

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

Appellate Case No. 2016-001037

**RECEIVED**

DEC 08 2016

**SC Court of Appeals**

APPEAL FROM NEWBERRY COUNTY  
Court of Common Pleas

R. Lawton McIntosh, Circuit Court Judge

Case No. 2015-CP-36-00120

Oien Family Investments, LLC.....Appellant

v.

Piedmont Municipal Power Agency.....Respondent

**APPELLANT'S MOTION TO STRIKE AND/OR  
DISREGARD RESPONDENT PMPA'S AFFIDVIT OF  
MICHAEL FRAZIER DATED NOVEMBER 30, 2016**

By and through its undersigned counsel, Appellant Oien objects to the Affidavit of Michael Frazier submitted by PMPA with its Return dated December 2, 2016 and moves for an Order striking this affidavit from consideration by this Court. Such filing is not allowed by the South Carolina Appellate Court Rules and further the filing is based on hearsay. The affidavit is believed to be incorrect and/or misleading. Mr. Frazier lives in Greenville County, South Carolina (Transcript, p. 13), and the record shows that he

refused Oien's request for a meeting for six months and only came to Newberry County on one occasion – on November 26, 2013. (Transcript, pp. 141-142, 144). Since Frazier does not reside here, it appears that he has based his affidavit on hearsay or rumor, as the undersigned counsel, who are residents of the City of Newberry are aware of no outages in the City.

#### AUTHORITIES

The record in this case was established at trial and by post-trial court orders. The South Carolina Appellate Court Rules do not allow or provide a mechanism for a party to add to the record by supplying affidavits. Neither Rule 240 SCACR (motions in general) and Rule 241 SCACR (Stay and Supersedes in Civil Actions) reference allowing a party to bolster its position by supplementing the record with affidavits that were not supplied at trial.

In the alternative, if this Court is not inclined to grant Oien's motion to strike this affidavit from consideration, Appellant Oien would request it be granted leave to file its own affidavits which will refute Frazier's statement that "there have been several partial outages in the City of Newberry" and point out that there have been no outages other than minor normal ones and that none are caused by or due to the project for which PMPA is attempting this condemnation.

Because Appellant believes that allowing consideration of affidavits will lead to dueling affidavits, Appellant suggests that doing so is improper. However, if the Court is going to consider Respondent's affidavit, it is only fair to hear from Appellant in like manner.

**CONCLUSION**

Appellant Oien requests that this Court grant its motion and strike the Frazier affidavit dated November 30, 2016, as improper under Rules 240 and 241 SCACR, as irrelevant, or as inadmissible hearsay. Rulings by this Court should be based on the record, rather than on dueling affidavits.

In the alternative, if this Court allows consideration of the Frazier affidavit, Appellant Oien moves and requests leave to file its affidavits refuting the Frazier affidavit.

Respectfully submitted,

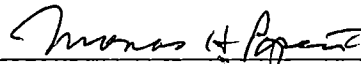
**POPE AND HUDGENS, P.A.**

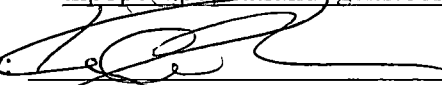
PO Box 190

1508 College Street

Newberry, SC 29108

P: 803-276-2532; F: 803-276-8684

By:   
\_\_\_\_\_  
Thomas H. Pope III  
[thpope@popeandhudgens.com](mailto:thpope@popeandhudgens.com)

By:   
\_\_\_\_\_  
Kyle B. Parker  
[kbparker@popeandhudgens.com](mailto:kbparker@popeandhudgens.com)

Attorneys for Appellant Oien Family Investments, LLC

December 8, 2016

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

Appellate Case No. 2016-001037

**RECEIVED**

DEC 08 2016

**SC Court of Appeals**

APPEAL FROM NEWBERRY COUNTY  
Court of Common Pleas

R. Lawton McIntosh, Circuit Court Judge

Case No. 2015-CP-36-00120

Oien Family Investments, LLC.....Appellant,

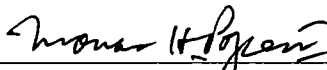
v.

Piedmont Municipal Power Agency.....Respondent.

**PROOF OF SERVICE**

I certify that I have served Appellant's Motion to Strike the Affidavit of Michael Frazier by U.S. Postal Service, with sufficient postage affixed and appropriate return address, on December 8, 2016, to its attorneys of record, O. W. Bannister, Esquire, Bruce Bannister, Esquire, and Luke Burke, Esquire, PO Box 10007, Greenville, SC 29601.

**POPE AND HUDGENS, P.A.**

By:   
Thomas H. Pope III  
PO Box 190  
1508 College Street  
Newberry, SC 29108  
P: 803-276-2532; F: 803-276-8684  
Email: thpope@popeandhudgens.com

Attorneys for Oien Family Investments, LLC

December 8, 2016

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

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

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

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

December 8, 2016

**RECEIVED**  
DEC 08 2016  
SC Court of Appeals

**HAND-DELIVERED**

The Honorable Jenny Abbott Kitchings  
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. Kitchings:

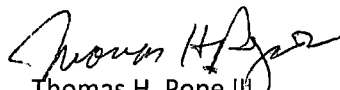
For filing, we enclose herein the original and six copies of Appellant's Reply to Return of Respondent to Appellant's Motion to Reconsider Lifting of Stay (with attachments) in connection with the above case, along with our Proof of Service of same. We also enclose the original and six copies of Appellant's Motion to Strike the Affidavit of Michael Frazier, with our Proof of Service of same, and our check for the filing fee.

Also enclosed are an extra copy of this letter and an extra copy of Appellant's Reply and Motion. We would request that a member of your staff clock-in these documents and return same to our courier.

With best regards.

Sincerely,

POPE AND HUDGENS, P.A.

  
Thomas H. Pope III

THP III/lg  
Enclosures

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