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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

\_\_\_\_\_  
Opinion No. 5576, Filed July 18, 2018  
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**RECEIVED**  
AUG 02 2018  
SC Court of Appeals

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

v.

Piedmont Municipal Power Agency, ..... Respondent.

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**PETITION FOR REHEARING**  
\_\_\_\_\_

In accordance with the provisions of Rule 221(a), SCACR, the appellant in this appeal petitions this Honorable Court for rehearing of published Opinion No. 5576 ("The Opinion") filed on July 18, 2018. The appellant received notice of the filing of The Opinion on July 19, 2018.

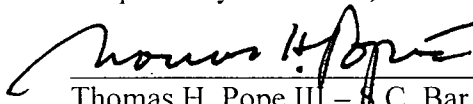
Attached to this Petition is a Memorandum in Support of Petition for Rehearing which identifies and analyzes the points which the appellant contends the Opinion has overlooked or misapprehended. This Petition incorporates herein the appellant's analysis and arguments in the attached Memorandum.

**WHEREFORE**, the appellant respectfully requests that this Honorable Court rehear the matters contained in The Opinion and reverse the judgment in the circuit court, and/or modify its Opinion in the following particulars:

- (a) Reversing the lower court's failure to grant injunctive relief to appellant OFI where its Order failed to properly apply Southern Development and to find that Respondent PMPA violated industry standard for route selection.
- (b) The lower court erred in the last sentence of Finding No. 29 of its Order in finding that expert Rogers "admitted" that if PMPA considered the Southern Development factors, it had not abused its discretion even though no written studies were performed, where the record in this case reflects Rogers said that to do a route analysis "mentally" without a writing in support was "not probable" and that PMPA had not followed the industry standard identified in Southern Development.
- (c) The lower court erred in its Finding No. 17 in ruling that "because Oien restricted access to the property neither PMPA nor Newberry completed the southern route engineering plan," as this finding is not supported in the record.
- (d) Reversing the lower court's Finding No. 32 which was not supported by the evidence and the intention of the lower court in Finding No. 33 which states that "based on the manner in which PMPA conducted its alternate route analysis, the Court does not find plaintiff's challenge to be brought in bad faith" (emphasis in original) and on page 11 of the Order where the lower court decreed that "each party shall be responsible for their own attorneys' fees and cost[s]."
- (e) Reversing the lower court's Findings Nos. 37 and 38 that plaintiff's single motivation was to force PMPA to relocate the transmission line along the southern route and that bringing its challenge was "not in good faith" because such was erroneous and contrary to the intentions of the lower court in Finding No. 33 and in its decree that each party would pay their own attorneys' fees and costs.
- (f) In vacating Finding No. 33 of the lower court, this Honorable Court misapprehended or overlooked that the respondent did not cross appeal in this matter, and the issue of the validity of Finding No. 33 is not before this Court. The lower court's intention was to find that plaintiff's action was not in bad faith and, therefore, plaintiff should not be subject to paying respondent's attorneys fees (per S.C. Code §28-2-510), as the lower court clearly ruled that each party would pay their own attorneys' fees and costs as stated on Page 11 of the Order and the Amended Order of the lower court.

- (g) This Honorable Court overlooked and/or misapprehended the fact that the lower court's intention in both its Order and Amended Order was that OFI had not acted in bad faith and that both parties should pay their own attorneys' fees and costs where this Court's Opinion created the impression that respondent's claim for attorneys' fees and costs per §28-2-510 could possibly be an open issue, despite the last sentence of both the Order and the Amended Order which stated that "each party shall be responsible for their own attorneys' fees and costs" (which decree the respondent did not appeal). On rehearing, the issue should be laid to rest that the appellant did not raise and litigate this issue in bad faith under S.C. Code §28-2-510 and, therefore, no attorneys' fees can be sought against OFI.
- (h) In affirming the lower court's Finding No. 29, this Honorable Court overlooked or misapprehended that Finding No. 29 was erroneous because this Court concluded that, while a written analysis is preferable for a route selection, it failed to consider that Southern Development affirmed the injunction against Santee-Cooper in large part because it [Santee-Cooper] had no writing of any type to support the route selection, the identical facts in the case at bar, which justifies a reversal of the lower court orders.
- (i) In affirming the lower court's Finding No. 29, this Honorable Court overlooked or misapprehended that Finding No. 29 was erroneous because it acknowledged in the Opinion that PMPA made its decision "without any written notes, memoranda or subsequent reports," which is factually identical to the Santee-Cooper decision in Southern Development that was rejected because of no written documentation.
- (j) In affirming the lower court's ruling, this Honorable Court overlooked that the very factors in the Southern Development case that caused Santee-Cooper's route selection decision to be rejected (the fact that Santee-Cooper assumed all land acquisition costs were identical and the absence of written notes) are present in this case, such that the lower court order should be reversed.
- (k) In affirming the lower court's ruling, this Honorable Court overlooked or misapprehended that the PMPA decision of the middle route was made before any PMPA personnel had been on the subject property or walked any alternate routes and before any route study was attempted, an issue present in Southern Development leading this Court to enjoin the route selection in that case.

Respectfully submitted,



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August 2, 2018

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**MEMORANDUM IN SUPPORT OF  
PETITION FOR REHEARING**  
\_\_\_\_\_

In support of the Petition for Rehearing of Opinion No. 5576 (the “Opinion”), the appellant respectfully submits this Memorandum.

**INTRODUCTION**

The appellant submits that the Opinion overlooked or misapprehended several points in the record which demonstrated that the lower court Order was a clear abuse of discretion. The Petition for Rehearing is based primarily on the holding in the Southern Development case<sup>1</sup> and on this

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<sup>1</sup> 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).

Honorable Court's treatment of the lower court's Finding of Fact Nos. 17, 29, 32, 33, 35, 37, 38, and 39.

In this case, as in Southern Development, the condemnor had no written notes to support its decision on route selection across the appellant's property. Also, as in Southern Development, PMPA's decision on route analysis assumed that all land acquisition costs for the condemnation project were the same. These two factors, along with the fact that the condemnor's board approved the route selection without any concrete analysis of alternate routes, were the basis for the holding in Southern Development affirming the lower court finding that the route selection of Santee Cooper was not based on a rational decision-making process supported by facts. Id. at 434.

The lower court's Finding No. 17 that "because Oien restricted access to the property, neither PMPA nor the City completed the southern route engineering plan" overlooked or misapprehended the record in the case which reflects that the Oiens did nothing to restrict access.

The Petition for Rehearing also addresses the interrelationship among the lower court's Finding Nos. 32, 33, 35, 37, 38, and 39. In Finding No. 33, the lower court, taking the proposed order submitted to it by respondent, specifically hand-wrote the following sentence: "Based upon the manner in which PMPA conducted its alternate route analysis, the Court does not find plaintiff's challenge to be brought in bad faith." Even though the Court let stand the portions of the proposed order that may have appeared to contradict its handwritten finding<sup>2</sup>, its handwritten notations control.

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<sup>2</sup> For example, Finding No. 32 states: "The Court finds that Oien brought this action, not for a legitimate purpose, but in an attempt to re-route the transmission line off of Oien's property." Further, in Finding No. 37, the proposed order states: "The single motivating factor for Oien was to force PMPA to relocate the transmission line to the southern route or to avoid Oien's property altogether." This finding does not equate to a finding of bad faith. Finally, in Finding No. 38, the lower court order states: "The Court finds that forcing a public utility to locate a transmission line where the landowner wants it by challenging the condemnation is not good faith." There is no factual support for this finding, but in any event this finding is superseded by the handwritten notes in the Order by the lower court.

Finally, the proposed order submitted by respondent to the trial judge included on page 11 that Oien would be responsible for PMPA's attorneys' fees and costs. The lower court struck this language from its Order and replaced it with the following language: "3. Each party shall be responsible for their own attorneys' fees and cost." These handwritten notes by the lower court make it crystal clear that the court found appellant did not bring the action in bad faith and that appellant should not be responsible for attorneys' fees (which could be allowed under S.C. Code §28-2-510). In furnishing this proposed order to the judge, the respondent included attorneys' fees, even though the lower court never stated in the hearing nor at any time that appellant had acted in bad faith.

The misapprehensions by this Honorable Court in its Opinion were (a) failing to reverse the lower court's application of Southern Development to the case at bar; and, (b) failing to understand the lower court's clear declaration that appellant did not act in bad faith and that the parties would each bear their own attorneys' fees and cost.

The misapprehension as to Southern Development being controlling herein (because the facts in the case at bar were directly on point to those in Southern Development, in that PMPA considered all land acquisition costs for the entire project to be the same and that PMPA's route selection analysis was not supported by a single piece of paper) requires a reversal of the lower court order.

Alternatively, this Honorable Court should revise its Opinion. As it stands now, the respondent may use the language in Finding Nos. 32, 37, 38, and 39 to take the position that it [PMPA] can now apply for attorneys' fees and costs from appellant per S.C. Code §28-2-510. At a minimum, this misapprehension can be corrected by a revised Order which reinstates Finding No. 33 (and strikes Findings 32, 37-39) and makes clear that appellant did not act in bad faith.

## ARGUMENTS

**I. IN AFFIRMING THE LOWER COURT’S ORDER, THIS COURT MISAPPREHENDED OR OVERLOOKED THE APPLICATION OF SOUTHERN DEVELOPMENT WHICH WAS CONTROLLING IN THIS CASE, PARTICULARLY IN THAT RESPONDENT PMPA USED THE SAME LAND ACQUISITION COSTS FOR ALL PROPERTIES IN THE PROJECT AND SUBMITTED NOT A SINGLE PIECE OF PAPER RELATING TO OR SUPPORTING ITS ROUTE ANALYSIS DECISION.**

This Court misapprehended that Southern Development is controlling in this case and compels a reversal of the lower court order. The cornerstone of the holding in Southern Development v. SC Public Service Authority, 305 S.C. 507, 409 S.E.2d 428 (Ct. App. 1991), aff’d as modified, 311 S.C. 29, 426 S.E.2d 748 (1993), is that the condemning authority must assess alternate routes and that its decision should be based on a “rational decision-making process based on facts.” Id. at 434. In that case, Santee Cooper asserted that it had considered the appropriate factors in making its decision, but the Court of Appeals ruled that it was arbitrary, capricious and an abuse of discretion for Santee Cooper to have based its selection on a route without properly “weighing and analyzing the factors.” Id. at 432. The court went on to say that “a condemning authority must exercise its discretion by a rational decision-making process which is supported by facts.” Id. at 434. Santee Cooper’s failure to have a rational process supported by facts constituted a clear abuse of discretion supporting the granting of an injunction in that case. The same analysis applies to the case at bar<sup>3</sup>.

In this case, the respondent’s expert testified that he drew a line for the preferred route through the middle of the Oien property based on Google Earth and Newberry County GIS maps

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<sup>3</sup> Bill Rogers, appellant’s expert in this case who is a transmission line right of way acquisition and route selection expert, testified that proper documentation and some type paper trail were required so that the process could be evaluated objectively and fairly. (R. p. 362, line 22 to R. p. 363, line 5).

in February 2013, which was before any landowner had been contacted<sup>4</sup> and before respondent had been on their property. (R. p. 368, lines 5-9). Further, PMPA never tried to ascertain the appellant's anticipated land use which was cited as important in Southern Development. Id. at p. 432.

As in any condemnation case, it is always simpler for a condemning authority such as PMPA to go through the middle of a piece of property, rather than to place its transmission line along the edge of a property which involves turns and perhaps additional poles. Notwithstanding a condemnor's natural preference for a straight transmission line, Southern Development requires an objective, rational analysis and a route decision that considers multiple factors, including the anticipated use of the property by a landowner and land acquisition costs of each alternate route. Some note or writing should support a route analysis decision and documenting that a proper analysis was, in fact, performed. The Opinion should be revisited because this Honorable Court has overlooked that condemnors who read the Opinion will be led erroneously to conclude that Southern Development is not good law and that, when challenged, they can now say:

“We have mentally considered all factors as to each alternate route and even though we have no document, note, or piece of paper relating to this analysis and even though we have considered land acquisition costs to be the same for the entire project, we have selected our transmission line route in accordance with the law.”

This is the unintended consequence of this Honorable Court's Opinion: creating the impression that the protections provided by Southern Development for route selection are illusory and do not exist.

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<sup>4</sup> This is another factor highlighted by Southern Development as problematic and which led to the imposition of the injunction.

The main points that appellant respectfully asserts that this Honorable Court misapprehended or overlooked are:

- Respondent PMPA considered all land acquisition costs for the project to be the same: \$5,000 per acre for each of the 15 takings on the project (which was a major point in Southern Development). (R. p. 729; R. p. 380, lines 3-19).
- The opinion of appellant's expert Rogers that some written documentation is required so that the route decision can be evaluated objectively and fairly. (R. p. 362, line 22 to R. p. 363, line 5).
- Respondent PMPA never tried to ascertain the anticipated land use of appellant and drew its route through the middle of appellant's property before ever seeing the property or talking to the Oiens. (R. p. 268, lines 13-23; R. p. 269, lines 5-15; R. p. 280, lines 8-18; R. p. 515, lines 16-18; R. p. 212, line 15 to R. p. 213, l. 6).
- Respondent PMPA was aware of appellant's request that the southern route be considered for at least 10 ½ months before the condemnation notice was filed. (R. p. 613, line 24 to R. p. 614, line 2; R. p. 627, lines 11-16), yet PMPA refused repeated requests for meetings with appellant and never analyzed the southern route. (R. p. 214, lines 5-8).
- Respondent PMPA's witnesses acknowledged that the southern route was aesthetically more pleasing than the middle route (R. p. 524, line 25 to R. p. 525, line 4), yet never compared the two routes using the factors in Southern Development to determine the total cost of each route. (R. p. 214, lines 5-8).
- The voicemail message of appellant in November 2013 was not a consent to the middle route, but was consent for PMPA to survey the middle route. (R. p. 283, line 1 to R. p. 284, line 25). Additionally, respondent's witnesses admitted that at least by March 2014 until the condemnation notice in February 2015(10 ½ months) the appellant was beseeching respondent to consider the southern route (R. p. 613, line 24 to R. p. 614, line 1), but was ignored by respondent.
- While Southern Development does not specifically mandate that a detailed route selection analysis be written up by a condemnor, it does require by inference that there be some written support for the condemnor's route selection comparing alternate

routes (Id. at 433), and the industry standard followed by SCE&G, Duke and Central Electric Power Cooperative was to do a full written route selection analysis which compared all the factors for all alternate routes. (R. p. 379, lines 1-19).

- Appellant’s expert Rogers was asked whether, if PMPA had performed a route analysis mentally, would it comply with Southern Development. Rogers responded that it may be “possible” but not “probable” that it would comply with Southern Development and that his opinion was that if it had done due diligence, PMPA would not have come to the conclusion it did about the route. (R. p. 432, lines 6-13).
- It is legally fatal for PMPA to have no written evidence of an analysis of the route selection factors, as Southern Development held that it was an abuse of discretion for Santee Cooper not to have written evidence of its route selection analysis and that Santee Cooper’s testimony of a “mental analysis” was insufficient to constitute a “rational decision-making process based on facts.”

The record in this case includes, in addition to the above facts, the uncontradicted opinion of Bill Rogers, appellants’ expert, who did a route study which included all factors in Southern Development and determined that, considering all costs (including land acquisition costs required by Southern Development) the southern route was at least \$70,000 less expensive (R. p. 794; R. p. 796; R. p. 403, lines 9-24.) than the middle route selected by PMPA without any alternate route analysis.

**II. THIS HONORABLE COURT MISAPPREHENDED ERRONEOUS FINDINGS OF FACT WHICH CAUSED IT TO MISAPPLY THE HOLDINGS IN SOUTHERN DEVELOPMENT.**

**A. Finding No. 17 Is Incorrect.**

There is no evidence in the record that appellant did anything to restrict access to the property. Appellant cannot prove a negative. PMPA had no reason and no restriction which precluded them from completing the southern route engineering plan. Appellant pleaded that

PMPA consider the southern route on numerous occasions for at least 10½ months before the condemnation notice was filed (R. p. 613, line 24 to R. p. 614, line 2; R. p. 627, lines 11-16).

**B. Lower Court Finding No. 29 Is Not Supported By The Record.**

In this finding, the lower court held that it could disregard the standard for route selection testified to by expert Rogers. It is undisputed that this is the same standard used by Duke, Progress Energy, SCE&G and Central (R. p. 379, lines 4-9), and the Court erred in its finding. This standard simply requires a condemnor to have a study of alternate route factors which were laid out in the Southern Development case. It is not a formulaic standard<sup>5</sup>, but some written evidence is required to be in compliance with the mandate that all alternate routes are “compared” and that the selection is based on a “rational decision-making process based on facts”. Id. at 434. This Honorable Court overlooked or misapprehended this issue in affirming Finding No. 29 because there is no evidence that PMPA’s decision was based on facts. Expert Rogers’ conclusion that the southern route was superior based on the proper route selection analysis mandated by Southern Development. His opinion is uncontroverted in the record.

**C. Lower Court Finding No. 33 Should Not Have Been Vacated And Should Be Reinstated.**

The Opinion vacated Finding No. 33. This was error as respondent did not appeal this finding that “[b]ased upon the manner In which PMPA conducted its alternate route analysis, the Court does not find plaintiff’s challenge to be brought in bad faith.” (R. pp. 14, 25). The Court commented on the record that the way PMPA handled the condemnation “could have been done on a much more professional basis.” (R. p. 639, ll. 1-9). This comment matches his finding No. 33, and respondent did not move to reconsider the finding or take an appeal. See also Hawkins

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<sup>5</sup> Expert Rogers testified that since 1991 the major transmission authorities had all developed route analysis criteria which were similar to his criteria, but not identical. (R. p. 362, lines 7-25; R. p. 379, lines 4-19).

v. Greenwood Development, 328 S.C. 585, 493 S.E.2d 875 (Ct. App 1997), which held that, where in conflict, handwritten provisions of a contract prevail over printed provisions. See discussion hereinbelow.

**D. Lower Court Finding Nos. 32, 35, 37, 38, and 39  
Are Not Supported By The Record.**

In these findings, as discussed in the Final Brief of Appellant, the Court found that the action was “not for a legitimate purpose but in an attempt to reroute the line off the Oien’s property”<sup>6</sup>; that the Oien’s “intent” was improper<sup>7</sup>; that the single motivating factor for Oien was “to force PMPA to relocate the line to the southern route or to avoid the Oien property altogether”<sup>8</sup>; and that “forcing a public utility to locate a transmission line where the landowner wants it...is not good faith.”<sup>9</sup> It also found that PMPA was “awarded fees and costs of \$68,817.52 to be deducted from any award in condemnation.”<sup>10</sup>

These findings of “intent” are unfounded. Oien had the full support of an expert, Bill Rogers, found qualified by the Court, that the route analysis showed that the southern route was superior. Rogers based his opinions in support of appellant’s challenge on the virtually identical factors set forth in the Southern Development case. The landowner in that case, a golf course developer, was not chastised for its challenge, even though it wanted the transmission line off its property, whereas Oien asked PMPA to consider the southern route on (not off) his property. Oien’s position was endorsed fully by his transmission line and route selection expert who was

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<sup>6</sup> Finding No. 32.

<sup>7</sup> Finding No. 35.

<sup>8</sup> Finding No. 37.

<sup>9</sup> Finding No. 38.

<sup>10</sup> Finding No. 39.

aware of, and had followed, the mandates of Southern Development since 1991. (R. p. 362, lines 7-19).

It is a factual inaccuracy to find that Oien was attempting to “force” PMPA to do anything. Appellant has only asserted its rights under Southern Development, the same rights which were recognized in 1991 for Southern Development, a landowner and golf course developer which brought a challenge action against Santee Cooper based on virtually identical facts.

The only intent appellant had was the pursuit of its rights under Southern Development and S.C. Code §28-2-470. The record clearly shows that appellant repeatedly asked for PMPA to consider the southern route on its property. (R. p. 272, line 6 to R. p. 274, line 24). This is in contrast to Southern Development where the landowner’s alternate routes were both off the landowner’s property altogether. Accordingly, there is no support in the record for these findings.

This Honorable Court has overlooked and/or misapprehended the factual parallels between Southern Development and this case, which are remarkable. In both cases, the condemnor did not contact property owners along the proposed route before the route was chosen regarding anticipated use of their property. Id. at 432 (R. p. 195, lines 11-23; R. p. 213, lines 4-24; R. p. 269, lines 1-15; R. p. 80, lines 8-23; R. p. 515, lines 7-23). In both cases, Santee Cooper and PMPA failed to analyze the cost to acquire land and considered all land valued at the same per acre price on the entire project which in this case was 15 landowners. Id., at 432. (R. p. 729; R. p. 380, lines 3-19). The experts for Santee Cooper and for PMPA both testified that they had “mentally” considered and analyzed the alternate routes for the factors of safety, reliability, costs and aesthetics in choosing the route, but neither condemnor had a memorandum, note, written document or any piece of paper reflecting or supporting any such mental analysis.

By contrast, the appellant's expert, Bill Rogers, testified that as soon as Southern Development was handed down (1991), he was serving as Director of Right of Way for Central Electric Power Cooperative, and he was directed by his employer to develop route selection criteria to be utilized on all alternate routes for all transmission line projects undertaken by Central. (R. p. 362, line 9 to R. p. 363, lines 19). Rogers also testified without contradiction that all the other transmission companies in South Carolina (for example, SCE&G, Duke, Progress Energy, etc.) also adopted similar, but not identical, route selection criteria after Southern Development was handed down. (R. p. 379, lines 4-19).

The criteria used by Rogers, which he said were virtually the same used by the other transmission authorities since Southern Development was decided, were: costs, tap access, aesthetics, wetlands, and structures. (R. p. 795). He said that in determining estimated total costs the acceptable industry standard was to consider three elements of costs: (1) construction; (2) engineering; and, (3) right of way acquisition. (R. p. 794). Applying this analysis in the instant case, Rogers performed an analysis of total acquisition costs, including the three elements referenced above, and that, while the southern route construction costs were higher than the middle route because of turns and additional poles, the right of way acquisition costs for the middle route were much higher which led him to the conclusion that the southern route running across the Oien property was superior to the middle route. (R. pp. 796-797; R. p. 409, lines 5-19). The total acquisition cost for the southern route was more than \$70,000 cheaper than the middle route. (R. p. 794). By contrast, PMPA never analyzed the three elements of the total costs for the alternate routes and was in no position to assert that the middle route was superior.

Appellant respectfully asserts that this Honorable Court overlooked or misapprehended the lower court findings, which, correctly determined, that Respondent PMPA clearly abused its discretion in the selection of the route in contravention to Southern Development, it did not “weigh and consider” the factors for alternate route selection analysis,<sup>11</sup> and its discretion was abused when it was exercised without “a rational decision-making process which is supported by facts.” Id. at 434.

**III. IN THE ALTERNATIVE, IN VACATING FINDING NO. 33 AND AFFIRMING ALL OTHER FINDINGS OF THE LOWER COURT, THIS HONORABLE COURT MISAPPREHENDED OR OVERLOOKED THAT TAKING THE LOWER COURT’S FINDINGS AND CONCLUSIONS AS A WHOLE SUPPORT THAT APPELLANT DID NOT BRING THIS ACTION IN BAD FAITH AND THAT ALL PARTIES AS A MATTER OF LAW SHOULD BE RESPONSIBLE FOR THEIR OWN ATTORNEYS’ FEES AND COSTS.**

**A. Finding No. 33 Should Be Restored and Finding No. 39 Reversed.**

The respondent sent a proposed Order to the lower court. The lower court handwrote on to that proposed Order the following to Finding No. 33:

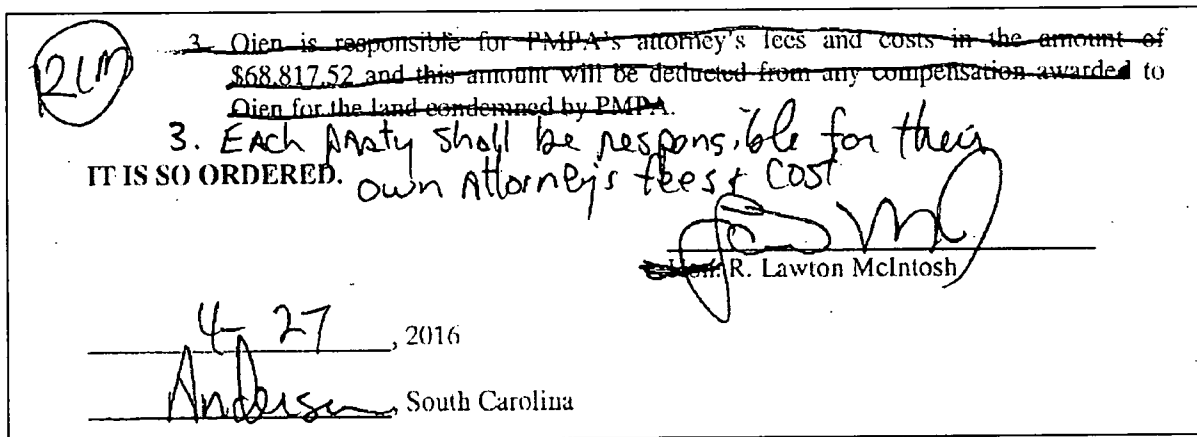
33. S.C. Code §28.2.510(A) allows this Court to award PMPA reasonable costs and litigation expenses if it finds Oien did not raise and litigate the challenge to condemnation in good faith. *Based upon the manner in which PMPA conducted its alternate route analysis, the Court does not find Plaintiff's challenge to be brought in bad faith.*

<sup>11</sup> This court in Southern Development adopted the ruling and analysis in Florida Power & Light Co. v. Berman, 429 So.2d 79 (Fla. Dist. Ct. App. 1983), petition denied, 436 So. 2d 98 (Fla. 1983), which held that “the condemning authority did abuse its discretion by making a selection of a route without weighing and considering the factors.” Id. at 432.

This makes it clear that the lower court independently found that appellant did not act in bad faith and was not subject to the provisions of S.C. Code §28-2-510 (attorneys' fees and costs for bad faith).

It is the law that, where in conflict, handwritten provisions prevail over printed provisions of a contract. Hawkins v. Greenwood Development, 328 S.C. 585, 493 S.E.2d 875 (Ct. App 1997). Even though the issue in Hawkins was interpretation of a contract, not an interpretation of a court order, the same principle should apply. See 3 Arthur L. Corbin, Corbin on Contracts, §548 at 181-83 (1960) (printed provisions of a contract should be harmonized, if possible, with handwritten ones. If there is an inconsistency between the two provisions, however, the handwritten provision prevails).

This is shown also by its handwritten note in its decree on Page 11 of the Order where all reference to attorney's fees and costs was stricken as follows:



From these two handwritten rulings from the lower court and the Form 4 Order dated May 9, 2016 (R. p. 30), it is clear that the appellant did not act in bad faith and that S.C. Code §28-2-510 did not apply here. Respondent did not appeal this issue. The Opinion, however, vacated Finding No. 33, leaving a possible misconception that respondent could seek attorney's fees and costs. If this petition were granted on this alternative ground, a revised Opinion restoring No. 33

declaring that appellant was not in bad faith could correct that point. The issue of Finding No. 33 was not raised by respondent as it filed no cross-appeal, so this issue is not before this Court. Commercial Credit Loans, Inc. v. Riddle, 334 SC 176, 512 SE2d 123 (Ct. App 1999)(providing that a finding of the lower court is the law of the case where respondent failed to cross appeal).

Further, Finding 39 awarding attorneys' fees and costs should be reversed because the lower court decree on Page 11 that each party bears its own fees and costs supercedes the language of Finding No. 39. See Hawkins, supra. Respondent did not appeal the decree portion of the Order that no fees were being awarded.

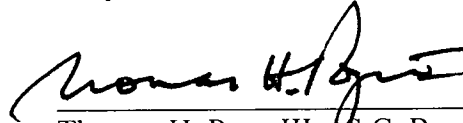
### CONCLUSION

This Honorable Court overlooked or misapprehended that, based on the record, including erroneous Findings set forth above, Southern Development was controlling. Applying it to the facts herein compels that the lower court order be reversed. Respondent had no land acquisition costs (construction and land damages) for either the middle or southern routes. It performed no engineering assessment comparing the two routes. It ignored the criteria of aesthetics and anticipated usage by landowner/appellant. It performed no analysis of route selection and had no notes about any. Its decision was not based on a "rational decision-making process", and was a clear abuse of discretion, and the Petition should be granted and the lower court Order should be reversed.

For the reasons set forth in this Memorandum, the appellant requests that this Honorable Court grant the Petition for Rehearing and issue its Opinion:

- a. reversing the lower court's granting directed verdict in favor of respondent;
- b. reversing the lower court's failure to grant injunctive relief, where the lower court failed to apply Southern Development properly to the facts;
- c. reversing Findings No. 17, 32, 37, 38, and 39 of the lower court order;
- d. reinstating Finding No. 33 of the lower court order;
- e. In the alternative, revising the Opinion by reinstating Finding No. 33, reversing Finding No. 39, and issuing an amended opinion which reinstates Finding No. 33 and rules that each party is responsible for its own attorneys' fees and costs.

Respectfully submitted,



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August 2, 2018

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

**RECEIVED**  
AUG 02 2018  
SC Court of Appeals

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

v.

Piedmont Municipal Power Agency.....Respondent.

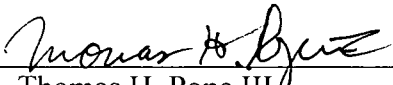
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**PROOF OF SERVICE**

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I certify that I have served a copy of the Petition for Rehearing and Memorandum in Support of Petition of Appellant by U.S. Postal Service, with sufficient postage affixed and appropriate return address, on its attorneys of record, O. W. Bannister, Esquire, Bruce Bannister, Esquire, and Luke Burke, Esquire, PO Box 10007, Greenville, SC 29601.

**POPE PARKER JENKINS, P.A.**

By:   
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Thomas H. Pope III  
W. Chad Jenkins  
Kyle B. Parker  

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Joseph W. Hudgens  
*of counsel*  
Thomas H. Pope  
(1913-1999)

August 2, 2018

**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 - Opinion No. 5576, Filed July 18, 2018

Dear Ms. Kitchings:

On behalf of appellant, I enclose herein for filing the original and six (6) copies of the Petition for Rehearing and Memorandum in Support of Petition, together with our firm check for the \$25 filing fee and my certificate of service of same on counsel for respondent.

I would appreciate your clocking in and returning to me via the courier the two additional copies of the Petition and Memorandum enclosed herewith.

With kind regards.

Sincerely,

POPE PARKER JENKINS, P.A.

Thomas H. Pope III

**RECEIVED**  
AUG 02 2018  
SC Court of Appeals

THP III/lg  
Enclosures

cc: The Honorable Jackie S. Bowers, Newberry County Clerk of Court, w/encls.  
Bruce Bannister, Esquire, w/encls.  
O. W. "Bill" Bannister, Jr., Esquire, w/encls.  
Luke Burke, Esquire, w/encls.  
Court Administration, w/encls.