Petition for Supersedeas before the ALC. Mr. West testified:

> Q: And you're not an accountant, correct?
> A: I am not.
> Q: You're not a financial expert, correct?
> A: No.
> Q: You're not on economist, correct?
> A: No.
> Q: You're not a weather forecaster or a meteorologist, correct?
> A: No.
> Q: And you are not a statistician on population growth; is that correct?
> A: Correct.
>
> (R. p. 1567:6-20).

Notably, Dominion's own counsel explicitly conceded that Mr. West was not testifying as an expert witness, stating: "[H]e's not here as an expert witness." (R. p. 1571:7-8). Judge Anderson himself observed that Mr. West "didn't give his opinion to a reasonable degree of professional certainty as an engineer. What say—I mean he had a shot of doing it." (R. p. 1571:2-6).

This Court has clearly established the distinction between expert and lay testimony: "Expert testimony differs from lay testimony in that an expert witness is permitted to state an opinion based on facts not within his firsthand knowledge or may base his opinion on information made available before the hearing so long as it is the type of information that is reasonably relied upon in the field to make opinions. See Rule 703, SCRE. On the other hand, a lay witness may only testify as to matters within his personal knowledge and may not offer opinion testimony which requires special knowledge, skill, experience, or training. See Rules 602 and 701, SCRE." *Watson v. Ford Motor Co.*, 699 S.E.2d 169, 175, 389 S.C. 434, 446 (2010).

Mr. West further admitted that he did not personally perform the calculations on which his cost estimates were based:

> Q: "Did you do the calculations yourself or how the population is going to grow?"
> A: "I did not. We have a group, a resource planning group, internal to Dominion South Carolina that is statisticians and look at historical growth in the area."
> Q: "But they're not here in the courtroom today, correct?"
> A: "Correct."
>
> (R. p. 1568:2-10)

This testimony fails to meet even the most basic standards for reliability. No court would find that Dominion has demonstrated economic harm based on testimony from a witness who, by his own admission and his counsel's concession, lacks the qualifications to opine on the very matters at issue.

III. The Public Interest Overwhelmingly Favors Maintaining the Stay.

A. The Project Unnecessarily Impacts Protected Waters Despite Feasible Alternatives.

The public interest in protecting South Carolina's water resources and ensuring compliance with environmental regulations weighs heavily in favor of maintaining the stay. It is undisputed that this Project is not water-dependent—a fact acknowledged by both DHEC and Dominion (Exh. 75, Hightower Desig. 63:3-5 at R. p. 816). Despite this admission, Dominion has insisted on pursuing a project that impacts 32 separate wetlands and waters rather than feasible alternatives that would avoid or minimize these impacts. Said differently, Dominion has chosen to place a project that is not water-dependent through State and Federal protected waters and wetlands. In this sense, Dominion is the architect of the very dilemma it now asks this Court to cure.

The record clearly establishes that Dominion failed to adequately assess alternatives that would avoid impacts to wetlands and streams:

1. Horizontal Directional Drilling (HDD): Dominion's witness, Mr. Priester, admitted that he did not recall seeing any study evaluating the cost of using HDD for all wetland and stream crossings (R. p. 750:4-9), despite acknowledging that this technique would avoid stream and wetland impacts.
2. Alternative Routes: Dominion testified that it did not recall undertaking any efforts to assess the cost of easements that would avoid wetland and stream impacts (Exh. 76, Priester Desig., 42:5-12, 42:25-43:2, and 43:4, all at R. p. 843; see also Ex. 77, Shier Desig., 94:3-12 at R. p. 895).
3. "No Action" Alternative: Dominion summarily rejected the "No Action" alternative without substantive analysis, despite managing its operations with the existing 8-inch pipeline supplemented by LNG since 2019 (R. p. 1568:25-1569:6).

Dominion's failure to meaningfully consider these alternatives demonstrates that its decision to impact protected waters stems not from necessity but from convenience and cost-cutting—considerations that cannot override the public's interest in protecting these resources or the State and Federal Regulations addressed in the instant appeal.

B. The Project Raises Significant Environmental Justice Concerns.

The Project route cuts through communities that are predominantly minority (57%) and low-income (56%) (Ex. 77, 79:10-24 at R. p. 891). These communities already bear a disproportionate burden of industrial pollution, with wastewater discharges above the 75th percentile (R. p. 9; Exh. 77, Shier Design. 80:7-19 at R. p. 891).

Despite the clear environmental justice implications, neither Dominion nor DHEC conducted baseline well testing for personal water wells in these communities, even though residents rely on these wells for drinking water. This failure is particularly egregious given that the City of Florence's drinking water is produced at a surface water treatment facility that withdraws water from the Great Pee Dee River, which runs along the proposed pipeline route (R. p. 110).

Dominion exploited the COVID-19 pandemic to minimize public participation in the regulatory process. Instead of conducting in-person hearings accessible to all community members, Dominion pushed forward with virtual proceedings that effectively excluded many elderly residents and those without reliable internet access—often the very people most directly affected by the Project. This approach systematically silenced the voices of those with the most at stake.

The public interest in ensuring protection of our waters and fair treatment of all communities—particularly those historically marginalized and overburdened by environmental

harms—supports maintaining the stay until this Court can address the substantive environmental justice concerns raised in this appeal.

C. Dominion's Pattern of Limiting Public Participation Continues With This Motion.

Dominion's timing and approach to this motion reflect a troubling continuation of its tactics during the project approval process. As documented in the record, Dominion exploited the COVID-19 pandemic to minimize meaningful public engagement. The Department "held the public hearing virtually to facilitate increased attendance and to adhere to social distancing protocols because of COVID-19 concerns" (Final Order, R. p. 13), despite knowing this format would effectively exclude many community members without reliable internet access. While DHEC claimed to provide alternatives, such as "a call-in number... so that individuals without internet access could still participate" (R. p. 13), these measures proved inadequate for meaningful participation in a predominantly minority (57%) and low-income (56%) community (Ex. 77, 79:10-24 at R. p. 891).

Now, Dominion employs similarly questionable timing—waiting over a year after the Court of Appeals granted the stay, only to file this motion weeks before oral argument. This delay is indicative of a deliberate strategy to rush construction before this Court can conduct a thorough review of the serious environmental concerns at issue. Just as Dominion maneuvered to minimize community input during the regulatory process, it now seeks to circumvent full judicial scrutiny. The Court should recognize this pattern of procedural manipulation and refuse to reward tactics designed to sidestep meaningful review, whether by affected communities or by this Court.

IV. DOMINION'S NEWLY SUBMITTED AFFIDAVITS SHOULD BE DISREGARDED.

Dominion's motion improperly relies on sixteen affidavits (Attachments A through P) that were never presented to the Administrative Law Court during the underlying proceedings or to the

Court of Appeals when it granted the stay. This Court should disregard these materials for the following reasons:

A. The Affidavits Constitute Improper Extra-Record Evidence.

It is a bedrock principle of appellate procedure that review is limited to the record developed before the lower tribunal. Dominion's submission of sixteen new affidavits—none of which were presented to either the ALC or the Court of Appeals when it granted the stay—flagrantly violates this principle.

South Carolina case law firmly establishes that appellate courts are limited to reviewing only what appears in the official record on appeal. This principle is explicitly stated in Rule 210(h) of the South Carolina Appellate Court Rules (SCACR), which provides that "the appellate court will not consider any fact which does not appear in the Record on Appeal."

The record in this case was closed when the ALC issued its Final Order in July 2023. Had Dominion considered these affidavits relevant to the stay determination, it should have presented them during the ALC's in-person hearing on BREDL's Petition for Writ of Supersedeas or submitted them to the Court of Appeals prior to its granting of BREDL's petition on May 13, 2024. Dominion's attempt to introduce this evidence now, over a year after the stay was granted and mere weeks before oral argument, constitutes an improper attempt to supplement the record on appeal and avoid judicial scrutiny.

B. The Affiants Were Not Subject to Cross-Examination.

The right to cross-examination is fundamental to our adversarial system. These affidavits present self-serving statements from individuals who were never subjected to cross-examination regarding their claims, qualifications, potential biases, or the factual basis for their assertions. This

Court should not consider untested statements that BREDL has had no opportunity to challenge through the crucible of cross-examination.

This situation stands in marked contrast to Dominion's previous approach. When the supersedeas issue was properly before the ALC, Dominion presented Mr. West as its witness, submitting his affidavit and making him available for examination. During that hearing, cross-examination revealed that Mr. West lacked qualifications to opine on economic matters, population growth, weather forecasting, or transportation costs—the very subjects underpinning Dominion's claims of economic harm. Indeed, Dominion's counsel expressly conceded that Mr. West was "not here as an expert witness" (R. p. 1571:7-8), and Judge Anderson himself noted that Mr. West "didn't give his opinion to a reasonable degree of professional certainty as an engineer" (R. p. 1571:2-6). Having failed with a witness who was actually subject to cross-examination, Dominion now attempts an end-run around judicial scrutiny by submitting sixteen affidavits from non-parties whose qualifications, methodology, and credibility have never been tested in any proceeding in this case.

C. The Affiants Lack Established Qualifications to Render Their Opinions.

Many of these affidavits contain opinions on complex matters such as economic impacts, regional development forecasts, energy demand projections, and environmental consequences without establishing the affiants' qualifications to render such opinions. Under South Carolina law, opinion testimony requires proper qualification. See *Watson v. Ford Motor Co.*, 389 S.C. 434, 699 S.E.2d 169 (2010) (requiring that expert testimony be reliable and come from a qualified witness).

For example, in Attachment A, Rob Tanner offers specific projections about housing development delays and precise figures on economic impact ($1,300,000,000) without establishing any expertise in economic forecasting, real estate development, or financial analysis.

Similarly, in Attachment B, Charles H. Daniel provides specific projections about construction cost increases ($1,500,000) and annual operating cost increases ($100,000) without demonstrating any qualifications in construction economics or operational cost analysis.

In Attachment F, Glenn R. Marple III asserts that "each month of delay equates to losses of $100,000 to $500,000," offering a precise range without establishing expertise in financial forecasting or the methodology behind this calculation. Attachment M, from Felipe Saes, claims "an additional $300,000 in increased costs from curtailments from just one winter season" and an additional $19,000 per day cost associated with fuel oil use—specific financial projections offered without establishing qualifications in energy cost analysis or utility economics.

Even the lay witness affidavits improperly venture beyond the bounds of permissible lay testimony. Rule 701, SCRE, strictly limits lay witness testimony to opinions that are: (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702. Many of these affidavits plainly transgress these limitations by offering opinions requiring specialized knowledge about economic forecasting, energy market analysis, and regional development impacts—areas that fall squarely within the realm of expert testimony under Rule 702, not lay testimony under Rule 701.

D. The Affidavits Contain Inadmissible Hearsay.

The statements in these affidavits would constitute inadmissible hearsay if offered in an evidentiary proceeding. See Rule 802, SCRE. While affidavits may be permissible in certain limited contexts, using them to introduce entirely new factual assertions at the appellate stage circumvents the hearsay rule and deprives BREDL of the opportunity to test the reliability of these statements.

For instance, the affidavit of Rob Tanner (Attachment A) claims that approximately $1,300,000,000 in economic benefit to the local community would result from proposed developments, without identifying the source of this information or establishing that Mr. Tanner has personal knowledge of how this figure was calculated. Similarly, Charles H. Daniel's affidavit (Attachment B) asserts that construction costs would increase by "approximately $1,500,000" and annual operating costs by "approximately $100,000" if natural gas service is unavailable—figures that appear to be based on out-of-court statements or documents not in evidence.

Upon further review, C. Gregory Robinson's statement in Attachment C regarding purported Florence County losses in excess of $10,000,000 may be admissible if Robinson has personal knowledge of these losses through his position. However, without cross-examination, it is impossible to determine whether this statement is based on his personal knowledge or derived from out-of-court statements by others, which would constitute hearsay. This ambiguity further illustrates why these affidavits should not be considered without the opportunity for examination.

E. Dominion's Tactical Timing Reveals Improper Purpose.

The tactical nature of this timing cannot be overlooked. If these economic concerns were as dire as Dominion now claims, it had ample opportunity to present them to the Court of Appeals when that court was considering BREDL's petition for writ of supersedeas, or even in the months immediately following the stay order. Instead, Dominion waited until the eleventh hour, after the appeal has been fully briefed and just before oral argument, to suddenly claim urgent economic necessity based on entirely new evidence. Dominion appears to be strategically exploiting the certification of this case to this Court as a procedural vehicle to introduce evidence that would have been rejected had it been offered to the Court of Appeals—effectively attempting to leverage the transition between courts to circumvent normal evidentiary standards and judicial scrutiny.

The Court should reject Dominion's diversionary tactics and disregard the sixteen improper affidavits in their entirety. Alternatively, if the Court is inclined to consider this new evidence, fundamental fairness would require that BREDL be afforded an opportunity to depose and/or cross-examine these affiants before the Court rules on Dominion's motion. However, such an approach would unnecessarily delay resolution of this appeal ***on the merits***, which is precisely what Dominion seeks to avoid by the timing of its motion. Accordingly, the simpler and more appropriate course is to disregard these improper submissions entirely and proceed with the scheduled oral argument in June.

V. A Bond Is Neither Required Nor Appropriate.

Should this Court determine that the stay remains in effect, Dominion requests that BREDL be required to post a supersedeas bond of approximately $5.3 million. The Court of Appeals considered and rejected an identical bond request when it granted BREDL's petition for a writ of supersedeas nearly a year ago on May 13, 2024. This request should, once again, be denied for the following reasons.

A. Rule 241 Does Not Require a Bond for a Stay Pending Appeal.

Pursuant to Rule 241(c)(3), SCACR, the imposition of a supersedeas bond is notably not a requirement for obtaining a writ of supersedeas. To the contrary, the decision on whether or not to impose a supersedeas bond is completely discretionary and limited to those circumstances where the appellate court deems it appropriate. Rule 241(c)(3), SCACR. Here, the imposition of a supersedeas bond is not appropriate.

Supersedeas in this case would not require Dominion to do anything other than maintain the status quo—to do what it has always done and continues to do. Dominion own Final Brief to this Court establishes that it has been supplementing pipeline-supplied natural gas with liquid

natural gas ("LNG") before this pipeline project was ever challenged or appealed. (Return, p. 12). This has been their long-standing practice, and part of their normal operating expense. By seeking a supersedeas bond, Dominion seeks to shift the costs associated with LNG to Petitioner despite the fact that LNG has traditionally been a standard operating cost incurred by the company.

Dominion, a sophisticated energy corporation with operations across sixteen states, reported annual revenue exceeding $16 billion and assets totaling more than $100 billion, seeks to shift these standard operating costs onto a regional non-profit environmental organization.[4] This tactical maneuver represents a transparent attempt to create a financial barrier to judicial review, effectively punishing BREDL for exercising its legal right to challenge a regulatory decision.

B. The Proposed Bond Amount Is Based on Unreliable Evidence by an Unqualified Witness.

The $5.3 million bond amount is derived entirely from the testimony of Mr. West, who admitted under oath that he lacked the qualifications to render opinions on economic matters, population growth, weather impacts, or transportation costs. Dominion's own counsel conceded that Mr. West was not testifying as an expert (R. p. 1571:7-8), and Judge Anderson observed that Mr. West "didn't give his opinion to a reasonable degree of professional certainty as an engineer" (R. p. 1571:2-5).

This Court has clearly established the distinction between expert and lay testimony: "Expert testimony differs from lay testimony in that an expert witness is permitted to state an opinion based on facts not within his firsthand knowledge or may base his opinion on information made available before the hearing so long as it is the type of information that is reasonably relied upon in the field to make opinions. See Rule 703, SCRE. On the other hand, a lay witness may

[4] https://www.sec.gov/ix?doc=/Archives/edgar/data/103682/000119312520054469/d854390d10k.htm

only testify as to matters within his personal knowledge and may not offer opinion testimony which requires special knowledge, skill, experience, or training. See Rules 602 and 701, SCRE." *Watson v. Ford Motor Co.*, 699 S.E.2d 169, 389 S.C. 434 (2010).

Mr. West explicitly admitted that he did not personally perform the calculations on which his cost estimates were based:

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

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

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

A: "Correct." (R. p. 1568:3-11).

Notably, Dominion's opinions regarding future costs are not based on the projections of an independent, qualified third party. Instead, Dominion attempts to pass off the affidavit of one of its own 21,000 employees as authority. Respectfully, while Mr. West is a professional engineer, he is not an accountant, financial expert, or economist, nor does he possess any qualifications that would enable him to estimate potential population growth and its associated costs. More to the point, even as a professional engineer, Mr. West was not qualified as an expert and did not purport to offer an opinion to any degree of professional certainty. As a result, his testimony should not be given undue weight by this Court. Given Mr. West's admitted lack of qualifications and Dominion's failure to present testimony from qualified experts, the proposed bond amount lacks any reliable evidentiary foundation. See *Watson v. Ford Motor Co.*, 389 S.C. 434, 699 S.E.2d 169 (2010), cited supra, (holding that expert testimony must be based on reliable methodology and offered by a qualified witness).

C. A Bond Would Effectively Deny BREDL Access to Judicial Review.

BREDL is a non-profit environmental organization with limited financial resources representing a community that is predominantly minority (57%) and low-income (56%), already disproportionately burdened by industrial pollution above the 75th percentile (Ex. 77, 79:10-24 at R. p. 891, R. p. 9). Requiring BREDL to post a multi-million dollar bond would effectively deny this vulnerable community access to judicial review of agency actions directly affecting their environmental welfare.

The South Carolina Constitution guarantees that "[a]ll courts shall be public, and every person shall have speedy remedy therein for wrongs sustained." S.C. Const. art. I, § 9. Imposing an excessive bond requirement would contravene this fundamental constitutional guarantee by creating an insurmountable financial barrier for a non-profit organization seeking to protect public resources and vulnerable communities.

The stark disparity in resources between the parties further demonstrates the impropriety of a bond requirement. While BREDL operates with the limited resources typical of a community-based non-profit, Dominion is a sophisticated energy corporation with operations across sixteen states, annual revenue exceeding $16 billion, and assets totaling more than $100 billion. This resource imbalance makes even more apparent that a bond requirement would function not as a legitimate protection against economic harm, but as a procedural mechanism to effectively foreclose judicial review.

Courts have long recognized that access to judicial review should not be contingent on financial resources, particularly in cases involving the public interest. Imposing a $5.3 million bond requirement on a non-profit environmental organization would set a troubling precedent that

would undermine this principle and could effectively immunize agency decisions from review whenever they are challenged by organizations or individuals with limited resources.

CONCLUSION

For the foregoing reasons, BREDL respectfully requests that this Court deny Dominion Energy's Motion Regarding the Effect of Certification on Stay.

At its core, Dominion's motion represents a calculated attempt to circumvent meaningful judicial review of significant environmental and regulatory violations. By seeking to nullify the Court of Appeals' carefully considered stay on procedural grounds rather than substantive merits, Dominion aims to irreversibly alter protected wetlands and waterways before this Court can fully examine the legal issues at stake. This transparent maneuver—filed over a year after the stay was granted and mere weeks before oral argument—reveals Dominion's true objective: to create facts on the ground that render judicial review effectively meaningless.

South Carolina's courts have consistently held that stays continue throughout appellate proceedings until specifically lifted or until remittitur is issued. This principle safeguards the integrity of the judicial process by ensuring that parties cannot evade review through tactical timing or procedural technicalities. To permit Dominion to proceed with construction now would not only contravene Rule 241, SCACR, and binding precedent in *Stokes-Craven*, *Lancaster*, and *Graham*, but would fundamentally undermine this Court's authority to provide meaningful environmental protection.

Dominion's improper submission of sixteen new affidavits—containing inadmissible hearsay, unqualified opinions, and assertions never subjected to cross-examination—further demonstrates its attempt to circumvent proper judicial scrutiny. These tactical maneuvers, coupled

with Dominion's troubling environmental track record, including the 2018 pipeline construction incident that contaminated a public water supply, provide compelling reasons to maintain the stay.

The requested $5.3 million bond represents yet another attempt to obstruct judicial review by creating an insurmountable financial barrier for a non-profit organization representing predominantly minority and low-income communities that already bear disproportionate environmental burdens. Such a requirement would effectively immunize agency decisions from review whenever challenged by organizations with limited resources.

Appellant respectfully submits that this Honorable Court should reject Dominion's attempt to short-circuit judicial oversight, maintain the stay that prevents irreparable environmental harm, and preserve its ability to render effective relief after full consideration of the substantive issues on appeal.

By maintaining the Court of Appeals' carefully reasoned stay, this Court would not only uphold binding legal precedent but would also fulfill its constitutional duty to ensure that judicial review remains meaningful rather than merely symbolic. The permanent wetland fills, stream impacts, and habitat destruction that would result from lifting the stay cannot be undone—no matter what this Court might ultimately decide on the merits. In contrast, maintaining the stay for the brief period until oral argument in June imposes only temporary economic considerations on a multi-billion dollar corporation that has operated successfully with its existing infrastructure since 2019. The scales of justice tip decisively toward preserving the status quo, protecting vulnerable environmental resources, and ensuring that the regulatory process remains accountable to the people and communities it was designed to protect. This Court should deny Dominion's motion and allow full consideration of the substantive issues that affect not just this pipeline, but the integrity of South Carolina's environmental regulatory framework.

Respectfully submitted,

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