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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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APPEAL FROM THE ADMINISTRATIVE LAW COURT
The Honorable Ralph King Anderson, III, Chief Administrative Law Judge

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Appellate Case No. 2021-000219
Administrative Law Court Case No. 18-ALJ-0443-CC

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Colonial Pipeline Company ........................................................................................Respondent,

v.

South Carolina Department of Revenue, Abbeville County, Anderson County,
Greenville County, Aiken County, Laurens County, and York County ......................... Appellants.

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**APPELLANTS ABBEVILLE COUNTY, ANDERSON COUNTY, GREENVILLE COUNTY, AND YORK COUNTY INITIAL REPLY BRIEF**

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## TABLE OF CONTENTS

**Page**


TABLE OF AUTHORITIES ........ ii

ARGUMENTS ........ 1

I. **RESPONDENT'S ARGUMENT REGARDING THE SUBSTANTIVE DHEC REQUIREMENT OF SECTION 12-37-220(A)(8) IS MISPLACED.** ........ 1

II. **RESPONDENT'S ARGUMENT THAT RESPONDENT'S PIPELINE CONSTITUTES AN "INDUSTRIAL PLANT" IS IN ERROR.** ........ 3

III. **RESPONDENT'S ARGUMENT REGARDING THE DUAL PURPOSE DOCTRINE MUST FAIL.** ........ 5

CONCLUSION ........ 8

## TABLE OF AUTHORITIES

**Cases** **Page(s)**

*Am. Tel. & Tel. Co. v. Dir., Div. of Taxation*,
194 N.J. Super. 168, 476 A.2d 800 (Ct. App. Div. 1984) ........ 5

*Berkeley Cty. Sch. Dist. v. S.C. Dep't of Revenue*,
383 S.C. 334, 679 S.E.2d 913 (2009) ........ 4

*CFRE, LLC v. Greenville Cty. Assessor*,
395 S.C. 67, 716 S.E.2d 877 (2011) ........ 4

*Duke Energy Corp. v. S.C. Dep't of Revenue*,
415 S.C. 351, 782 S.E.2d 590 (2016) ........ 5, 7

*Hock RH, LLC v. S.C. Dep't of Rev.*,
423 S.C. 208, 813 S.E.2d 540 (Ct. App. 2018) ........ 5

*Lemmons v. Maced. Water Works, Inc.*,
431 S.C. 186, 847 S.E.2d 471 (Ct. App. 2020) ........ 1

*South Carolina Public Interest Foundation v. City of Columbia*,
431 S.C. 164, 847 S.E.2d 257 (2020) ........ 3

*Stinney v. Sumter Sch. Dist. 17*,
391 S.C. 547, 707 S.E.2d 397 (2011) ........ 1

*Thomas Sand Co. v. Colonial Pipeline Co.*,
349 S.C. 402, 563 S.E.2d 109 (Ct. App. 2002) ........ 1

**Statutes**

S.C. Code Ann. § 4-1-170(A) ........ 3

S.C. Code Ann. § 12-28-110(7) ........ 4

S.C. Code Ann. § 12-37-220(A)(8) ........ *passim*

**Other Authorities**

S.C. Const. Art. VIII § 13(D) ........ 3

Tex. Tax Code § 11.31(a) ........ 8

## ARGUMENTS

### I. RESPONDENT'S ARGUMENT REGARDING THE SUBSTANTIVE DHEC REQUIREMENT OF SECTION 12-37-220(A)(8) IS MISPLACED.

Respondent, like the Administrative Law Court ("ALC"), has misunderstood Respondent's own failure to comply with a substantive requirement of South Carolina Code Annotated section 12-37-220(A)(8) as one of a "failure to exhaust administrative remedies." (R. p. ___) [Amended Final Order, p. 11, Feb. 9, 2021]. However, South Carolina case law is clear that "the doctrine of exhaustion of administrative remedies only comes into play when a litigant attempts to invoke the original jurisdiction of a ***circuit court*** to adjudicate a claim based on a statutory violation for which the legislature has provided an administrative remedy." *Thomas Sand Co. v. Colonial Pipeline Co*., 349 S.C. 402, 413, 563 S.E.2d 109, 115 (Ct. App. 2002) (emphasis added) ; s*ee also Stinney v. Sumter Sch. Dist. 17*, 391 S.C. 547, 707 S.E.2d 397 (2011) (holding that the circuit court and court of appeals erred by applying the doctrine of exhaustion of administrative remedies where there was no statutory violation for which the legislature has provided an administrative remedy).

In the present case, Appellants are not contending that Respondent failed to exhaust administrative remedies prior to bringing a separate circuit court action. Indeed, no circuit court action has been commenced. Moreover, section 12-37-220(A)(8) does not provide any independent remedy. Rather, what section 12-37-220(A)(8) requires is that once DOR invites DHEC to issue a determination as to whether property is "pollution control equipment," DHEC ***shall*** investigate, ***shall*** determine, and ***shall*** furnish. These are statutory mandates and conditions precedent to Respondent's receiving the exemption. *See, e.g.*, *Lemmons v. Maced. Water Works, Inc.*, 431 S.C. 186, 196, 847 S.E.2d 471, 476 (Ct. App. 2020) ("[U]se of words such as '***shall***' or 'must' indicates the legislature's intent to enact a ***mandatory*** requirement." (internal quotation omitted)). Accordingly, the DHEC investigation and determinations are substantive requirements

of the statute, the failure with which to comply are not mere inconveniences to be ignored.

Respondent has also incorrectly argued that DHEC made a determination in Respondent's favor "overwhelmingly and convincingly." Respondent's Brief, p. 47, n. 14. DHEC provided a letter denying DHEC had authority to determine anything regarding pipeline equipment and operations because those matters were regulated by federal law. DHEC's dicta-like comment on Respondent's equipment follows DHEC's specific (and sole) determination that DHEC could not render any opinion on a federally regulated transportation company. DHEC's letter is further qualified by DHEC's being able to comment on equipment only in the context of underground storage tanks, which are entirely absent in the present case. (R. p. ___) [Joint Exhibit 16]. Respondent's failure to fulfill the necessary statutory requirements is further highlighted by DHEC's failure to provide a detailed list of "property ***that [actually] qualifies*** as pollution control property," S.C. Code Ann. § 12-37-220(A)(8) (emphasis added), rather than, as DHEC's letter suggests, property that ***might*** be pollution control property in a completely different and unrelated context.

Further, section 12-37-220(A)(8) requires a "detailed listing," which strongly suggests the General Assembly intended for DHEC to perform (a) a meaningful and thorough investigation, and (b) create a list that would be used by DOR to cross-reference against a Respondent's property tax returns and issue a property tax assessment notice, with the specific pieces of equipment exempted from taxation.

***None*** of that happened in this case.

Because there was no determination by DHEC after a request from DOR, a statutory condition precedent to the exemption was not met. Accordingly, there could be no exemption for Respondent in this case.

## II. RESPONDENT'S ARGUMENT THAT RESPONDENT'S PIPELINE CONSTITUTES AN "INDUSTRIAL PLANT" IS IN ERROR.

Respondent erroneously argues that DOR and Appellants contend that a "plant" must have some form of production. Rather, Appellants maintain that Respondent is simply a transportation company that is treated differently under the tax code than manufacturing companies and other companies that produce a product. The salient inquiry is not what constitutes a "plant," but rather what constitutes an "industrial plant," reading all words of the statute together and in context.

Respondent recognizes that neither the Constitution nor section 12-37-220(A)(8) define "industrial plant." Rather, Respondent relies on *South Carolina Public Interest Foundation v. City of Columbia*, 431 S.C. 164, 847 S.E.2d 257 (2020). At issue in that case was whether college residential apartment complexes met the definition of an "industrial or business park" as contained in South Carolina Constitution Article VIII, section 13(D) and South Carolina Code Annotated section 4-1-170(A), neither of which are remotely relevant to this case and neither of which contain a definition of "industrial plant." Respondent then relies on various dictionary definitions for the separated words "industrial" and "plant," while conceding that Respondent's selected definitions do not encompass the entire phrase "industrial plant."

By contrast, Appellants have cited many cases in other jurisdictions that have interpreted the entire phrase that is relevant in this case: "**industrial plant.**"

Further, looking at the South Carolina Code of Regulations' definition of a "plant site" together with the many other statutory and case law interpretations of the phrase "industrial plant," Appellants', not Respondent's, interpretation of this phrase is correct. *See* Brief of Appellants, July 16, 2021, pp. 23-31.

Respondent next argues that the exemption applies to the "property of any manufacturer *or company*." Respondent's Brief, pp. 23-24 (emphasis added). Respondent's argument is an

attempt to divert attention from the controlling language of the exemption: "industrial plant" and has no bearing on the absurd conclusion that Respondent's transportation pipeline somehow constitutes an "industrial plant."

Respondent then argues that the definition of "bulk plant," which applies to "motor fuel storage and distribution facility that is not a terminal and from which motor fuel may be removed at a rack," section 12-28-110(7), is somehow relevant to the tax exemption for "industrial plants." But section 12-28-110(7) refers to "facilities" not "industrial plants."

Finally, Respondent argues from cases from a few other jurisdictions that have interpreted the word "plant," or provided exemptions for companies that ship gas, as opposed to refining or extracting it. Respondent's Brief, pp. 27-28. Again, Respondent cites no cases that have interpreted the phrase "industrial plant" as Respondent would have this Court do.

In sum, a review of pertinent statutes and cases that have actually interpreted the relevant phrase "industrial plant" leads to the inescapable conclusion that the Appellants have argued throughout the pendency of this case: Respondent's pipeline may not properly be considered an "industrial plant."

This is particularly true when considered in the context of the strict statutory interpretation our Supreme Court requires when reviewing a tax exemption statute. South Carolina case law is clear that tax exemption statutes "will not be strained or liberally construed in the taxpayer's favor." *CFRE, LLC v. Greenville Cty. Assessor*, 395 S.C. 67, 74-75, 716 S.E.2d 877, 881 (2011). In addition to the typical rules of statutory construction, because this case deals with the interpretation of a tax exemption statute, the language of the exemption "must be given its plain, ordinary meaning and **must be strictly construed against the claimed exemption**." *Berkeley Cty. Sch. Dist. v. S.C. Dep't of Revenue*, 383 S.C. 334, 345, 679 S.E.2d 913, 919 (2009) (emphasis

added); *Hock RH, LLC v. S.C. Dep't of Rev.*, 423 S.C. 208, 213, 813 S.E.2d 540, 542 (Ct. App. 2018) ("The general rule is that **a strict construction is required** of constitutional and statutory provisions that grant exemptions . . . from taxation." (internal quotation omitted) (emphasis added)). It is improper to strain or liberally construe the constitutional or statutory language creating the pollution control exemption in favor of the taxpayer claiming the exemption. *Hock RH, LLC*, 423 S.C. at 213, 813 S.E.2d at 542.

Here, Respondent's interpretation of "industrial plant" is far too broad and liberally construed, which would lead to an absurd result. *See, e.g., Duke Energy Corp. v. S.C. Dep't of Revenue*, 415 S.C. 351, 358, 782 S.E.2d 590, 593–94 (2016) ("It is axiomatic that a statute will not be construed to lead to absurd results. All rules of construction are subordinate to that obvious proposition.") (quoting *Am. Tel. & Tel. Co. v. Dir., Div. of Taxation*, 194 N.J. Super. 168, 172, 476 A.2d 800, 802 (Ct. App. Div. 1984)).

Because at least one of the four statutory requirements is not met, *i.e.*, the presence of "facilities or equipment of an industrial plant," Appellant's argument that it is entitled to the exemption on this ground is in error.

## III. RESPONDENT'S ARGUMENT REGARDING THE DUAL PURPOSE DOCTRINE MUST FAIL.

Respondent argues that the ALC correctly determined that the "dual purpose" doctrine set forth in section 12-37-220(A)(8) is inapplicable under the facts of the present case. This argument must fail.

Respondent concedes, as it must, that "[f]or equipment that serves a dual purpose of production and pollution control, the value eligible for the ad valorem exemption is the difference in cost between this equipment and equipment of similar production capacity or capability without the ability to control pollution." S.C. Code Ann. § 12-37-220(A)(8). The record shows that the

equipment in question must, by definition, serve dual purposes, and therefore the doctrine must apply.

The ALC concluded, and the Respondent argues, that the dual purpose provision is applicable only to equipment that is actively engaged in production activities, while also simultaneously finding that a company that engages in no production whatsoever is eligible for the exemption. Specifically, the ALC found the following:

> The dual-purpose provision with section 12-37-220(A)(8) directly relates to the method of assessment of pollution control property when that property serves a dual purpose of production and pollution control. If the pollution control property is not used for production, then the special assessment described in this provision does not apply. Here, the equipment at issue is not used to produce a product. In fact, all the parties agree Colonial is not engaged in production. Therefore, the dual-purpose provision in [sic] inapplicable to the equipment at issue in this case.

(R. p. ___) [Amended Final Order p. 31].

Respondent parrots the ALC's finding that the dual purpose provision applies to only property that is engaged in production. That argument is correct to the extent that the conclusion results from the fact that only companies engaged in manufacturing and production activities are entitled to the exemption at all. However, even if the Court were to assume that non-manufacturers or non-producers are entitled to the exemption (which they are not), nothing in section 12-37-220(A)(8) states that the dual purpose provision is applicable to only *some* eligible companies, but not others. This is because the entire theme of the exemption—when interpreted properly—reflects that the exemption is intended to apply to only companies that are engaged in manufacturing or production activities. Thus, the dual purpose provision must apply to *all* companies that are eligible to receive the exemption.

It is clear from a plain reading of section 12-37-220(A)(8) that it must first be determined whether a company meets the initial threshold elements for eligibility (*e.g.*, determining if the

company is an "industrial plant"), then the dual purpose provision is applied to *all* of the eligible company's property to determine the portion of the property's total value that is entitled to receive the exemption. It would be absurd to interpret the exemption otherwise, and in a manner that applies to almost every single business in this State, but restricts the application of the dual purpose provision, specifically, to only companies who are engaged in manufacturing or production.

To illustrate the absurdity of this interpretation, consider that under the Respondent's interpretation, a manufacturer's property that is used to turn raw materials into goods is subject to the dual purpose provision. But, for a company that neither manufactures nor produces anything whatsoever, each piece of property that has the ability to control pollution would be entitled to a 100% exemption, even if that property is used to further the business's operations. For example, under the Respondent's interpretation, if a paper mill used a particular piece of equipment in manufacturing paper that had the ability to control air pollution and cost $200, but there existed a piece of equipment capable of manufacturing the same amount of paper that did *not* have the ability to control air pollution and cost only $100, then the paper mill only would be entitled to an exemption on the $100 cost differential. Yet, under the ALC's interpretation, a company that does not manufacture or produce any products is entitled to receive a 100% exemption on any property that is capable of controlling pollution ***because*** that equipment is not engaged in manufacturing or production. This is an absurd result. Therefore, the Respondent's interpretation is incorrect. *See, e.g.*, *Duke Energy Corp.*, 415 S.C. at 355, 782 S.E.2d at 592.

Respondent next argues that its equipment does not, in fact, serve a dual purpose. In so doing, Respondent relies almost exclusively on interpretation of a Texas statute for pollution control exemption. The Respondent argues that the elaborate Texas statutory scheme is relevant because "TCEQ has designated pipeline coatings, cathodic protection, and automatic shut-off

valves as Tier I property, with a standard pollution control use percentage of 100%. This means that according to the TCEQ, 100% of the equipment at issue in this case is deemed 100% pollution control property, with no ancillary use." Respondent's Brief, p. 35.

In actuality, the Texas system could not be less akin to the relevant South Carolina statute. First, the Texas legislature elected to provide the pollution control exemption to "all or part of real and personal property that the person owns and that is used wholly or partly as a facility, device, or method for the control of air, water, or land pollution." Tex. Tax Code § 11.31(a). Unlike section 12-37-220(A)(8), the Texas statute does not provide an exemption for equipment specifically of "industrial plants." Second, Texas provides an elaborate three-tier system that provides three distinct levels of pollution control equipment. This system comes complete with explanatory tables identifying, with specificity, all types of equipment that should be tax-exempt. The Texas legislature, unlike the South Carolina legislature, has chosen to tax energy-related businesses on a very different level and provides broad exemptions for them. That is not what the South Carolina legislature elected to do when it enacted legislation to exempt only equipment of "industrial plants."

Finally, Respondent cites several cases from other states where the "dual purpose" doctrine resulted in an exemption being upheld. None of the cases cited are based on the exemption on the standard of "industrial plants" or the dual use concept as described in section 12-37-220(A)(8), that is, a concept that applies if, and only if, the initial requirements of the statutory scheme are met.

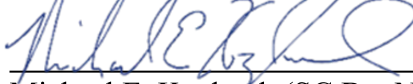
## CONCLUSION

For the reasons stated, and by virtue of the authorities cited herein and in Appellants' Brief, Respondent's arguments must fail, the Administrative Law Court's Amended Final Order dated February 9, 2021, must be reversed in its entirety, and Respondent's requested exemption be

denied.

Respectfully submitted,


**KOZLAREK LAW LLC**



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APPEAL FROM THE ADMINISTRATIVE LAW COURT
The Honorable Ralph King Anderson, III, Chief Administrative Law Judge

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Appellate Case No. 2021-000219
Trial Court Case No. 18-ALJ-17-0443-CC

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Colonial Pipeline Company ....................................................................................Respondent,

v.

South Carolina Department of Revenue, Abbeville County, Anderson County, Greenville County, Aiken County, Laurens County, and York County,......................................... Appellants.

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**PROOF OF SERVICE**

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The undersigned hereby certifies that on September 30, 2021, he caused a copy of the foregoing Appellants Abbeville County, Anderson County, Greenville County, and York County Initial Reply Brief to be served on all counsel of record via electronic mail to each counsel's individual AIS mail address pursuant to SC Supreme Court COVID Order 2020-05-29-02 addressed as follows:

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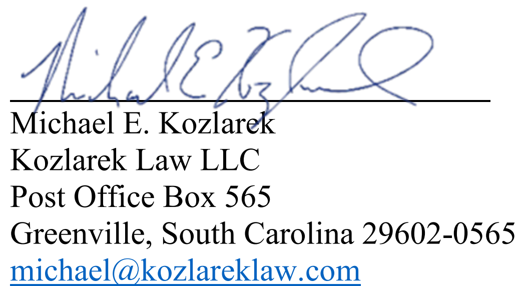

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September 30, 2021

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**ALC Case No. 18-ALJ-17-0433-CC**
**Appellate Case No. 2021-000219**

Dear Ms. Kitchings:

Enclosed please find Appellants Abbeville County, Anderson County, Greenville County, and York County Initial Reply Brief in the referenced matter. By copy of this correspondence, we are serving all counsel of record with a copy of the attached document.

Should you have any questions regarding this matter, please do not hesitate to contact me.

Sincerely,

Michael E. Kozlarek

MEK/cbs

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