

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

Appellate Case No. 2016-001037

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SC Court of Appeals

APPEAL FROM NEWBERRY COUNTY
Court of Common Pleas

R. Lawton McIntosh, Circuit Court Judge

Case No. 2015-CP-36-00120

Oien Family Investments, LLC.....Appellant

v.

Piedmont Municipal Power Agency.....Respondent

FINAL REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

Table of Authorities.....	ii
Statement of Facts.....	1
Arguments	
I. THE LOWER COURT ERRED IN FAILING TO FIND AND CONCLUDE THAT PMPA’S ALLEGED “ROUTE SELECTION” DECISION WAS ARBITRARY, CAPRICIOUS, AND A CLEAR ABUSE OF DISCRETION.....	6
II. THE LOWER COURT COMMITTED REVERSIBLE ERROR IN ITS FINDINGS AND CONCLUSIONS WHICH DISREGARDED OR MISINTERPRETED THE HOLDING IN <u>SOUTHERN</u> <u>DEVELOPMENT</u>	11
CONCLUSION.....	13

TABLE OF AUTHORITIES

<u>Case</u>	<u>Page</u>
<u>Cameron v. City of Chester</u> , 253 S.C. 574, 172 S.E. 2d 306 (1970).....	11
<u>Thompson v. Hammond</u> , 299 S.C. 116, 382 S.E. 2d 900 (1989).....	11
<u>Southern Development v. S.C. Public Service Authority</u> , 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).....	4, 6, 7, 8, 10, 11, 12, 13
<u>South Carolina Code of Laws</u>	
S.C. Code §28-2-510.....	13

STATEMENT OF FACTS

The Appellant Oien relies on the facts stated in its original brief under “Statement of Facts.” However, PMPA’s Statement of Facts in its initial brief (pp. 3-7) contain egregious factual errors that are addressed herein below.

The Oien subject property is a single tract of 116 acres.¹ It includes a retirement home site that Oien has cleared and graded. Oien has further installed underground power via its electric provider Newberry Electric Cooperative, Inc., and a well, spending over \$100,000 in preparing the site and paying a down payment for materials on a 9,000-square foot retirement home. (R. p. 256, line 5 – R. p. 260, line 5; R. p. 353, lines 14-23).

Respondent, on page 4 of its brief, states erroneously that PMPA outside engineer Alan Cobb “conducted his investigation [and] presented a report to the PMPA Board in February 2013.” When Cobb presented his report in February 2013, he had not been on the Oien property nor had he investigated any possible alternate routes. (R. p. 511, lines 2-6). Contrary to the assertions of PMPA in its brief, his “investigation” consisted of drawing a straight line route through the middle of the Oien tract consulting only a “Google Earth” map and a Newberry County GIS map. (R. p. 479, line 15 – R. p. 480, line 1). He had not been on the property. (R. p. 511, lines 2-6). He had not talked to Oien or any other landowners. (R. p. 515, lines 15-18). He did nothing to learn of the Oien’s retirement home site. (R. p. 280, lines 8-18; R. p. 515, lines 16-18; 517, lines 20-24). After this preliminary report, he did no further analysis whatsoever.

¹ PMPA states it is two parcels; however, the two parcels which Oien purchased together in 2005 were combined eight years before the PMPA project and were used together as one tract for the Oien’s retirement plans since 2005. (R. p. 254, line 24 – R. p. 255, line 8).

The record in this case, including testimony from PMPA officials, shows that a line bisecting the Oien retirement estate site, is not desirable. Neighbor Misty West said in an email to Oien in late February 2013 that she told PMPA that she knew Oien would not want a line “splitting the property in half” and pointing out the southern route is the obvious alternative. (R. p. 162, lines 11-20; R. p. 700). The trial judge confirmed his thoughts about PMPA’s middle route and its effect to devalue the Oien property after the testimony as follows:

“The [PMPA] expert...that there was no damage to the remainder, I thought that was beyond believability...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 damage.” (emphasis added) (R. p. 640, lines 19-25)

PMPA engineer Mike Frazier also stated that he had seen nothing to indicate the southern route was not suitable (R. p. 189, lines 20-23) and he had seen nothing about possible increased costs for the southern route. (R. p. 189, line 24 – R. p. 190, line 1). Frazier admitted this route involved no dramatic turns (R. p. 186, lines 11-22), and that a transmission line on the southern route would not be visible from the Oien retirement home site. (R. p. 190, lines 13-17). He agreed that PMPA should be diligent to understand a landowner’s concerns about their usage of the property (R. p. 191, lines 8-11). However, PMPA failed to do so, because it was not aware that Oien had spent money in its commitment to build a \$1 million home near the middle route. (R. p. 195, lines 17-23). PMPA officials, acknowledging that their line goes right through the middle of the Oien property (R. p. 191, lines 12-18) and knowing that most landowners would consider this aesthetically objectionable, nevertheless refused to analyze the southern route.

PMPA misstates the record below when it states in its brief that the Oiens accepted the middle route. PMPA witnesses admitted that the Oiens had requested consideration of the southern

route in 2013 (R. p. 273, lines 18-25; R. p. 718) and that it was clear to them since at least March 2014 that they were asking PMPA for the southern route. (R. p. 289, lines 12-14).² The Oiens naïvely thought that PMPA would try to accommodate their request that the southern route be considered. From their first notice of the project in 2013, they expressed to PMPA that they objected to the middle route because it would place 100' high transmission poles in close proximity to their proposed \$1 million retirement home (R. p. 278, lines 10-23). Nevertheless, Oien politely considered all options presented by PMPA, including the middle route (R. p. 274, line 2 – R. p. 276, line 10), expecting the same courtesy in return.

At the November 2013 meeting, the Oiens were clear that they preferred and requested the southern route be considered because it would not be visible from their retirement home site. (R. p. 183, lines 11-16; R. p. 273, line 22 – R. p. 275, line 16; R. p. 275, lines 3-25; R. p. 281, lines 13-15; R. p. 289, lines 12-14; R. p. 314, lines 12-17). At that same meeting, PMPA insisted on the middle route and asked the Oiens if they would consent to having a survey done in order to answer some questions that the Oiens had posed about the middle route. Later, Mr. Oien called Frazier and left a voice message granting permission for the survey. (R. p. 283, lines 6-11). At no time did Oien agree to the middle route.³

² Mark Regier's testimony at trial was 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)

(R. p. 613, line 24 – R. p. 614, line 2; R. p. 627, lines 11-16).

³ PMPA's brief argues that PMPA “understood” from this message that Oien had consented to the middle route. However, this was not pled in the PMPA Answer (Answer and Counterclaim), nor did Frazier write or tell Oien that he understood his message to be consent to the middle route. (R. p. 245, lines 12-22; R. p. 270, lines 4-23; R. p. 283, lines 4-23).

The testimony was that the Oiens insisted that PMPA consider the southern route and never wavered. (R. p. 272, line 6 – R. p. 274, line 24). PMPA officials admitted that as of March 2014 going forward the Oiens were adamant with PMPA that they would not agree to the middle route and that they wanted consideration of the southern route. (R. p. 207, lines 11-15).

Instead, PMPA ignored their pleas and refused to meet with Oien for 10½ months before the condemnation notice was filed in February 2015. (R. p. 172, lines 2-24; R. p. 613, line 24 – 614, line 2; R. p. 627, lines 11-16; R. p. 784). PMPA ignored eight email requests for a meeting to discuss the southern route in the 4½ months prior to filing the condemnation notice. (R. p. 182, lines 7-17; R. p. 705-716). In October 2014, Oien, through counsel, again requested a meeting and consideration of the southern route and informed PMPA that its failure to properly consider this alternate route “would violate the Southern Development case.”⁴ (R. p. 174, lines 12-18; R. p. 784). Again, PMPA refused.

PMPA asserts in its brief that the record reflects that the southern route is more expensive to build. This, too, is false. In 2013, PMPA drew a possible southern route across the Oien property (R. p. 721), but never performed or produced any analysis of it and never compared any of the factors (aesthetics, cost to acquire, construction costs, safety, etc.) for either the middle and the southern routes. (R. p. 211, lines 14-21; 214, lines 5-8; R. p. 512, lines 3-20; R. p. 513, lines 6-23; R. p. 524, lines 14-24). PMPA presented no evidence that it had considered, analyzed, or compared the southern route with the middle route, except Cobb’s estimate at trial that the southern route would cost \$30,000 to \$40,000 more and it would cost more to cross a pond. (R. p. 198, line

⁴ Neither PMPA nor its outside engineer had ever heard of Southern Development. (R. p. 191, lines 2-18; R. p. 213, lines 4-24). Interestingly, Oien’s expert Rogers pointed out that when the Supreme Court handed down this case in 1993, it resulted in all South Carolina transmission authorities developing procedures requiring alternate route studies to be performed on all affected landowners to be in compliance with this decision. (R. p. 362, line 7 – R. p. 364, line 24).

10 – R. p. 200, line 25; R. p. 210, lines 6-19; R. p. 498, lines 15-17). No documents or factual information was provided at trial to support Cobb’s “guess.” In fact, Cobb stated that he had not done an analysis of the southern route. (R. p. 513, lines 21-23). So, he was making those numbers up out of whole cloth. He described his effort as a “mental” analysis. (R. p. 513, lines 15-16). Cobb never talked to Oien, was unaware of their site plans, and admitted that he prefers to go in a straight line. (R. p. 515, lines 16-18; R. p. 519, lines 8-23).

PMPA further misleads the Court when it states in its brief that the southern route would involve significant damage to the remainder. Oien testified that the southern route would not cause any diminution in value to the remainder of its 116-acre tract because a transmission line on that route would not be visible from the retirement home (R. p. 279, lines 22-25) and the proximity of the southern line to his caretaker’s cottage was of no concern to Oien.⁵ (R. p. 264, lines 2-9; R. p. 280, lines 3-7). The Oien appraiser, Paul Major, also stated there was no damage to the remainder if the southern route were used. (R. p. 330, lines 2-24).

The PMPA engineer who made the decision on route selection, Michael Frazier (R. p. 195, lines 22-23), testified that he learned from an email in April 2013 that the Oiens were “adamant” in their demand that PMPA consider the southern route (R. p. 718), yet, after this date, PMPA never did a route analysis of the southern route. (R. p. 183, line 17 – R. p. 184, line 5; R. p. 196, line 9 – R. p. 197, line 14). He testified as follows:

Q: “But you never did a cost analysis for, as the total cost of the middle route versus the total cost of the southern route; you never did that?”

A: No.” (Frazier) (R. p. 214, lines 5-8).

⁵ Oien explained that the existing cottage on the property near the pond is quite old, and his intention was to use it for a caretaker’s home after the retirement home was built. (R. p. 263, line 13 – R. p. 264, line 9).

The plain fact is that PMPA was ignorant of its obligations to conduct a route selection using a “rational decision making process.” Southern Development v. S.C. Public Service Authority, 305 S.C. 507, 513, 409 S.E. 2d 428, 434 (Ct. App. 1991), aff’d as modified 311 S.C. 29, 426 S.E. 2d 748 (1993). Frazier testified that PMPA has no guidelines for routing of transmission lines. (R. p. 184, line 16 – R. p. 185, line 15). It ignored, after being placed on notice at least four months before its filing of the condemnation notice, that Oien informed PMPA that it was, or could be, in violation of the Southern Development case if it did not properly analyze alternate routes. (T. p. 784). It never objectively compared the two alternate routes using a rational decision-making process. PMPA’s head engineer admitted that he had never heard of a comparative route analysis (R. p. 191, lines 2-7; R. p. 213, lines 4-24), and that no engineering had been done to see what construction costs would be on the southern route. (R. p. 211, lines 14-21). There was no factual basis to support the testimony of Cobb which PMPA relies on to incorrectly claim that the southern route is inferior.

ARGUMENT

I. THE LOWER COURT ERRED IN FAILING TO FIND AND CONCLUDE THAT PMPA’S ALLEGED “ROUTE SELECTION” DECISION WAS ARBITRARY, CAPRICIOUS, AND A CLEAR ABUSE OF DISCRETION.

PMPA is required by South Carolina law to conduct a “rational decision making process” of alternate routes and any decision made must be supported by objective facts to avoid being an abuse of discretion. Southern Development v. S.C. Public Service Authority, *supra*. Respondent’s brief has overlooked this premise, as it argues on page 7 that PMPA properly exercised its discretion “in selecting one route over another” upon which to build its transmission line. PMPA makes this argument despite the fact that PMPA had no study, no email, and not a single note

comparing the two routes. As set forth herein, PMPA produced no testimony showing a reasoned analysis or a “rational decision making process which is supported by facts” required by Southern Development. Id. at 434. On the contrary, the record shows that PMPA selected a route down the center of the Oien property in early 2013; it refused to do any analysis of the southern route; and, because of that, it could not have compared (and did not compare) the southern and middle routes. It further shows that PMPA refused to even meet with Oien for 10 ½ months before filing the condemnation notice after it had knowledge that Oien requested consideration of the southern route. (R. p. 613, line 24 – p. 614, line 2; R. p. 627, lines 11-16; R. p. 715).

Respondent asserts that Appellant has misapprehended the import of Southern Development. On the contrary, as was apparent from the trial testimony, it is PMPA which refuses to recognize the reasoning of this Court as clearly stated therein. Under Southern Development, a condemning authority must employ a “rational decision making process based on facts.”⁶ Id. at 434. The Court held that a proper route selection process should consider factors such as safety, availability of an alternate route, and costs. There, this Court reasoned that Santee Cooper had clearly abused its discretion in selecting its route because it had failed to “legitimately” consider land acquisition costs, and remanded the matter to the Master with instruction that Santee Cooper be directed to “re-evaluate its proposed route *and* the alternate routes proposed by Southern.” (emphasis added). Id. at 434. PMPA was required to compare the alternate routes, using the factors set out in that case.

This Court correctly noted that prior case law concerning condemnation had not set out what constituted a clear abuse of discretion warranting the intervention of the courts. Id. at 433.

⁶ Rogers testified that PMPA had violated the industry standard; that its routing decision was not based on facts; that it had refused to do a proper alternate route study; and, that a proper route study would have concluded that the southern route was the superior route based on cost to acquire and aesthetics and other factors. (R. p. 796-797; R. p. 409, lines 5-19).

This Court set out to clarify that with its decision in Southern Development. The route selection analysis was ground breaking. On writ of certiorari, the Supreme Court reversed this Court on the issue of estoppel, but affirmed this Court's analysis of Santee Cooper's abuse of discretion. Southern Development Land and Golf Co. v. S.C. Public Service Authority, 311 S.C. 29, 34, 426 S.E.2d. 748, 751 (1993). There is no other conclusion to draw. To argue otherwise is to profess one's willful ignorance.

It is for this reason that all other transmission authorities in South Carolina recognized the significance of this Court's ruling in Southern Development. As Appellant's expert witness, Bill Rogers, testified, the electrical transmission industry thereafter developed policies and procedures to ensure that route selection is performed by a rational decision making process based on facts to comply with that case. (R. p. 368, line 14 – R. p. 371, line 15; R. p. 379, lines 4-19; R. p. 796-797). If the Court's analysis of the route selection process were as unimportant as PMPA professes in its brief, then there would be no reason for every other condemning authority to have adopted clear procedures for comparative route analysis. Instead, this Court's Southern Development decision, and the Supreme Court's endorsement of it, is the law of this state.

The amended order of the trial court failed to apprehend and conclude that PMPA was grossly deficient in its route selection process on the Oien property. Before contacting any affected landowners on this transmission route and before going on the property of any landowner, PMPA's outside engineering consultant, Alan Cobb, submitted a report to the board of PMPA.⁷ On the same day it was presented, on March 5, 2013, the board of PMPA approved the line drawn on

⁷ His report cited, without comment, that Cobb had considered the following factors: environmental factors, land use, impact upon individual property owners, cost of the route, and visual impact. (R. p. 737). Neither Cobb, nor PMPA, ever analyzed or compared the two alternate routes, which is required by Southern Development.

Cobb's report directly through the center of the Oien property.⁸ PMPA did not send any public notice, nor did it initiate contact or send any letters to the affected landowners, including the Oiens, to explain its plans. (R. p. 195, lines 11-23; R. p. 213, lines 4-24; R. p. 269, lines 1-15; R. p. 280, lines 8-23; R. p. 515, lines 7-23). On February 25, 2013, Oien first learned via an email from its neighbor, Misty West, that PMPA had drawn this proposed line through the middle of their property and commented that "there is no way you would willingly give an easement to cut your property in half." (R. p. 162, lines 3-17; R. p. 700). In June 2013, Oien first saw PMPA and/or City of Newberry officials on its property. (R. p. 296, lines 5-24).

For the next several months, the Oiens were frustrated that PMPA had made no contact with them about this line (R. p. 272, line 20 – R. p. 273, line 4) and requested a meeting with PMPA. (R. p. 273, lines 1-4). Finally, on November 26, 2013, PMPA granted an audience with the Oiens and they attended the meeting with their home plans. (R. p. 181, line 20 – R. p. 182, line 6; R. p. 206, lines 18-24; R. p. 273, lines 2-25; R. p. 275, lines 2-23; R. p. 287, lines 1-13; R. p. 332, line 11 – R. p. 334, line 23). PMPA declined to look at those home plans. (R. p. 287, lines 11-13). At that meeting, the Oiens again expressed their desire that PMPA consider the southern route. This route would follow the southern boundary line of the Oien property. (R. p. 273, lines 19-25). PMPA had drawn the southern route in June 2013. (R. p. 629, lines 15-17; R. p. 721).

In fact, PMPA's engineer, Mike Frazier made the decision to disregard consideration of the southern route, even though he was not aware of the increased cost, if any, for the southern route or anything unsatisfactory about that route and even though he knew the southern route would not likely be visible from the Oien home site. (R. p. 190, lines 13-17). He had seen no

⁸ The PMPA board never voted again on this transmission line after March 2013. PMPA officials Michael Frazier and Coleman Smoak had sole authority on the final route for this line. (R. p. 170, lines 1-3). Smoak deferred to Frazier (R. p. 646, lines 5-10). Thus, Frazier's acknowledgments in his testimony that PMPA never compared the southern and middle routes is fatal.

document showing any impediment to running the line over the small pond on the southern route. (R. p. 198, line 23 – R. p. 199, line 19). Because no engineering had been done to see what the construction costs would be on the southern route (R. p. 211, lines 14-24), Frazier was simply turning a blind eye to the southern route and the requirements of Southern Development. Even though he and Cobb agreed that the southern route was more aesthetically pleasing to the Oien home site (R. p. 524, line 25 – R. p. 525, line 4), it is obvious they did not want to be bothered by comparative routes. Cobb admitted “the straightest line was to go through the middle of the Oien property.” (R. p. 519, lines 8-21). This is the very “tunnel vision” Southern Development seeks to prohibit.

The similarity of the facts at bar to those in Southern Development is remarkable.

As noted in Appellant’s brief and herein, it is undisputed PMPA simply refused to do any alternative route analysis. It failed altogether to consider land acquisition costs for the southern route. It failed to even inquire about Oien’s intended uses for the land before selecting its route. Instead, PMPA chose its route based solely on a “Google Earth” map and thereafter obstinately refused to consider any alternative despite the fact that the southern route had no rational reason to conclude that the middle route is superior.

PMPA, in its brief, mischaracterizes Appellant’s position. PMPA argues that Appellant seeks to permanently enjoin it from constructing the transmission line over the Oiens’ property altogether. Every paper filed in this Court belies this assertion. Unlike PMPA, Appellant recognizes the remedy available to it under Southern Development. It is Oien’s position that PMPA is required to legitimately consider and compare in a rational manner the costs and other factors relating to both the middle and southern routes. The record below shows that PMPA has

admittedly failed, and even now refuses, to do so.⁹ As noted in Appellant’s brief, if Santee Cooper abused its discretion in the selection of its route in Southern Development, then, based on the record below, PMPA certainly did so as well, and should be required to actually conduct a proper alternate route analysis. In the case at bar, the lower court order should be reversed.

If a judge’s ruling is controlled by error of law or is without evidentiary support, it is a clear abuse of discretion. Thompson v. Hammond, 299 S.C. 116, 382 S.E. 2d 900 (1989).

This matter is one in equity. A court of equity can interfere with the exercise of the condemnation power if the condemning authority has acted with a clear abuse of discretion. Id. at 433, *citing* Cameron v. City of Chester, 253 S.C. 574, 172 S.E. 2d 306 (1970). This Court and the Supreme Court in Southern Development properly affirmed the ruling of the Master-in-Equity that Santee Cooper acted without a rational basis and without factual support, making it a clear abuse of discretion. A clear abuse of discretion exists when a route is selected without weighing and comparing the relevant factors on each alternate route. This Court, taking its own view of the preponderance of the evidence, should reverse the Amended Order of the lower court in the present case for the same reasons.

II. THE LOWER COURT COMMITTED REVERSIBLE ERROR IN ITS FINDINGS AND CONCLUSIONS WHICH DISREGARDED OR MISINTERPRETED THE HOLDING IN SOUTHERN DEVELOPMENT.

The brief of Appellant addressed the lower court’s erroneous findings of fact. This reply brief addresses arguments made in Respondent’s brief, Pages 13-16, about Oien’s expert Bill Rogers. PMPA urges that Rogers “had no experience in land valuation.” (Respondent’s Brief, p. 13). This is incorrect, as Rogers has served as real estate appraiser since the 1980’s and is a

⁹ In fact, PMPA at trial informed the lower court that it had no duty to analyze and compare alternate routes, and could satisfy legal requirements by analyzing only its preferred middle route. (R. p. 633, lines 6-24).

licensed South Carolina real estate broker, in addition to his 25+ years experience as a transmission right-of-way acquisition expert. (R. p. 798-799). Rogers' testimony and report were unequivocal:

- PMPA abused its discretion in that it did not following industry routing standards;
- PMPA's process of route selection was arbitrary and capricious in that they ignored the effect of the project on landowner's property;
- PMPA did not follow the Santee Cooper case establishing route election processes;
- PMPA deviated from acceptable right of way practices with regard to eminent domain;
- The southern route would have resolved the matter with the Oiens in that has much less impact on the property at a lower overall cost;
- The selection of the route is arbitrary as no detailed study was made comparing it to other route alternatives and,
- PMPA did not review the Oien's property with enough study as it simply viewed the tract as a rural timberland property and not as a private retirement retreat without consideration of the Oien's future use of the property.

(R. p. 796-797; R. p. 366-379).

These opinions were rendered to a reasonable degree of certainty in the field of right of way acquisitions and route studies in condemnation cases. (R. p. 797; R. p. 409, lines 14-20).

PMPA urges in its brief that the lower court was free to ignore Rogers' testimony.¹⁰ (Brief, p. 15). Rogers testified at length about why PMPA's route selection lacked a factual basis. It had performed no analysis on the southern route (R. p. 408, lines 22-25) and there was no evidence that PMPA did an estimate of total costs for either of the two routes. (R. p. 379, line 4 – R. p. 380, line 2). He also pointed out that PMPA used the same per acre land costs for all of the 15 landowners on the route. (R. p. 380, lines 7-19). His³ opinions are supported by the record and

¹⁰ PMPA urges that Rogers testified that it was perhaps "possible" that a comparative route analysis could be performed mentally, without any documents. An opinion of what is "possible" does not meet the expert standard. Rogers testified that it was "not probable" that a mental analysis that satisfied Southern Development was performed by PMPA. Based on everything Rogers had read and heard in court, it was his opinion that there was no factual basis for selecting the middle route over the southern route. (R. p. 432, lines 14-18).

hardly surprising, given that the PMPA decision-maker, Mike Frazier, who had never heard of a route analysis (R. p. 191, lines 6-7) admitted that he had seen no construction costs or cost analyses for either route. (R. p. 211, lines 4-21; R. p. 214, lines 5-8). Rogers explained in detail the industry standard for alternate route studies that is followed by South Carolina transmission authorities and that PMPA did not adhere to this standard. (R. p. 409, lines 11-13). The lower court erred in disregarding Rogers' testimony.

CONCLUSION

The Respondent's Brief ignores the similarities between the facts of Southern Development and those in the case at bar. PMPA had no land acquisition costs (construction and land damages) for either the middle or southern routes. PMPA performed no engineering assessment comparing the two alternate routes. PMPA ignored the criteria of aesthetics and the anticipated usage by landowner Oien (or the money Oien has spent on the retirement site).

PMPA's outside engineer had no analysis to show the court. His "mental" assessment that the southern route was more costly was not based on facts. It was deficient under both the industry standard and the ruling in Southern Development. Its decision was a clear abuse of discretion.

For the reasons set forth in Appellant's Brief and in this Reply Brief, Appellant Oien requests the following relief:


- 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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APPEAL FROM NEWBERRY COUNTY
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R. Lawton McIntosh, Circuit Court Judge

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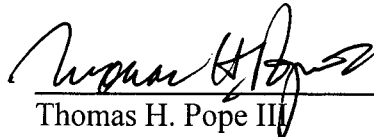
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CERTIFICATE OF COUNSEL

I, Thomas H. Pope, III, Esquire, do hereby certify that the Final Reply Brief of Appellant complies with Rule 211(b).



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