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**SC Court of Appeals**

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, and Laurens County, and York County,.....Appellants.

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**SOUTH CAROLINA DEPARTMENT OF REVENUE'S FINAL BRIEF**

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November 18, 2021

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STATEMENT OF ISSUES ON APPEAL

- I. DID THE ADMINISTRATIVE LAW COURT ERR BY GRANTING A POLLUTION CONTROL EXEMPTION FOR FACILITIES AND EQUIPMENT OF AN INDUSTRIAL PLANT—WHICH MUST ENGAGE IN PRODUCTION—TO A TRANSPORTATION COMPANY THAT DOES NOT HAVE A PLANT OR PRODUCE ANYTHING?
- II. DID THE ADMINISTRATIVE LAW COURT ERR BY NOT APPROPRIATELY DISCOUNTING THE POLLUTION CONTROL EXEMPTION BASED ON THE DUAL PURPOSE PROVISION?
- III. DID THE ADMINISTRATIVE LAW COURT ERR BY LIMITING THE SCOPE OF THE CONTESTED CASE HEARING TO ONLY THREE TYPES OF TAXPAYER'S PROPERTY WHEN THE BASIS FOR THE DEPARTMENT'S DENIAL— THAT TAXPAYER FAILED TO MEET THE THRESHOLD ELEMENT OF THE POLLUTION CONTROL EXEMPTION—APPLIES TO ALL OF TAXPAYER'S PROPERTY FOR THAT SAME TAX YEAR?

## STATEMENT OF THE CASE

This matter came before the Administrative Law Court (ALC) in accordance with the Administrative Procedures Act, S.C. Code Ann. §§ 1-23-310 et seq. (2005 & Supp. 2015) for a contested case hearing. Respondent Colonial Pipeline Company (Colonial) filed a request for a contested case hearing with the ALC on December 5, 2018, in case number 18-ALJ-17-0443-CC to challenge a Department Determination issued by Appellant South Carolina Department of Revenue (Department). *See* Department Determination (issued November 19, 2018) (R. pp. 2443-2448). In the Department Determination, the Department determined that Colonial is not entitled to a property tax exemption pursuant to § 12-37-220(A)(8)—commonly referred to as the Pollution Control Exemption. *Id.*

Six counties moved to intervene in the case, and the ALC granted these motions and added Abbeville, Anderson, Greenville, Aiken, Laurens, and York counties as Intervenors (Counties) to the hearing. *See* Order (filed April 16, 2019) (R. pp. 1-2); Order (filed May 29, 2019) (R. pp. 3-4); Order (filed June 13, 2019) (R. pp. 5-6).

The Department filed an Amended Prehearing Statement clarifying the Amount in Dispute. *See* First Amended PHS (filed June 19, 2019) (R. pp. 157-162). The Department filed a Second Amended Prehearing statement clarifying that Colonial does not qualify for an ad valorem property tax exemption pursuant to S.C. Code Ann. §12-37-220(A)(8) (2014) for any of its claimed property—including property for which the Department initially granted the exemption. *See* Stipulation of Facts No. 31 (R. p. 2465); Second Amended PHS (filed September 4, 2019) (R. pp. 177-185).

The parties stipulated to the operative facts and filed cross-motions for summary judgment, responses in opposition, and replies. *See* Department's Motion for Summary Judgment and Memo in Support (filed December 11, 2019) (R. pp. 305-480); Department's Response in Opposition (filed December 20, 2019) (R. pp. 481-507); Department's Reply (filed January 3, 2020) (R. pp. 639-658);

Abbeville, Anderson, Greenville, and York's Motion for Summary Judgment and Memo in Support (filed December 11, 2019) (R. pp. 218-241); Abbeville, Anderson, Greenville, and York's Response in Opposition (filed December 23, 2019) (R. pp. 508-515); Abbeville, Anderson, Greenville, and York's Reply (filed January 3, 2020) (R. pp. 566-573); Aiken and Laurens' Motion for Summary Judgment and Memo in Support (filed December 11, 2019) (R. pp. 186-217); Aiken and Laurens' Response in Opposition (filed December 23, 2019) (R. pp. 516-526); Aiken and Laurens' Reply (filed January 3, 2020) (R. pp. 574-582); Colonial's Motion for Summary Judgment (filed December 11, 2019) (R. pp. 242-304); Colonial's Response in Opposition (filed December 23, 2019) (R. pp. 527-565); Colonial's Reply to Respondent's and Intervenors' Responses to Colonial's MSJ (filed January 3, 2020) (R. pp. 583-638). In its Reply to the Department's and Counties' Motions for Summary Judgment, Colonial argued for the first time that only some of its property (namely pipe coatings, cathodic protection, and automatic shut-off valves) were at issue in the contested case hearing, even though it had claimed the Pollution Control Exemption on a number of other types of property as well. *Id.* The ALC heard the cross-motions for summary judgment on January 6, 2020. During that hearing, Colonial—for the first time—objected to the Department's filing its Second Amended Prehearing statement four months earlier. In response, the Department orally moved to amend its Prehearing Statement consistent with the Second Amended Prehearing Statement filed on September 4, 2019, but the ALC did not rule on the Department's oral motion. The ALC denied the cross-motions for summary judgment. *See* Order on Cross Motions for Summary Judgment (filed March 6, 2020) (R. pp. 7-29).

To alleviate any doubt as to the sufficiency of its filing, the Department filed a written Motion to Amend its Prehearing Statement consistent with the Second Amended Prehearing filed on September 4, 2019. *See* Motion to Amend Department's PHS (filed April 20, 2020) (R. pp. 659-673). By email that same day, the ALC advised the Department that its Motion to Amend the Prehearing Statement was not necessary. *See* Email dated April 20, 2020 (R. pp. 2470-2472). Colonial filed a

Motion in Opposition to the Department's Motion to Amend its Prehearing Statement on April 30, 2020. *See* Colonial's Motion in Opposition to Department's Motion to Amend PHS (filed April 30, 2020) (R. pp. 674-681). In a reversal from its prior email, the ALC indicated that a Motion to Amend the Prehearing Statement was now necessary because Colonial opposed the Amended Prehearing Statement. *See* Email dated May 1, 2020 (R. pp. 2473-2476). The Department filed a Reply to Colonial's Motion and Memorandum in Opposition. *See* Department's Reply (filed May 4, 2020) (R. pp. 682-686). The ALC denied the Department's Motion to Amend its Prehearing Statement. *See* Order Denying Motion to Amend PHS (filed May 20, 2020) (R. pp. 30-38). The Counties and Department subsequently filed respective Motions to Alter or Amend the May 20, 2020 Order. *See* Counties Joint Motion to Alter or Amend May 20, 2020 Order (filed May 27, 2020) (R. pp. 687-691); Department's Motion to Alter or Amend May 20, 2020 Order (filed June 1, 2020) (R. pp. 692-701). The ALC denied the Counties' and Department's Motions to Alter or Amend the May 20, 2020 Order. *See* Order Denying Motion to Alter or Amend (filed June 22, 2020) (R. pp. 39-46).

On August 4-5, 2020, the ALC held a contested case hearing. In its original Order, the ALC ordered: 1) Colonial's application for the Pollution Control Exemption for pipeline coatings be denied for 2017 and 2018 tax years; 2) Colonial's application for the Pollution Control Exemption for cathodic protection be granted for 2017 and 2018 tax years; and 3) Colonial's application for the Pollution Control Exemption for automatic shut-off valve be granted for 2017 and 2018 tax years. *See* Order (filed December 1, 2020) (R. pp. 47-79). The Counties and Colonial filed Motions for Reconsideration. *See* Abbeville, Anderson, Greenville, and York Motion to Recons. (filed December 11, 2020) (R. pp. 710-720); Aiken and Laurens Motion to Recons. (filed December 11, 2020) (R. pp. 721-755); Colonial's Motion to Recons. (filed December 11, 2020) (R. pp. 756-823). The Counties and Department filed Responses to Colonial's Motion for Reconsideration. *See* Abbeville, Anderson, Greenville, and York Resp. to Mot. to Recons. (filed December 21, 2020 ) (R. pp. 824-830); Aiken

and Laurens Resp. to Mot. to Recons. (filed December 21, 2020) (R. pp. 831-833); and Dep't Resp. to Mot. to Recons. (filed December 23, 2020) (R. pp. 834-836). To allow time to review the motions and responses, the ALC rescinded its December 1, 2020 Order. See Order (filed January 4, 2021) (R. pp. 80).

The ALC issued an Amended Final Order that: 1) Colonial's application for the Pollution Control Exemption for pipeline coatings be granted for 2017 and 2018 tax years; 2) Colonial's application for the Pollution Control Exemption for cathodic protection be granted for 2017 and 2018 tax years; and 3) Colonial's application for the Pollution Control Exemption for automatic shut-off valve be granted for 2017 and 2018 tax years. *See* Amended Final Order filed February 9, 2021 (R. pp. 81-112). Abbeville County, Anderson County, Greenville County, and York County appealed the Amended Final Order on February 25, 2021. Aiken County and Laurens County appealed the Amended Final Order on March 2, 2021. The Department appealed the Amended Final Order on March 10, 2021.

### STANDARD OF REVIEW

In an appeal from the decision of an administrative agency, the Administrative Procedures Act provides the appropriate standard of review. *Olson v. S.C. Dep't of Health & Env'tl. Control*, 379 S.C. 57, 63, 663 S.E.2d 497, 500-501 (Ct. App. 2008); *Turner v. S.C. Dep't of Health & Env'tl. Control*, 377 S.C. 540, 544, 661 S.E.2d 118, 120 (Ct. App. 2008); *Clark v. Aiken County Gov't*, 366 S.C. 102, 107, 620 S.E.2d 99, 101 (Ct. App. 2005). S.C. Code Ann. § 1-23-610(B) (Supp. 2017) provides the applicable standard:

The review of the administrative law judge's order must be confined to the record. The court may not substitute its judgment for the judgment of the administrative law judge as to the weight of the evidence on questions of fact. The court of appeals may affirm the decision or remand the case for further proceedings; or, it may reverse or modify the decision if the substantive rights of the petitioner have been prejudiced because the finding, conclusion, or decision is:

- (a) in violation of constitutional or statutory provisions;
- (b) in excess of the statutory authority of the agency;
- (c) made upon unlawful procedure;
- (d) affected by other error of law;
- (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
- (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

The Pollution Control Exemption is grounded in the South Carolina Constitution and Code of Laws. Therefore, the ALC erred as a matter of law resulting in a decision that is contrary to constitutional and statutory provisions. Resolution of the issues in this case depends upon the rules of statutory construction, and when construing a statute, the cardinal rule is to ascertain the intent of the Legislature. *Georgia-Carolina Bail Bonds, Inc. v. County of Aiken*, 354 S.C. 18, 22, 579 S.E.2d 334, 336 (Ct. App. 2003). “All rules of statutory construction are subservient to the one that legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in the light of the intended purpose of the statute.” *Id.* at 23, 579 S.E.2d at 336. The words of the statute “must be given their plain and ordinary meaning without resort[ing] to subtle or forced construction to limit or expand [the statute's] operation.” *Hitachi Data Sys. Corp. v. Leatherman*, 309 S.C. 174, 178, 420 S.E.2d 843, 846 (1992) (internal citations omitted).

## FACTS

### I. Colonial’s physical structure

Colonial is a pipeline company that transports refined petroleum, jet fuel, gasoline, diesel, heating oil, kerosene, and blend stocks (collectively, “Refined Petroleum Products,” each, a “Refined Petroleum Product”). *See* Stipulation of Facts No. 1 (R. p. 2462). Colonial’s pipeline connects to a refinery’s storage tanks, which each contain a Refined Petroleum Product. *See* Stipulation of Facts No. 11 (R. p. 2463). The pipeline starts in Houston, Texas and ends in New York harbor and consists of more than 5,500 miles of pipeline. *See* Colonial Pipeline Website – About Colonial (Stipulated/Joint Exhibit 3) (R. p. 1895).

Colonial's operations in South Carolina span eleven counties and are comprised of 515 miles of pipeline, two tank farms, three booster stations, and one delivery facility. *See* Hr'g Tr. 99:10-100:2 (R. pp. 1540-1541). All of Colonial's pipelines are buried between four and five feet below the ground. *See* Hr'g Tr. 103:12-16 (R. p. 1544). The two tank farms receive and store Refined Petroleum Products from the transmission pipeline and pump the product to individual truck terminals. *See* Hr'g Tr. 104:3-15 (R. p. 1545). The tank farms fall under the U.S. Department of Transportation and relate primarily to the transportation of Refined Petroleum Products. *See* Hr'g Tr. 65:9-22 (R. p. 1506). The three booster stations push Refined Petroleum Products through the pipeline. *See* Hr'g Tr. 108:22-25 (R. p. 1549). The one delivery facility delivers Refined Petroleum Products on a transmission line to a truck terminal. *See* Hr'g Tr. 150:7-14 (R. p. 1591).

For the tax years in dispute, Colonial claimed the Pollution Control Exemption for pipe coatings, cathodic protection, automatic shutoff valves, wastewater pollution control equipment, storm water pollution control, secondary containment, and tank internal/external floating roofs. *See* Stipulation of Facts Nos. 15 and 22 (R. pp. 2463-2464). Pipe coatings and cathodic protection help prevent corrosion on pipe exteriors. *See* Hr'g Tr. 233:13-18 (R. p. 1674); *See* Hr'g Tr. 225:24-226:8 (R. pp. 1666-1667). The automatic shutoff valve can be closed in the event of a leak. *See* Hr'g Tr. 236:21-237:11 (R. pp. 1677-1678). The pipeline has had pipe coatings, cathodic protection, and automatic shut off valves since it was constructed in 1962 and prior to any state or federal law requiring them. *See* Hr'g Tr. 230:9-12 (R. p. 1671); Hr'g Tr. 233:23-234:7 (R. pp. 1674-1675); 30(b)(6) Depo Tr. 184:21-23 (Exhibit 19) (R. p. 1168); 30(b)(6) Depo Tr. 289:15-291:17 (Exhibit 19) (R. pp. 1273-1275). Today, pipes are purchased with coating already applied. *See* Hr'g Tr. 233:4-6 (R. p. 1674). Pipe coatings, cathodic protection, and automatic shut off valves serve a business function for operating the pipeline and are not one hundred percent pollution control. *See* 30(b)(6) Depo Tr. 65:7-14 (Exhibit 19) (R. p. 1049).

The wastewater pollution control equipment are facility drain lines that can be isolated from the main pipeline. *See* 30(b)(6) Depo Tr. 242:8-18 (Exhibit 19) (R. p. 1226). The storm water pollution control equipment are dike drains that maintain a closed system. *See* 30(b)(6) Depo Tr. 242:19-25 (Exhibit 19) (R. p. 1226). The secondary containment system is a subsurface tank used to prevent overflowing a tank or to examine water before Colonial releases it offsite. *See* 30(b)(6) Depo Tr. 243:1-244:11 (Exhibit 19) (R. pp. 1227-1228). The tank internal/external floating roofs are aluminum roofs that float on the liquid in a tank and reduces the vapor emission. *See* 30(b)(6) Depo Tr. 244:12-245:1 (Exhibit 19) (R. pp. 1228-1229).

## **II. Colonial's transportation services**

Colonial concedes it does not manufacture or produce any product. *See* Motion for Reconsideration Hr'g. Tr. 14:25-15:7 (R. pp. 1877-1878). Colonial transports fungible products, and a customer may not receive the exact same petroleum product it paid Colonial to transport. *See* Hr'g Tr. 124:16-23 (R. p. 1565). At least 90% of each Refined Petroleum Product transported by Colonial is of the same specification and quantity when it enters the pipeline as it is when it leaves the pipeline. *See* Stipulation of Facts No. 10 (R. p. 2463).

Colonial transports multiple products back-to-back through the pipeline, which results in some mixing of the products where they interface. When two incompatible products mix, the result is called Transmix—an unusable and unsaleable fluid. *See* Stipulation of Facts Nos. 3 and 4 (R. p. 2462). Each Refined Petroleum Product that combines to create Transmix can be separated into a once again saleable Refined Petroleum Product. *See* Stipulation of Facts No. 7 (R. p. 2462). As part of its transportation services, Colonial separates Transmix back into each Refined Petroleum Product at no additional charge to the customer. *See* Stipulation of Facts No. 8 (R. p. 2462). Colonial could avoid Transmix entirely by transporting a single Refined Petroleum Product at one time in the pipeline. *See* Stipulation of Facts Nos. 5 and 6 (R. p. 2462). Colonial injects drag reducing agents to reduce friction

on the lines in South Carolina and does various inspections in this state. *See* Stipulation of Facts No. 2 (R. p. 2462). Colonial removes water that condenses in the pipeline called sting water. *See* Hr'g Tr. 157:23-158:2 (R. pp. 1598-1599). These *de minimus* or auxiliary activities ensure that the quality of each Refined Petroleum Product received by the customer is the same as the Refined Petroleum Product that went into the pipeline. *See* Stipulation of Facts No. 9 (R. p. 2463).

### III. The Department's review of the exemption request

On April 19, 2017, Colonial applied for the Pollution Control Exemption for tax year 2017. *See* Stipulation of Facts No. 15 (R. p. 2463). In its application, Colonial claimed the Pollution Control Exemption for certain pipe coatings, cathodic protection, automatic shut-off valves, wastewater pollution control equipment, storm water pollution control, secondary containment, and tank internal/external floating roofs. *Id.*

Taylor Ingram, a Utility Assessment Coordinator in the Department's Property Division<sup>1</sup>, reviewed Colonial's application. According to Mr. Ingram, his review focused exclusively on whether the subject property was designed for the elimination, mitigation, prevention, treatment, abatement, or control of water, air, or noise pollution. After his review, Mr. Ingram issued a Proposed Assessment Notice granting the Pollution Control Exemption for some property (wastewater pollution control equipment, storm water pollution control, secondary containment, and tank internal/external floating roofs) but denying the Exemption for other property (pipe coatings, cathodic protection, and automatic shut-off valves) because he did not believe these latter items were designed for pollution control. *See* 2017 Proposed Assessment Notice (Colonial's Exhibit 2) (August 15, 2017) (R. pp. 2361-2364); *see also* Stipulation of Facts No. 16 (R. p. 2463).

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<sup>1</sup> Although officially the Government Services Division, this division is commonly referred to as the Property Division.

Importantly, during his review Mr. Ingram never considered or determined whether the property at issue was the facilities or equipment of an industrial plant. *See* Hr'g. Tr. 310:14-16; 345:12-13 (R. pp. 1751; 1786). He only learned of this element of the Pollution Control Exemption once the Department's legal department reviewed the matter and issued the Department Determination (as discussed in more detail below). Further, Mr. Ingram has not granted the Pollution Control Exemption to any pipeline since learning that the exemption is only available for the facilities or equipment of industrial plants. *See* Hr'g. Tr. 345:14-21 (R. p. 1786); *see also* Stipulation of Facts No. 30 (R. p. 2465).

Colonial timely protested the proposed assessment for tax year 2017. *See* Stipulation of Facts No. 17 (R. p. 2463); Protest Letter for 2017 dated September 7, 2017 (Colonial's Exhibit 3) (R. pp. 2365-2408). The Property Division notified the county auditors of the relevant counties about Colonial's appeal of the 2017 assessment. *See* Stipulation of Facts No. 18 (R. p. 2463); *see also* S.C. Code Ann. 12-60-2120(A)(2) (requiring Department to notify affected counties of a taxpayer's written protest of property tax assessment). In addition, the Department forwarded Colonial's 2017 exemption application to the Department of Health and Environmental Control (DHEC) and requested that DHEC investigate Colonial's property to determine whether the pipe coatings, cathodic protection, and automatic shut-off valves qualified as pollution control property. *See* Stipulation of Facts No. 19 (R. p. 2464).<sup>2</sup>

In its response, DHEC did not provide a detailed listing of the property that qualified as pollution control property; rather, it simply noted that federal agencies, like the United States Department of Transportation ("USDOT"), regulate pipelines, and that DHEC lacks authority to

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<sup>2</sup> S.C. Code Ann. § 12-37-220(A)(8) provides that, upon request by the Department, DHEC "shall investigate the property of any manufacturer or company, eligible for the exemption to determine the portion of the property that qualifies as pollution control property" and then provide the Department with a "detailed listing of the property that qualifies as pollution control property."

permit, inspect, or enforce pipeline operations. *See* Stipulation of Facts No. 20 (R. p. 2464). On or around April 11, 2018, the Property Division forwarded the file to the Department's Office of General Counsel (OGC) for further analysis and to draft the Department Determination addressing whether the pipe coatings, cathodic protection, and automatic shut-off valves qualified for the Pollution Control Exemption under section 12-37-220(A)(8). *See* Stipulation of Facts No. 21 (R. p. 2464).

While the OGC was reviewing the application, Colonial filed a second application for the Pollution Control Exemption, this time for tax year 2018. The 2018 application claimed as exempt the same property as the 2017 application. *See* Stipulation of Facts No. 22 (R. p. 2464). Because the Department had not yet resolved the outstanding issues related to tax year 2017, the Property Division issued a Property Assessment Notice to Colonial for tax year 2018 that granted and denied the Pollution Control Exemption in a manner consistent with its prior decision for tax year 2017. *See* 2018 Proposed Assessment Notice (July 27, 2018) (Colonial's Exhibit 5) (R. pp. 2436-3438). Colonial timely protested the Proposed Assessment Notice. *See* Protest Letter for 2018 dated August 13, 2018 (Colonial's Exhibit 6) (R. pp. 2439-2442).

Because DHEC's initial response had not specifically determined which—if any—of Colonial's property qualified for the Pollution Control Exemption, the OGC again asked DHEC to investigate Colonial's property for tax year 2017 and provide the Department with a detailed listing of the property that qualified as pollution control property under § 12-37-220(A)(8). *See* Stipulation of Facts Nos. 23 (R. p. 2464). The OGC also forwarded the 2018 exemption application for pipe coatings, cathodic protection, automatic shut-off valves, wastewater pollution control equipment, storm water pollution control, secondary containment, and tank internal/external floating roofs to DHEC to be included in its investigation. *See* Stipulation of Facts No. 26 (R. p. 2464).

DHEC responded to the Department's request by letter, in which it concluded that the pipe coatings, cathodic protection, and automatic shut-off valves for property tax years 2017 and 2018

could be described as pollution control equipment. However, DHEC again noted that federal agencies, like USDOT, regulate pipelines, and DHEC lacks authority to permit, inspect, or enforce pipeline operations. *See* Stipulation of Facts No. 27 (R. pp. 2464-2465). DHEC Letter (August 27, 2018) (Stipulated/Joint Exhibit 16) (R. pp. 1940-1941).

The Department issued its Determination in this matter on November 19, 2018, in which it concluded that Colonial is not entitled to the Pollution Control Exemption. *See* Stipulation of Facts No. 28 (R. p. 2465). Colonial timely requested a contested case hearing on December 5, 2018. *See* Stipulation of Facts No. 29 (R. p. 2465).

## ARGUMENTS

### I. THE ADMINISTRATIVE LAW COURT ERRED BY GRANTING A POLLUTION CONTROL EXEMPTION FOR FACILITIES AND EQUIPMENT OF AN INDUSTRIAL PLANT—WHICH MUST ENGAGE IN PRODUCTION—TO A TRANSPORTATION COMPANY THAT DOES NOT HAVE A PLANT OR PRODUCE ANYTHING.

South Carolina law provides for a tax on “[a]ll real and personal property in this State...” S.C. Code Ann. § 12-37-210 (2014). This rule has limited exemptions, including the Pollution Control Exemption provided by S.C. Code § 12-37-220(A)(8) (2014), which states:

(A) [T]here is exempt from ad valorem taxation:

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**all facilities or equipment of industrial plants** which are designed for the elimination, mitigation, prevention, treatment, abatement, or control of water, air, or noise pollution, both internal and external, required by the state or federal government and used in the conduct of their business. At the request of the Department of Revenue, the Department of Health and Environmental Control shall investigate the property of any **manufacturer** or company, eligible for the exemption to determine the portion of the property that qualifies as pollution control property. Upon investigation of the property, the Department of Health and Environmental Control shall furnish the Department of Revenue with a detailed listing of the property that qualifies as pollution control property. **For 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.** For the purposes of this item, twenty percent of

the cost of any piece of machinery and equipment placed in service in a greige mill qualifies as internal air and noise pollution control property and is exempt from property taxes. “Greige mill” means all textile processes from opening through fabric formation before dyeing and finishing. (emphasis added).

This property tax exemption statute derives from S.C. Const. art. X, § 3(h), which exempts from ad valorem taxation “all facilities or equipment of industrial plants which are designed for the elimination, mitigation, prevention, treatment, abatement or control of water, air or noise pollution.”

All the parties agree and the ALC made no contrary finding to the fact that Colonial does not engage in production. *See* Amended Final Order at p. 31 (R. p. 111); Motion for Reconsideration Hr’g. Tr. 14:25-15:7 (R. pp. 1877-1878). As the threshold element of the Pollution Control Exemption, claimed property must be facilities or equipment of industrial plants. Because an industrial plant must engage in production, Colonial has no industrial plant and therefore no facilities or equipment of industrial plants to which the Pollution Control Exemption could apply.

**A. The Pollution Control Exemption statute emphasizes production.**

The language of the exemption itself indicates the exemption applies to manufacturers or similar companies. The only appellate case interpreting the Pollution Control Exemption concerns a greige mill— i.e. a textile manufacturer— as the taxpayer. *See TNS Mills, Inc. v. S.C. Dep’t of Revenue*, 331 S.C. 611, 503 S.E.2d 471 (1998) (“Pollution control equipment typically forms an integral part of the **production** process in a greige mill...” (emphasis added)). As a company similar to a manufacturer, a utility may qualify for the Pollution Control Exemption because utilities are engaged in production— e.g. production of electricity.<sup>3</sup> In relevant part, the exemption statute instructs DHEC to investigate “the property of any **manufacturer** or company.” § 12-37-220(A)(8) (emphasis added). In construing a statute, courts presume that no word is superfluous or without meaning. *State v. Sweat*, 386 S.C. 339,

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<sup>3</sup> S.C. Code Ann. § 12-23-20(4) (2014) refers to “[a]ny industrial plant manufacturing or generating electricity.”

351, 688 S.E.2d 569, 575 (2010) (“A statute should be so construed that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous . . . .” (citation omitted)). Because every manufacturer would be a company, the word “manufacturer” must inform the term “company,” or the terms would be redundant and meaningless. If the General Assembly wished to offer the pollution control exemption to transportation companies, it could use the more specific terminology of “transportation company” similar to the language it used in other tax statutes. *See* S.C. Code Ann. § 12-36-2120(9) (2014 & Supp. 2019) (exempting, for example, the gross proceeds of sales, or sales price of “coal, or coke or other fuel sold to manufacturers, electric power companies, and transportation companies” for certain enumerated uses). Although this language indicates that the exemption may extend to companies other than manufacturers, those companies—similar to manufacturers—must be engaged in production.

Further, the presence of the provision “[f]or equipment that serves a dual purpose of **production** and pollution control” in the Pollution Control Exemption statute assumes that an “industrial plant” is engaged in some sort of production. *See State v. Sweat*, 386 S.C. at 350, 688 S.E.2d at 575 (“A statute as a whole must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers.”); *City of Columbia v. Niagara Fire Ins. Co.*, 249 S.C. 388, 391, 154 S.E.2d 674, 676 (1967) (“The true guide to statutory construction is not the phraseology of an isolated section or provision, but the language of the statute as a whole considered in the light of its manifest purpose.”). Following this principle, the purpose of the statute, especially in light of the statute’s use of the terms manufacturer and production, should be read as limited to companies that manufacture or produce. This would exclude a transportation company like Colonial that does not manufacture or produce anything.

**B. The usual, customary, ordinary, and popular meaning of “industrial plant” has a manufacturing and production element.**

Section 12-37-220(A)(8) does not define the term “industrial plant,” nor is that term statutorily defined elsewhere in Title 12. “When faced with an undefined statutory term, the court must interpret the term in accord with its usual and customary meaning.” *Liberty Mut. Ins. Co. v. S.C. Second Injury Fund*, 363 S.C. 612, 622, 611 S.E.2d 297, 302 (Ct. App. 2005). “Words used in a statute should be taken in their ordinary and popular significance unless there is something in the statute requiring a different interpretation.” *Santee Cooper Resort v. South Carolina Pub. Serv. Comm’n*, 298 S.C. 179, 184, 379 S.E.2d 119, 122 (1989).

The usual, customary, ordinary, and popular meaning of “industrial plant” involves manufacturing and production. “Where a word is not defined in a statute, our appellate courts have looked to the usual dictionary meaning to supply its meaning.” *Lee v. Thermal Eng’g Corp.*, 352 S.C. 81, 91–92, 572 S.E.2d 298, 303 (Ct. App. 2002). Because Merriam-Webster’s Online Dictionary does not define the term “industrial plant,” it is reasonable to consider the individual definitions of “plant” and “industrial.” Merriam-Webster’s Online Dictionary defines “plant” as:

- a: the land, buildings, machinery, apparatus, and fixtures employed in carrying on a trade or an industrial business;
- b: a factory or workshop for the manufacture of a particular product also: POWER PLANT;**
- c: the total facilities available for **production** or service;
- d: the buildings and other physical equipment of an institution.

(emphasis added) *Plant*, MERRIAM-WEBSTER’S ONLINE DICTIONARY, <https://www.merriam-webster.com/dictionary/plant> (last visited February 8, 2021).<sup>4</sup> In Merriam-Webster’s Online Dictionary, “Industrial” is defined as “of or relating to industry.” *Industrial*,

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<sup>4</sup> Although South Carolina law does not define “plant,” S.C. Code Ann. Regs. 117-1700.7 (2012) defines “plant site” as “all land contiguous to a plant which is related to the overall **manufacturing** operation...” (emphasis added). S.C. Code Ann. § 12-43-220(a)(3) and (4) (2014) references “the plant site of the manufacturer” and “the manufacturing plant,” respectively.

MERRIAM-WEBSTER'S ONLINE DICTIONARY, <https://www.merriam-webster.com/dictionary/industrial> (last visited February 8, 2021). Merriam-Webster's Online Dictionary defines "industry" as:

- a: **manufacturing activity as a whole** (the nation's industry);
- b: a distinct group of **productive** or profit-making enterprises (the banking industry);
- c: a department or branch of a craft, art, business, or **manufacture** (especially one that employs a large personnel and capital **especially in manufacturing**);
- d: systematic labor especially for some useful purpose or **the creation of something** of value.

(emphasis added) *Industry*, MERRIAM-WEBSTER'S ONLINE DICTIONARY, <https://www.merriam-webster.com/dictionary/industry> (last visited February 8, 2021). Throughout these definitions there is a consistent theme that manufacturing and production is an essential element of "industry" and "plants." Because Colonial is not a manufacturer and does not engage in production, it is not and does not have an "industrial plant" in the usual, customary, ordinary, and popular meaning. Even Colonial's 30(b)(6) witness admitted that Colonial does not refer to any of its property as a "plant." *See* 30(b)(6) Depo Tr. 141:20-25; 142:1-5 (Exhibit 19) (R. pp. 1125-1126).

**C. South Carolina law treats companies engaged in production differently from those not engaged in production.**

Other related sections of Title 12 dealing with property taxation provide additional insight into whether the General Assembly intended to extend the Pollution Control Exemption to a transportation company like Colonial. Article X, section 1 of the South Carolina Constitution and section 12-43-220 of the South Carolina Code generally treat manufacturers and utilities similarly for property tax assessment purposes while distinguishing them from transportation companies like Colonial. Specifically, article X, section 1(1) and section 12-43-220(a) provide an assessment ratio for manufacturers of 10.5%, while article X, section 1(2) and section 12-43-220(g) provide an assessment

ratio for transportation companies of 9.5%.<sup>5</sup> Based on these constitutional and statutory sections, transportation companies enjoy a lower tax assessment ratio than manufacturing/utility companies.<sup>6</sup>

Understanding the disparate assessment ratios explains why the legislature would limit the Pollution Control Exemption only to manufacturers and similar companies. Those companies engaged in manufacturing and production—activities that often generate potential pollution—are taxed at the highest assessment ratio (10.5%), so the Pollution Control Exemption incentivizes manufacturers to mitigate pollution by reducing their tax burden. By contrast, as a transportation company, all of Colonial’s property in South Carolina has a lower assessment ratio of 9.5%. *See* Hir’g Tr. 51:7–52:17 (R. pp. 1492-1493).

In other words, none of Colonial’s property in South Carolina is taxed as a manufacturer. *Id.* Colonial admits it is a transportation company and not a manufacturer. *See* 30(b)(6) Depo Tr. 98:9-10 (Exhibit 19) (R. p. 1082); 30(b)(6) Depo Tr. 69:21-25-70:1 (Exhibit 19) (R. p. 1053-1054). Rather than focus on *de minimus* or auxiliary activities that may approximate manufacturing or production, the ALC correctly found that Colonial’s “property work together as an integrated whole and should be

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<sup>5</sup> S.C. Const. Art. X, § 1(1) (2009) (“All real and personal property owned by or leased to manufacturers, utilities and mining operations and used by the manufacturer, utility or mining operation, in the conduct of such business shall be taxed on an assessment equal to ten and one-half percent of the fair market value of such property.”); S.C. Const. Art. X, § 1(2) (2009) (“All real and personal property owned by or leased to companies primarily engaged in transportation for hire of persons or property and used by the company in the conduct of such business shall be taxed on an assessment equal to nine and one-half percent of the fair market value of such property.”); S.C. Code Ann. § 12-43-220(a)(1) (“All real and personal property owned by or leased to manufacturers and utilities and used by the manufacturer or utility in the conduct of the business must be taxed on an assessment equal to ten and one-half percent of the fair market value of the property.”); S.C. Code Ann. § 12-43-220(g) (“All real and personal property owned by or leased to companies primarily engaged in the transportation for hire of persons or property and used by such companies in the conduct of such business and required by law to be assessed by the department shall be taxed on an assessment equal to nine and one-half percent of the fair market value of such property.”).

<sup>6</sup> The Department appraises the property of pipelines similarly to utilities, but this is for valuation purposes only. As authorized by section 12-4-540 of the South Carolina Code (2014), the Department uses unit valuation for certain companies including pipelines, railroads, and utilities to consider a taxpayer’s operations as a whole.

evaluated as a whole rather than piecemeal.” *See* Amended Final Order (R. pp. 81-112); *see also* Hr’g Tr. 359:17-360:9 (R. pp. 1800-1801). Viewed as an integrated whole, Colonial’s property works together to transport products that have already been manufactured or produced. Because Colonial already provides this transportation service with the benefit of a lower tax assessment ratio than the manufacturing company, it makes sense that the Legislature would see no need to extend the tax benefit of the Pollution Control Exemption to a company that is not engaged in production or manufacturing.

**D. Tax exemption statutes must be construed narrowly against taxpayers, but the ALC’s decision interpreted the Pollution Control Exemption broadly in favor of Colonial.**

It is black letter law in South Carolina that tax exemption statutes are strictly construed against taxpayers. *See, e.g., CFRE, LLC v. Greenville Cty. Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011) (stating that South Carolina courts have a long-standing policy of “strictly construing tax exemption statutes against the taxpayer”). The burden is on the taxpayer to prove he is entitled to an exemption by bringing himself clearly within the conditions of the statute authorizing the exemption. *TNS Mills, Inc. v. S.C. Dep’t of Revenue*, 331 S.C. 611, 618, 503 S.E.2d 471, 475 (1998) (citing *York Cty. Fair Assoc. v. S.C. Tax Comm’n*, 249 S.C. 337, 341, 154 S.E.2d 361, 363 (1967)) *see also* *State v. City of Columbia*, 115 S.C. 108, 104 S.E.2d 337 (1920) (“taxation is the rule and exemption is the exception”) *State v. City of Columbia*, 115 S.C. 108, 104 S.E.2d 337 (1920). Thus, if any portion of the Pollution Control Exemption is ambiguous, it must be construed against Colonial. Although the ALC recognized this rule of strict construction, its interpretation resulted in a broad construction of the tax exemption statute in favor of the taxpayer.

Whether the exemption statute is ambiguous or unambiguous, a pipeline is not an “industrial plant,” so none of its facilities or equipment are facilities or equipment of an industrial plant. After considering Merriam-Webster’s Online Dictionary definitions discussed above, the ALC broadly

interpreted “industrial plant” to mean “the land, buildings, machinery, apparatus, and fixtures employed in carrying on a trade or an industrial business that uses systematic labor for some useful purpose.” Amended Final Order at p. 24 (R. p. 104). In fact, the ALC specifically rejected a definition of “industrial” that it believed was “too narrow,” instead opting for a “**broad**” definition. *See* Amended Final Order at p. 20 (emphasis added) (R. p. 100). The ALC also posits, “it is not unreasonable for the exemption to be **broadly** applicable...” Amended Final Order at p. 26 (emphasis added) (R. p. 106). Further, the ALC concluded that “at least part of Colonial’s operations (for example, its tank farms) met the **broad** definition of ‘industrial plant.’” Amended Final Order at p. 26 (emphasis added) (R. p. 106). Moreover, the ALC acknowledged that its definition of “industry” could “result in a very **broad** interpretation” that would encompass business enterprises that do not fit within the term “industrial plant.” Amended Final Order at p. 21 (emphasis added) (R. p. 101).

However, the ALC’s broad construction of the Pollution Control Exemption omits the production/manufacturing emphasis present in the dictionary definitions of “plant” and “industry,” as well as the Pollution Control Exemption itself. While considering the words “industrial” and “plant” separately may be reasonable, the resulting ALC definition exceeds the usual and customary definition of industrial plant and would be broad enough to include a hospital, bank, train, tractor trailer, or fishing boat. If the term “industrial plant” is unambiguous as the ALC found, it unambiguously requires a production element, and the ALC erred by not requiring that element in its definition of what constitutes an “industrial plant” for purposes of the Pollution Control Exemption.

## **II. THE ADMINISTRATIVE LAW COURT ERRED BY NOT APPROPRIATELY DISCOUNTING THE POLLUTION CONTROL EXEMPTION BASED ON THE DUAL PURPOSE PROVISION.**

Colonial is not eligible for the Pollution Control Exemption on any of its property because it does not meet the threshold requirement of having an “industrial plant.” *See* Part I, *supra*. However, even if this Court concludes the ALC was correct in granting the Pollution Control Exemption to

Colonial, this Court should reverse the ALC's decision insofar as it failed to reduce the value of the exemption based on the dual-use of the subject property. *See* S.C. Code Ann. § 12-37-220(A)(8) (“For 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.”).

The Pollution Control Exemption contains a dual-purpose provision, which reduces the value eligible for exemption from taxation by taking into consideration whether the claimed property has a production purpose in addition to a pollution control purpose. Specifically, the exemption provides that “[f]or equipment that serves a dual purpose of **production** and pollution control,” the value of the exemption is reduced based upon a formula. § 12-37-220(A)(8) (emphasis added). For example, if equipment with pollution control capabilities is valued the same as equipment with no pollution control capability, the value eligible for the Pollution Control Exemption is zero.

The ALC's interpretation of the dual-purpose provision restricts this limiting language in the Pollution Control Exemption statute to apply only to companies engaged in production. While the ALC may be correct that the dual-purpose provision only applies to companies engaged in production, it necessarily follows that the Pollution Control Exemption itself only applies to companies engaged in production. Under the ALC's interpretation of the dual-purpose provision, one-hundred percent (100%) of the equipment's value is eligible for the Pollution Control Exemption if a company does not engage in production. This interpretation leads to the absurd result that a manufacturer's equipment has less value eligible for the Pollution Control Exemption— despite the Pollution Control Exemption statute explicitly including manufacturers— than companies like Colonial that produce nothing. The usual and customary interpretation that an “industrial plant” must be engaged in production eliminates this absurdity.

Nonetheless, if the Court interprets “industrial plant” broadly to include companies that are not engaged in production, the Court should similarly interpret “production” broadly to include any business purpose. The ALC’s original Final Order adopted this very interpretation. *See* Original Final Order (filed December 1, 2020) at pp. 30-32 (R. pp. 76-78). Specifically, the ALC held, “[i]f the equipment serves a function apart from pollution control, the utility of that function must be recognized before allowing the property tax exemption.” *Id.* at 30. Equating production purpose to business purpose would treat manufacturers or other companies that produce a product the same as companies that do not produce a product like Colonial. This would avoid the disparate treatment that the ALC’s interpretation invites.

Colonial’s 30(b)(6) witness conceded that pipe coatings, cathodic protection, and automatic shutoff valves are a “good investment” and “[i]t makes good financial sense... to protect your asset and to keep the... product from... being released from your pipeline.” *See* 30(b)(6) Depo Tr. 291:6-17 (Exhibit 19) (R. p. 1275). Regarding pipe coatings in particular, the ALC found, “there is no cost differential between what the pipe would cost with or without the coating,” and “100 % of the cost associated with purchasing the pipes is a business cost.” *Id.* at 31. Despite its business operation function, the ALC did not discount the value of the Pollution Control Exemption for any property in its Amended Final Order based on its dual purpose and granted the Exemption in full.

**III. THE ADMINISTRATIVE LAW COURT ERRED BY LIMITING THE SCOPE OF THE CONTESTED CASE HEARING TO ONLY THREE TYPES OF TAXPAYER’S PROPERTY WHEN THE BASIS FOR THE DEPARTMENT’S DENIAL—THAT TAXPAYER FAILED TO MEET THE THRESHOLD ELEMENT OF THE POLLUTION CONTROL EXEMPTION—APPLIES TO ALL OF TAXPAYER’S PROPERTY FOR THAT SAME TAX YEAR.**

**A. The Revenue Procedures Act (RPA) governs the process by which the Department determines property tax exemptions and assesses property, and how taxpayers may protest the denial of a tax exemption or appeal a proposed tax assessment.**

In order to understand how the ALC erred by improperly limiting the scope of this contested case hearing, it is important first to understand the general process for how property tax exemptions

are handled at the administrative level. In a typical property tax matter, the Department's Property Division reviews a taxpayer's property tax return, along with any exemption claims, and issues a Proposed Assessment listing the assessed value of the taxpayer's property. *See, e.g.*, 2017 Proposed Assessment (Aug. 15, 2017) (R. pp. 2361-2364); 2018 Proposed Assessment (August 21, 2018) (R. pp. 2127-2129). Thereafter, the Department sends an annual assessment certification to the county auditor(s), which includes the assessment information for each taxpayer's property. *See* S.C. Code Ann. § 12-37-970 (requiring Department to forward property assessments to counties by August 15).

The taxpayer can protest the Proposed Assessment in accordance with sections 12-60-2120 and 12-60-450 and SC Revenue Procedure #06-2. This appeal usually leads to a Department Determination, which is prepared by a "Department representative" (typically an attorney within the OGC) who likewise represents the Department at any subsequent contested case hearing. *Id.* § 12-60-30(11); *see also* SCALC Rule 8 (requiring agency to be represented by attorney during ALC proceeding), SC Revenue Procedure #06-2 at 4-7 (explaining process for appealing proposed assessment and issuance of Department Determination). A "department determination means the final determination within the department from which a person may request a contested case hearing before the Administrative Law Court." S.C. Code Ann. § 12-60-30(10). A Department Determination is different from a "division decision," which is a "decision by a division of the department that affects the rights or obligations of a person for which no specific appeals rights are provided by this act." *Id.* § 12-60-30(13).

These definitional distinctions are important and consistent with the Department's administration of its statutory duties. Every day, hundreds of Department employees in the ordinary course of business make decisions that affect the rights or obligations of taxpayers. By designing an internal appeals procedure and designating only certain people to issue Department Determinations, the RPA and Department practice ensure that only those decisions that have been fully vetted

internally by agency stakeholders in conjunction with its legal staff become the *final* decision of the Department. *See* SC Revenue Procedure # 06-2 at 6–7. Although Department Determinations often agree with the initial conclusions in a division decision, the Determinations are not intended merely to rubber-stamp every earlier decision by a division. In fact, many times a Department Determination (which represents the final agency decision) may revise, clarify, or even “reverse” some or all of an earlier division decision.

Thus, when the administrative review of a disputed tax matter ultimately leads to the issuance of a Department Determination, any issue or finding that was the subject of the division decision that led to the taxpayer’s protest can rightfully be included in the Department’s final determination regarding the dispute—even if the taxpayer had agreed with (and not objected to or protested) that specific finding or conclusion in the division decision.

**B. Colonial protested the Department’s proposed assessment for tax years 2017–2018, and the Department’s Determination that Colonial was not entitled to the Pollution Control Exemption necessarily applies to all of Colonial’s property the Department had assessed for tax years 2017–2018.**

At the division level, the Department denied the Pollution Control Exemption for some of the claimed property and granted it for other claimed property. However, as discussed above, the division decision focused solely on whether certain property was properly considered pollution control equipment and did not take into consideration whether Colonial was in fact an “industrial plant” that could even claim the Pollution Control Exemption in the first instance. *See* pp. 8–9, *supra*. Subsequently, Colonial protested the Department’s partial denial of the Pollution Control Exemption by protesting the Department’s assessment for tax years 2017 and 2018. *See* Protest Letter for 2017 dated September 7, 2017 (Colonial’s Exhibit 3) (R. pp. 2365-2408); Protest Letter for 2018 dated August 13, 2018 (Colonial’s Exhibit 6) (R. pp. 2439-2442). As a result of the protest, the Department proceeded with reviewing the division decision regarding the assessment, including the entire exemption application for those tax years. Because Colonial protested the assessment for tax years

2017 and 2018 and that assessment was under appeal, Colonial's eligibility for the Pollution Control Exemption for any of its property had not yet been finally decided. *See, e.g.*, S.C. Code Ann. § 12-60-450(C) (noting that the filing of an appeal of a proposed assessment extends the time for assessment).

As the statutory framework of the RPA illustrates, Colonial cannot bifurcate its appeal in a way that estops the Department from reviewing portions of its assessment during the administrative review process. Likewise, the Department is not barred from correcting any portion of its initial decision at the division level that may have granted the Pollution Control Exemption in error.

**C. The ALC erred in denying the Department's Motion to Amend its Prehearing Statement, and further erred by concluding that certain property was beyond the scope of the contested case hearing even though the legal effect of the Department's Determination regarding the Pollution Control Exemption necessarily applied to all of Colonial's property.**

*i. The Department Determination's matter in dispute is broad.*

The Department Determination states the matter in dispute as: "Is Colonial Pipeline Company (Taxpayer) entitled to an ad valorem property tax exemption pursuant to S.C. Code Ann. § 12-37-220(A)(8) (2014)?" *See* Department Determination (R. pp. 2443-2448). The matter in dispute in no way limits the Department or the ALC to consider only the property denied the exemption at the division level. Whether no, yes, or some combination, the answer to this question applies to all property Colonial claims as exempt under § 12-37-220(A)(8).

*ii. If the Department's determination is correct (that Colonial is ineligible for the Pollution Control Exemption), it is ineligible for all of its property.*

The Department issued its final decision that: "The Taxpayer is not entitled to a property tax exemption pursuant to § 12-37-220(A)(8)." *See* Department Determination (R. pp. 2443-2448). Logically, if Colonial does not qualify for the Pollution Control Exemption because it fails to meet the threshold element by not having an industrial plant, then none of its property qualifies for the exemption. Colonial even argued the converse that if it qualifies for the Pollution Control Exemption by having an industrial plant for some property, its other property must qualify for the exemption. *See*

Hr'g Tr. 359:17-360:9 (R. pp. 1800-1801). The Department Determination specifically mentioned the three items that the Department denied at the division level— pipe coatings, cathodic protection, and automatic shut-off valves. However, the analysis and ultimate determination that “[t]he Taxpayer is not entitled to a property tax exemption pursuant to § 12-37-220(A)(8)” applies to all of Colonial’s property.

iii. *The contested case hearing is de novo.*

A contested case hearing is a trial de novo, in which “the whole case is tried as if no trial whatsoever had been had in the first instance,” and the administrative law judge conducting the hearing is the sole finder of fact. *Marlboro Park Hosp. v. S.C. Dep't of Health & Envtl. Control*, 358 S.C. 573, 579, 595 S.E.2d 851, 854 (Ct. App. 2004) (quoting *Blizzard v. Miller*, 306 S.C. 373, 412 S.E.2d 406 (1991) and *Converse Power Corp. v. S.C. Dep't of Health & Envtl. Control*, 350 S.C. 39, 564 S.E.2d 341 (Ct. App. 2002)); see also *Da West Bar & Grill, LLC, d/b/a Da West Bar & Grill v. SC Dep't of Revenue*, Docket No. 21-ALJ-17-0099-CC (May 20, 2021) at 6. A *de novo* hearing is not limited to facts included in the Department Determination, but instead

[a] *de novo* hearing is one in which the decisionmaker does not review the decision of someone else but makes the determination himself. Thus, the ALJ while he may use the record compiled earlier as part of the evidence in the case, may receive additional evidence and decides the issue without regard to the decisions made by the agency.

R. Lowell, *South Carolina Administrative Practices Procedure* 151-52 (2d ed. 2008) (footnotes omitted, quoting William F. Funk and Richard H. Seamon, *Administrative Law: Examples & Explanations* at 71 n.1 (2001)). Therefore, even if the ALC thought the Department Determination was limited to some of Colonial’s property, the ALC should consider all property claimed in Colonial’s exemption application *de novo*.

Instead, the ALC erroneously limited the scope of the hearing and failed to consider all property claimed as exempt under the Pollution Control Exemption. The relevant evidence remains the same whether the action includes only three or all seven of the items for which Colonial claims

the Pollution Control Exemption. Colonial bears the burden to prove it has an industrial plant and meets the threshold element of the Pollution Control Exemption. In addition to the threshold element of having or being an industrial plant, the ALC should have considered whether the wastewater pollution control equipment, storm water pollution control, secondary containment, and tank internal/external floating roofs met the remaining elements of the Pollution Control Exemption and applied the dual-purpose provision. Because the ALC did not consider all the property claimed as exempt under the Pollution Control Exemption *de novo*, its decision is affected by an error of law.

*iv. The Department did not change its position or argument since the issuance of the Determination that formed the basis of the contested case hearing.*

In its Order on Cross Motions for Summary Judgment, the ALC addressed the Department's division decision granting the Pollution Control Exemption for some items while its Amended Prehearing Statement argued none of the items qualify for the exemption. The ALC stated that "[s]ince this is a *de novo* hearing, the Department is entitled to change its position if it believes its initial decision was not in accordance with the law." *See* Order on Cross Motions for Summary Judgment (R. pp. 7-29). As discussed above, the RPA allows review of a division decision, so the Department Determination may reach a conclusion different from the division decision. *See* S.C. Code Ann. § 12-60-2120(D). Further, the Department is not estopped from invoking the correct elements of the Pollution Control Exemption even if Department personnel incorrectly or inadvertently misapplied those elements at the division level. *See TNS Mills*, 331 S.C. at 621-22, 503 S.E.2d at 477. Similarly, the Department can amend its Department Determination to correct errors and omissions, which it offered to do in this case. *See* Email dated August 29, 2019 (R. pp. 2458-2459).<sup>7</sup>

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<sup>7</sup> Importantly, amending the Department Determination after an appeal has been filed with the ALC creates several procedural complications. Does the taxpayer have to request a new contested case hearing (and pay an additional nonrefundable filing fee) to appeal the amended Determination? *See* SCALC Rule 71. If so, does that moot the first appeal, or should the two contested case hearings be consolidated? If the taxpayer does not request a new contested case hearing following the issuance of

Further, the ALC has made clear in prior cases that an argument not raised in the Department Determination and Prehearing Statement is not waived so long as the Department amends its Prehearing Statement prior to the conclusion of the case. *See* Order on Cross Motions for Summary Judgment in *Amazon Services, LLC v. South Carolina Department of Revenue*, Docket No. 17-ALJ-17-0238-CC (filed January 29, 2019) at 15-16 (R. pp. 2456-2457). This holding is consistent with the letter and spirit of Rule 15, SCRCPP, which instructs courts that “leave [for a party to amend its pleadings] shall be freely given when justice so requires and does not prejudice any other party,” including to allow a party to amend its pleadings to conform to the evidence presented at trial. *See* Rule 15, SCRCPP (encouraging courts to permit amendments to conform to the evidence when “the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits”).

That is precisely the situation here. The Department’s argument in its Determination, initial Prehearing Statement, and Amended Prehearing Statement is exactly the same: “the claimed property fails the first element [of the Pollution Control Exemption] because the claimed property is not a facility or equipment of an industrial plant.” *See* Department Determination (R. pp. 2443-2448). Even if the Court considers the Amended Prehearing Statement to be a new argument (which it was not), such a change was permissible.

Consistently, the Department’s initial and both amended prehearing statements set forth: “The Department intends to show that the Taxpayer is not entitled to a property tax exemption pursuant

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an amended Determination, does that bar the taxpayer from appealing any new issues raised in the amended Determination even though the taxpayer already has contested case hearing pending relating to the same tax and tax year? For these reasons, the Department believed that filing an amended Prehearing Statement was the best way to clarify the issues relating to the scope of its Determination and Colonial’s property.

to § 12-37-220(A)(8) because the property claimed by the Taxpayer is not facilities or equipment of industrial plants.” Based on Colonial’s line of questioning at its 30(b)(6) deposition, Colonial seemed to mistakenly believe only the items denied at the division level were at issue. After communicating to Colonial that it did not qualify for the Pollution Control Exemption for any property claimed, the Department filed the Second Amended Prehearing Statement as clarification for the ALC.

The ALC ultimately denied the Motion to Amend and excluded from its consideration the property granted the exemption at the division level. *See* Order Denying Motion to Alter or Amend Order Denying Motion to Amend PHS (filed June 22, 2020) (R. pp. 39-46). The ALC cited *Mead v. Beaufort Cty. Assessor*, 419 S.C. 125, 796 S.E.2d 165 (Ct. App. 2016) to limit this action to the items originally denied by the Property Division. However, this Court allowed an ALC decision granting an exemption to include subsequent years that were unchallenged with a contingency. *Id.* at 141, 796 S.E.2d at 174 (“we modify the ALC’s order to provide Mead’s eligibility to the homestead exemption in subsequent years is contingent on no change in his circumstances.”). This Court was most concerned that no evidence regarding subsequent years was presented at the ALC hearing because changes could occur in subsequent years that would affect the taxpayer’s eligibility for the exemption. In contrast to *Mead v. Beaufort Cty. Assessor*, this case only involves certain limited property tax years, so the circumstances are not subject to change. Whether the Petitioner has an industrial plant for the periods involved does not change if the four items initially granted the exemption by the Property Division are included in the action. The determination of that threshold issue is not dependent on any specific property claimed by Colonial. Therefore, *Mead v. Beaufort Cty. Assessor* supports the Department’s assertion that the four items not mentioned in the Department Determination are justiciable.

Further, if the original prehearing statement filed by the Department in January 2019 had contained content identical to the Second Amended Prehearing Statement currently at issue, the

Petitioner would have had no basis to object to the issues and action requested by the Department because the ALC rules do not require a motion to accompany the initial filing. The ALC erroneously looked to *International Paper Company, Inc. v. South Carolina State Energy Office*, Docket No. 12-ALJ-30-0086-CC (filed December 19, 2012) to justify limiting its consideration to only some of Colonial's property. In *International Paper*, the ALC held that the petitioner attempted to convert a request for a contested case into a notice of appeal—"an entirely different document" with "entirely different procedural rules." In addition to being distinguishable from the instant case and having no precedential value, *International Paper* would not apply without invocation of ALC Rule 18. Here, the prehearing statement remains a prehearing statement. As a mere amendment of a pleading, paper, or document—not the creation of a different document—amendment of the prehearing statement does not implicate any different procedural rules.

*v. The ALC's analysis leads to an absurd, bifurcated result.*

If the ALC had agreed (as this Court should find) that Colonial is not entitled to the Pollution Control Exemption, Colonial would still have received the exemption on some of its property, despite the Court having concluded as a matter of law that it was not entitled to claim the exemption at all. This absurd, bifurcated result shows why the scope of the contested case hearing must include all property that Colonial claimed under the Pollution Control Exemption within the tax years at issue. *Florence Cty. Democratic Party v. Florence Cty. Republican Party*, 398 S.C. 124, 128, 727 S.E.2d 418, 420 (2012) (courts should not "construe a statute in a way which leads to an absurd result.")

### CONCLUSION

For the reasons stated above, this Court should reverse the ALC's decision because the ALC erred as a matter of law resulting in a decision that is contrary to constitutional and statutory provisions. The Pollution Control Exemption is only available for the facilities or equipment of "industrial plants," and industrial plants require some level of manufacturing and production. Colonial

does not own or operate an “industrial plant,” nor can its 515 miles of pipeline in South Carolina be considered an “industrial plant” because Colonial is a transportation company that does not manufacture or produce anything. Therefore, as a matter of law Colonial is not entitled to the Pollution Control Exemption for any of the property it claimed as exempt in tax years 2017 and 2018.

Respectfully Submitted,



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November 18, 2021

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**SC Court of Appeals**

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.

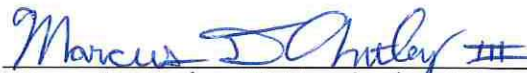
South Carolina Department of Revenue, Abbeville County, Anderson County, Greenville County,  
Aiken County, and Laurens County, and York County,.....Appellants.

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**CERTIFICATE OF COUNSEL**

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The undersigned certifies that the South Carolina Department of Revenue’s Final Brief and  
Final Reply Brief comply with Rule 211(b), SCACR.



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Columbia, South Carolina  
November 18, 2021