THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

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.

SOUTH CAROLINA DEPARTMENT OF REVENUE'S FINAL REPLY BRIEF

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Columbia, South Carolina
November 18, 2021

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A. The Department correctly ruled that Colonial was not an "industrial plant" in its Final Agency Decision and was not estopped by a division decision.

Both S.C. Code Ann. § 12-37-220(A)(8) (2014) and S.C. Const. art. X, § 3(h), limit the Pollution Control Exemption to "facilities or equipment of **industrial plants**." (emphasis added). No party disputes that a taxpayer must meet this fundamental element to receive the Pollution Control Exemption. Initially, the Department missed this element at the division level and erroneously granted the Pollution Control Exemption for some limited property claimed by Colonial. *See* Stipulation of Facts Nos. 16 and 24 (R. pp. 2463-2464). When asked if he analyzed whether Colonial's property in South Carolina was an "industrial plant," the division level employee who granted the Pollution Control Exemption testified, "At that time, I did not, no." *See* Hr'g Tr. 310:14-16 (R. p. 1751). The employee further testified, "Prior to this case I never focused on the language of industrial plant in the exemption." *See* Hr'g Tr. 345:13-14 (R. p. 1786). Consistent with the testimony, the parties stipulated that the Property Division "evaluated the exemption application based on whether the property was designed for the elimination, mitigation, prevention, treatment, abatement, or control of water, air, or noise pollution"— with evaluation of the "industrial plant" element noticeably absent. Stipulation of Facts No. 16 (R. p. 2463).

Contrary to Colonial's assertion in its Brief, the Department never ruled that Colonial is an "industrial plant." In fact, the Department specifically determined Colonial *not* to be an "industrial plant" and issued a Final Agency Decision explicitly stating this. *See* Department Determination (R. pp. 2443-2448). Based on that Determination, the Department denied the Pollution Control Exemption to Colonial and all other pipeline companies. *See* Hrg. Tr. 345:19-21 (R. p. 1786).

Regardless, the Supreme Court of South Carolina has made clear that even if the Department incorrectly interpreted the statute and granted the exemption under this erroneous view, neither the Department nor the Courts are bound to this erroneous view. *See TNS Mills, Inc. v. S.C. Dep't of Revenue*, 331 S.C. 611, 621-22, 503 S.E.2d 471, 477 (1998). In other words, the Department is not estopped from invoking the correct elements of the Pollution Control Exemption as it did in the Department Determination even if Department personnel incorrectly or inadvertently misapplied those elements at the division level. *See id.*

B. "Industrial plant" has a manufacturing and production element.

The primary issue is whether Colonial's operations in South Carolina constitute an "industrial plant." However, Colonial and the ALC commit a logical fallacy when analyzing the compound term "industrial plant" through its component words. The ALC illustrates this error by stating, "If it's related to industry, then you don't really stick them back together, you just come back to whether it operates as a plant." *See* Motion for Summary Judgment Hr'g. Tr. 38:3-6 (R. p. 1364). While analyzing the component words helps arrive at a definition for "industrial plant," the meanings of those component words must be combined. The Department attempted a number of times to clarify this for the ALC:

> THE COURT: Okay. So— but it's not a plant?
> MR. ANTLEY: Yes, Your Honor. "Industrial plant" together...
> Motion for Summary Judgment Hr'g. Tr. 37:24-38:1 (R. pp. 1363-1364).[1]

> THE COURT: Along those lines, if there are portions of the facility that is industrial activity, then why would not the operation of the entire facility be considered an industrial plant?
> MR. ANTLEY: So, you said "industrial activity." Do you mean industrial plant?
> Motion for Summary Judgment Hr'g. Tr. 52:3-8 (R. p. 1378).

[1] When arguing the only issue before the Court is the term "plant," Colonial notably omits the Department's response, "'Industrial plant' together" from this citation in Footnote 3 of its Brief.

A tree to be used for timber demonstrates the flaw with this logic. The tree is "of or related to industry"— namely the timber industry. Additionally, the tree is a plant. However, a tree is not an "industrial plant."[2]

As elaborated in the Department's Brief, the definitions of "industry" and "plant" contain a consistent theme of manufacturing and production. The ALC seemed to agree with this interpretation before it erroneously granted the Pollution Control exemption to a company that undisputedly does not engage in production.

> THE COURT: You've got a facility, and if you've got a facility out there, and portions of that facility are conducting industrial activity, then— not everything they do is industrial activity, but a percentage. Let's say 30 percent— we'll pick a figure— is engaged in industrial activity, then why would not the facility be considered an industrial plant?
> MR. ANTLEY: By industrial— I'm not sure what you mean by "industrial activity." If you mean producing or manufacturing; is that... ?
> THE COURT: Yeah, producing something.
> Motion for Summary Judgment Hr'g. Tr. 52:9-20 (R. p. 1378).

Interestingly, Colonial even references in its Brief the American Heritage Dictionary definition of plant as, "A building or group of buildings for the **manufacture of a product**; a **factory**; works in an auto plant." (emphasis added). *See* Colonial Initial Brief at 22.[3] This definition continues the production theme present in the definitions cited in the Department's Brief. However, Colonial successfully

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[2] After Colonial argued that the Court should choose the primary dictionary definition of "plant," the Department pointed out in its Reply to Colonial's Response in Opposition to the Department's Motion for Summary Judgment at p. 2 (R. p. 641), the first and therefore primary definition of "plant" would be definition 1.a.— "a young tree, vine, shrub, or herb planted or suitable for planting." *See Merriam-Webster* (December 30, 2019, 1:54 PM), https://www.merriam-webster.com/dictionary/plant.

[3] Colonial also reverts to referencing Wikipedia as it did in its Summary Judgment filings. Wikipedia is an online encyclopedia that any person can edit, so its reliability is highly questionable. Further, the Taxpayer concedes that Wikipedia does not have an independent definition of "industrial plant."

distracted the ALC from the term "industrial plant" and focused its attention on the individual terms "industrial" and "plant."

Advocating for an expansive definition of "industrial," Colonial suggests in its Brief that this Court held that college apartments fell within the definition of "industrial" in *South Carolina Public Interest Foundation v. City of Columbia*, 431 S.C. 164, 847 S.E.2d 257 (2020). *See* Colonial's Brief at 20. Besides having nothing to do with the term "industrial plant," the issue in that case centered on the meaning of "industrial *or* business." (emphasis added) *Id.* at 167, 847 S.E.2d at 258. Rather than hold the dormitories were industrial, this Court explicitly stated, "[w]e hold these dormitories are commercial enterprises that fall within the definition of "*business*." (emphasis added) *Id.* Even if "industrial" were broad enough to include a dormitory, combining "industrial" and "plant" results in a term that requires a production element.

C. The laws of other states either support the Department's position or lack relevance.

No other State has an exemption identical to the Pollution Control Exemption, particularly the language about "industrial plants." Although lacking any authority in South Carolina, the law of other states either support the Department's position that Colonial does not have an industrial plant or are distinguishable legally and factually.

In its Brief, Colonial cites *Richards v. Jolley*, 208 N.C. App. 436, 703 S.E.2d 467 (2010). In that case, the Court of Appeals of North Carolina found a business that manufactures pallets qualified as a "plant." All agree that a manufacturer may qualify for the Pollution Control Exemption. The principal holding of *Richards v. Jolley* is that complexity does not determine what constitutes an industrial plant, which contradicts Colonial's touting itself a complex system as evidence it is an industrial plant. To the extent North Carolina's law is instructive here, under North Carolina General Statute 62-3, "'industrial plant' means any plant, mill, or factory engaged in the business of

manufacturing." (emphasis added). Therefore, under North Carolina law, Colonial does not have an industrial plant.

Colonial also cites an Illinois case, *Commonwealth Edison Co. v. Department of Local Government*, 426 N.E.2d 817 (Ill. 1981), interpreting whether a statutory amendment was a change in the law or a clarification. This is another case regarding a manufacturer. Instead of an exemption statute, the Illinois statute concerned valuation. The Illinois court ultimately held the amendment to be a clarification of the term "productive earning value." Although Colonial admits the Illinois statute is unique, it implies "productive earning value" is similar to production purpose. The term "productive earning value" is an Illinois law term and does not appear in the South Carolina Code of Laws. Still, under the Illinois law, the property claimed by Colonial would be attributed a "productive earning value" because the property "reduces the production costs of the products or services otherwise sold by the owner of such facility." *See* Ill.Rev.Stat.1979, ch. 120, par. 502a-3. Specifically, Colonial's claimed property helps maintain the integrity of the pipe, so Colonial can efficiently transport Refined Petroleum Products. *See* 30(b)(6) Depo Tr. 131:2-132:7(Exhibit 19) (R. pp. 1115-1116). Colonial admits the property stops leakage. *See* Colonial's Brief at p. 40.

The remaining out of state cases cited by Colonial lack relevance because they are factually and legally different. *Jacksonville Port Authority v. Florida*, 305 So.2d 166 (Fla. 1974) is a nearly fifty year old case analyzing eligibility for industrial development revenue bonds. The Florida court liberally construed the industrial revenue bond statute, which is the opposite of South Carolina's long established law of construing tax exemptions against the taxpayer. *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"). This Florida case is not relevant, but even if it were, Florida's liberal statutory construction would directly contradict South Carolina law.

The sales tax cases cited by Colonial regard natural gas systems in Minnesota and Alabama. *See Great Lakes Gas Transmission L.P. v. Comm'r of Revenue*, 638 N.W.2d 435 (Minn. 2002); *S. Nat. Gas Co. v. State*, 261 Ala. 222, 73 So. 2d 731 (1953); and *State v. Alabama Gas Corp.*, 258 Ala. 356, 62 So. 2d 454 (1952). In *Great Lakes Gas*, the statute at issue was repealed and does not use the term industrial plant. The purpose of that statute was to avoid double taxation, and the record contained testimony that the taxpayer was refining. *Id.* at 440-441. In *S. Nat. Gas Co.*, the taxpayer also refined. *S. Nat. Gas Co. v. State*, at 226. Undisputedly, Colonial is not a refiner and does no refining in South Carolina. *See* 30(b)(6) Depo Tr. 126:22-25; 188:13-16 (Exhibit 19) (R. pp. 1110; 1172). Further, Colonial does not transport natural gas, which requires a completely different infrastructure from Colonial's pipeline. Natural gas systems are more akin utilities than transportation companies like Colonial. Therefore, these factually and legally distinct Minnesota and Alabama sales tax cases lack any relevance to this case.

Additionally, Colonial cites *International Paper Co. v. Board of Environmental Protection*, 737 A.2d. 1047 (Me. 1999), a Maine case that held the fact finder must consider the primary purpose of equipment with a pollution control function. Maine's pollution control exemption is distinct from South Carolina's exemption. Instead of a primary purpose test, South Carolina provides a formula for calculating the value eligible for the Pollution Control Exemption in the dual purpose provision. If the Court looks to the primary purpose of Colonial's property, it is a business purpose, not pollution control. Ultimately, this is a factual question, and Colonial failed to meet its burden of proof.

Before altering its interpretation of the dual purpose provision, the ALC considered the purpose of Colonial's property and, at least for pipe coatings, found the purpose to be 100% business. *See* Original Final Order (filed December 1, 2020) at 31 (R. p. 77). Interestingly, Colonial cites Washington and Texas cases that also held the taxpayers' property was not 100% pollution control property. *See Weyerhaeuser Co. v. St. Dep't of Ecology*, 545 P.2d 5 (Wash. 1976) and *Mont. Belvieu Caverns,*

LLC v. Texas Comm'n on Envtl. Quality, 382 S.W.3d 472 (2012). The Department agrees that the fact finder must consider the value of the pollution control equipment relative to its business purpose if the Court interprets "industrial plant" broadly to include companies that are not engaged in production. Still, since Colonial does not meet the threshold element of having an industrial plant, the analysis ends before ever applying the dual use provision.

Colonial dedicates roughly six pages of its Brief to discussing Texas law. The Texas statute that exempts pollution control property from property taxes states, "[a] *person* is entitled to an exemption from taxation of 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." (emphasis added) Tex. Tax Code § 11.31(a) (West 2021). The most striking difference between the South Carolina exemption and the Texas exemption is Texas offers the exemption to all persons instead of limiting the exemption to "industrial plants." In this case, the "industrial plant" element is the primary issue. Further, the Texas statute includes land pollution and excludes noise pollution. Because of the substantive differences between the two exemptions, Texas' regulatory guidance is irrelevant.[4] Texas may also favor the petroleum industry for its prominent role in its economy and more liberally grant property tax exemptions to pipeline companies. Regardless, Texas law offers no authority for interpreting South Carolina law.

D. The ALC and Colonial erroneously adopted an expansive definition of "industrial plant" despite fact exemptions should be construed strictly and narrowly.

As discussed in the Department's Brief, the ALC adopted Colonial's argument and erroneously defined "industrial plant" broadly despite recognizing tax exemptions are strictly

[4] Colonial asserts "other states have recognized in published guidance that pipeline coatings, cathodic protection, and automatic shut-off valves serve an exclusive, 100% pollution control function." *See* Colonial's Brief at 39. However, Colonial only mentions Texas and cites no other state's published guidance.

construed against taxpayers. *See* Amended Final Order at 10 (R. p. 90) ("South Carolina's tax exemption statutes are strictly construed against taxpayers."); *see also* Amended Final Order at 28 (R. p. 108) ("there is no need to strictly construe the exemption against Colonial"). Broadly reading the term "company" used later in the Pollution Control Exemption, Colonial makes the conclusory statement that the General Assembly wanted to incentivize as many industrial polluters as possible to acquire pollution control equipment. *See* Colonial Brief at 25.[5] Besides begging the question why limit the Pollution Control Exemption at all, an element of the exemption is the facilities or equipment must be "required by the state or federal government." *See* § 12-37-220(A)(8). Therefore, taxpayers are legally obligated to have the pollution control equipment. A more likely explanation is that the General Assembly wanted to lessen the financial burden on companies already assessed at the higher ratio of 10.5% (manufacturers and utilities) when required to acquire pollution control equipment. Further, "[a] court should not consider a particular clause in a statute as being construed in isolation, but should read it in conjunction with the purpose of the whole statute and the policy of the law." *Enos v. Doe*, 380 S.C. 295, 305, 669 S.E.2d. 619, 623 (Ct. App. 2008). Considering the Pollution Control Exemption as a whole, companies eligible for the exemption must engage in production or manufacturing.

While trying to broaden the definition of "industrial plant," Colonial appears to conflate the term "output" with "transport." *See* Colonial's Brief at 25. The term "output" is roughly synonymous with "produce." Therefore, this contradicts Colonial's arguments that it should not be assessed as a manufacturer and that the dual-use provision does not apply. In other words, Colonial wants the

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[5] Colonial makes two more legislative intent arguments. First, Colonial points to the definition of "bulk plant" within the context of motor fuel user fees. However, a "bulk plant" does not equal "industrial plant," and the General Assembly did not describe "bulk plant" as an "industrial plant." Second, Colonial looks to the definition of "project" within the context of industrial revenue bonds. Again, the General Assembly did not define "industrial plant," and the ALC correctly did not consider the industrial revenue bonds as part of its reasoning. *See* Amended Final Order at 21.

benefit of an exemption for companies engaged in production without any discount for the equipment's dual-purpose. Further, although refined petroleum products come out at the end of the pipeline, the pipeline does not output them. What goes in Colonial's pipeline is generally the same as what comes out. *See* 30(b)(6) Depo Tr. 122:7-16 (Exhibit 19) (R. p. 1106). Moving a product does not equal outputting a product. By way of example, a bus does not output people when it transports them from one stop to another although people come out of the bus. Accordingly, Colonial does not "output" a product.

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. 1111); Motion for Reconsideration Hr'g. Tr. 14:25-15:7 (R. pp. 1877-1878); *see also* Colonial's Brief at p. 32 ("In summary, Colonial, the ALC, the Counties and the Department all agree— Colonial performs no 'production' as it is a transportation company, and is not a manufacturer... "). The Department has consistently argued that an industrial plant must produce something. While manufacturers produce, other companies may also produce— i.e. utilities. 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— which Colonial does not— Colonial has no industrial plant and therefore no facilities or equipment of industrial plants to which the Pollution Control Exemption could apply

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

A. The dual purpose provision is consistent with the South Carolina Constitution.

Colonial erroneously argues that the dual purpose provision of the Pollution Control Exemption unconstitutionally restricts the exemption. *See* Colonial's Brief at footnote 6. However, section 12-37-220(A)(8) is consistent with S.C. Const. art. X § 3(h) and simply explains how to calculate the value eligible for the Pollution Control Exemption. For example, if equipment with

pollution control capability costs a dollar more than similar equipment without pollution control capability, only $1.00 is eligible for the exemption. As a concrete example, Colonial's pipe provides the path Refined Petroleum Products travel. The pipe simultaneously keeps the Refined Petroleum Products from escaping and polluting the water or air. Equipment like pipe coatings and cathodic protection help maintain the integrity of the pipe, so Colonial can efficiently transport Refined Petroleum Products. *See* 30(b)(6) Depo Tr. 131:2-132:7(Exhibit 19) (R. pp. 1115-1116). A leak not only pollutes, but it also wastes the Refined Petroleum Products Colonial is paid to transport. A large failure of the pipe might prevent Colonial from transporting Refined Petroleum Products completely.

Further illustrating their business purpose, the pipeline had pipe coatings and cathodic protection before any state or federal law required 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). Colonial admitted the pipe coatings, cathodic protection, and automatic shut-off valves serve an operational function. *See* 30(b)(6) Depo Tr. 65:7-14 (Exhibit 19) (R. p. 1049). In its original Final Order, the ALC correctly found that 100% of the cost of the pipe coatings is a business cost and unrelated to pollution control, which made the value eligible for the exemption zero. *See* Original Final Order (filed December 1, 2020) at 31 (R. p. 77). The Department agrees with Colonial that "It is logical that when property increases the efficiency of a production process by increasing output, it should not be eligible for a property tax exemption— that is the intent of South Carolina's dual use provision." *See* Colonial's Brief at p. 37. However, 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— i.e. property that increases efficiency operationally or financially should not be eligible for the exemption.

The General Assembly could have passed a statute that denies the exemption entirely for property with a dual purpose. In other words, property designed for a production or business purpose does not equate to property designed for pollution control. Arguably, the South Carolina Constitution could limit the exemption to pure pollution control property, so none of Colonial's property would qualify even if Colonial did have an industrial plant. Instead, the General Assembly included the dual purpose provision to address property with a production or business purpose in addition to a pollution control purpose. This common sense approach only exempts the difference in value between equipment with pollution control capabilities and similar equipment without pollution control capabilities. Therefore, the General Assembly preempted confusion over dual purpose property by codifying the dual purpose provision.

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 Department's Motion to Amend its Prehearing Statement was a proper procedure to clarify the effects of the Department Determination consistent with prior ALC holdings.

The Department disagrees with Colonial's description of the property tax appeal system and refers the Court to Section III(A) of its brief for a general explanation of the administrative process for property tax exemptions. For unit valuation, the Department reviews a taxpayer's property tax return to certify an assessment for the county to apply its millage rate for property tax bills. *See* Hr'g Tr. 302:4-14; 304:1-25 (R. pp. 1743; 1745); *see also* S.C. Code Ann. § 12-4-540 (2014). In other words, the Department acts as an impartial intermediary between taxpayers and counties. At the time this matter went through the Department's administrative process, SC Revenue Procedure # 06-2

governed the appeals process.[6] Colonial appealed the proposed assessment, which denied the Pollution Control Exemption for some of Colonial's property.[7] Colonial's appeal of the Property Tax Division's proposed assessment did not go through the Department's Appeals Division but proceeded directly from the Property Tax Division to the Department's Office of General Counsel for Litigation for issuance of a Department Determination. The Department Determination may revise, clarify, or even "reverse" some or all of a division decision. In this case, the Department determined that Colonial did not have an "industrial plant" (an element not considered by the Property Tax Division) and therefore was not entitled to the Pollution Control Exemption. *See* Department Determination (R. pp. 2443-2448). The Department sent the Department Determination by first class mail pursuant to S.C. Code Ann. § 12-60-450 (Supp. 2020).[8] Colonial then requested a contested case hearing at the ALC to challenge the Department Determination.

Under SCALC Rule 14, the Court "*may request* each party to prepare and return a Prehearing Statement setting forth with particularity the issues in the contested case." The ALC chose to request a Prehearing Statement, and the parties complied. The Department first filed an Amended Prehearing Statement to clarify the Amount in Dispute. *See* First Amended PHS (filed June 19, 2019) (R. pp. 157-162). No party objected to the first Amended Prehearing Statement. The Department moved to amend its Prehearing Statement to make sure the parties and the ALC were clear that Colonial did not qualify for the Pollution Control Exemption for any property because it did not meet the threshold element of having an industrial plant. Instead of issuing a new or amended Department Determination precipitating the need for Colonial to request another contested case hearing based on a simple

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[6] SC Revenue Procedure # 20-1 superseded SC Rev. Proc. # 06-2.

[7] Colonial incorrectly states it protested the "denials," citing Stipulation 17 & 25. However, those stipulations refer to "proposed assessments," not "denials." The whole proposed assessment was subject to review.

[8] The statute does not require "service."

clarification, the Department chose to amend its Prehearing Statement after conferring with the parties. 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). The Department's amendment did not go so far as to raise a new argument, but instead, made sure that everyone clearly understood the ramifications of the Department Determination. Despite having no objection to the Amended Prehearing Statement filed a couple months prior and opposing the Department's offer to issue an amended Department Determination, Colonial seized on the Department's Motion to Amend its Prehearing Statement as an opportunity to limit the ALC's consideration to only a portion of the property Colonial claimed under the Pollution Control Exemption. *See* Email dated August 29, 2019 (R. pp. 2458-2459).

B. Colonial is not prejudiced simply because it may have to pay more taxes.

Without any explanation or citing supporting evidence, Colonial makes a conclusory statement that it was "obviously prejudiced" by the Amended Prehearing Statement. *See* Colonial's Brief at 44. Colonial confuses prejudice to be owing more taxes instead of prejudice in the presentation of its case under SCALC Rule 18. The Department explicitly determined that Colonial was not entitled to the Pollution Control Exemption. *See* Department Determination (R. pp. 2443-2448) ("The Taxpayer is not entitled to a property tax exemption pursuant to § 12-37-220(A)(8)."). Further, the Department Determination explained in the Analysis section that the reason for the exemption denial was because "the property claimed as exempt is not facilities or equipment of industrial plants." *See* Department Determination (R. pp. 2443-2448). Contradicting Colonial's argument, the stipulated Assessment in Dispute reflects denying the Pollution Control Exemption for *all* property claimed by Colonial, not

just the property denied at the division level. *See* Stipulation of Facts § C. (R. pp. 2462). The issue before the ALC was whether Colonial was entitled to the Pollution Control Exemption; specifically, whether Colonial met the threshold element of having an industrial plant in South Carolina.[9] If Colonial does not have an industrial plant, it is not entitled to the Pollution Control Exemption for any property. Even if Colonial mistakenly believed only some of the property claimed as exempt were at issue, Colonial must have understood the issue was whether it was an "industrial plant." Therefore, the Amended Prehearing Statement did not prejudice Colonial.

C. The *de novo* contested case hearing was not limited by the Department Determination or Prehearing Statement.

Further, a contested case hearing such as this 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.

[9] Since Colonial did not meet the threshold element, the Department did not need to analyze the other elements of the Pollution Control Exemption. Rather than "ignore" DHEC's conclusion regarding pollution control as Colonial characterizes in its Brief, the analysis simply stopped once Colonial failed the first element.

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)). Colonial had the burden to prove it was entitled to the Pollution Control Exemption and what assessment was appropriate. As a *de novo* hearing, Colonial cannot restrict the matter before the ALC by opposing the Department's Motion to Amend its Prehearing Statement.

D. The ALC erroneously limited its consideration to property denied the Pollution Control Exemption at the division level.

Erroneously, the ALC adopted Colonial's argument and only considered some of the property Colonial claimed as exempt. Contrary to the ALC's assertion, the Department never changed its mind as to the interpretation of the law from the initial Prehearing Statement to the Second Amended Prehearing Statement and was itself dragged into court by Colonial. Other than missing the "industrial plant" element at the division level, the Department consistently argued Colonial was not an industrial plant and therefore ineligible for the Pollution Control Exemption. Colonial cites a nonbinding ALC decision issued by the same judge to oppose the amendment— *International Paper Company, Inc. v. South Carolina State Energy Office*, Docket No. 12-ALJ-30-0086-CC (filed Dec. 19, 2012). Even applying this unauthoritative case, the ALC should have allowed the amendment. The Department did not substitute an entirely different document or implicate different procedural rules. The amendment only resolved any doubt that, if Colonial is not an industrial plant, it does not qualify for the Pollution Control Exemption for any property— including property granted the exemption at the division level.

A simple scenario illustrates the flaw of limiting the action to only some property claimed as exempt. If the ALC correctly found that Colonial was not an "industrial plant," Colonial still would receive an exemption to which it is not entitled based on an error at the division level and the Counties would lose revenue to which they are entitled. As already discussed, the Department should not and cannot be estopped from correcting that mistake and properly applying the law. Further, as argued in the Department's Brief, the Court should avoid this absurd, bifurcated result.

CONCLUSION

For the reasons stated above and in the Department's Brief, 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," which requires 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

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

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.

CERTIFICATE OF COUNSEL

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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