THE STATE OF SOUTH CAROLINA

In The Court of Appeals

Appellate Case No. 2016-001037

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 REPLY TO RESPONDENT PMPA'S RETURN TO APPELLANT'S MOTION TO RECONSIDER LIFTING OF STAY

The procedural background of this appeal has been identified in Appellant's Motion to Reconsider the Order of this Court dated October 20, 2016, granting Respondent PMPA's motion to lift the stay. In its Order dated November 22, 2016, this Court withdrew the October 20, 2016, Order lifting the stay and reinstated the stay. The

Court further instructed Respondent PMPA to file a return to the motion to reconsider by December 2, 2016, and to deliver the trial transcript to this Court.

On Monday, November 14, 2016, while its motion for reconsideration was pending, Appellant Oien served and filed the Initial Brief of Appellant with this Court, a copy of which Appellant attaches as Exhibit A hereto and incorporates herein by reference. The Return of PMPA dated December 2, 2016, contains errors and misstatements which will be addressed hereinbelow.

ARGUMENT

A. A Stay Is Required and Must Be Imposed Under South Carolina Law

The Return of PMPA misapprehends the applicable law in the context of the case at bar. It is well for this Court to note, in the context of the instant matter, that our courts take a restrictive view of the power of eminent domain. Georgia Dept. of Transp. v. Jasper County, 355 S.C. 631, 586 S.E.2d. 853 (2003). The exercise of the right of eminent domain by the sovereign is, in its very nature, in derogation of the "great and fundamental principle of all constitutional governments, which secures to every individual the right to acquire, possess, and defend property." Karesh v. City Council of City of Charleston, 271 S.C. 339, 247 S.E.2d. 342 (1978), *quoting*, Young et al. v. Wiggins et al., 240 S.C. 426, 126 S.E.2d 360 (1962). While in other jurisdictions the power of eminent domain may be exercised for a public purpose, benefit or the public welfare, the courts of South Carolina have adhered to a strict interpretation of our constitutional provision. Karesh, *supra*. This is because the power of eminent domain expressed by the framers of our constitution and the courts of this State proclaim a high regard for private property. (Id.) "However attractive the proposed project, however desirable the project from a government planning point of view, the use of the power of

eminent domain for such purposes runs squarely into the right of an individual to own property and use it as he pleases." Jasper County, *supra*, at 856.

It is this principle on which the Southern Development decision is grounded. It is further through this lens that the statute providing for an action to challenge the right to take, and the automatic stay provided in it, must be viewed. S.C. Code §28-2-470 provides that "[***a]ll*** proceedings under the Condemnation Notice are automatically ***stayed*** until the ***disposition of the action***..." (emphasis added). Of course, it would be helpful if the issue of the stay imposed by the statute had been previously litigated, but the question is not a complicated one despite the protestations of PMPA because the statute cannot be more clear. It plainly states that all proceedings are stayed. It does not say that some or certain types of actions are allowed to proceed. It unequivocally says "all" condemnation actions stop when an action such as Appellant's is filed, and the fact that it does informs the construction of the phrase "disposition of the action". That all actions are stayed necessarily means that the legislature intended that the final adjudication of the action must be had. Otherwise, the purpose of the statute is defeated.

SC Code §28-2-470 creates the right of a landowner to seek a judicial determination of the condemnor's right to proceed with the Condemnation Notice or whether it will be enjoined from doing so altogether. For "disposition of the action" to mean anything other than a final adjudication would be an aberration of not only the plain meaning of the phrase, but its operation in all other facets of the law. Any meaning short of final adjudication is not a "disposition" in the plain in ordinary sense. Blacks Law Dictionary defines "disposition" as "a ***final*** settlement or determination". Black's Law

Dictionary, p. 484 (7th Ed. 1999). The matter is not "disposed of" until all appeals are exhausted.

The construction of "disposition of the action" asserted by PMPA is absurd, stands the purpose of the SC Code §28-2-470 on its head, and requires the court to supply additional words to the statute or apply meaning to the terms used contrary to their plain and ordinary meaning. Such a construction is impermissible. The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature. Hodges v. Rainey, 341 S.C. 79, 533 S.E.2d 578 (2000); SCDOT v. First Carolina Corp. of SC, 369 S.S. 150, 631 S.E.2d. 533 (2006). What a legislature says in the text of a statute is considered the best evidence of legislative intent. Hodges, *supra*. Where such intent can be reasonably discovered from the plain and ordinary meaning of the language used, rules of construction are subservient to the principle that legislative intent must prevail and must be construed in light of the intended purpose of the statute. First Carolina Corp of SC, *supra*. Where the statute's language is plain and unambiguous, conveying a clear and definite meaning, the rules of statutory interpretation are not needed and "the court has no right to impose another meaning." Id. at 535. A court is further prohibited from rewriting the statute or injecting matters into it which are not in the legislature's language. Hodges, *supra*.

It is absurd to contend that the legislature intended the phrase "disposition of the action" to mean that the automatic stay is only in place until the trial court renders its decision. If the legislature had intended the decision of the trial court to be the effectual end of the challenge proceeding, it surely would have said so or specified what actions were not stayed on appeal, or limited appellate jurisdiction. It did not. Moreover, were

that the case, nothing would prevent PMPA from installing the transmission line right through the middle of the Appellant's property while this matter is on appeal. That logic could also lead to PMPA having to incur the costs of removing the transmission line and reconstructing it somewhere else if the Appellant prevails on appeal. Respondent's position is, at the very least, an unreasonable construction which has no basis in the common understanding of the meaning of the terms used by the legislature. Courts cannot employ a subtle or forced construction of a statute so as to limit its operation. Centex Intern., Inc. v. SCDOR, 406 S.C. 132, 750 S.E.2d 65 (2013). Nevertheless, this is precisely what the Return of Respondent asks this Court to do by lifting the automatic stay provided by SC §28-2-470 at this stage of the proceedings.

Appellant's Argument relating to Rule 241(a) contained in Appellant's Return in Opposition to Motion to Lift Stay dated May 31, 2016, is incorporated herein by reference. The rule states that all matters "affected by the appeal" are stayed pending the appeal. There is no legal or factual basis to grant supersedeas in a challenge case such as this. Respondent has overlooked or misapprehended both §28-2-470 and Rule 241(a) SCACR.

B. PMPA's Blatant Disregard of Southern Development Compels the Need for Application of the Automatic Stay

In this Reply, Appellant Oien urges this Court to reconsider and grant a stay of the Order of the lower court, and of the underlying condemnation, based on the automatic stay provisions of SC Code §28-2-470, Rule 241 SCACR, and based on the record and initial brief of Appellant which reflect that there is a substantial likelihood that Appellant will prevail on appeal, based on Southern Development v. S.C. 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). This means that if Respondent PMPA is not stayed and Appellant Oien prevails on appeal, Oien may be irreparably harmed.

The Return of PMPA contains factual errors and misstatements discussed hereinbelow. Further, the Return erroneously argues that Appellant's reliance on the Southern Development case is based on dicta.

PMPA's Return argues, without any factual support, that Appellant's challenge to the route selection methodology is based on its "bad motive." The truth is that this challenge is based on the right recognized for over 23 years by our Court in in Southern Development allowing a landowner to challenge an arbitrary route selection that was not based on a "rational decision-making process which is supported by facts," Id. at 434, as required by the Southern Development case. Appellant did not try to make PMPA use the southern route. It begged PMPA to consider it. PMPA refused to do so. PMPA did not quantify, analyze, or compare the construction costs and the land acquisition costs for either the middle or the southern route. PMPA acknowledged aesthetics was an important factor in route selection and that the southern route was more aesthetic; however, it never compared aesthetics and the other factors before selecting a route. When Appellant's expert Rogers performed the comparative route analysis, which PMPA should have done, it became crystal clear that the southern route was the preferable route, as its total costs were more than $70,000 less expensive than the middle route. (Exhibit 40; Transcript, p. 266).

Despite knowing since at least March 2014[1] that Appellant wanted PMPA to consider the aesthetic southern route, PMPA ignored this request. PMPA had drawn this

[1] Lynn Oien testified that he asked for consideration of the southern route at a meeting with the City in September 2013 (Transcript, p. 135) and continuously thereafter.

southern route in June 2013 but yet never analyzed the factors on this route (or the middle route). Appellant had repeatedly informed PMPA for many months that it should consider the southern route and had repeatedly requested a meeting with PMPA to discuss routing, including nine email requests. (Exhibit 9; Exhibits B to J to Complaint). In one email request dated October 1, 2014, Appellant's counsel put PMPA on notice that its decision appeared to be contrary to Southern Development. (Exhibit 9). PMPA ignored these meeting requests at its own peril.

PMPA is now alleging an urgency. However, PMPA knew Mr. & Mrs. Oien's concerns about the middle route, and preference for the southern route, for almost 12 months before filing its Notice of Condemnation, but PMPA not only never analyzed the southern route but also refused for over a year to meet with the Oiens to discuss it. Yet, PMPA tells this Court that a stay should not be granted because it is now in a hurry. There is no urgency, and PMPA is estopped by its conduct from asserting one.[2] If PMPA had granted the Oien request for a meeting, considered the southern route, and applied the correct factors (costs to acquire, costs to construct, aesthetics, etc.) as Rogers did in his report (Exhibit 40), PMPA would have concluded the southern route was preferable and superior to the middle route, this action would not have been filed, and the southern line could have been built two years ago.

The issue of PMPA's refusal to properly consider the southern route is also puzzling because:

- PMPA's appraiser acknowledged that running a transmission line through the middle of retirement property hurts the owner's aesthetics (Transcript, p. 322) and that damages need to be considered. (Transcript, p. 339).

[2] Appellant's Reply dated April 9, 2015, alleged the defense of unclean hands.

- Using the southern route would mean the transmission poles would be so far from Oien's home site that the poles would not visible from it. (Transcript, p. 135, 141).

- In February 2013, the Oiens' neighbor, Misty West, sent them an email notifying them of the news that PMPA had a line that was proposed to run through the middle of the Oien tract.

- Plaintiff's trial Exhibit 7 is a copy of the West email and is attached herewith. In this email, neighbor West, an electrical contractor, identified the following: a transmission line through Oien's nice residential estate property is a terrible idea that any landowner would oppose. She also attached with the email a map with a dotted route. The email stated:

- "...there is no way you would willingly give them an easement that cut your property in half...." (emphasis added).

- "...I suggested if they have to do this, they relocate the proposed line to your southern property line – see the "dotted" line...." (Plaintiff's Exhibit 7).

Even a lay person in early 2013 could see that the southern route West identified was the appropriate route. The third page of attached Exhibit 7 includes a yellow highlight of West's suggested southern route.

On page 8 of the Return, PMPA argues that "land acquisition costs will be determined by a jury." This is true as to a condemnation trial; however, that fact is not relevant in the present posture of this challenge case under §28-2-470 where PMPA has ignored the holding in Southern Development and has failed to utilize a "rational decision-making process" in its route selection; has failed to analyze and compare the factors of land acquisition costs, construction costs, etc. for both the southern and middle routes; and, where PMPA admits it has not a single scrap of paper to support or relate to a route analysis.[3] (Transcript, p. 377). PMPA is trampling on the rights of the appellant

[3] Engineer Cobb did not even know what pole construction costs were on the southern route (Transcript, p. 389). He knew the southern route was more aesthetically pleasing for a home site. (Transcript, pp. 389-390). He never assessed or compared the factors of the two routes in question, even though he conceded

landowner with "tunnel vision" – i.e., it wants to act first (without a factual basis) and answer questions later.

To uphold the decision of PMPA in "selecting" the middle route would stand the holding in Southern Development on its head where the route selection was made by officials at PMPA who had never heard of a comparative route analysis (Transcript, p. 74), who had never heard of Southern Development (Transcript, pp. 379-80), who knew the Oiens wanted consideration of the southern route but refused to analyze it, and who presented no comparative land acquisition or construction costs. Decisions by condemnors like PMPA which lack any "rational decision-making process" for route selection are the very evil that this Court sought to abolish in Southern Development. PMPA in essence did nothing required by this Court in that case.

Given that the Respondent admittedly conducted no route analysis, the Respondent is effectively asking this Court to overrule Southern Development and the rationale upon which it is founded. It is for this Court to determine whether Southern Development stands for reigning in heavy handedness and "tunnel vision" in the exercise of the power of condemnation or not. Appellant asserts that it does, and its application to the record of this case is squarely against the Respondent.

C. The Return of PMPA Contains Misstatements of Fact

In its Return, PMPA made assertions that are contradicted by the record.

On page 3 of its Return, PMPA argues that Oien "rejected" the southern route in early 2013. This is incorrect. During the summer of 2013, various routes across the property were considered–i.e., southern, middle, northern. However, as of the September

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there was nothing unusual about considering alternate routes on every landowner on a project. (Transcript, p. 381). He simply failed to do so here.

2013 meeting with the City, Oien steadfastly requested that PMPA utilize the southern route for aesthetic and other reasons, upon learning the proposed heights of the poles. (Transcript, pp. 135, 177, 193). PMPA admitted that from at least March 2014, it was aware that the Oiens were begging PMPA to consider the southern route. (Transcript, pp. 471, 477-478).

On page 4 of the Return, PMPA argues erroneously that "after the November 2013 meeting, Lynn Oien left a message on Frazier's phone that the middle route was satisfactory to Oien." First, PMPA did not plead in its Answer to this action challenging the route selection that Oien had agreed to any route (i.e., an accord and satisfaction); this makes its belated argument fatal. Second, the message Mr. Oien left on Frazier's phone made no reference to Frazier's request for permission to do a survey on the property, which Oien granted in his message. PMPA stated that they needed Oien's permission to survey in order to answer questions Mr. Oien had about the middle route, and Oien's message was in response to give permission. (Transcript, pp. 144-145). There would be no point in seeking answers to a route Oien had already accepted.

On page 5 of the Return, PMPA also argues that the Oiens had a bad motive because of the finding in the Order of Judge McIntosh that the motivating factor for Oien was "to use the challenge to the condemnation to force the public utility to place the line where they now say they want it placed." This is incorrect and a blatant misstatement. The Oiens are lay persons who had no knowledge of Southern Development; they merely asked PMPA to look at the southern route because of aesthetics since a line on this route would not be visible from the home site. (Transcript, p. 135), and Oien had over $800,000 invested in its property, home site and other improvements. (Transcript, p.

148). There is nothing in the record to show that the Oiens had any bad motivation. The judge found that this action was "not brought in bad faith." (Order, p. 10). There is not one word of testimony in the transcript that reflects any bad motivation by Oien. Unlike the landowner in Southern Development v. SC Public Service Authority, Oien did not ask that the line be moved off their property entirely but merely asked that PMPA consider the southern route on their property. (Transcript, pp. 141, 176).

Additionally, PMPA argues that it relied on Alan Cobb, its outside engineer, to design the route. On page 10 of the Return, it argues erroneously that Cobb determined Duke Power would not allow the tap where the Oiens wanted the southern route. There is no evidence in the record to support this. The evidence shows that Cobb never talked to Duke (Transcript, p. 398). Appellant's expert Rogers, who did an alternate route study in 2015 on a project in Newberry County, testified that, in working with Duke on tap points over the years, the tap point for the southern route beside the Oiens' driveway was ideal. Rogers testified that he saw no reason this point would not work for Duke. (Transcript, pp. 268-269). Likewise, PMPA argues erroneously that the middle route is 670' feet from the Oiens' home site in which they have invested over $100,000. The record shows that the middle route is 250 to 300 feet from the Oien home site (Transcript, p. 139) and is clearly visible because it runs through a field which is 100 feet from the home site and which would visually expose a transmission line. (Transcript, p. 140).

Contrary to PMPA's argument in its Return, the record shows that PMPA drew a southern route in June 2013 (Plaintiff's Exhibit 12; Transcript, p. 498), yet it never did a comparative route analysis between the southern and middle routes. Neither PMPA nor its outside engineer Cobb ever computed the construction costs or the land acquisition

costs for the middle route versus the southern route. Cobb admitted that he did not have a single note about an analysis across any of the routes through the Oien property. (Transcript, pp. 376-378, 401). He claimed he did a "mental" analysis (Transcript, p. 378) but admitted he had no note or document to verify this. (Transcript, pp. 376-378). On page 10, PMPA asserts further that "Cobb could not consider land acquisition costs because no one knew what they would be." This constitutes an admission that PMPA committed the same fatal errors as Santee Cooper in in the Southern Development case. PMPA's error is even more egregious than Santee Cooper's. Santee Cooper's error was to consider all such costs as the same. In the end, the uncontradicted testimony of expert Rogers was that there was no factual basis for PMPA's choice of the middle route. (Transcript, pp. 271-272).

CONCLUSION

Based on this and previous filings, including the Initial Brief of Appellant, this Court should grant the motion of Appellant Oien to reinstate the stay, to remain in place until the conclusion of the appeal process with finality.

The briefing at this Court is well under way, and it is expected that final briefs and the record on appeal will be completed in the first two months of 2017. Appellant does not object to an expedited schedule for oral argument, if the Court wishes.

The record shows that PMPA wholly failed to comply with Southern Development, that its currently alleged "time crunch," if it exists, is because it refused the Oiens' numerous requests for more than a year to meet with them about the southern route and because of its refusal to perform any proper analysis of either route. Its failure

should not be rewarded in the face of the statutory automatic stay of SC Code §28-2-470. There has not been a "disposition of the action".

Appellant respectfully requests that the stay remain in place so that the Oien retirement property will not be ruined before this Court can properly determine whether the process by which PMPA selected its route, as shown by the record below, constitutes a "rational decision making process based on facts" or was arbitrary in its refusal to even properly consider an alternate route.

Respectfully submitted,

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December 8, 2016

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Begin forwarded message:

From: "Misty West" <mwest@westelectrical.com>
Subject: FW: Message from "RNP0026732B00BA"
Date: February 25, 2013 at 4:56:04 PM EST
To: "'Lynn Oien'" <leo@deltatsystems.com>

Lynn-
I hope this finds you doing well. Dad and I met with the City of Newberry today. They are working on plans for a new 100 KW transmission line from
the service line near your house to the Kraft plant. As planned it crosses out tract on SC 121 (about midway in the new line) and I noted it crossed your tract (start of new line).
I attached a copy of the GIS map the City provided to me. In my discussion
with them I told them there was no way you would willingly give them an easement that cut your property in half - note the "hash dot hash" line. That would run across your garden area, near the new house site.
I suggested if they have to do this, they relocate the proposed line to your southern property line - see the "dotted" line. That would take it across the wet area at the head of the pond.
I wanted to give you a heads up because they will be contacting you.

Please feel free to call me any time if you have questions or want to discuss this.

Have a great day -
Misty

-----Original Message-----
From: Misty West [mailto:mwest@westelectrical.com]
Sent: Monday, February 25, 2013 16:43

To: Misty West
Subject: Message from "RNP0026732B00BA"

This E-mail was sent from "RNP0026732B00BA" (C9145).

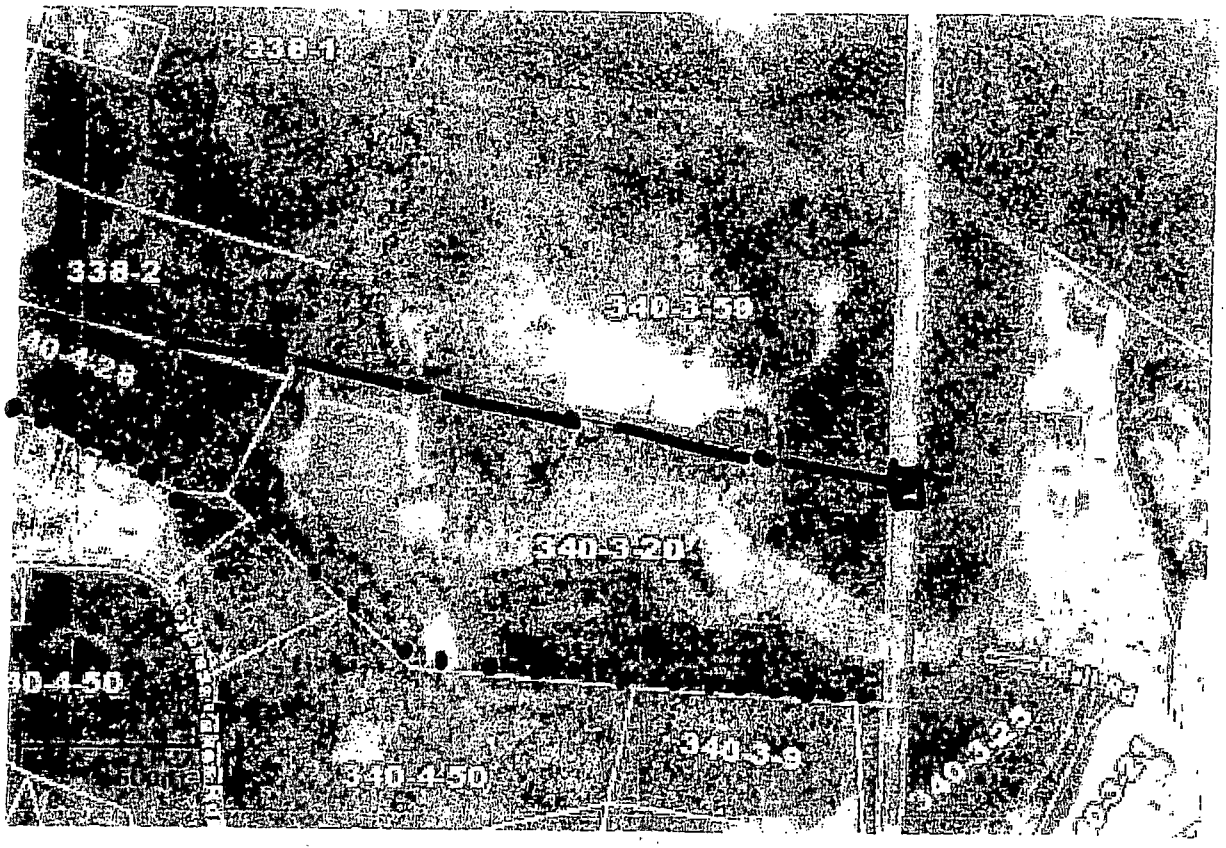
Scan Date: 02.25.2013 16:42:48 (-0500)

Newberry County GIS

Parcel #340-3-59

OWNER
OIEN FAMILY INVESTMENTS LLC
1216 SE COLONY WAY
JUPITER, FL 33478

THIS MAP IS PREPARED FOR THE INVENTORY OF REAL PROPERTY FOUND WITHIN THIS JURISDICTION, AND IS COMPILED FROM RECORDED DEEDS, PLATS, AND OTHER PUBLIC RECORDS AND DATA. USERS OF THIS MAP ARE HEREBY NOTIFIED THAT THE AFORMENTIONED PUBLIC PRIMARY INFORMATION SOURCES SHOULD BE CONSULTED FOR VERIFICATION OF THE INFORMATION CONTAINED ON THIS MAP. THE COUNTY AND MAPPING COMPANY ASSUME NO RESPONSIBILITY FOR THE INFORMATION CONTAINED ON THIS MAP.



LEGAL
Grantors Name: OIEN LYNN AND JUNE,
Sale Price: $10.00
Sale Date: 02/14/2012
Deed Book: 1607
Deed Page: 173
Plat Book: C136
Plat Page: 9

PROPERTY INFO
Parcel ID: 340-3-59
Card Number: 1
Location: OFF ODELL RD
Land Use Code: 4AGV: Qualified Agricultural Vacant
Acres/Lots: 66.27

225 Odell Rd
Plus Sanders

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STATEMENT OF ISSUES ON APPEAL

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II. THE LOWER COURT MADE ERRONEOUS FINDINGS OF FACT AND CONCLUSIONS OF LAW WHICH WERE CONTRARY TO THE RECORD AND WHICH DISREGARDED OR MISINTERPRETED THE HOLDING IN SOUTHERN DEVELOPMENT.

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   B. The Court Erred In Its Finding No. 26 Which Stated That "Transmission Lines Should Be Constructed As Nearly Straight As Practicable" Because That Statement Relies On A 65 Year Old Case Which Was Overruled By Southern Development.

   C. The Lower Court Erred In Making Its Finding No. 29 To The Effect 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" Where The Record Does Not Support Such Finding.

D. The Court Erred In The Last Sentence Of Finding No. 29 In Finding That Mr. Rogers "Admitted" That If PMPA Had Considered The Southern Development Factors It Had Not Abused Its Discretion Even If No Written Studies Were Performed Where The Record Reflects Rogers Said To Do A Route Analysis "Mentally" Without A Writing In Support Was "Not Probable" And That PMPA Had Not Followed The Industry Standard.

E. The Court's Finding No. 32 Is Not Supported By The Evidence. Finding No. 32 States That The Plaintiff Brought This Action Not For A Legitimate Purpose But In An Attempt To Reroute The Transmission Line Off The Oiens' Property.

F. The Court Erred In Making Finding No. 35 About The Oiens' "Intent," As There Is No Evidence Of Oiens' Intent Other Than To Challenge PMPA Based On The Holding Of Southern Development.

G. The Court Erred In Finding Nos. 37 And 38 Which Assert That The Oiens Are Trying To "Force" PMPA To Relocate The Line For Other Than Legitimate Legal Reasons Which Findings Are Not Supported By The Record.

STATEMENT OF THE CASE

In this appeal, plaintiff-appellant Oien Family Investments, LLC ("Oien" or "Appellant"), seeks reversal of the Amended Order of the Circuit Court which denied the injunctive relief sought in the Complaint under S.C. Code §28-2-470 and granted PMPA's motion for directed verdict. Appellant's position was based on respondent PMPA's failure to perform the objective route analysis set forth in Southern Development v. S.C. 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 PMPA ("PMPA" or "Respondent") notice of condemnation was served on the appellant on or about February 9, 2015. The notice concerned the location of an electric transmission line across appellant's property. Thereafter, appellant timely filed and served its Summons and Complaint dated March 6, 2015, challenging PMPA's right to take its chosen route through the middle of appellant's property rather than along the southern border of appellant's property. The Complaint sought an injunction against Respondent. The Answer and Counterclaim of respondent PMPA were filed on or about March 23, 2015. The Answer asserted that the chosen route, a straight line bisecting the Oien property, was the appropriate route and the only viable alternative for PMPA. It denied the allegations of the Complaint and asserted a counterclaim for attorney's fees.

Appellant Oiens' Reply was timely filed and served on or about April 9, 2015. It denied the counterclaim and asserted the defense of unclean hands as to PMPA's conduct.

Discovery was conducted, including production of the entire PMPA file, as well as the depositions of the parties, witnesses for the parties, and that of the Oiens' two expert witnesses.

The trial of the case was conducted by the Honorable R. Lawton McIntosh, Circuit Judge, on March 28 and 29, 2016. All of Appellant's trial exhibits (Nos. 1-43) were admitted into evidence without objection of counsel for respondent PMPA (Transcript, p. 152). The court took testimony from witnesses of both parties. The lower court on April 27, 2016, issued its Order, submitted as a proposed Order by PMPA, which denied relief to appellant and granted a directed verdict for PMPA. Appellant filed a motion for reconsideration and motion to alter or amend on May 6, 2016. The Court issued an Amended Order dated May 9, 2016 (Amended Order of 5/9/16). It also found that the most feasible route for the transmission line was throught the middle of the Oien property. On May 17, 2016, Appellant Oien filed its motion for reconsideration and motion to alter or amend the Amended Order. (Motion for Reconsideration). In its Form 4 Orders dated May 16, 2016, and May 17, 2016, the lower court denied the motions to reconsider. (Form Orders of 5/16/16 and 5/17/16).

The motion to reconsider the Amended Order was premised on the fact that Respondent PMPA's chosen route was arbitrary; PMPA failed to employ an objective comparative route analysis; PMPA made a route decision through the middle of the Oien property without properly assessing the costs to acquire the land and the construction costs of both its chosen middle route and the southern route requested by appellant Oien; PMPA determined incorrectly that the land acquisition costs were identical on all 15 properties through which the PMPA transmission land crossed; PMPA failed to adhere to

the transmission industry standard for route selection identified without contradiction by appellant's expert Rogers; and, PMPA purported to have done a "mental" route selection process but produced no note or document reflecting any comparative route analysis, and there was no factual basis to support the determination – all in contravention to the holding of the Supreme Court in Southern Development v. S.C. 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). As set forth in Appellant's motion to reconsider, had PMPA performed a comparative route analysis consistent with Southern Development and as identified by Appellant's expert, it would have concluded that the southern route requested by Appellant, based on all the applicable factors, was the preferred route.

On May 18, 2016, appellant filed its Notice of Appeal, as well as its petition/motion for Enforcement of Statutory Automatic Stay, Injunction and/or Supersedes. (Notice of Appeal). On May 18, 2016, the Court of Appeals issued its Order, by Judge Stephanie McDonald, granting appellant's Motion for Stay, Injunction, and/or Supersedes.

Responded filed a motion to lift the stay or require bond on May 20, 2016. Appellant filed a Return in Opposition to that motion on May 31, 2016. The Court of Appeals granted respondent's motion to lift the stay on October 18, 2016. Appellant on October 20, 2016, filed its motion to reconsider that Order and a memorandum in support of same.

STATEMENT OF FACTS

A. Background

Oien Family Investments, LLC, which was created by Lynn and June Oien, owns 116 acres in Newberry County. The property was purchased in June 2005 for the construction of Mr. & Mrs. Oien's retirement home. (Transcript, pp. 118, 147). The per acre purchase price was approximately $3,500. (Transcript, p. 147).

The Oiens had been looking for retirement estate property and Mr. Oien described the 116-acre tract "almost like a plantation"; it was very pristine, secluded, yet close to the city, the hospital, and three miles from downtown Newberry. After purchasing the property, he made substantial improvements to the property such as constructing a 7,000 square foot shop building to house his equipment (track hoes, tractors, mowers, etc.). He spent $160,000 in the construction of this building and the installation of a well and septic tank. He also constructed roads and prepared his retirement home site by clearing the timber and grading the property himself. (Transcript, pp.118-120).

Mr. Oien entered a contract for a large log home in 2008. (Transcript, pp. 121, 123, 138). The contract was for materials in the total amount of $600,000. The construction costs on this home, including labor, was between $900,000 to $1,000,000. He paid $78,588 in September 2008 for the plans for this home and the down payment on the materials. (Transcript, p. 121). Because 2008 was a bad economic year, he could not carry through with the contract then, but he obtained an extension and the contract is still valid. (Transcript, pp. 121, 123).

A. PMPA Actions (2013 Through Service of Notice of Condemnation on 2/9/2015)

PMPA is a joint agency formed by ten municipal electric utilities in the upstate of South Carolina. PMPA provides wholesale electric services to its members. (Transcript, p. 14). PMPA has the power of eminent domain, and its assignment was to plan, design, select the route, and build the transmission line. The City of Newberry ("City") is a member of PMPA, and it arranged with PMPA for the installation of a new substation near the Kraft Food plant for the electric needs of the City, including Kraft Food. (Transcript, pp. 14, 16).

The Oiens never received a notification or letter from PMPA about the project. The first they heard about the project is when they got an email from Misty West, a developer, dated February 25, 2013, to say that she heard that there was going to be a line through their property and her email recited that "there is no way you would willingly give an easement to cut your property in half." (Transcript, pp. 22, 131; Plaintiff's Exhibit 7). Attached to the email was Ms. West's drawing of a suggested southern route along their property. (Transcript, p. 134). The Oiens assumed that someone from PMPA would be contacting them, but that never happened. PMPA never called or wrote Mr. Oien. (Transcript, p. 142, 380). To that point, Mr. Oien was never briefed by the city or PMPA about what their intentions were. Ultimately, he found PMPA people on his property in the summer of 2013. (Transcript, p. 158). After that, he insisted on a meeting and the City gave him one in September 2013. He attended the meeting with his wife and forester Paul Major. He expressed to the City then that a route along his southern boundary was preferable because it was far away from the home site, would not be visible from the home site, whereas, the middle route went right through the center of

the property. (Transcript, p. 135). However, the City only wanted to talk about the middle route. (Transcript, pp. 135-137).

When Oien finally saw the middle route proposed by PMPA in the summer of 2013, he saw that the line went right through the center of the property, approximately 250 to 300 feet from the home site, and he was told that the transmission lines would 80 to 90 feet high. Mr. Oien was very unhappy about the route selected by PMPA because he had already invested significant time and money on his home site, substantial monies that he was going to invest to consummate his home site. (Transcript, p. 140).

PMPA agreed to a meeting with Mr. Oien which was held at City Hall on November 26, 2013. At that meeting, the only meeting PMPA had with the Oiens (Transcript, pp. 41-42, 67, 135, 137, 142, 149, 194-195), Mr. Oien made it clear that he wanted the southern route. (Transcript, pp. 44, 135-137, 141, 143, 150, 176). PMPA asked if he would consider the middle route. He reluctantly said that he would, but had a number of questions about that route. PMPA informed him that they would need to do a survey in order to answer these questions, and he gave permission to do that. (Transcript, p. 145). At the November 26, 2013, meeting Oien had his house plans with him to show them why the middle route was so problematic, but PMPA did not want to review them. (Transcript, p. 149).

After that meeting, months went by, and in March 2014 PMPA drew the middle route and sent it to Mr. Oien. The Oiens again expressed in March 2014 that they continued to believe the southern route was more practical for all concerned. However, they got no response from PMPA until August 2014 when PMPA sent the Oiens a right of way agreement describing the middle route. The Oiens rejected this agreement.

(Transcript, p. 151). PMPA has never furnished any analysis, figures, or comparisons between the two routes that explained the basis for its rejection of the southern route. (Transcript, pp. 44-45, 73, 75, 104, 196, 377).

The transmission line which is the subject of this action is the first transmission project ever undertaken by PMPA in Newberry County (Transcript, p. 29), and the City has never been involved with a transmission line project prior to this one. (Transcript, p. 105). The transmission poles are to be 80' to 100' high. (Transcript, p. 140). The proposed line runs for 2.1 miles through 15 separate properties, from the power source at the Duke transmission line (which runs north-south for a distance of 1,500 feet through the Oien property) to a substation beside the Kraft Foods plant (Transcript, p. 243).

Mike Frazier is the Director of Engineering for PMPA, and he and General Manager Coleman Smoak made the final decisions regarding the transmission line and its route. (Transcript, p. 30). PMPA had only done five previous transmission lines. Mr. Frazier had never heard of an alternate route analysis. (Transcript, pp. 44-45, 52). He said that PMPA had no guidelines referring to consideration of alternate routes. (Transcript, pp. 45-46). He said this is because PMPA "only builds short lines." (Transcript, pp. 45-46). Be it a short or long line, Frazier agreed that the affect on the landowner is the same whether PMPA or SCE&G is building the transmission line. (Transcript, p. 46).

Frazier never met with the Oiens until they requested a meeting in November 2013. He also admitted that he had never had a discussion with the Oiens about their plans for the property, even though he is the one that made the routing decision. (Transcript, p. 56). Frazier indicated that even though it was his job to make the selection

of routes, he went with his engineer's recommendations and did no analyses himself. (Transcript, p. 57).

Mr. Frazier only became aware through discussions with the City of Newberry that the Oiens wanted the line to run on the southern route of their property line. (Transcript, pp. 44, 135-137, 141, 143, 150, 176). Frazier said that there was no engineering ever done to see what the construction costs would be on the southern route. (Transcript, p. 72). He also said that he had seen nothing in writing that confirmed that there was anything unsuitable about the southern route. (Transcript, p. 50). Further, he had seen nothing in writing about what the increased costs, if any, would be for the southern route. (Transcript, pp. 50-51). Mr. Frazier never knew that the Oiens had spent substantial monies clearing the home site, building a well on the home site, installing underground electric power, and had made a down payment for the materials on the home. (Transcript, p. 49). He acknowledged that he only learned in discovery that the plans that the Oiens had were not just an aspiration, but that they had a contractual commitment. (Transcript, p. 108).

Frazier identified the fact that PMPA approved the line in February 2013 at a time when no one from PMPA had physically inspected the properties along the route. (Transcript, p. 73-74). He indicated the routing of the line at that point was based strictly on a review of a Google Earth map and GIS maps. (Transcript, p. 104). He admitted that in February 2013 there was no analysis made for any routing along the Oien property– middle, southern, or otherwise. (Transcript, p. 377). Mr. Frazier acknowledged that PMPA never considered the total cost of the middle route versus the total cost of the southern route. (Transcript, p. 75). He admitted that it was feasible to use the southern

route and that the southern route would be less likely to be seen from the Oien's home site. (Transcript, pp. 51, 109).

PMPA decided in early 2013 to do this transmission project. It sent no public notice of its plan. (Transcript, p. 52). It did not write any affected landowners. (Transcript, P. 130-131, 142, 380). PMPA'S position was that it asked the City of Newberry to contact the landowners about the PMPA project. Not a single city employee, including the City Utilities Director, had any prior experience with a transmission line project. (Transcript, p. 105). PMPA did not train the City employees for their task. (Transcript, p. 67). In fact, Mr. Frazier, as PMPA's transmission director, had no knowledge of, or prior experience with, route selection criteria. (Transcript, pp. 52, 74). He had never heard of the requirements of Southern Development and had never seen a route selection analysis comparing the relevant factors for alternate routes. (Transcript, pp. 52, 74).

The PMPA report of February 28, 2013, selecting the route, was issued before any notice went out to any landowner affected by the transmission route. (Transcript, p. 375, 277, 411). While PMPA's tentative report (Plaintiff's Exhibit 15), listed several factors (environmental impact, land use, impact to individual landowners, costs for the route, and visual impact), the report contains no specific reference to how these factors were considered. The PMPA report was based on only two resources: Google Earth and Newberry County GIS maps (Transcript, pp. 344, 375, 411), and was submitted prior to PMPA talking to any landowner or visiting any landowner's property. (Transcript, pp. 375, 377-378, 380). PMPA proposed no subsequent report which contained any comparative analysis for any of the alternate routes. (Transcript, p. 411). Plaintiff's

expert Bill Rogers testified that because this temporary report was prepared without any site visits, PMPA's process of route selection did not meet the standards of the industry and was arbitrary and capricious. (Transcript, p. 302).

PMPA during 2013 also drew northern and southern routes across the Oien property. Because the northern route was too close to the home site of the Oiens and because PMPA did not want the northern route, it was rejected by all parties. (Transcript, pp. 28, 235, 245-246). PMPA preferred the middle route because it was a straight line through the Oiens' property. (Transcript, pp. 52, 348, 384). Despite the Oiens' objections and despite its having taken steps to actually draw other routes through their property, PMPA never provided any route justifications to plaintiff or conducted any comparative analysis of the middle or the southern routes. (Transcript, pp. 44-45, 52, 73, 75, 104).

Mr. Frazier testified that he relied on PMPA's consulting engineer, Alan Cobb from Charlotte, North Carolina, on whom Mr. Frazier relied as to routing issues. (Transcript, p. 29-30). Cobb testified that his report of February 28, 2013, to PMPA was based on maps and that he had no notes about the cost of the middle route or any alternate routes. (Transcript, pp. 375, 377-378). He performed no comparative alternate route analysis. (Plaintiff's Exhibit 40; Transcript, pp. 375, 377-378). Instead, he described his effort as a "mental" analysis. (Transcript, p. 378). As was the case with Mr. Frazier, Mr. Cobb had never heard of the Southern Development case and had never met with the Oiens, stating it was not his job to do so. (Transcript, p. 380).

He was unaware of the Oiens' home site plans. (Transcript, p. 382). Mr. Cobb acknowledged that aesthetics are very important to a landowner. He conceded that the

southern route was more aesthetically pleasing. (Transcript, pp. 389-390). While he admitted that there was nothing unusual about considering alternate routes on the property of every landowner affected by a transmission line project (Transcript, p. 381), Cobb was unaware how many poles would have been placed on the southern route because he never considered or analyzed it. He could not quantify what the construction costs were on the southern route, just that they were "more expensive." (Transcript, pp. 386-387, 389).

B. Appellant's Appraisal and Transmission Right of Way Experts

Appellant Oien presented the testimony of its appraiser/forester, Paul Major, and its transmission right of way expert, Bill Rogers. Both were qualified as experts by the lower court. Major testified as a fact witness as well as an expert. He accompanied the Oiens to their meeting with the City of Newberry in September 2013 and March 14, 2014, and to their meeting with PMPA on November 26, 2013. (Transcript, pp. 193-196).

Major was the Oiens' forester before the transmission line project. (Transcript, p. 181). He described the property as "unique" and beautiful because of the mixed pine/hardwood trees, the pond and the fact that the property is both quiet and remote (at the edge of a public road; no through-traffic and no adjoining roads), yet close to amenities, such as shopping, medical care and entertainment. (Transcript, p. 182). The Oiens paid $3,500 per acre in 2005 which, Major explained, was top dollar at that time. (Transcript, p. 182).

Major's opinion as an appraiser was that the middle route selected by PMPA, due to its proximity to the home site, would cause damage to the value of the remaining

acreage (112 acres of the total acreage of 116 acres). He identified that the highest and best use of the property was as a high-end rural residential estate (Defendant's Exhibit 28) which had a present value of $5,200 per acre. Major said that the middle route would cause damage to the remainder in the range of 10% to 50%. Thus, 15% damage would create remainder damages of $87,000, and 20% would create damages of $116,000. (Transcript, pp. 191, 203-204).

Major's opinion as to the southern route was that there would be no damage to the remainder caused by the southern route because one would be unable to see the line from the Oien home site. (Transcript, p. 192-193). He testified that the current fair market value of the property is $603,000 and that the property, assuming the middle route right of way is installed, would instead have a fair market value of $380,000, causing damages of $223,000. (Transcript, p. 203).

It was his opinion that no rational buyer would build a 9,000-square foot home overlooking a power line. (Transcript, p. 216). He further stated that in his opinion there would not be a buyer of the property at $5,200 per acre because the middle route would cause the property to lose its uniqueness and its highest and best use as a high-end residential site. (Transcript, pp. 219-220).

Bill Rogers testified as an expert in the process of right of way acquisition in condemnation cases. (Transcript, p. 229). Rogers had just retired in early 2016 from Central Electric Power Cooperative where he served as Manager of Right of Way Services. His career in right of way acquisitions and appraisals began in 1970 for Georgia Power Company. Mr. Rogers has also served as president of William Rogers Company since 1990, performing contract right of way acquisition services for such

clients as Duke Power, Carolina Power & Light, Progress Energy, and SCE&G. (Transcript, p. 230). Mr. Rogers was also an active senior member of the International Right of Way Association, which is the premier association for transmission right of way agents[1].

When the decision of our Supreme Court was handed down in Southern Development v. SC Public Service Authority in 1993, Mr. Rogers was employed at Central Electric. He was asked by Central's corporate counsel to develop a written procedure for Central Electric to utilize for alternate route cost studies in the route selection process. (Transcript, p. 225). Mr. Rogers said that Central Electric and all other electric utilities in South Carolina take the power of eminent domain seriously and that it is important for there to be "proper documentation, open to the public about what you're doing, why you're doing it, and how you're doing it." (Transcript, p. 226). Rogers confirmed that after the Southern Development case, Central and other transmission companies developed protocols for alternate route selection, including assessing the cost to acquire the right of way on alternate routes based on land use and other factors. (Transcript, p. 226).

Mr. Rogers explained the route selection and analysis process following Southern Development. He identified that once an initial draft of a route across a landowner's property is chosen, Central and other companies for whom he has worked are tasked with notifying property owners (Transcript, p. 227) in writing about what the condemning authority is doing, what the project is about, and that the condemning authority is willing to meet with the landowners. (Transcript, p. 227). He said that then a visit with the

[1] Mr. Rogers became further familiar with alternate route analysis through his association with this group.

property owner on the property is arranged. He indicated that the condemning authority needs to find out from that owner the use of the property and what problems the planned route may cause. (Transcript, p. 227).

Rogers pointed out that alternate route studies are done to show the public that an authority has done its due diligence and that it has not been arbitrary but rather objective in the selection of routes. (Transcript, p. 231). He pointed out that the industry standard was to take alternate route cost studies on every tract and that you have to have an estimate of the costs to acquire the property. (Transcript, p. 231). According to the industry standard identified by Rogers, the information developed in a proper written route study gives the decision maker or committee the information on which to base a decision about developing the preferred route. (Transcript, p. 231).

Rogers also said that, in his experience as an acquisition agent for many years, if a route goes through the middle of a landowner's property, the condemning authority will pay a lot more for that property than if they go along property lines. (Transcript, p. 233). He commented that there had been studies showing that damage to the remainder of such properties can range anywhere from 10% to 35%. (Transcript, p. 234).

Mr. Rogers identified that he had reviewed the entire file of PMPA in the case and that he had also reviewed the depositions of PMPA officials Smoak and Frazier, as well as their consulting engineer, Alan Cobb. (Transcript, p. 232). He also reviewed the preliminary report submitted by Cobb in 2013 (Plaintiff's Exhibit 15, pp. 230-231) and observed that there were no alternate route studies accompanying that document. He commented that the study was done before anyone at PMPA had been on the properties and before the landowners had been contacted. (Transcript, p. 230).

Prior to his study, Mr. Rogers interviewed the landowner who told him about his concerns and his preference for the southern route. (Transcript, p. 235). Rogers pointed out that you cannot do a rational alternate route study without physically going on the property. (Transcript, p. 235). Rogers commented that when he went to the Oien property, he found it to be a beautifully well-maintained piece of property and that its usage was clearly as a residential estate. (Transcript, p. 236). He said that his site visit reflected that a lot of preliminary work had been done (underground utilities to the home site, a large equipment shed, etc.) and that significant improvements had been made by the Oiens. (Transcript, p. 237).

Rogers testified that Southern Development required an estimate of total costs which would include land acquisition costs and construction costs and that the PMPA depositions and documents did not indicate any estimated total costs had been prepared for any of the three routes on the Oien property. (Transcript, pp. 242-243). He noted that the tie line of the transmission right of way extends 2.1 miles with approximately 20 acres in it and that PMPA assigned a value of $5,000 per acre for the entire line for acquisition costs. (Transcript, p. 243; Plaintiff's Exhibit 15, PMPA172).

Rogers then set out to do an alternate route study of the northern route, the middle route, and the southern route which had originally been drawn by PMPA in 2013. (Plaintiff's Exhibit 12; Transcript, p. 240). Rogers emphasized that the other utility companies in South Carolina, like SCE&G, Duke, and Progress Energy, do alternate route studies that include costs to acquire and that their studies are very similar to the one he prepared for the Oien case and use the same factors that he considered (Transcript, p. 242).

Rogers then testified about the costs to acquire the middle route and the southern route. The middle route is 3.95 acres and is 2,200 feet long. Per Major's report, damage to the remainder was at $182,960, assuming a 15% damage to the remainder which Rogers felt was conservative. (Transcript, p. 256).

He noted the southern route is 3,200 feet and consists of 5.51 acres. He said there is no damage to the reminder using the southern route, and the landowner is not asking for any. (Transcript, p. 260). By comparison, the cost to acquire the middle route is $71,000 higher than the southern route. (Plaintiff's Exhibit 40).

The "total estimated costs," including construction, engineering and right of way are higher on the middle route than the southern. The total estimated costs for the southern route were $292,700, whereas, the total estimated costs for the middle route were $364,200, making the southern route over $70,000 less expensive than the middle route. (Plaintiff's Exhibit 40). Moreover, Rogers identified that his analysis showed that the southern route was preferable to the middle route in terms of cost, tap access, aesthetics, and structures. (Transcript, p. 237).

Mr. Rogers' detailed report was offered into evidence without objection. (Plaintiff's Exhibit 40, Transcript, pp. 241-242).

STANDARDS OF REVIEW

On review of an order granting a directed verdict, the evidence and all reasonable inferences therefrom must be viewed in the light most favorable to the party against whom the verdict was directed. Jones v. Ridgely Communications, Inc., 304 S.C. 452, 405 S.E.2d 402 (1991). The Court will reverse the trial court's grant of a directed verdict where there is any evidence which supports the party opposing the motion. Graves v. Horry-Georgetown Tech. Coll., 391 S.C. 1, 704 S.E.2d 350 (Ct. App. 2010). Even a scintilla of evidence will suffice to withstand a directed verdict motion. Jamison v. The Pantry, Inc., 301 S.C. 443, 392 S.E.2d 474 (Ct. App. 1990).

In this case, the lower court's Amended Order was styled as one granting directed verdict; however, the lower court ruled on a fully developed record by both parties after a two-day trial, and the Amended Order made findings of fact and conclusions of law on the merits.

To the extent the appealed order is construed as one assessing the merits, the applicable standard of review in an action challenging a condemnation, being a matter of equity, provides that the appellate court may take its own view of the preponderance of the evidence. Georgia Dept. of Transportation v. Jasper County, 355 S.C. 631, 586 S.E.2d 853 (2003).

ARGUMENT I

I. THE LOWER COURT ERRED IN GRANTING A DIRECTED VERDICT FOR RESPONDENT PMPA AND IN FAILING TO GRANT INJUNCTIVE RELIEF TO APPELLANT OIEN WHERE ITS AMENDED ORDER FAILED TO PROPERLY APPLY THE HOLDING IN SOUTHERN DEVELOPMENT TO THE FACTS IN THE RECORD.

A. The lower court failed to appreciate that the route selection requirements of *Southern Development* and the applicable industry standard were violated by PMPA.

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 SE2d 748 (1993), this Court affirmed the lower court's granting an injunction against the condemning authority finding that the condemning authority (Santee Cooper) failed to legitimately consider the cost to acquire land for the three alternate routes involved in that case because Santee Cooper assumed all land in the general area was worth the same. In that case, Master-in-Equity Breeden found that the utility's route selection lacked a factual basis because it had given no concrete consideration to land acquisition costs, and assumed all land in the general area had the same fair market value. Id. at 433. In affirming the Master's ruling, this Court noted that "no notes or memoranda were kept by Santee Cooper employees of their analysis." Id. at 433.

At trial, appellant's evidence established that PMPA failed to adhere to the basic requirements of Southern Development, which are that a transmission authority:

(a) must consider applicable factors including land usage, cost to acquire and aesthetics, and it must have some writing to support a "rational decision-making process." (PMPA did not do this);

(b) must not consider the cost to acquire land at the same cost as other tracts on the project (PMPA considered cost to acquire all

(c) must compare the facts on all alternate routes (PMPA did not do so; no quantification of costs to acquire or total costs for the alternate routes were provided by PMPA); and,

(d) must make an objective assessment of the alternate routes, compare them using a rational decision-making process, and make a route decision that is supported by facts. Id. at 434. (PMPA did not perform this, and its decision was arbitrary and capricious).

In Southern Development, the plaintiff was a golf course developer, and the transmission lines on the route chosen by Santee Cooper would have been visible from several proposed golf holes, an aesthetic factor which would have damaged the remainder of Southern's property. This Court noted it would "detract substantially from the aesthetics of the golf course and planned residential development." Id., at 431. Southern Development's transmission line design expert, like the Oien expert Rogers, testified that the alternate routes proposed by Southern were cheaper than, and superior to, the route chosen by Santee Cooper. Id. at 432. The Court affirmed the finding of the Master that the alternate routes (which were not even on Southern's property) were less expensive than Santee Cooper's and were "more aesthetically pleasing due to potential effect of the Santee Cooper route on Southern's development." Id. at 432. The Court further noted that the cost element for construction by Santee Cooper only involved construction cost of the line by Santee Cooper "without substantive regard to the cost to acquire the land" because Santee Cooper, just as PMPA here, considered that all of the land required had equal value. In this case, neither PMPA engineer Frazier nor outside consultant Cobb identified the specific engineering cost of the middle route or the southern route. Southern Development requires a comparative analysis. Obviously, PMPA could not "compare" these routes without doing so.

Despite Santee Cooper's assertion that it had considered the appropriate factors/criteria, the Court ruled that it was arbitrary and capricious and an abuse of discretion for Santee Cooper to have based its selection of a route without properly "weighing and analyzing the factors." Id. at 432.

> "We simply hold that a condemning authority must exercise its discretion by a rational decision making process which is supported by facts." Id. at 434. (emphasis added)

The failure of Santee Cooper to have a rational process, supported by facts, constituted a clear abuse of discretion to support the granting of an injunction in that case.

In the case of Florida Power Corp. v. Gulf Ridge Council, 385 So.2d 1155 (Ct. App. Fla. 1980), which was cited with approval by the Southern Development court, the District Court of Appeals affirmed a lower court order dismissing the condemning authority's petition because it failed to properly consider all necessary factors required for a rational, fact based route selection. The facts of this case are strikingly similar to those of the case at bar. There, Florida Power Corp. sought to condemn a route for a transmission line. The intended route bisected the landowner's property, a recreational and wildlife refuge. Despite the landowner's proposal of two alternative routes over other portions of the property, Florida Power Corp. refused to consider any alternative routes and insisted on only the "most direct and economical route". It overlooked environmental and aesthetic damage caused by the intended route. Just as in this case, the engineers for the condemnor testified that they did not know what factors, if any, company officials had considered in approving the chosen route. The District Court of Appeals found that Florida Power Corp. abused its discretion in the selection of the route explaining:

> "The reason that Florida courts have consistently held that a judicial inquiry is permissible into the necessity of taking stems from their awareness of the 'tunnel vision' that so often plagues a bureaucracy which deems itself immune from judicial review." "While failure of a condemnor to consider one factor would seldom warrant denial or dismissal of a condemnation petition, clearly a condemnor's failure to consider anything other than its own convenience constitutes an abuse of discretion." Id. at 1157.

The very same circumstances present in Florida Power Corp. are revealed by the record in the instant case. PMPA refused to consider any alternative routes proposed by the Oiens, but, instead, insisted on the "easiest" and "cheapest" route. It admittedly failed to consider or legitimately consider tap access, aesthetic, environmental factors, construction costs, land acquisition costs, or any other matter concerning the southern route. The PMPA officials similarly admitted that they had not even heard of Southern Development or its requirements. Rather, they were burdened with the very "tunnel vision" that the Florida Power Corp. court (and by extension the Southern Development court) warned against. Under the facts of this case, there is no rational decision making process at play with PMPA's route selection, and the result here should be the same as that of Florida Power Corp. PMPA should be enjoined from proceeding with the middle route until such time as a proper comparative route analysis is performed.

Southern Development does not stand for the proposition that only a wealthy golf developer (Southern Development Company) has a right to challenge route selection. A couple from Florida who invest in a retirement estate in Newberry County has the same right.

In the instant case, plaintiff's expert Bill Rogers was qualified as an expert in the area of transmission line right of way acquisitions and route selection. (Transcript, p. 229). His testimony and resume (Transcript, p. 241; Plaintiff's Exhibits 40 & 41) reflect

his experience in transmission line acquisitions before and after the Southern Development case. He had performed right of way alternate route studies and comparative route costs studies for over 40 years. (Transcript, p. 225). As manager of right of way services for Central Electric Power Cooperative (CEPC) from 1991 to January 2016, he had developed the alternate route study analysis for CEPC in response to the Southern Development case. (Transcript, p. 225). After the Supreme Court ruled in 1993, he was instructed by corporate counsel of CEPC to develop a procedure for alternate route studies to be used by his employer which would be in compliance with Southern Development and he did so. (Transcript, pp. 225-226). Rogers explained that, in addition to CEPC, the other electric utilities in South Carolina developed similar written procedures for alternate route studies and comparisons. (Transcript, pp. 226, 230). Being familiar with the industry standard for these studies, because he had worked with Central, Progress Energy, SCE&G, and Duke (Transcript, p. 230), Rogers testified that proper documentation and a paper trail was required so that the process could be evaluated objectively and fairly. (Transcript, p. 226).

In Southern Development, as in the case at bar, no property owners were contacted before the route was chosen regarding the "anticipated use of their property." Id., at 432. Rogers said that the industry standard for transmission right of way required that input be allowed from landowners and that comparative alternate route studies had to be prepared on every tract to be acquired, and that these studies should give consideration to the landowner's concerns as well as to the objective factors required. (Transcript, pp. 227-228, 230-231). In Rogers' testimony, he noted that PMPA's report of February 28, 2013 (Transcript, pp. 230-231), selecting the preferred route through the middle of the

Oien property was based only on "Google Earth" and Newberry County GIS maps (Transcript, pp. 231, 234, 243, 294) and was prepared and submitted to PMPA before any landowner had been contacted (Transcript, p. 237) and before PMPA had been on the property. (Transcript, p. 230).

The record is clear that PMPA failed to employ a rational decision-making process. Instead, it arbitrarily chose the middle route without even bothering to obtain the basic information needed to perform an analysis. It never wrote appellant or any landowner to give notice of the project. (Transcript, p. 52). It drew the middle route through the Oien property in early 2013 and refused to move it because it was lazy ("straight line is easier") before even seeing the property or talking to the Oiens. (Transcript, pp. 130-131, 142, 380). PMPA never tried to find out the anticipated land use of the appellant, which was cited as important in Southern Development. Id. at 432.

Rogers testified that the entire issue with this project on the Oien tract would be the location of the right of way. He said that a condemning authority has to be objective and fair- minded in doing alternate route studies on all property to be taken and, in this case, PMPA did no route studies. (Transcript, p. 239). Rogers also identified that relations with the landowner are important for condemning authorities to be aware of. In his experience with Central Electric for over 25 years, Mr. Rogers said that, in his experience, 90% of relocation type consideration requests (rerouting) by landowners were granted by Central Electric. (Transcript, pp. 227-228).

Rogers dissected the deficient efforts of PMPA step-by-step. He pointed out that, while it was normal for a condemning authority to begin by drawing an initial proposed route, as PMPA did, it was still critical that landowners be contacted thereafter so their

concerns could be addressed, and that a site visit should be arranged before the authority began its comparative route analysis. The industry standard was that alternate route cost studies should be prepared on every tract to be acquired, so that the utility's decision maker will have a rational basis for the routing decision. A routing decision should reflect to the public or anyone reviewing it that the utility/condemning authority had acted with "due diligence" and had been objective, not arbitrary, in its decision making. (Transcript, pp. 231, 302).

Rogers testified that, based on the testimony of the PMPA decision makers (Frazier and Smoak) and their outside engineer Cobb, no alternate route study, objective or otherwise, was prepared on the Oien property or any other affected landowner. Rogers' opinions, expressed to a reasonable degree of certainty in his field of expertise (right of way acquisition), included the following:

(a) That there was no factual basis to support PMPA's selecting the middle route. (Transcript, p. 272);

(b) That PMPA did not adhere to the industry standard in South Carolina for a transmission line authority in its alternate route selection methodology on the Oien property, as PMPA did not compare the factors listed in Southern Development, as to the middle route and the southern route, including consideration of cost to acquire land and aesthetics. (Transcript, p. 272);

(c) If PMPA had performed a proper alternate route study of the alternate routes, it would have concluded that the southern route requested by Appellant Oien was the best, most aesthetic, and least expensive route. (Transcript, p. 268).

Based on his site visits to the Oien property, he described the 116-acre tract as a generally wooded tract with gently rolling physical features and an open field, plus a pond. He identified in his site visit that the Oiens had cleared a home site in 2008-2009, and that the site had a well dug and underground electricity to it. (Transcript, pp. 236-

237) The Oien property was a beautiful piece of property and it was clear from his visit that the Oiens had done a lot of preliminary work well in advance of the PMPA project. (Transcript, p. 237). He said that the fact that it had underground utilities and a large shed would tip off any right of way agent that the landowner was serious about his property. (Transcript, p. 237).

In Rogers' report, he used the relevant factors (cost, tap access, aesthetics, wetlands, structures, environmental) and developed a comparable analysis of the northern route, the middle route selected by PMPA, and the southern route requested by the Oiens. He pointed out that the northern route was rejected by both the landowner and PMPA early on (Transcript, pp. 28, 235, 245-246) and therefore he focused on the comparable factors as to the middle route and the southern route.

Rogers explained that the middle route went right through the middle of the 116-acre tract and that going through the middle in his experience was always a red flag. (Transcript, pp. 289, 294). In Rogers' words, a condemning authority "is going to pay a heck of a lot more for it [a line through the middle] than you are if you go along property lines." (Transcript, p. 233). Rogers, who has participated in hundreds of transmission line right of way acquisitions, including those in court, testified that the range of damages that he experienced where a line goes through the middle of a property range from 10% damage to the remainder to 35% damage to the remainder. (Transcript, p. 234).

In doing his route studies comparing the middle route and the southern route, he says that it is imperative for a utility to objectively prepare the estimated total costs, which would include the costs to acquire the land, plus the construction costs and other factors. (Transcript, p. 242-243). It was contrary to Southern Development and without

factual basis for PMPA to have evaluated all of the property taken along the 2.1 mile route at the same per acre value of $5,000. (Transcript, p. 243).

Rogers discussed the middle route and explained his route analysis. The middle route is 3.95 acres, which is 2,200 feet in length. He believes the damage to the remainder, per appraiser Paul Major, was $182,960 and that the 15% damage to remainder figure used by Paul Major was conservative.[2] Rogers discussed the southern route which ran for a distance along the Oiens' southern boundary for approximately 3,200 feet (5.51 acres). The land acquisition cost for the right of way in the southern route is $150,000 less than the costs in the middle route, because there was no damage to the remainder along the southern route.

Mr. Rogers' report was entered into evidence without objection from PMPA. (Transcript, p. 152). Mr. Rogers also reviewed the costs of construction on the middle route versus the southern route. He based his construction costs on the actual cost of construction in a project in Newberry County in 2015 in which his company CEPC was a condemning authority. (Transcript, p. 261. The construction costs on the middle route were $181,236, whereas the construction costs of the southern route were $263,616 (Plaintiff's Exhibit 40). However, when the cost to acquire the land was factored in the estimated total costs (construction costs, engineering costs, and right of way acquisition costs, including damage to the remainder), the estimated total costs for the southern route were $71,500 cheaper than the middle route. (Transcript, p. 266).

Mr. Rogers also included in his report his "route ratings" which evaluate and "score" or "rate" alternate routes based on costs, tap access, aesthetics, wetlands,

[2]Paul Major testified that the damage to the remainder caused by the middle route was $230,000. If the damage to the remainder because of the transmission line is 20%, the amount of the cost to acquire the Oien right of way using the middle route would be $116,000.

structures, and environmental. The route ratings score each of the three routes on a scale of one (best) to three (worst). Mr. Rogers' report identified that in terms of cost the southern route was preferable to the middle route because the estimated total costs were lower on the southern route even though the route was longer and required pole turns. Mr. Rogers said that in terms of tap access the southern route was preferable to the middle route for the reasons that there were tap points along the southern boundary, which was a short distance from the Oiens' driveway in a flat place. (Transcript, p. 291). Whereas the tap access that PMPA used when it drew a line straight through the Oien property in the middle was 400-500 feet uphill from the driveway, which made it less accessible. (Transcript, pp. 290-291).

In terms of aesthetics, the southern route was far preferable to the middle route, according to Mr. Rogers' testimony, for the reason that if the transmission line with 80-90 foot poles was routed along the southern boundary, it would not be visible from the Oiens' home site. (Transcript, pp. 290-291).

In terms of structures, the southern route was also preferable to the middle route according to Mr. Rogers' "route ratings." The environmental factors were equal between the two routes.

The only route rating criteria in which the middle route scored better than the southern route was the criteria of wetlands. The southern route would cross a small pond whereas the middle route would not cross a pond, but it would cross a wet area behind the dam of the pond. Mr. Rogers indicated that transmission lines commonly cross small ponds and that the wetlands issue was a very minor one. His route rating resulted in a score of "9" for the southern route and "15" for the middle route (Plaintiff's Exhibit 40).

B. The Record Shows That PMPA Did Not Understand What It Was Required To Do and Failed To Conduct the Alternate Route Analyses Required.

PMPA drew a line through the middle of the Oien property in early 2013 and refused to change its decision about that route. Even Oien's neighbor, Misty West, knew a transmission line through the middle of a retirement home site was undesirable. Her email of February 25, 2013, stated the obvious:

> "...no way you'd willingly give them an easement that cut your property in half...I suggested that they relocate the proposed line to your southern property line...." (Plaintiff's Exhibit 7).

PMPA's entire process was simply uninformed and inept. PMPA sent no notice to the public or to the affected landowners. The PMPA decision makers, Frazier and Smoak, belonged to no transmission right of way organizations, they had never heard of an alternate route survey, or the Southern Development case, and they "delegated" contact with landowners to persons (City of Newberry employees such as Mr. Regier) who had no prior experience in transmission right of way acquisition or route selection[3].

PMPA urged at trial that the Oiens were wishy-washy about what route they wanted. However, the record shows that PMPA was aware at least 10 ½ months before the condemnation was commenced – i.e., in March 2014 – that the Oiens were adamantly requesting the southern route. Mr. Regier, working for PMPA, testified as follows:

> "Q: Mr. Regier, so for the last 2 years it's been clear to you that the Oiens have adamantly requested the southern route since March of 2014?
>
> A: That's my understanding." (Regier)
>
> (Transcript, pp. 478-479; 496).

[3] Mr. Regier graduated from Newberry College in 2011 with an education degree (Transcript, p. 488) and had no transmission line training or experience.

He understood that the Oien request referred to the southern route drawn by engineer Cobb in June 2013. (Plaintiff's Exhibit 12; Transcript, p. 498).

Regier agreed that it was obvious that the southern route would be more aesthetically pleasing to the owner of a home site (Transcript, pp. 389-390) and that he never saw a report quantifying the costs for the southern route. (Transcript, p. 389). The record shows there was none for any alternate route.

PMPA hired an outside engineer, Cobb, who said he "mentally" assessed the three alternate routes, but did not have a single note about any analysis. He said construction of the southern route would be "more expensive" that the middle, straight-shot route, but he provided no comparable dollar figures for any costs. He had never heard of Southern Development either.

During the 10 ½ months from the time PMPA understood clearly that the Oiens were adamantly requesting the southern route until the time the condemnation notice was filed, PMPA refused repeated email requests for a meeting (Plaintiff's Exhibit 9). During that time, appellant sent PMPA a memo notifying it that to put the line anywhere other than the southern route "would violate Southern Development v. SC Public Service Authority." (Plaintiff's Exhibit 39). In fact, an email from Frazier to Smoak in September stated "the Oiens want to settle, money isn't an issue, and the line needs to go on the south side...," and requested a meeting. (Transcript, p. 32).

Notwithstanding these pleas from Appellant Oien, PMPA never considered the southern route or prepared a route analysis comparing the southern and middle routes. It is confounding that PMPA, even though Cobb drew the southern route in 2013, would

fail or refuse to do a route cost analysis on the southern and middle routes so that it could have a basis upon which to accept (or reject) the southern route.

The holding in Southern Development will be turned on its head if this Court affirms the lower court's Amended Order. PMPA is not exempt from the application of Southern Development, as found by the lower court, and its relative inexperience in transmission projects is not a legal excuse. The lower court clearly felt sorry for PMPA and commented that Rogers testimony amounted to a "gold standard" which was too high for PMPA. (Transcript, p. 507). The Court also said that this was respondent's "first time" (not true) and so their handling "could have been done on a much more professional basis...since they are new at it.[4]" (Transcript, p. 508). The lower court's ruling held PMPA to no standard at all in direct conflict with Southern Development.

Bill Rogers testified that the analysis he employed with regard to the alternate routes present in this case stems directly from the Southern Development decision. His testimony regarding the standard applied by the industry concerning route selection analysis went uncontroverted, and the record reveals that PMPA did not even attempt to deny or question its veracity. While a court does not always have to accept uncontradicted evidence as establishing the truth to be applied in the case, it should generally be accepted unless there is reason for disbelief. Okatie River, LLC v. Southeastern Site Prep, LLC, 353 S.C. 327, 577 S.E.2d 468 (2003), *citing*, Johnson v. Painter, 279 S.C. 390, 307 S.E.2d 860 (1983); Hines v. Pacific Mills, 214 S.C. 125, 51 S.E.2d 383 (1949) (Where evidence is all one way, it must be accepted by fact finding body and cannot be disregarded unless there is competent and substantial evidence to the

[4] However, the judge found that, "based on the manner PMPA conducted its alternate route analysis, the challenge was not brought in bad faith." (Amended Order, p. 10). This comment appears to be an acknowledgment that PMPA bungled its handling of this matter.

contrary.) The lower court erred in failing to apply the undisputed standard established by Mr. Rogers to PMPA's route selection in this case.

PMPA has been in business 36 years and has 17 employees, two of whom are engineers.[5] The industry standard identified by expert Rogers is followed by South Carolina transmission line authorities (Transcript, p. 272), and PMPA is subject to this same standard; and PMPA violated the standard. (Transcript, p. 272). Even without consideration of the industry standard, PMPA failed to follow the holding in Southern Development.

Instead, the evidence shows that PMPA did not compare the alternate routes. It produced no dollar figures for the comparable acquisition costs for the southern and middle routes, as is required by Southern Development. Indeed, PMPA's counsel argued before the lower court that PMPA was not required to do so:

> "(PMPA counsel) They do not have to do a full-blown review of every alternate route...." (Transcript, p. 502).

In this case, PMPA actually drew a southern route in 2013, but failed or refused to perform a route analysis of either alternate route and, further, it assumed all property on the 2-mile route at the same value, both of which are contrary to the mandate of Southern Development.

The judge's post-trial comments show the Court's failure to appreciate that PMPA must be required to follow the holding in Southern Development and the industry standards identified by Rogers. The comments include the following:

- There is no "obligation for the condemning authority to meet the gold standard that's established by Mr. Rogers." (Transcript, p. 507).

[5] www.PMPA.com

- Just because PMPA "didn't make this in-writing does not mean that...they didn't consider the factors." (Transcript, p. 507).

- "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, p. 508).

- "The [PMPA] expert...that there was no damage to remainder, I thought that was beyond believability in the sense that you can build a high-rise transmission line through the middle of somebody's property, especially as pristine as this property is and there not be any damage." (Transcript, p. 509).

The lower court committed reversible error in denying relief to appellant and in failing to properly apply the holding in Southern Development. Its ruling was an error of law and a clear abuse of discretion, as PMPA's decision had no factual basis and was arbitrary and capricious.

C. It Was Reversible Error for the Lower Court to Grant PMPA's Motion for Directed Verdict

It was reversible error for the lower court to grant respondent PMPA's motion for directed verdict, in the face of appellant's and respondent's evidence. Rule 50 SCRCP provides that directed verdict is appropriate when the case presents only questions of law. In the case at bar, a directed verdict motion could only be granted if there is no evidence upon which a party could prevail. Where the evidence yields more than one inference, the motion should be denied. Carolina Chloride v. Richland County, 394 S.C. 154, 163, 714 S.E. 2d. 896, 873 (2011).

The circuit court must deny the motion for a directed verdict when the evidence yields more than one inference or its inference is in doubt. Singleton v. Cuthbert, 417 S.C. 555, 790 S.E.2d 213 (2003).

On review of an order granting a directed verdict, the evidence and all reasonable inferences therefrom must be viewed in the light most favorable to the party against whom the verdict was directed. The Court will reverse the trial court's grant of a directed verdict where there is any evidence which supports the party opposing the motion or where the ruling is controlled by an error of law. Jones v. Ridgely Communications, Inc., 304 S.C. 452, 405 S.E.2d 402 (1991); Graves v. Horry-Georgetown Tech. Coll., 391 S.C. 1, 704 S.E.2d 350 (Ct. App. 2010); Hinkle v. National Ins. Co., 354 S.C. 92, 579 S.E.2d 616 (2003). Even a scintilla of evidence will suffice to withstand a directed verdict motion. Jamison v. The Pantry, Inc., 301 S.C. 443, 392 S.E.2d 474 (Ct. App. 1990).

It should be noted that while this Court granted a directed verdict for PMPA (and committed reversible error in doing so), the record was fully developed, as both parties presented evidence and testimony in full. Based on the record, as argued herein, the Court's amended order should be treated as a ruling on the merits. Further, based on the foregoing, the order of the lower court should be reversed on appeal and the injunction should be granted.

In this case, the evidence and testimony presented, including appellant's experts, as recited in the Statement of Facts and throughout this brief, is not only sufficient to defeat the grant of directed verdict for PMPA, but rather it demonstrates that the lower court committed reversible error in failing to grant relief to appellant, where the Court misapprehended the application of Southern Development as controlling authority to the facts presented. The lower court failed to find that PMPA's route selection was arbitrary and capricious, a clear abuse of discretion and not based on facts, just as was the decision of Santee Cooper in Southern Development. Appellant, without repeating the arguments

and facts set forth above, incorporates them herein. It appears that the lower court's Amended Order, which cited no case under Rule 50, is one on the merits, but whether a ruling under Rule 50 or on the merits, the lower court committed reversible error.

ARGUMENT II

I. THE LOWER COURT MADE ERRONEOUS FINDINGS OF FACT AND CONCLUSIONS OF LAW WHICH CAUSED IT TO MISAPPLY THE HOLDING IN SOUTHERN DEVELOPMENT.

A. The Court erred in its Finding No. 17 (Amended Order) in ruling that "because Oien restricted access to the property that neither PMPA nor Newberry completed the southern route engineering plan."

This is not supported by the record in the case. On the contrary, the evidence indicates that the Oiens did not restrict access. Mr. Regier, the City liaison of PMPA, characterized his interaction with Oien as "good" (Transcript, p. 451) and "pleasant." (Transcript, p. 441). Further under S.C. Code §28-2-70(c), the condemning authority has the *ex parte* right to access to the property during a proper condemnation to perform studies.

B. The Court erred in its Finding No. 26 which stated that "transmission lines should be constructed as nearly straight as practicable" because that statement relies on a 65 year old case which was overruled by Southern Development.

The lower court erred in relying on a "straight line is good" methodology set forth in Bookhart v. Central Electric Power Coop, 219 S.E. 414, 432, 65 S.E.2d 781 (1951). This finding in Bookhart was overruled by Southern Development v. S.C. Public Service Authority. Straight line routing is almost always the most economical, but Southern Development, as discussed hereinabove, held that a comparative route study requires that

cost is only one factor to be considered in selecting one route over other alternative routes. The Court erred in relying on Bookhart.

C. The lower court erred in making its Finding No. 29 to the effect 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," where the record does not support the finding.

This finding is contradicted by the record in the case, by the holding in Southern Development, and by the testimony of the industry standard of Mr. Rogers that this is the applicable standard used by condemning authorities all over South Carolina including Duke, SCE&G, Central Electric, and Progress Energy. (Transcript, p. 242). The standard identified by Rogers and his testimony applying that standard are not contradicted in the record. A trial court which has admitted the uncontroverted testimony of an expert who identifies an industry standard cannot reject that industry standard absent a factual basis for doing so.

D. The Court erred in the last sentence of Finding No. 29 in finding that Mr. Rogers "admitted" that if PMPA had considered the Southern Development factors it had not abused its discretion even if no written studies were performed where the record reflects Rogers said to do a route analysis "mentally" without a writing in in support was "not probable " and that PMPA had not followed the industry standard.

This is a misapprehension of Mr. Roger's testimony. Rogers testified that it was "possible" but not probable that this could be done, as a project with multiple properties and each one having several potential alternative routes would require one to "remember" multiple cost estimates, an unlikely event. For the numerous reasons he cited, he further testified that PMPA's decision was arbitrary and capricious and properly an abuse of discretion. (Plaintiff's Exhibit 40). The lower court found that PMPA had considered the Southern Development factors. This finding is erroneous because the Southern

Development case specifically rejected Santee Cooper's contention that it had "verbally" or "mentally" considered the factors where there was not a single note or memoranda from which the court could assess whether or not the objective criteria had been considered and applied. Thus, the Court held that it was an abuse of discretion for Santee Cooper not to have an analysis which compared the factors as to each alternate route, because there can be no review of any "rational decision making process" without a written document of some type at least.

E. The Court's Finding No. 32 is not supported by the evidence. Finding No. 32 states that the plaintiff brought this action not for a legitimate purpose but in an attempt to reroute the transmission line off the Oiens' property.

First, this finding is contradicted by the Court's Finding No. 33 where the court found that "the plaintiff's challenge was not brought in bad faith." (Amended Order, Finding No. 33). It is further refuted by the fact that all three of the alternate routes which were supposed to have been considered were on the Oien property and not off of it. The Court also erred in finding that the Oiens admitted that their goal was to keep PMPA from building the line across their property. The record is actually replete with instances where they requested PMPA to consider the southern route.

F. The Court erred in making Finding No. 35 about the Oiens' "intent," as there is no evidence of Oiens' intent other than to challenge PMPA based on the holding of Southern Development in the record.

The lower court, in Finding No. 35, referred to the Oiens' "intent" as reflected in their grounds for challenge. The record is devoid of any evidence of intent. At the close of their case, appellant withdrew its challenge on ground of "public purpose" and focused on the challenge based on Southern Development. The plaintiff in Southern

Development, a golf course developer, did likewise. The "intent" of the Oiens was the pursuit of their rights under Southern Development and S.C. Code §28-2-470.

G. The Court erred in Finding Nos. 37 and 38 which assert that the Oiens are trying to "force" PMPA to relocate the line for other than legitimate legal reasons by challenging the condemnation which is not in good faith.

This finding is completely contradictory to the Court's finding in No. 33 that plaintiff's challenge was not brought in bad faith. In fact, Appellant Oien's position has steadfastly been to get PMPA to use the southern route across the Oien property, unlike in Southern Development, where a golf developer prevailed in convincing this Court that a proper route analysis would have shown two alternate routes which were entirely off the developer's property. It is clear from the record that the Oiens simply seek a proper comparative analysis because they believe, as Mr. Rogers' report shows, that when PMPA does so, it will determine the southern route to be a superior route.

CONCLUSION

The record clearly reflects that PMPA's route selection was arbitrary and capricious, that it was not based on facts, that it was a clear abuse of discretion, and that the Court committed reversible error in both granting respondent PMPA's motion for directed verdict and in failing to grant relief to appellant Oien under the holding of Southern Development.

PMPA's actions in route selection under the law of South Carolina is not immune from judicial review, yet its actions herein made it appear that it thought so. It conducted no comparable analysis of alternate routes across the Oien property. It focused only on

its preferred route through the middle of the Oien property and failed to conduct a "rational decision making process which is supported by facts." Id. at 434.

The appellant Oien requests the following relief on appeal:

a. That this Court reverse the amended order granting a directed verdict to PMPA;

b. That this Court reverse said order and, conducting its own view of the preponderance of the evidence, grant injunctive relief against PMPA from proceeding with its condemnation on appellant's property and remand this action for a determination of attorney's fees (trial and appellate) and costs to be paid by PMPA under S.C. Code §28-2-510;

c. In the alternative, that this Court reverse the amended order and remand the case

(1) for a determination of appellant's attorney's fees and costs to be paid by PMPA under S.C. Code §28-2-510; and,

(2) directing PMPA to conduct a full, objective and fair analysis of all alternate routes on the Oien property and apply all relevant factors in the route selection process for its transmission line.

Respectfully submitted,

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November 14, 2015

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

Appellate Case No. 2016-001037

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 Reply to Respondent PMPA's Return to Appellant's Motion to Reconsider Lifting of Stay (with attachments) 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: _____

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December 8, 2016

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.