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THE STATE OF SOUTH CAROLINA

In the Court of Appeals

Appeal from Newberry County
Court of Common Pleas

R. Lawton McIntosh, Circuit Court Judge

Case No. 2015-C-36-00120

RECEIVED
OCT 20 2016
SC Court of Appeals

Appellate Case No. 2016-001037

Oien Family Investments, LLC.....Appellant

v.

Piedmont Municipal Power Agency.....Respondent

**APPELLANT'S MOTION TO RECONSIDER
AND MEMORANDUM IN SUPPORT**

Appellant Oien Family Investments, LLC does hereby move for a motion to reconsider the Order of the panel of the South Carolina Court of Appeals dated October 18, 2016, granting respondent's motion to lift the stay. In the alternative, appellant moves to reconsider and hold in abeyance the ruling on this motion until the transcript of trial can be considered. The bases for said motion are set forth hereinbelow.

This Court held a hearing on the motion to lift stay on July 27, 20126. At that hearing, there was no record upon which to base the motion. Counsel argued without benefit of a record and the arguments were in some instances outside the record reflected in the transcript of the trial.

On October 13, 2016, the court reporter furnished to the appellant the entire transcript of record from the trial (consisting of over 500 pages). Appellant's Initial Brief is due on November 13, 2016. Appellant's counsel has recently read the entire transcript and the Initial Brief of Appellant will be filed timely on or before November 13.

Because this Court issued its Order granting the motion to lift the stay without the benefit of a record and heard arguments outside the record, it is requested that this Court reconsider its Order and revisit the issue after reviewing at least the briefs of the parties, and in the alternative, that the Court reconsider the Order and revisit the issue after reviewing the Initial Brief of Appellant. This will involve only a delay of less than one month from the date of this motion.

The position of appellant is that the ruling of the lower court which is the subject of the appeal was contrary to the clear holding of the Supreme Court of South Carolina in the case of Southern Development Corp. v. SC Public Service Authority , 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). The appellant's position is also based upon the fact that irreparable harm will be caused if the stay is lifted and the condemnation project is allowed to proceed without this Court having the benefit of having reviewed the record in this matter to confirm whether or not it concurs that the lower court order was proscribed by Southern Development and whether irreparable harm will occur if the condemnation project proceeds.

PROCECURAL HISTORY OF CASE

PMPA served its notice of condemnation on Oien on February 9, 2015. On March 6, 2015, Oien filed an action challenging the condemnation in Newberry County. The action was premised on the ruling of the Supreme Court of South Carolina in Southern Development v. SC Public Service Authority, 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) which case affirmed the lower court's granting an injunction against the condemning authority based on the fact that the condemning authority had failed to consider the cost to acquire land for the three alternate routes involved in that case as it had assumed the land values of the alternate routes were identical. The appellant's challenge to the condemnation was heard by the Honorable R. Lawton McIntosh on March 29 and 29, 2016. On May 2, 2016, Judge McIntosh filed his Order denying the challenge. Oien filed motions to reconsider and on May 17, 2016, Judge McIntosh filed an Amended Order denying Oien's relief from the condemnation and Oien's motions to reconsider.

PMPA indicated to Oien's counsel that it intended to proceed with the condemnation after Judge McIntosh's rulings. On May 18, 2016, appellant moved for enforcement of the statutory automatic stay, injunction and/or supersedes. This motion was based upon the automatic stay provisions of S.C. Code §28-2-470 and/or Rule 241(c), SCACR, and Rule 241 (c)(1), SCACR.

By letter dated May 18, the Clerk of the South Carolina Court of Appeals wrote counsel and advised them that Appellant's Motion for Enforcement of Statutory Automatic Stay, Injunction and/or Supersedes was "granted" by Judge Stephanie P. McDonald for the Court. Thereafter, respondent filed its Motion to Lift Stay or Require Bond dated May 20, 2016. Appellant filed its Return in Opposition to the Motion to Lift Stay or Require Bond on May 31, 2016.

This Court held oral argument on the motion on July 27, 2016, and there was no record available at that time. The transcript of the trial was provided by the court reporter to counsel on October 13, 2016. Appellant's Initial Brief is due on November 13, 2016. It was not until October 13, 2016 that a transcript of the trial was available. By Order dated October 18, 2016 and received by undersigned counsel on October 20, 2016, the Court of Appeals granted respondent's motion to lift the stay.

ARGUMENT

A. The Trial Transcript Demonstrates That The Lower Court Order Did Not Correctly Apply Southern Development v. SC Public Service Authority

Pursuant to SC Code §28-2-470, all condemnation proceedings are stayed until the disposition of a challenge. It is appellant's position that because this action is on appeal, it has not been disposed of. The effect of the Order lifting the stay would be to allow Respondent PMPA to proceed with its condemnation action. The condemnation action is one in which the transmission line (poles 80' to 100' high) goes through the middle of the Oien property. The testimony at trial was that PMPA did not perform an alternate route study comparing the alternate routes using the factors listed and suggested in the Southern Development case. If the appellant is correct that the judge's Order was violative of Southern Development, the effect of the Order lifting the stay would be to allow the condemnation to proceed even if PMPA ultimately loses the

appeal. The automatic stay provision of §28-2-470 would be violated. The Order of October 18, 2016 would also render the Southern Development case a nullity.

In Southern Development v. SC Public Service Authority, supra, the Supreme Court in a unanimous opinion recognized that proper route selection must be employed based upon an objective comparative analysis of several factors. The appellant's expert testimony was that the PMPA route analysis was arbitrary and capricious, lacking in a factual foundation, and a clear abuse of discretion (Plaintiff's Exhibit 40 attached herewith). In fact, PMPA's alleged analysis involved a verbal consideration by PMPA's outside engineer who had never performed a proper cost analysis.

The recent Order of this Court dated October 18, 2016 granting the motion to lift the stay may have misapprehended or disregarded the effect of the testimony in this case, because there was no record available to it. Because there is now a record available, the motion to reconsider should be granted until a proper review can be conducted of the testimony and whether or not the Order did violate or likely did violate the unanimous holding of the Supreme Court in Southern Development v. SC Public Service Authority, 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).

In Southern Development, the Supreme Court affirmed the findings of Master-in-Equity Breder that the utility's choice of route selection of a transmission line lacked a factual basis. In that case, as in this one, the utility employees, in the route selection process, gave no concrete consideration to land acquisition costs, assuming all land in the general area had the same fair market value and where cost estimates for alternate routes did not include land acquisition costs. Id. at p. 433. The Supreme Court noted that "no notes or memoranda were kept by Santee Cooper employees of their analysis." Id. at 433.

In the instant case, PMPA has no notes or scraps of paper of any analysis. (Transcript, p. 378). PMPA's contract engineer admitted he had no notes, papers, or documents showing any analysis comparing the routes. (Transcript, p. 378).

As for land acquisition costs, PMPA appraised all 15 properties involved in the transmission project using the same per acre value (\$5,000 per acre). PMPA's appraiser admitted he did not compare the cost to acquire any route other than the middle route through the Oien property. (Transcript, p. 328).

The Order of the lower court failed to properly apply Southern Development to the facts presented. The Supreme Court found that failure to properly consider land acquisition costs by Santee Cooper was an abuse of discretion and that Santee Cooper's choice of a route lacked a factual basis. Id. at 433. In the instant case, the cost to acquire the southern route was \$292,700, and the cost to acquire the middle route was \$364,200. (Plaintiff's Exhibit 40). PMPA's choice of the middle route was arbitrary and without factual basis. As in Southern Development, PMPA has no piece of paper or document reflecting any analysis. (Transcript, p. 378). Using Mr. Roger's written route ratings ("1" being best), applying all the Southern Development factors, were that the southern route scored a "9," while the middle route scored a "15" and that the southern route was superior in 5 out of 6 categories. (Plaintiff's Exhibit 40).

At the hearing on July 27, 3016, before this Court on the motion to lift stay, the absence of a trial transcript allowed both counsel to argue "outside the record." For example, PMPA argued at the hearing that the Oiens had refused to allow PMPA on their property. The transcript reflects this comment is not accurate. The Court even noted that the Oiens were congenial people. (Transcript, p. 508).

The trial court disregarded the uncontradicted testimony of appellant's transmission line right of way expert Bill Rogers (with over 30 years' experience with Central Electric Power Cooperative) who identified that PMPA had violated the industry standard followed by other transmission companies in not having any tangible evidence or analysis of the factors in an alternate route study being performed by PMPA in accordance with Southern Development. Rogers testified that there was no factual basis for PMPA's route selection. (Plaintiff's Exhibit 40).

The Court rejected Rogers' testimony and said "I don't believe there is an obligation for condemning authority to meet the gold standard that is established by Mr. Rogers." (Transcript, p. 507). The lower court further seemed to allow PMPA to be exempt from the industry standard when he said: "I don't think they're

required to have it in writing...but since this is their [PMPA's] first time, it could have been done on a much more professional basis..since they're new at it." (Transcript, pp. 507-508). Southern Development does not allow any laxity. It requires a comparable route analysis. In the instant case, Rogers' comparable analysis between the selected middle route and the southern route requested by the Oiens showed that the southern route was the preferred route because, considering all the factors, it was over \$70,000 cheaper than the PMPA middle route; it was far more aesthetic as it would be out of sight of the Oiens' retirement home into which they had spent over \$100,000 for plans, well installation, grading and electric hook up; less impact on the property owners' usage; and better tap access to the Duke transmission line. (Plaintiff's Exhibit 40). The Court disregarded Rogers' uncontradicted opinion that PMPA abused its discretion in that it did not follow industry routing standards. (Plaintiff's Exhibit 40). PMPA produced no expert witness to refute Mr. Rogers. It is true that PMPA is inexperienced in transmission right-of-way acquisition. Its inexperience is not an excuse for it to be exempt from the requirements of Southern Development.

In Southern Development, the Supreme Court also discussed the importance of a landowner's anticipated use of the property and noted the following: There was no public notice give of the proposed transmission line, and no property owners were contacted by Santee Cooper before the route was chosen regarding the anticipated use of their property. Id. at 432. In the instant case, the identical facts are that PMPA gave no public notice of the line nor did it contact the Oiens about their intended, anticipated use of the property. PMPA treated their property as though it was just timber land, identically like all properties on the line.

The post-trial comments by the lower court indicate that the court did not believe the PMPA appraisal expert who testified there was no damage to the remainder caused by the middle route. The Court commented about the condemnation selected by PMPA causing great damage as follows: "I thought that was almost beyond believability in the sense you can build a high-rise transmission line through the middle of somebody's property, especially as pristine this property is and there not be any damages." (Transcript, p. 509). The court went on to explain that he was inclined to deny the injunction because the jury in a

condemnation trial could “very easily find up to the value” [of the damages to install the southern route]. The Court obviously believed that there was significant damage to the Oiens’ property because of the middle route, but felt the appellant’s relief should be a large condemnation award. This ignores the rights of property owners which are recognized in Southern Development.

The effect of the Order of October 18 will create irreparable harm to the Oiens. The testimony and the transcript indicate that the Oiens have a high end tract, that PMPA selected a middle route directly through the center of the Oien property without regard to the damage to the remainder of the Oien tract by going through the middle route, when in fact the southern route (which unlike the middle route was out of view of the Oiens’ retirement home) would cost less than the costs of the middle route which was selected by PMPA without analysis. The record in this case indicates that there is not a single piece of paper showing any analysis by PMPA and that it is impossible to do a complete, thorough analysis as required by Southern Development without proper data supporting it based on the comparable factors listed in that case. Attached herewith are copies of Plaintiff’s Exhibit 40 and several transcript pages referenced herein.

B. This Motion Is Reasonable In Light Of The Irreparable Harm that May Result Otherwise

In order to properly and fully consider a motion to lift the stay, which has the effect of allowing the Oien property to be perhaps ruined in value, consideration should be given to the trial transcript. The current motion is a reasonable one: to request the Court to reconsider its Order of October 18, 2016, and hold it in abeyance until such time as the Court has reviewed the record and the briefs of the parties. This process should not take more than 90 days. In the alternative, appellant requests that this Court reconsider and hold in abeyance the ruling until at least appellant has filed its Initial Brief at which time said Initial Brief could be supplied to the Court for its consideration in reconsidering the motion to lift the stay.

CONCLUSION

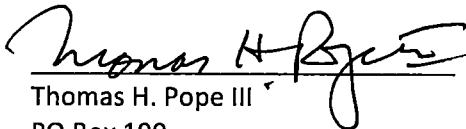
For the reasons set forth above, appellant respectfully requests that this Court reconsider its Order of October 18, 2016, and withdraw said Order until the conclusion of the appeal. In the alternative, appellant requests that this Court reconsider its Order and hold same in abeyance until one of the following events:

- (a) until both parties have submitted their briefs in this appeal and/or
- (b) until at least the appellant has filed its Initial Brief on or before November 13, 2016.

This motion is based upon irreparable damage which will occur unless this Court can at least make its decision on the motion to stay based upon the transcript of record and the briefs to be filed.

Respectfully submitted,

POPE AND HUDGENS, P.A.

By: 

Thomas H. Pope III

PO Box 190

Newberry, SC 29108

P: 803-276-2532; Email: thpope@popeandhudgens.com

Attorneys for Appellant

October 20, 2016

THE STATE OF SOUTH CAROLINA

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APPEAL FROM NEWBERRY COUNTY
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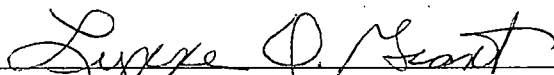
v.

Piedmont Municipal Power Agency.....Respondent

PROOF OF SERVICE

The undersigned employee of Pope & Hudgens, P.A. does hereby certify that she has this date served one (1) copy of the Appellant's Motion for Reconsideration dated October 20, 2016 in the above-captioned case upon the following counsel of record by causing said copy to be deposited with the United States Postal Service, first class postage prepaid, affixed thereto, and addressed as follows:

O.W. Bannister, Esquire
Bannister, Wyatt & Stalvey
P.O. Box 10007
Greenville, SC 29603



Lynne O. Grant, Secretary to Thomas H. Pope III
Pope & Hudgens, P.A.
PO Box 190
Newberry, SC 29108

October 20, 2016
Newberry, SC

THOMAS H. POPE III
W. CHAD JENKINS
KYLE B. PARKER

**DOPE
&
HUDGENS**
ATTORNEYS, P.A.

1508 COLLEGE STREET-P.O. BOX 190
NEWBERRY, SOUTH CAROLINA 29108
PHONE (803) 276-2532 FAX (803) 276-8684
WWW.POPEANDHUDGENS.COM

JOSEPH W. HUDGENS
Of Counsel
THOMAS H. POPE
(1913-1999)

October 20, 2016

HAND-DELIVERED

The Honorable V. Claire Allen
Deputy Clerk, South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

RE: Oien Family Investments, LLC v. Piedmont Municipal Power Agency
Appellate Case No.: 2016-001037

Dear Ms. Allen:

We enclose herewith the original and six copies of the appellant's motion to reconsider the Order granting the lifting of the stay in this matter and, in the alternative, holding said Order in abeyance until briefing is completed so that the record can be considered. Also enclosed is our Proof of Service and firm check in the amount of \$25.

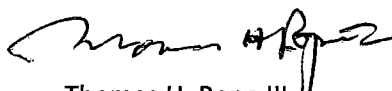
By copy of this letter, we are providing a copy of this motion to opposing counsel.

Please let us know if you need anything further.

With best regards.

Sincerely,

POPE AND HUDGENS, P.A.


Thomas H. Pope III

THP III/lg

Enclosures

cc: O. W. "Bill" Bannister, Jr., Esquire, w/encls.

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