

STATE OF SOUTH CAROLINA

COUNTY OF NEWBERRY

Oien Family Investments, LLC,

Plaintiff,

vs.

Piedmont Municipal Power Agency,

Defendant.

IN THE COURT OF COMMON PLEAS  
EIGHTH JUDICIAL CIRCUIT

CASE NUMBER: 2015-CP-36-00120

AMENDED ORDER

RECEIVED

MAY 18 2016

CC Court of Appeals  
March 28 and 29, 2016

R. Lawton McIntosh

Thomas H. Pope, III

Bruce W. Bannister and Luke A. Burke

2016 MAY 16 AM 10 13

FILED  
NEWBERRY COUNTY

HEARING DATE:

JUDGE:

ATTORNEY FOR PLAINTIFF:

ATTORNEYS FOR DEFENDANT:

COURT REPORTER:

This matter is before the Court for trial pursuant to Plaintiff's Complaint, filed March 6, 2015, challenging Defendant's right to condemn Plaintiff's property in Newberry County pursuant to S.C. Code § 28-2-470. Plaintiffs alleged:

1. The proposed taking is not necessary;
2. The proposed taking is not reasonably calculated to fulfill a public purpose; rather, the proposed taking has been initiated to further arbitrary and capricious decisions and actions taken by Defendant;
3. The proposed taking is not for a public use; and
4. There are less intrusive means available to Defendant to accomplish its intended objectives and to comply with South Carolina law, including aesthetics and the fact that the taking crosses an existing easement when another means of taking would not do so.

Defendant filed an Answer and Counterclaim on March 26, 2015, denying the relief requested in Plaintiff's complaint and counterclaiming for attorney's fees and costs of litigation related to this action. Plaintiff filed a reply on April 9, 2015.

At the call of the case, Thomas H. Pope, III appeared and represented the Plaintiff, Oien Family Investments, LLC, (hereinafter "Oien"). Bruce W. Bannister and Luke A. Burke were present on behalf of the Defendant, Piedmont Municipal Power Agency (hereinafter "PMPA").

Based upon the pleadings, the sworn testimony of the witnesses, the exhibits placed in the record by both parties, and the arguments of counsel, the Court makes the following findings of fact and conclusions of law:

1. Oien Family Investments, LLC, is a company started by Lynn and June Oien for the purposes of holding their investment properties. In December 2005, the Oiens, who are residents of Florida, purchased two contiguous tracts of land in Newberry County totaling approximately 116 acres. In 2012, the two tracts were transferred into Oien Family Investments, LLC. Reference to Oien in this Order refers to both the Oiens individually and Oien Family Investments, LLC.
2. PMPA is a joint action agency formed by ten municipal electric utilities in the Upstate of South Carolina. PMPA provides wholesale electric services to include power to its members. The power comes primarily from the Catawba Nuclear Station.
3. Currently, the City of Newberry (hereinafter "Newberry") leases electrical substations from Duke Energy Corporation (hereinafter "Duke"). Newberry determined that installing a new substation would allow for increased electrical output to its customers and greater reliability because Newberry could service the substation itself instead of relying on Duke. In addition, one of Newberry's largest customers, Kraft Foods, informed Newberry that it intended to enlarge its plant and that additional power would be required. Kraft is one of the largest employees in the City of Newberry and its wages

are considered among the highest locally. Construction of the substation was completed in April 2014.

4. Newberry is a member of PMPA and the two entities partnered to secure the right-of-way for the transmission line to energize the new substation. The transmission line consists of metal poles, some of which would be as high as ninety (90) feet into the air with cross arms. The poles would be anchored by concrete bases. No structures can be in the right-of-way or endanger these lines. PMPA was primarily concerned with route selection and designing the transmission line. Newberry was primarily concerned with explaining the project to landowners, gathering their feedback on route selection, and assisting in procuring the necessary right-of-ways.
5. PMPA and Newberry found there were two possible points in which to tap the Duke lines to transmit the electrical power to its new substation. A cursory inspection of one point was rejected because the right of way would require PMPA to condemn and go through residential areas which would be cost prohibitive. PMPA determined that the only feasible route would need to cross Oien's property.
6. One Oien tract, identified as the "southern tract" contained a house and a large pond. Oien use the house as a residence when they are in town. The other tract, identified as the "northern tract" is undeveloped field or woodlands. Oien selected a house site on the northern tract, dug a well, and had underground power run to the site. They made a down payment on a log house to construct on the site in 2008 but did not follow through with the actual building.

7. The most feasible route for PMPA to run the power line from a Duke tap point to the new substation would be along the joint lines of Oien's two properties, or stated another way, fairly in the middle of the two tracts.
8. A Newberry employee, Todd Guy, made the initial contact with Oien concerning the right-of-way. A Newberry electrical official, Mike Regier, also met with Oien on the property to discuss the proposed right-of-way. Initially, Oien wanted the line to run across the southern tract which included the pond but then rejected that route. Oien suggested that the right-of-way run along the edge of the northern tract but soon rejected that line as being too close to their proposed house. Oien favored the middle route and had several suggestions, one of which was to route the line so as to miss having to destroy several oak trees. PMPA and Newberry officials also had meetings with Oien's property manager concerning some of the conditions of the right-of-way and some of the objections Oien had to the proposed right-of-way document.
9. In November of 2012, Oien met with PMPA officials, City of Newberry officials, and Oien's property manager in an attempt to come to an agreement. Following this meeting, Oien left a message which PMPA officials took to mean that Oien had finally selected the right-of-way that followed the property line between their two tracts which was basically in the middle of their property.
10. Shortly thereafter, Oien requested additional meetings and rejected the middle route. As a result, PMPA delivered a Notice of Condemnation on Oien on February 11, 2015. This action was timely filed on March 6, 2015.
11. At the outset of the trial, Oien announced that it was moving forward on two theories: that the proposed taking is not for public use and that, based on the factors stated in

*Southern Dev. & Golf Co. v. S.C. Pub. Serv. Auth.*, 305 S.C. 507, 409 S.E.2d 428 (Ct. App. 1991), *aff'd as modified*, 311 S.C. 29, 426 S.E.2d 748 (1993), PMPA abused its discretion when deciding on the route of the transmission line.

12. At the close of its case, Oien announced that it was abandoning its argument that the proposed taking is not for public use.
13. Oien called one William Rogers who was qualified as an expert by his experience as a right-of-way agent for several electric transmission authorities. According to Rogers, the *Southern Dev.* case required a detailed analysis of the alternate routes to include the land acquisition costs. According to Rogers the lack of a detailed analysis of alternate routes was not in compliance with the requirements *Southern Dev.* and thus arbitrary and capricious.
14. Oien also presented an opinion of a qualified appraiser as to the damage to the Oien property by having the right-of-way run through the middle of its two tracts. His estimate of the damage was \$210,000.00, although his written report estimated damage of \$182,000.00. He calculated the damage of the southern route to be \$23,000.00.
15. At the close of Oien's case, PMPA moved for a directed verdict on the grounds that Oien had not met its burden of proving a clear abuse of discretion by PMPA. *See Sease v. City of Spartanburg*, 242 S.C. 520, 131 S.E.2d 683 (1963) ("The burden is on the landowner who challenges the right of condemnation."). The Court took the motion under advisement.
16. PMPA elicited testimony from the professional engineer, Alan Cobb, who designed the route. According to Cobb, he considered (1) the availability of alternate routes; (2) the aesthetics; (3) cost including engineering costs and land acquisition costs; (4)

environmental factors; (5) safety; and (6) reliability.

17. PMPA presented testimony concerning the three proposed routes across the Oien property. The northern route was rejected by Oien as being too close to the home site where Oien proposed to build their home. The southern route required several bends in the transmission line which are expensive. In addition, it requires engineering to cross the pond on the southern tract of the Oien property. Also, because Oien restricted access to the property, neither PMPA nor Newberry completed the southern route engineering plan. All parties acknowledge that the southern route would be more expensive from an engineering standpoint and that the necessary poles could be viewed from the only house on the two tracts of the Oien property. Running the transmission lines around the pond could involve the Corps of Engineers or the Environmental Protection Agency.
18. PMPA's appraisal of damage to the Oien property if the middle route was chosen and executed conflicted with the Oien appraisal. According to PMPA's expert, the damage to the Oien property would be \$23,000.00.
19. Based upon the record before this Court the Court finds that no evidence was presented showing that PMPA acted in bad faith. PMPA and Newberry met with landowners and attempted to incorporate their concerns into route planning where possible.
20. The Court finds that no evidence was presented showing that PMPA committed fraud.
21. The Court finds that ample evidence was produced showing that the taking was necessary, reasonably calculated to fulfill a public purpose, and for public use.
22. Oien argued that the lack of a detailed analysis of the costs between PMPA's chosen route in the middle of the property and a costs analysis of the route across the pond is arbitrary and capricious. They supported their argument by presenting their appraisal that

- the damage to their property on the middle route is between \$182,000.00 and \$210,000.00 but only \$23,000.00 if the pond route is used. They use an estimate of additional engineering cost for the pond route of \$80,000.00 even though the additional engineering costs have not been determined.
23. PMPA also presented expert testimony that the damage to the Oien property of the middle route was \$23,000.00. Thus, there is a conflict between the two experts as to the land acquisition costs for the middle route. The Court notes that the ultimate land costs of either route will be determined by a jury at a subsequent trial.
24. As the trier of fact, this Court can give such weight to either expert's opinion as it deems fit.
25. As a matter of fact and law the Court finds the decision of PMPA to locate the right-of-way on the middle route of Oien's land was neither arbitrary nor capricious.
26. "Economic and engineering considerations require [transmission] lines to be constructed as nearly straight as practicable, and there is no other feasible route for the line except the route across the lands in question, because any other route would increase the length of the line by several miles, and the cost would be substantially increased by reason of the additional guy wires, anchors and appropriate structures which would be necessitated at each of four additional angles." *Bookhart v. Central Elec. Power Co-op*, 219 S.C. 414, 432, 65 S.E.2d, 781, 789 (1951).
27. In *Southern Dev. Land & Golf Co. v. S.C. Pub. Serv. Auth.*, 305 S.C. 507, 409 S.E.2d 428 (Ct. App. 1991), the Court of Appeals upheld a decision by a master in equity who upheld a challenge to the proposed condemnation of a high voltage line across a golf

course. The basis for the injunction was the master's finding that the power company was estopped from crossing the golf course due to the golf course developer's reasonable reliance upon prior statements by one of the power company's officers that the power company did not intend to build a line on its existing right of way across the proposed golf course. The master also concluded that the power company was enjoined from condemning additional land and using its existing right of way because it abused its discretion. The decision regarding abuse of discretion was based on a finding that the power company did not consider land acquisition costs in choosing the route.

The Court of Appeals reversed the master on the estoppel issue but upheld the master on the abuse of discretion issue. The Court of Appeals vacated that portion of the master's decision and remanded with instructions for the power company to reevaluate the choice of route based on utilizing the factors of safety, reliability, aesthetics, and costs including land acquisition costs.

28. In *Southern Dev. Land & Golf Co. v. S.C. Pub. Serv. Auth.*, 311 S.C. 29, 426 S.E.2d 748 (1993), the Supreme Court reversed the Court of Appeals on the estoppel issue. In addressing the finding of abuse of discretion, the Supreme Court stated, at page 34:

Accordingly, we affirm the Master's order enjoining Santee Cooper from proceeding with the condemnation of the easement in question. Although we agree with the Court of Appeals' analysis of the issue of abuse of discretion, in light of our holding on the question of estoppel, we find the remand as ordered by the Court of Appeals unnecessary. Thus, the opinion of the Court of Appeals is AFFIRMED IN PART, and REVERSED IN PART.

29. Oien's expert witness, William Rogers, testified about the procedure for right-of-way acquisition at Central Electric Power Co-op and other entities Mr. Rogers has worked for. However, the Court finds that there is no legal requirement for PMPA to conform to the

standard created by Mr. Rogers which involves numerous written and detailed alternate route studies. Further, Mr. Rogers admitted in his testimony that, if PMPA considered the factors laid out in *Southern Dev.*, then it had not abused its discretion, even if PMPA did not perform written alternate route studies.

30. Further, the Court finds that PMPA relied upon professional appraisers and professional engineers for analysis and did consider the following factors when determining the location of the route:

- a. Availability of alternate routes;
- b. Aesthetics;
- c. Cost including engineering costs and land acquisition costs;
- d. Environmental factors;
- e. Safety; and
- f. Reliability.

31. Therefore, the Court finds that PMPA did not abuse its discretion and did not act capriciously when determining the location of the transmission line route.

32. Finally, the Court finds that Oien brought this action, not for a legitimate purpose, but in an attempt to reroute the transmission line off of Oien's property. Mr. Oien admitted that their goal was to keep PMPA from building the transmission line across Oien's property. Further, although Oien presented evidence attempting to show its preferred route, it failed to present any evidence that PMPA abused its discretion in choosing the location of the route.

33. S.C. Code §28.2.510(A) allows this Court to award PMPA reasonable costs and litigation expenses if it finds Oien did not raise and litigate the challenge to condemnation in good

faith. Based upon the manner in which PMPA conducted its alternate route analysis, the Court does not find Plaintiffs challenge to be brought in bad faith.

34. Oien was aware that a challenge would halt the construction of a needed substation and thus place pressure on PMPA and Newberry to try and find a solution. That solution was to either move the right-of-way off Oien's property or place it on the southern pond route in disregard of the almost certain higher costs to the customers of Newberry.

35. The alleged grounds for their challenge to the condemnation show Oien's intent. Thus, the grounds were abandoned. The abandoned grounds were 1) the proposed taking was not necessary; (2) the proposed taking is not reasonably calculated to fulfil a public purpose, rather, the proposed taking has been initiated to further arbitrary and capricious decision and actions taken by PMPA; (3) the proposed taking is not for public use.

36. The remaining grounds of Oien's complaint alleges "There are less intrusive means available to Defendant to accomplish its intended objectives and to comply with South Carolina law, including aesthetics and the fact that the taking crosses an existing easement when another means would not do so."

37. The single motivating factor for Oien was to force PMPA to relocate the transmission line to the southern route or to avoid Oien's property altogether. Lynn Oien admitted as much in his testimony.

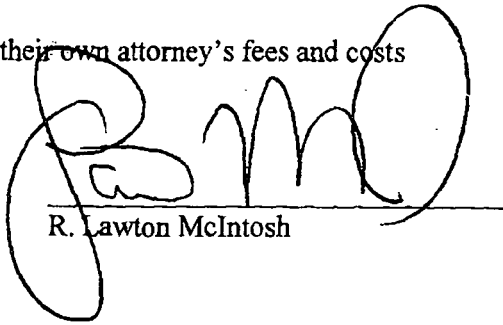
38. The Court finds that forcing a public utility to locate a transmission line where the landowner wants it by challenging the condemnation is not good faith.

**NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED** as follows:

1. PMPA's Motion for a Directed Verdict is GRANTED;
2. Oien's request for an injunction is DENIED; and

3. Each party shall be responsible for their own attorney's fees and costs

**IT IS SO ORDERED.**



R. Lawton McIntosh

5-9, 2016

Wahalla, South Carolina

**FORM 4**

**STATE OF SOUTH CAROLINA  
COUNTY OF NEWBERRY  
IN THE COURT OF COMMON PLEAS**

**JUDGMENT IN A CIVIL CASE  
CASE NUMBER 2015CP3600120**

Oien Family Investments Llc	Piedmont Municipal Power Agency
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<b>PLAINTIFF(S)</b>	<b>DEFENDANT(S)</b>
<b>Submitted by:</b>	Attorney for: <input type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant <input type="checkbox"/> Self-Represented Litigant

**DISPOSITION TYPE (CHECK ONE)**

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.  See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON):**       Rule 12(b), SCRPC;       Rule 41(a), SCRPC (Vol. Nonsuit);  
 Rule 43(k), SCRPC (Settled);       Other: \_\_\_\_\_
- ACTION STRICKEN (CHECK REASON):**       Rule 40(j) SCRPC;       Bankruptcy;  
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;       Other: \_\_\_\_\_
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**  
 Affirmed;     Reversed;     Remanded;     Other:

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

**IT IS ORDERED AND ADJUDGED:**  See attached order. (formal order to follow)  Statement of Judgment by the Court:  
**ORDER INFORMATION**

**Amended Order**

This order  ends  does not end the case.  
Additional Information for the Clerk: \_\_\_\_\_

**INFORMATION FOR THE JUDGMENT INDEX**

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

S/R. Lawton McIntosh

05/09/2016

Circuit Court Judge

Judge Code

Date

**For Clerk of Court Office Use Only**

This judgment was entered on **May 16, 2016**, and a copy mailed first class or placed in the appropriate attorney's box on **May 16, 2016**, to attorneys of record or to parties (when appearing pro se) as follows:

**Thomas H. Pope III** PO Box 190 Newberry, SC 29108

**Oscar W. Bannister** Bannister, Wyatt & Stalvey, LLC PO Box 10007 Greenville, SC 29603

**ATTORNEY(S) FOR THE PLAINTIFF(S)**

**ATTORNEY(S) FOR THE DEFENDANT(S)**

Jackie S. Bowers (jt)

**Court Reporter**

**Jackie S Bowers - Clerk of Court**

**ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.**

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

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FORM 4

STATE OF SOUTH CAROLINA  
COUNTY OF NEWBERRY  
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2015-CP-36-120

Oien Family Investments, LLC

Piedmont Municipal Power Agency

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:	Attorney for : <input type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant
	or
	<input type="checkbox"/> Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.  See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON):**  Rule 12(b), SCRCP;  Rule 41, SCRCP (Vol. Nonsuit);  Rule 43(k), SCRCP (Settled);  Other
- ACTION STRICKEN (CHECK REASON):**  Rule 40(j), SCRCP;  Bankruptcy;  Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;  Other
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**  
 Affirmed;  Reversed;  Remanded;  Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED:  See attached order (formal order to follow)  Statement of Judgment by the Court:

ORDER INFORMATION

PLAINTIFF'S MOTION TO RECONSIDER, ALTER, AND AMEND IS DENIED UNDER RULES 52, 29, AND 60 WITHOUT THE NECESSITY OF A HEARING; NO FORMAL ORDER REQUESTED

This order  ends  does not end the case.

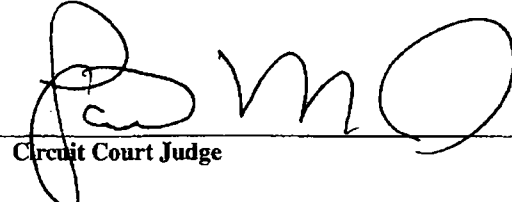
INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		\$
		\$
		\$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

  
Circuit Court Judge

2155  
Judge Code

5-16-16  
Date

FILED  
NEWBERRY COUNTY  
2016 MAY 18 AM 9 46  
JACKIE S. BOWERS  
CLERK





State of South Carolina  
The Circuit Court of the Tenth Judicial Circuit

R. Lawton McIntosh  
Judge

Post Office Box 8002  
100 South Main Street  
Anderson, SC 29622-8002  
Phone: (864) 260-4059  
Fax: (864) 224-6320  
lmcintosh@sccourts.org

May 16, 2016

Newberry County Clerk of Court  
P.O. Drawer 10  
Newberry, SC 29108-0010

Dear Madam Clerk:

Please find enclosed an original Order which has been signed by Judge McIntosh in the following matter:

Oien Family Investments, LLC v. Piedmont Municipal Power Agency  
CA #: 2015-CP-36-120

Thank you for your assistance.

Sincerely,

Elizabeth Nicholson  
Law Clerk to R. Lawton McIntosh, Judge  
Tenth (10<sup>th</sup>) Judicial Circuit

JACKIE S. BOWERS  
CLERK OF COURT

2016 MAY 18 AM 9 46

FILED  
NEWBERRY COUNTY

efn

enclosure