IN THE COURT OF APPEALS
STATE OF GEORGIA

CASE # A21A1129

SIERRA CLUB, INC.
Appellant

v.

GEORGIA PUBLIC SERVICE COMMISSION
Appellee

&

GEORGIA POWER COMPANY
Intervenor - Appellee

APPELLANT'S MOTION FOR RECONSIDERATION

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Appellant moves this Court, pursuant to Georgia Court of Appeals Rule 37, to reconsider its October 25, 2021 Opinion affirming the Georgia Public Service Commission's decision in this matter. Under Rule 37 (e) of the Rules of the Court of Appeals of the State of Georgia, Appellant respectfully submits that this Court, in rendering its Order affirming the decision of the Georgia Public Service Commission, (1) has overlooked material facts in the record including but not limited to the unrebutted analysis of geologist Mark Quarles regarding Georgia Power's treatment of toxic coal ash for decades; and (2) has erroneously construed or misapplied a provision of law or controlling authority, including O.C.G.A. § 46-2-25(b) and *Georgia Power Co. v. Georgia Public Service Comm'n,* 196 Ga. App. 572, 576-77, 396 S.E.2d 562 (1990).

For the reasons more fully set forth in its *Brief in Support of Appellant's Motion for Reconsideration*, Appellant respectfully requests that this Court inquire into and reconsider its opinion affirming the Georgia Public Service Commission.

Respectfully submitted this 3rd day of November 2021.

This submission does not exceed the word count limit imposed by Rule 24.

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CERTIFICATE OF SERVICE

Pursuant to Court of Appeals Rule 6, I hereby certify that based on a prior agreement with counsel for Appellee and for Intervenor\Appellee that service of a .pdf copy of this filing via email will be deemed sufficient service. I have served a true and correct copy of the foregoing *APPELLANT'S MOTION FOR RECONSIDERATION* to Appellee and Intervenor-Appellee via their attorneys, in a .pdf format sent via email before filing. I certify that there is a prior agreement with Appellees to allow documents in a .pdf format sent via email to suffice for service.

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BRIEF IN SUPPORT OF APPELLANT'S MOTION FOR RECONSIDERATION

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COMES NOW Appellant Sierra Club, Inc., pursuant to Georgia Court of Appeals Rule 37(b), and submits this Brief in Support of its Motion for Reconsideration within ten (10) days of this Court's October 25, 2021 Opinion rendered in this case.

ARGUMENT

The unrebutted facts before the Georgia Public Service Commission ("Commission") and this Court are that Georgia Power Company ("Georgia Power") was unlawfully disposing of its toxic coal ash waste ("coal combustion residuals or CCR") in contravention of federal and state law for decades; that Georgia Power's toxic waste handling practices were therefore not prudent; that costs to clean up the toxic wastes were avoidable had Georgia Power been handling its wastes in compliance with law; and that Georgia Power's request to have its customers pay over $7 billion dollars to clean up Georgia Power's illegally dumped toxic waste, and the Commission's approval of that request, violates O.C.G.A. § 46-2-25(b) because the approval was neither reasonable nor just.

Rule 37 requires this Court to grant a motion to reconsider "when it appears that the Court overlooked a material fact in the record . . . or has erroneously construed or misapplied a provision of law or a controlling authority." This Court's

single page October 25 Order denying Sierra Club's appeal and affirming the decisions below, states in its entirety:

(1) The evidence supports the judgment;

(2) No reversible error of law appears, and an opinion would have no precedential value;

(3) The judgment of the court below adequately explains the decision; and

(4) The issues are controlled adversely to the appellant for the reasons and authority given in the appellees' briefs.

October 25 Order @ 1.

Sierra Club's Motion for Reconsideration should be granted because there is no evidence in the record supporting the Superior Court's Order (and this Court has cited none); because there is reversible error of law and an opinion would have precedential value; and because neither the judgment of the Superior Court nor the Appellees' briefs provide reasons and explanations that -- in the face of Appellants undisputed facts -- support this Court's Order.

Contrary to this Court's Order, there is no evidence to support the Commission's Decision that Georgia Power acted prudently when it unlawfully disposed of toxic coal ash in violation of State and Federal Law; that Georgia Power's otherwise preventable clean-up costs-- projected to exceed $7 Billion--were

therefore prudently incurred; nor that it was reasonable and just to require Georgia Power customers to pay for Georgia Power's unlawful conduct.

Sierra Club submitted to the Commission the unrebutted analysis of geologist Mark Quarles that shows Georgia Power has, for decades, unlawfully disposed of toxic waste in streams, wetlands, and groundwater; that its disposal practices unlawfully contaminated groundwater; and that Georgia Power's draft, unapproved closure plans would continue to contaminate groundwater. R2-D2.2 pp52-98, 58, 68-69. *See also* R2-D2.2 p89 ("[g]roundwater contamination is present due to the leakage of unlined surface impoundments that Georgia Power constructed […]"). Neither the Commission nor Appellees dispute these facts. They do not dispute that it has been illegal to discharge pollutants to groundwater in Georgia without a permit since the 1964 Georgia Water Quality Control Act ("GWQCA") (O.C.G.A. § 12-5-30); that Georgia Power never had such a permit; nor that Georgia Power's toxic wastes have been discharging pollution to groundwater for decades. R2-D2.2 p80. Likewise, they do not dispute that it is unlawful to "store, treat, or dispose of hazardous waste in Georgia without a hazardous waste facility permit" (O.C.G.A. §§ 12-8-66; 12-8-62(4); 12-8-62(11)), and that Georgia Power has been doing so at its toxic coal ash ponds for decades.

More importantly, neither Georgia Power nor the Commission ever identified any evidence contradicting Appellant's expert opinion in the record that Georgia

Power was unlawfully and imprudently disposing of its toxic waste, and that it was this very conduct that led to Georgia Power have to spend billions of dollars to clean up its unlawful disposal practices. That is because there is no evidence in the record that demonstrated that Georgia Power was acting lawfully or prudently over the many decades it was illegally dumping its toxic wastes in state and federal waters, and contaminating groundwater.

Instead, the Commission avoided the issue altogether belatedly contending in its appeal defense that it need not "identify every argument and all evidence that it is not adopting." Commission Br. at 23. Although this Court states that the "evidence supports the judgment" (October 25 Order @ 1), this Court similarly never explains what evidence supports the judgment. Nor does this Court explain how the uncontradicted and undisputed evidence cited above support a finding that Georgia Power's and the Commission's plan to make Georgia Power's customers pay the billions of dollars needed to correct Georgia Power's unlawful conduct is just and reasonable. Indeed, this Court never identifies a single iota of evidence that Georgia Power acted lawfully or prudently when it put its toxic wastes in federal and state waters, nor when it contaminated groundwater, nor any evidence that passing along 100% of Georgia Power's clean-up costs for that illegal conduct to Georgia Power customers is just and reasonable.

I. CONTRARY TO THIS COURT'S OCTOBER 25 ORDER, THERE IS CLEAR REVERSIBLE ERROR; A DECISION WOULD HAVE PRECEDENTIAL VALUE; AND CONTROLLING AUTHORITY REQUIRES REVERSAL.

This Court must appreciate and understand that the significance of the unrebutted and undisputed pollution evidence cited above cannot be overstated. Georgia Power and the Commission are seeking to have Georgia Power customers pay the full costs to correct Georgia Power's imprudent and unlawful conduct. This Court has misconstrued and misapplied controlling law (O.C.G.A. § 46-2-25(b) and *Georgia Power Co. v. Georgia Public Service Comm'n,* 196 Ga. App. 572, 576-77, 396 S.E.2d 562 (1990)) if upon review of that evidence, this Court agreed that customers rather than Georgia Power itself must pay 100% of the coal ash clean-up.

Under Georgia law, in order for Georgia Power to recover costs from its customers, Georgia Power has the burden of proof to show that the costs it seeks from customers are "just" and "reasonable" (O.C.G.A. § 46-2-25(b)), "prudently incurred" and not unlawful. *Georgia Power Co.*, 196 Ga. App. at 576-77. <u>The Commission can only allow Georgia Power to recover costs it has incurred if those costs are just, reasonable, and prudently incurred</u>. *Id*. Whether it is just reasonable and prudent to allow cost recovery from Georgia Power's customers is the core question to be resolved in a rate case. *See* O.C.G.A.

§§ 46-3A-2(b); 46-2-25. The record here is clear that Georgia Power did not meet its burden in this case.

Nowhere in the one-page October 25 Order does this Court ever cite any legal authority to support the proposition that Georgia Power's unlawful disposal of coal ash was prudent. Nor does this Court cite any authority for the proposition that it is just and reasonable to make Georgia Power's customers pay to correct that unlawful conduct.

Miriam Webster defines "just" as "conforming to a standard of correctness: PROPER;" "acting or being in conformity with what is morally upright or good: RIGHTEOUS." *Just, Webster's New Collegiate Dictionary* (1977). Miriam Webster defines "reasonable" as "agreeable to reason," "not extreme or excessive," and "MODERATE, FAIR." *Reasonable, Webster's New Collegiate Dictionary* (1977). Simply stated, it cannot be "correct," "proper," "morally upright," "righteous," "good," "moderate," or "fair" to make Georgia Power's customers pay the extreme and excessive cost of Georgia Power's unlawful conduct.

A judicial decision clarifying that it is neither just or reasonable to make a utility's captive customers pay the cost for the utility's unlawful conduct would have precedential value in Georgia. Indeed, the North Carolina Supreme Court concluded similarly when it issued its December 2020 decision that reversed and remanded the North Carolina Utilities Commission's ("NCUC's") attempt to allocate coal ash

clean-up costs to that utility's customers on similar grounds. *State ex rel. Utilities Comm'n v. Stein,* 375 N.C. 870, 851 S.E.2d 237 (2020). As the *Stein* court explained, the NCUC was

> required to consider *all* material facts of record…including…facts pertaining to alleged environmental violations such as non-compliance with NPDES permit conditions, unauthorized discharges, and groundwater contamination from the coal ash basins…and to incorporate its decision with respect to the nature and extent of the utilities' violations, if any, in determining the appropriate ratemaking treatment for the challenged coal ash costs."

Id. at 276-77 (emphasis added).

This highly persuasive North Carolina Supreme Court decision on this very issue has tremendous precedential value here. It provided the clarity necessary for the parties to the NCUC proceeding to apply North Carolina law, as clarified by the Supreme Court, to the facts at issue in that case and reach a settlement that ensured the costs that utility customers' pay was more reasonable and just than they would have been otherwise.

A decision by this Court would have similar precedential value. It would clarify Georgia law for the Commission and the parties, provide guidance to the Commission to conduct the necessary factual inquiries, and allow the parties to work together and perhaps even to come to settled resolution of this matter to ensure that clean-up costs paid by Georgia Power customers (if any) is just and reasonable.

II. CONTRARY TO THIS COURT'S ORDER, APPELLEES NEVER IDENTIFY ANYTHING IN THEIR BRIEFS THAT SUPPORTS THIS COURT'S OCTOBER 25 ORDER.

As a final basis for affirming the decisions below, the Court's October 25 Order mentions the Superior Court's order and then states that the "issues are controlled adversely to the appellant for the reasons and authority given in the appellees' briefs" (October 25 Order @ 1). However, the Court never identifies what in the lower court Order supports its decision nor what issues it believes are controlled by what reasoning and authority in the Appellees' briefs.

To be clear, nowhere in any of the Appellees' briefs do the Appellees cite any evidence or authority that:

1) Georgia was handling its wastes lawfully or prudently: rather the only evidence in the record is that Georgia was handling its wastes unlawfully and imprudently, and Georgia Power is now seeking to make its customers pay the costs to correct that unlawful and imprudent conduct;
2) It is just or reasonable to force Georgia Power's captive customers to pay all the costs to clean up the coal ash pollution caused solely by Georgia Power's unlawful and imprudent conduct.

There is nothing in the lower Court Order or Appellees' briefs that can sustain this Court's decision.

CONCLUSION

This Court should grant Sierra Club's Motion for Reconsideration because it is clear on the record here that "the Court overlooked a material fact in the record … or has erroneously construed or misapplied a provision of law or a controlling authority." In so doing, this Court should grant Sierra Club the relief it requested: reverse the Commission's Final Decision and remand this case; instruct the Commission to examine the cost of Georgia Power's coal ash handling practices and evaluate whether Georgia Power, and not its customers, should bear all (or some) of those costs as required by O.C.G.A. § 46-2-25(b), this Court's ruling in *Georgia Power Co. v. Georgia Public Service Comm'n,* 196 Ga. App. 572, 576-77, 396 S.E.2d 562 (1990), and consistent with the North Carolina Supreme Court's *Stein* decision.

In addition, as noted in the briefs in chief in this case, this Court should instruct the Commission to consider whether -- in the absence of Georgia Environmental Protection Division permits approving the closure plans -- it is premature for the Commission to determine a recoverable amount of just, reasonable, prudent and not excessive coal ash costs incurred, where the dollar amounts are from draft closure plans that only provide mere future cost possibilities.

Respectfully submitted this 3rd day of November, 2021.

This submission does not exceed the word count limit of 4,200 imposed by Rule 24.

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