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THE STATE OF SOUTH CAROLINA

In the Court of Appeals

Appeal from Newberry County
Court of Common Pleas

R. Lawton McIntosh, Circuit Court Judge

Case No. 2015-C-36-00120

RECEIVED

DEC 22 2016

SC Court of Appeals

Appellate Case No. 2016-001037

Oien Family Investments, LLC.....Appellant

v.

Piedmont Municipal Power Agency.....Respondent

**APPELLANT’S PETITION FOR REHEARING,
REQUEST FOR REHEARING *EN BANC*
AND MEMORANDUM IN SUPPORT**

Appellant Oien Family Investments, LLC does hereby petition the Court *en banc* to rehear Appellant’s Motion to Reconsider the Order of the panel of the South Carolina Court of Appeals dated October 18, 2016, granting respondent’s motion to lift the stay. In the alternative, Appellant requests the Court expedite the briefing schedule and oral argument and reinstate the stay until such time as the Court decides the appeal. The bases for said petition are set forth hereinbelow.

SUMMARY OF ARGUMENT

The position of appellant is that if the stay is not reinstated and the condemnation project is allowed to proceed pending the appeal, then 1) the Court has effectively decided the appeal without a review of the record or the briefs of the parties contrary to our rules of appellate practice; 2) the holding of this Court in Southern Development Corp. v. SC Public Service Authority , 305 S.C. 507, 409 S.E.2d 428 (Ct. App. 1991), aff’d as modified, 311 S.C. 29, 426 S.E.2d 748 (1993), will be rendered meaningless because there would be

no point to requiring a route analysis after the line is installed; 3) the plain meaning and purpose of S.C. § 28-2-470 will be stood on its head; and, 4) appellant's plans for their retirement property will be forever ruined, a wrong for which there is no remedy at law. Moreover, there is no reason not to reinstate the stay because, contrary to the assertions made to this Court, PMPA knows that the line will not be installed unless and until this litigation is finally adjudicated because representatives of the electric company installing and energizing the line, Duke Power, informed PMPA that it would not "set a pole" as long as appellant is challenging the condemnation because Duke realized that if appellant prevails, Duke would later have to remove its equipment. (See Exhibit A, PMPA000339).

It is sufficiently clear, as recited herein, that the record below shows the ruling of the lower court is contrary to the clear holding in Southern Development. Because this Court issued its December 9, 2016, Order denying the appellant's motion to reconsider and lifting the stay without the benefit of a record and was presented with extraneous material, it is requested that this Court rehear Appellant's motion to reconsider *en banc* and revisit the issue after reviewing the record and briefs of the parties, and, to the extent any affidavits are allowed to be considered, considering those attached hereto.

PROCECURAL HISTORY OF CASE

PMPA served its notice of condemnation on Oien on February 9, 2015. On March 6, 2015, Oien filed an action challenging the condemnation in Newberry County. The action was premised on the ruling of this Court in Southern Development wherein the lower court grant of an injunction against the condemning authority was affirmed based on the fact that the condemning authority had failed to legitimately consider the cost to acquire land for the three alternate routes involved in that case. There, the condemning authority assumed all of the land values related to each alternate routes were identical. The appellant's challenge to the condemnation was heard by the Honorable R. Lawton McIntosh on March 28 and 29, 2016. On May 2, 2016, Judge McIntosh filed his Order denying the challenge. Oien filed motions to reconsider and on May 17, 2016, Judge McIntosh filed an Amended Order denying Oien's relief from the condemnation and Oien's motions to reconsider.

After Judge McIntosh's orders were entered, PMPA indicated to Oien's counsel that it intended to proceed with the condemnation. The very next day, on May 18, 2016, appellant filed the notice of appeal and moved for enforcement of the statutory automatic stay, injunction and/or supersedes. This motion was based upon the automatic stay provisions of S.C. Code §28-2-470 and/or Rule 241(c), SCACR, and Rule 241(c)(1), SCACR. Later that day, this Court issued its order dated May 18, 2016 granting Appellant's motion wherein the Court stayed the operation of the lower court's order pending the appeal.

Respondent then filed a Motion to Lift Stay on May 20, 2016. Appellant filed its Return in Opposition to the Motion to Lift Stay or Require Bond on May 31, 2016. The Court held a hearing on Respondent's motion on July 27, 2016. This Court held oral argument on the motion on July 27, 2016, and there was no record available at that time. The transcript of the trial was not provided by the court reporter to counsel until October 13, 2016. Counsel argued without benefit of a record and respondent's arguments supporting the motion were in some instances outside the record reflected in the transcript of the trial. The panel ultimately issued its order dated October 18, 2016, lifting the stay.

On October 20, 2016, appellant filed a motion to reconsider lifting the stay. The panel, after considering appellant's motion, ordered Respondent to file a return to the motion and a copy of the trial transcript and reinstated the stay on November 22, 2016. Respondent filed its return and the transcript (consisting of over 500 pages) on December 2, 2016. The return included an affidavit of a manager with PMPA, Michael Frazier, in which he makes statements that are based on hearsay or rumor, and imply, without any reference to the trial transcript, that the prompt installation of the subject transmission line is an urgent matter of public safety. Appellant filed a reply to Respondent's return on December 8, 2016, along with a motion to strike Mr. Frazier's affidavit. Appellant's motion to strike also sought, in the alternative, leave to submit affidavits disputing each statement contained in Mr. Frazier's affidavit and definitively showing that no such emergency exists because PMPA (and Mr. Frazier himself) knows that Duke Power will not "set a pole" until this litigation is concluded because "Duke's theory is that if PMPA loses, Duke will have

to remove their equipment.” Without addressing the motion to strike, the panel issued its order on December 9, 2016, denying appellant’s motion to reconsider and again lifting the stay.

Appellant filed its Initial Brief on November 14, 2016. This brief supports the position that PMPA’s route selection is violative of the Southern Development case. PMPA did not file its brief yet, and has requested and received an extension of the time in which to file its Initial Brief. Respondent’s brief is now due on January 13, 2017.

ARGUMENT

A. A Stay Is Required and Must Be Imposed Under South Carolina Law. Otherwise, the Court is Effectively Deciding the Appeal Without a Record and Without Considering the Briefs of the Parties.

PMPA’s position concerning the stay set forth in its motion to lift the stay and return to appellant’s motion to reconsider misapprehends the applicable law. 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.

The effect of the Order of the Court dated December 9, 2016, lifting the stay is, in essence, to finally decide the appeal, and therefore, rehearing of the matter is proper under Rule 240(i), SCACR. To lift the stay is to disregard the clear meaning and purpose of the statute and the appellate court rule. More importantly, however, to lift the stay is to effectively decide the matter without any review of the record or the briefs of the parties. Our rules of appellate practice contemplate and provide that the Court only decides a matter

after the record on appeal is established and the parties have fully briefed the issues on appeal. Appellant's action before this Court is one challenging PMPA's right to take under the statute. If PMPA is allowed to proceed with the taking during the pendency of the appeal, the provision of the right to challenge the taking in the first place is for naught; the taking has already happened; the damage is done even if this Court ultimately decides to reverse the lower court based upon the record and briefs. The Court should not set that precedent. The law and a common understanding of due process does not support that view. The stay should be reinstated.

B. PMPA Knows That the Transmission Line Will Not Be Constructed Until This Litigation Has Ended and There is No Urgency to Construct the Line Prior to the Disposition of this Appeal.

Attached hereto is an affidavit of counsel (Exhibit A) authenticating email correspondence provided by PMPA in discovery from the said Michael Frazier, manager of PMPA, to Marc Regier of the City of Newberry. In the email, Mr. Frazier states that "[o]ne bad thing is that Duke [Power] has told me that they will not set a pole if the Oiens are fighting condemnation. Duke's theory is that if PMPA loses, then Duke will have to remove their equipment." Duke's "theory" is obviously correct, which is exactly the argument made herein. It is only common sense. Moreover, this is proof positive that PMPA knows that the transmission line will not be completed unless and until this litigation is finally adjudicated. Therefore, there is no urgency to lifting the stay. If there is any urgency, it is to resolve this litigation.

Further attached (Exhibit B hereto) is an affidavit of Jason Merchant, Vice President of Engineering and Operations at Newberry Electric Cooperative. Contrary to what Mr. Frazier, who does not live or work in Newberry, says in his affidavit, Mr. Merchant makes clear that he is aware of no significant interruptions in electric service in Newberry and that any interruptions that have occurred do not stem from the fact that the subject transmission line has not been completed. Mr. Merchant is in a position to know what outages have or have not occurred and is qualified to opine on the cause of any such outages. Furthermore, the undersigned counsel live and work in the City of Newberry and have not experienced any interruptions. Mr. Frazier's implications to the contrary are at best mistaken and based on hearsay and rumor.

As set forth in appellant's reply to respondents return in opposition to appellant's motion to reconsider, this matter is not difficult to resolve. All Southern Development affords appellants is the right to require PMPA conduct a proper alternate route analysis by utilizing a "rational decision making process based on facts." Southern Development, at 434. That PMPA comes before this Court feigning an emergency, while steadfastly refusing to conduct the analysis which would render the appeal moot is all this Court needs to know about not only the disregard it has for the rights of the landowner, but the likelihood the Oiens are correct when they assert that a proper analysis, such as that conducted by Mr. Rogers, would find the southern route superior in all measures compared to the middle route.

C. The Trial Transcript Demonstrates That the Lower Court Order Did Not Correctly Apply Southern Development, and this Court Should Review the Record and Briefs of the Parties Before Allowing PMPA to Proceed with the Condemnation.

Respondent PMPA's condemnation action is one in which the transmission line (poles 80' to 100' high) goes through the middle of the Oien property. The testimony at trial was that PMPA did not perform an alternate route study comparing the alternate routes at all, much less one using the factors listed and suggested in the Southern Development case.

In Southern Development 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. Here, PMPA witnesses admitted not only was there is not a single shred of written material (notes, memorandum, reports, correspondence, etc.) kept by PMPA of any analysis conducted, not the first written material was ever created. Instead, the engineer hired to plan and "select" the route testified that he conducted a "mental" analysis.

In deciding Southern Development, this Court 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. Here, 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. Moreover, the sin that Santee Cooper committed resulting in the decision in favor of the landowner is the very sin present in this case. Santee Cooper failed to consider acquisition costs by considering land values for all properties along the line the same. The record reflects that PMPA made the exact same error that Santee Cooper did. Their own witness testified that PMPA considered all values along the line to be the same. PMPA appraised all 15 properties involved in the transmission project using the same per acre value (\$5,000 per acre). Either Southern Development means something or it does not. The appellant assert that it does, and under its holding, If Santee Cooper’s selection of the route was arbitrary and capricious, then so was PMPA’s.

At trial, appellant’s evidence further 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 15 landowners’ properties at \$5,000 per acre);
- (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).

The transcript reflects that 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. PMPA witnesses admitted that they never even considered any costs or other factors related to the southern route or compared them to the middle route. The PMPA officials similarly admitted that they had not even heard of Southern Development or its requirements.

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. The testimony below shows that PMPA’s selection was based on nothing more than “Google Earth” and Newberry County GIS maps (Transcript, pp. 231, 234, 243, 294) and was prepared and submitted by PMPA before any landowner had been contacted (Transcript, p. 237) and before PMPA had been on the Oiens’ property. (Transcript, p. 230). Clearly, for an authority with the power of eminent domain, this is not a “rational decision making process based on facts.” Id. at 434.

The post-trial comments by the lower court indicate that the court did not believe the PMPA appraisal expert who testified there was no damage to the remainder caused by the middle route. The Court commented about the condemnation selected by PMPA causing great damage as follows: “I thought that was almost beyond believability in the sense you can build a high-rise transmission line through the middle of somebody’s property, especially as pristine this property is and there not be any damages.” (Transcript, p. 509). The court went on to explain that he was inclined to deny the injunction because the jury in a condemnation trial could “very easily find up to the value” [of the damages to install the middle route]. The Court obviously believed that there was significant damage to the Oiens’ property because of the middle route, but felt the appellant’s relief should be a large condemnation award. This ignores the rights of property owners which are recognized in Southern Development.

The Order of the lower court failed to properly apply Southern Development to the facts presented. This Court found that failure to properly consider land acquisition costs by Santee Cooper was an abuse of discretion and that Santee Cooper's choice of a route lacked a factual basis. Id. at 433. Here, the only analysis in the record is that of appellant's expert who determined that the cost to acquire the southern route was \$292,700, and the cost to acquire the middle route was \$364,200. (Plaintiff's Exhibit 40). PMPA's choice of the middle route was arbitrary and without factual basis. Using Mr. Roger's written route ratings ("1" being best), applying all the Southern Development factors, the southern route scored a "9," while the middle route scored a "15". He further found the southern route was superior in 5 out of 6 categories. (Plaintiff's Exhibit 40).

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

Rogers' comparable analysis between the selected middle route and the southern route requested by the Oiens showed that the southern route was the preferred route because, considering all the factors, it was over \$70,000 cheaper than the PMPA middle route; it was far more aesthetic as it would be out of sight of the Oiens' retirement home into which they had spent over \$100,000 for plans, well installation, grading and electric hook up; less impact on the property owners' usage; and better tap access to the Duke transmission line. (Plaintiff's Exhibit 40). The Court disregarded Rogers' uncontradicted opinion that PMPA abused its discretion in that it did not follow industry routing standards. (Plaintiff's Exhibit 40). PMPA produced no expert witness to refute Mr. Rogers. It is true that PMPA is inexperienced in transmission right-

of-way acquisition. Its inexperience is not an excuse for it to be exempt from the requirements of Southern Development.

To uphold the decision of PMPA in “selecting” the middle route by lifting the stay 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.

Sections “B” and “C” of the argument in Appellant’s Reply To Respondent PMPA’s Return To Appellant’s Motion To Reconsider Lifting Of Stay concerning respondent’s misstatements of fact in its return and the Initial Brief of Appellant are incorporated herein by reference.

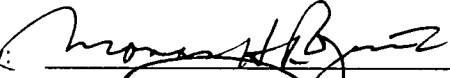
CONCLUSION

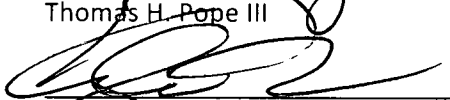
For the reasons set forth above, appellant respectfully requests that this Court rehear the appellant’s motion to reconsider its Order of October 18, 2016, en banc, and withdraw said Order until the conclusion of the appeal. In the alternative, Appellant requests the Court expedite the briefing schedule and oral argument and reinstate the stay until such time as all appeals are concluded. This petition is based on Rules 240(i) and 241(a), SCACR, S.C. 28-2-470, and irreparable damage which will occur unless this Court can at

least make its decision on the question of the stay based upon the transcript of record and the briefs to be filed.

Respectfully submitted,

POPE AND HUDGENS, P.A.

By: 
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December 22, 2016

THE STATE OF SOUTH CAROLINA

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v.

Piedmont Municipal Power Agency.....Respondent

AFFIDAVIT OF JASON MERCHANT

PERSONALLY appeared before me Jason Merchant who being duly sworn,
deposes and states as follows:

1. I am Vice President of Engineering & Operations for Newberry Electric Cooperative, Inc. ("NEC"), and I have served as Manager of Engineering and as Vice President of Engineering & Operations for over 18 years. I formerly worked for SCE&G also.
2. Newberry Electric Cooperative has approximately 13,000 members/customers (residential and commercial), and I am familiar with the other electric providers within Newberry County which include the City of Newberry; SCE&G in the southern part of the county; Duke Power Company in miscellaneous areas in the central and northern parts of the county; and, the Town of Prosperity.

3. Newberry Electric Cooperative serves more electric customers than any other electric supplier in this county.
4. In my capacity as Vice President of Engineering for Newberry Electric Cooperative, Inc., I am generally familiar with the operations of all the other electric suppliers. I am also familiar with if and when there are any outages sustained by any electric supplier in Newberry County.
5. I am also generally aware of the transmission line that PMPA, on behalf of the City of Newberry, is planning which runs from a Duke transmission line on the property owned by Oien Family Investment, LLC to the Louis Rich plant, a distance of a little more than two miles. I am aware of this because this proposed line goes through lands owned by customers of NEC and I have received telephone calls from many of these customers. Outages occur frequently with any electric provider; a squirrel or a car accident will cause a technical "outage" for a short duration.
6. As Vice-President of Engineering for Newberry Electric Cooperative, I am routinely in contact with my counterparts and employees (linemen) with SCE&G, Duke Power, and the City of Newberry on a regular basis.
7. Every electric supplier in this county has had outages in the last year or so; outages are a reality with which all electric suppliers contend.
8. In the last year, NEC has had approximately eight (8) non-storm related extended outages (affecting more than 100 customers).
9. I am not aware of any significant outage problems that the City of Newberry has had over the last year. Further, I am not aware of any outage of more than 30 minutes' duration in the city over the last year, and I have heard of none in the City during the last year.
10. I have read the Affidavit of Michael Frazier of Greenville County dated November 30, 2016. It is my belief that there have been no sustained partial outages more than 30 minutes in the City of Newberry over the course of the last 12 months. It is my belief that I would have known about any such outages had they occurred.

SWORN to before me this 22nd
 day of December 2016

Mina Elizabeth Brooks Alexander (L.S.)
 Notary Public for the State of South Carolina
 My commission expires: 1/29/2025

Jason Merchant
 Jason Merchant

THE STATE OF SOUTH CAROLINA

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AFFIDAVIT OF THOMAS H. POPE III

PERSONALLY appeared before me Thomas H. Pope III who being duly sworn,
deposes and states as follows:

1. Along with my law partner, Kyle B. Parker, I am counsel for Oien Family Investments, LLC in the above matter. This affidavit is supplied in connection with Appellant Oien's Petition for Rehearing *en banc*, and in opposition to the affidavit of Michael Frazier, an employee of PMPA who resides in Greenville County, South Carolina.
2. Mr. Frazier's affidavit asserts that there have been power outages in the City of Newberry that were caused by the City's inability to finish the installation of the transmission line which is the subject of the challenge asserted by appellant in this case.

3. I have been a resident of the City of Newberry for virtually my entire life, and, I have resided within the city limits of Newberry continuously since 1977.
4. PMPA now asserts that there is some urgency in completing its transmission line for the City of Newberry. In Mr. Frazier's affidavit dated November 30, 2016, PMPA is the first time it has been asserted that time is now of the essence.
5. Attached herewith as Exhibit 1 is a copy of an email produced in discovery and marked as PMPA00339, which is from Michael Frazier with PMPA to Marc Regier with the City of Newberry ("Transmission Line Update") dated November 14, 2014. In this email, Mr. Frazier asserts that Duke Power Company has informed him (PMPA) that it will not set a pole if the Oiens are "fighting condemnation." The reason asserted in this email is that Duke believes that if PMPA loses, Duke will have to remove its equipment.
6. This email refutes the fact that there is any urgency in completing this line and that Duke is not going to set a pole to allow power to go the substation until this case is resolved.
7. As stated in our filings, Mr. Frazier's affidavit should not be considered by this Court because Mr. Frazier does not live in the City or County of Newberry, his affidavit is based on hearsay, and there is no factual support for his assertion about outages.
8. As a resident of the City and County of Newberry, I am aware of no extensive outages in the City of Newberry either of my own knowledge or via "the grapevine." In the last year, there have been one or two occasions where power went off for a very short period of time, less than 15 minutes in some isolated spots in the City; however, there have been no outages of significant length of which I am aware. In fact, I have observed no more outages in the City during the last 12 months than in prior 12-month periods since 1977.

9. I am aware of no factual corroboration for Frazier's inference that either (a) there have been no more outages in the City since the trial (in March 2016); or, (b) any outages which have occurred are somehow caused by PMPA's not having completed the two mile transmission line which is the subject of this action challenging PMPA's condemnation and routing election.

SWORN to before me this 12nd
day of December 2016

Mina Elizabeth Becks Alexander (L.S.)
Notary Public for the State of South Carolina
My commission expires: 1/29/2025



Thomas H. Pope III

Mike Frazier

From: Mike Frazier
Sent: Friday, November 14, 2014 5:14 PM
To: 'Mr. Marc Regier (mregier@cityofnewberry.com)'
Subject: Transmission Line Update

Marc,

You saw my note to Kraft. Depending on the result, I plan to condemn them as well so as not to waste more time. The attorneys are getting ready for the clock to run out on the others. On the Oiens, we may have to add another person to that condemnation. One of the previous owners left the land to their son and daughter. The son sold it, but there is no paperwork about the daughter agreeing to anything, therefore she may still have a claim to a piece of the ROW payment. As far as the Oiens go, it's their land, but to condemn the land, this legal issue arises. It's not a big issue, just more cost to track down someone to get a signature.

The land clearing bids are going out and the transmission poles will be ordered soon. My goal is to get the bids back around the time when the time period runs out on the property and PMPA can proceed with the land.

One bad issue is that Duke has told me that they will not set a pole if the Oiens are fighting condemnation. Duke's theory is that if PMPA loses, then Duke will have to remove their equipment. Let's see what happens in a few weeks.

Mike

Piedmont Municipal Power Agency
121 Village Drive
Greer, SC 29651
O: 864.848.5409
M: 864.414.9614
mfrazier@mpa.com

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DEC 22 2016

SC Court of Appeals

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,

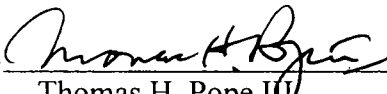
v.

Piedmont Municipal Power Agency.....Respondent.

PROOF OF SERVICE

I certify that I have served Appellant’s Petition for Rehearing, Request for Rehearing *En Banc*, and Memorandum in Support (with attachments) by U.S. Postal Service, with sufficient postage affixed and appropriate return address, on December 22, 2016, to its attorneys of record, O. W. Bannister, Jr., Esquire, Bruce Bannister, Esquire, and Luke Burke, Esquire, PO Box 10007, Greenville, SC 29601.

POPE AND HUDGENS, P.A.

By: 

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Newberry, SC 29108
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Attorneys for Oien Family Investments, LLC

December 22, 2016

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KYLE B. PARKER

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

December 22, 2016

RECEIVED
DEC 22 2016
SC Court of Appeals

HAND-DELIVERED

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

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

Dear Ms. Kitchings:

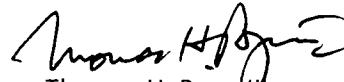
I enclose herein for filing the original and six copies of Appellant's Petition for Rehearing, Request for Rehearing *En Banc* and Memorandum in Support (with attachments), and my certificate of service of same on opposing counsel, O. W. Bannister, Jr., Esquire. Also enclosed is our firm check in the amount of \$25 for the filing fee.

Further enclosed is an extra copy of this letter and an additional copy of the Petition which I would appreciate your clocking-in and returning to me via our courier.

With best regards.

Sincerely,

POPE AND HUDGENS, P.A.


Thomas H. Pope III

THP III/lg

Enclosure

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