THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM THE ADMINISTRATIVE LAW COURT
Ralph King Anderson, III, Chief Administrative Law Judge
Case No. 12-ALJ-30-0086-CC
Appellate Case No. 2013-000114

International Paper Company, Inc., ...Appellant,

v.

South Carolina State Energy Office,.....Respondent.

MOTION TO HOLD APPELLATE TIMELINES IN ABEYANCE,
or in the alternative,
MOTION FOR EXTENSION

Pursuant to Rule 204(b), SCACR, Appellant has moved in the Supreme Court to certify this appeal to the Supreme Court. (copy of motion attached). Accordingly, Appellant moves to hold the appellate timelines in abeyance pending the Supreme Court's decision on the motion to certify because the structure, content, and language of the brief will depend on which Court is hearing the case. In the alternative, Appellant requests a 30 day extension to serve and file its Initial Brief of Appellant and Designation, making the brief due on or before June 21, 20013. This extension is necessary due to the recent illness and death of undersigned counsel's mother, as well as the more recent illness of undersigned counsel.

May 21, 2013

Respectfully Submitted,

Robert L. Widener

Robert L. Widener
Erik P. Doerring
McNair Law Firm, P.A.
Post Office Box 11390
Columbia, South Carolina 29211
803-799-9800
Attorneys for Appellant

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In The Supreme Court

APPEAL FROM THE ADMINISTRATIVE LAW COURT
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International Paper Company, Inc., ...Appellant,

v.

South Carolina State Energy Office,.....Respondent.

MOTION TO CERTIFY APPEAL TO SUPREME COURT

Pursuant to Rule 204(b), SCACR, Appellant moves to certify this appeal to this Court. Appellant respectfully submits that certification is appropriate for the reasons set forth below.

BACKGROUND

This appeal arises under Article 25 of the South Carolina Income Tax Act, which grants tax credits to numerous types of taxpayers. See generally S.C. Code Ann. §§ 12-6-3310 to -3750 (Rev. 2000 & Supp. 2012). Specifically, this appeal arises under § 12-6-3620 (Supp. 2012), which grants a tax credit for 25% of the costs incurred to purchase and install equipment that uses biomass fuel to produce energy for commercial use. The qualifying costs incurred by a taxpayer "must be certified by the State Energy Office" upon request for the tax credit by the taxpayer, and the State Energy Office must notify the taxpayer "that it qualifies for the tax credit and the amount of credit allocated to the taxpayer." § 12-6-3620(A), (D)(1) (Supp. 2012). Thereafter, the taxpayer may claim the credit on its tax return, and the Department of Revenue

"may require any documentation that it deems necessary to administer the credit." § 12-6-3620(D)(1) (Supp. 2012).

Here, Appellant International Paper Company (Taxpayer) requested the State Energy Office (SEO) to certify the biomass fuel equipment costs incurred by Taxpayer in the 2010 and 2011 tax years. The SEO refused to certify the costs, and Taxpayer filed "contested case" proceedings in the Administrative Law Court (ALC). The SEO moved to dismiss the ALC proceedings for lack of jurisdiction, and the ALC granted the motion under the following analysis:

1. The SEO is a state agency for purposes of the Administrative Procedures Act (APA). (Tab A at 3-4).
2. Nevertheless, the ALC did not have "contested case" jurisdiction because:
   (a) § 1-23-600(A) (Supp. 2012) of the APA limits the ALC's "contested case" jurisdiction to matters involving departments of the executive branch as defined by § 1-30-10 (Supp. 2012) of the APA; and
   (b) § 1-30-10 does not include the SEO in its definition of executive branch departments. (Tab A at 4).
3. The ALC also did not have "appellate jurisdiction" over the case because:
   (a) Taxpayer did not file the case as an appeal; and
   (b) in any event, the SEO had not yet issued a final determination so as to trigger the right to appellate review by the ALC. (Tab A at 8-9, including nn. 8 & 10).

Accordingly, the ALC remanded the case to the SEO for an administrative hearing that comports with the requirements of due process. (Tab A at 9 and n.10). Thereafter, Taxpayer timely commenced the present appeal, which is currently pending before the Court of Appeals.

ARGUMENT

Rule 204(b), SCACR, provides that this Court may certify "any case" that is pending in the Court of Appeals before a decision by that court. The rule further provides that certification is "normally appropriate where the case involves an issue of significant public interest or a legal principle of major importance." Here, certification is appropriate for the reasons set forth below.

First, § 12-6-3620 (Supp. 2012) is silent as to any procedure for contesting any refusal by the SEO to certify the amount of a biomass tax credit, and nothing in the South Carolina Income Tax Act, the APA, or any other law grants the SEO the power to hold a contested hearing that comports with the requirements of due process. The SEO does not have the power to promulgate any rules or regulations for holding a hearing or any other matter.[1] Thus, this case raises questions regarding important legal principles, including issues of due process.

Second, the issues raised in this case reach beyond the biomass fuel tax credit granted by § 12-6-3620, because the SEO is directed by other code sections to certify other tax credits under language that is virtually identical to § 12-6-3620 and also do not provide any procedure for challenging the SEO's decision under those code sections. *Compare* §12-6-3620(D)(1) (Supp. 2012) *with the following code sections*: § 12-6-3588(H)-(I) (Supp. 2012) (tax credits for renewable energy programs); § 12-6-3600(E)-(H)(1) (Supp. 2012) (tax credits for ethanol and

[1] The State Energy Office (SEO) was created as part of the South Carolina Energy Efficiency Act. See generally S.C. Code Ann. §§ 48-52-410 to -470 (Rev. 2008 & Supp. 2012). Its primary purpose is to "serve as the principal energy planning entity for the State" and "to develop and implement a well-balanced energy strategy and to increase the efficiency of use of all energy sources [in South Carolina]." § 48-52-410 (Supp. 2012). Nothing in the Energy Efficiency Act empowers the SEO to hear and decide contested cases so as to afford due process. Indeed, the Act specifically provides: "The State Energy Office must not function as a regulatory body." Thus, the SEO has no regulatory power whereby it could establish contested case procedures.

biodiesel facilities); § 12-6-3610(C)(1) (Supp. 2012) (tax credits for properties used in distributing or dispensing renewable fuel); *and* § 12-6-3631(E)(1) (Supp. 2012) (tax credits for biodiesel expenditures). Thus, this case raises important legal issues that reach beyond this case.

Third, the General Assembly's enactment of the tax credits noted above demonstrate a clear intent to foster and promote the development and use of renewable and alternative energy resources in South Carolina. Thus, this case presents issues of significant public interest.

Fourth, Section 12-6-3620(D)(1) (Supp. 2012) specifically provides that the "Department of Revenue may require any documentation that it deems necessary to administer the [biomass energy] credit." The South Carolina Income Tax Act, of which § 12-6-3620 is a part, provides that the Department of Revenue shall administer and enforce the provisions of the Act. § 12-6-20 (Rev. 2000). To that end, the General Assembly also enacted the South Carolina Revenue Procedures Act "to provide the people of South Carolina with a straightforward procedure to determine any disputed revenue liability." § 12-6-20 (Rev. 2000) (emphasis added). The Revenue Procedures Act specifically provides that a taxpayer may challenge a tax decision by the Department of Revenue by requesting a contested case hearing before the ALC. § 12-60-460 (Supp. 2012). Thus, this case presents the important legal question of whether the General Assembly intended that biomass tax credit disputes also be resolved by contested case proceedings in the ALC, particularly given the absence of any law granting the SEO the power to hold hearings regarding the biomass fuel tax credit or the numerous other tax credits for renewable and alternative energy resources.

CONCLUSION

This case presents important legal issues concerning the jurisdiction of the South Carolina Administrative Law Court, the creation and operation of the State Energy Office and its

role in administering tax statutes of this state, as well as the role of the Department of Revenue in administering these tax statutes, all of which impacts the significant public issues of energy resource planning and usage. For this reason, and for the reasons set forth above, it is respectfully requested that this Court certify this case for direct review by this Court under Rule 204(b), SCACR.

May 21, 2013

Respectfully Submitted,

Robert L. Widener
Erik P. Doerring
McNair Law Firm, P.A.
Post Office Box 11390
Columbia, South Carolina 29211
803-799-9800
Attorneys for Appellant

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

International Paper Company, Inc.,	)	
	)	Docket No. 12-ALJ-30-0086-CC
Petitioner,	)	
	)	
vs.	)	**ORDER**
	)	
South Carolina State Energy Office	)	
	)	
Respondent.	)	
	)	

This matter comes before the Administrative Law Court (ALC or Court) pursuant to a Motion to Dismiss (Motion to Dismiss) filed by Respondent State Energy Office (State Energy Office) on October 3, 2012.[1] This Motion was filed in response to the request filed by Petitioner International Paper Company, Inc. (IP) for a contested case hearing pursuant to Rule 11, SCALCR. IP challenges the State Energy Office's denial of its application for a tax credit under S.C. Code Ann. § 12-6-3620 (Supp. 2011) for taxpayers who purchase and install equipment used to create energy for commercial use from a fuel consisting of no less than ninety percent biomass resource (Biomass Resource Credit). In its Motion to Dismiss, the State Energy Office argues that the "Budget and Control Board, State Energy Office," is not an executive agency and is not subject to the jurisdiction of this Court pursuant to Title 1, Chapter 23 of the South Carolina Code. On October 15, 2012, IP filed a Memorandum in Opposition to Respondent's Motion to Dismiss for Lack of Jurisdiction (Memorandum in Opposition), in which IP contends that this Court has de novo[2] jurisdiction or alternatively, appellate jurisdiction, over State Energy Office decisions.

This Court held a hearing on the State Energy Office's Motion to Dismiss in Columbia, S.C. on October 17, 2012. The State Energy Office filed a Memorandum in Support of Motion to Dismiss (Memorandum in Support) at that hearing. Subsequently, based upon the issues raised by the parties, the Court, sua sponte, requested that both parties address specific questions related to the Court's jurisdiction in these proceedings. On October 29, 2012, IP filed

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1 Also on October 3, 2012, the State Energy Office filed a Motion to Quash Subpoena and a Motion for Protective Order.

2 The Court will refer to this jurisdiction as "subject matter jurisdiction."

Petitioner's Supplemental Memorandum in Opposition to Respondent's Motion to Dismiss for Lack of Jurisdiction (Supplemental Memorandum in Opposition), in which it asserts, in addition to arguments made in its initial Memorandum in Opposition, that IP has a protected property interest in the Biomass Resource Credit for due process purposes under Article I, section 22 of the South Carolina Constitution, and that the State Energy Office must, under S.C. Const. art. I, § 22, provide IP due process rights, including: (1) providing adequate notice of a hearing; (2) a hearing prior to rendering a final decision concerning IP's credit applications; (3) the right to introduce evidence; (4) and the right to confront and cross-examine witnesses. IP also asserts that should the Court conclude that it does not have de novo jurisdiction but does have appellate jurisdiction, IP should be allowed to amend its request for a contested case hearing to a notice of appeal pursuant to Rule 18(C), SCALCR.

Also on October 29, 2012, the State Energy Office filed Respondent's Second Memorandum in Support of Motion to Dismiss (Second Memorandum in Support), in which it argues that the Court lacks jurisdiction under S.C. Code Ann. § 1-23-600(A) because the State Energy Office is not a department of the executive branch of government as defined in Section 1-30-10; that this Court lacks jurisdiction under Section 1-23-600(A) or (D) because the certification process administered by the State Energy Office is not a contested case; that the Court also lacks appellate jurisdiction under Section 1-23-600(D) because IP did not file an appeal pursuant to Section 1-23-600(D); that IP does not have a protected property interest because the certification of the tax credit application was merely discretionary, and even after a tax credit amount was certified, the statute warns that it is not vested because the amount can be repealed at any time; that no law mandated the State Energy Office to conduct a trial-type proceeding before denying certification of an application for a biomass energy tax credit; that even if S.C. Const. Art. I § 22 applies, due process does not require a trial-type process to decline certification of a tax credit application but only the process afforded by the applicable statute; and that IP abandoned the process that the State Energy Office gave it by filing a request for a contested case hearing with the ALC after the State Energy Office asked IP for further information. The allegation that the State Energy Office gave IP process, or even had a process to have allowed IP to respond to the State Energy Office's review of its applications, is disputed by IP in Petitioner's Memorandum in Response to Respondent's Second Memorandum in

Support of Motion to Dismiss (Petitioner's Final Memorandum), which IP filed on October 31, 2012.

For the reasons set forth below, the State Energy's Office's Motion to Dismiss is granted.

DISCUSSION

Subject Matter Jurisdiction

The State Energy Office argues that this Court lacks subject matter jurisdiction over this matter. I agree.

S.C. Code Ann. § 1-23-600(A) (2011) states in pertinent part:

> An administrative law judge shall preside over all hearings of contested cases as defined in Section 1-23-505 or Article I, Section 22, Constitution of the State of South Carolina, 1895, involving the departments of the executive branch of government as defined in Section 1-30-10 in which a single hearing officer, or an administrative law judge, is authorized or permitted by law or regulation to hear and decide these cases . . . .

In its Memorandum in Opposition, IP concedes that though the Department of Revenue is listed as an executive branch department under Section 1-30-10, the State Energy Office is not. Nevertheless, IP argues that S.C. Code Ann. § 1-23-600(A) should still apply because the State Energy Office is performing an administrative function in the tax credit certification process under S.C. Code Ann. § 12-6-3620, and is assisting and acting on behalf of the South Carolina Department of Revenue in this capacity. I agree that the State Energy Office is a state agency for purposes of the Administrative Procedures Act (APA). S.C. Code Ann. § 1-23-505(2) defines "agency" as "a state agency, department, board, or commission whose action is the subject of a contested case hearing or an appellate proceeding heard by an administrative law judge. . . ."

While it is true that "[t]he State Energy Office must not function as a regulatory body" (S.C. Code Ann. § 48-52-410 (2011)), the State Energy Office is indisputably an office under the South Carolina Budget and Control Board, which is a state agency. See S.C. Code Ann. § 1-11-180 (B) ("The Budget and Control Board may **promulgate regulations** necessary to carry out this section") (emphasis added). The authority to promulgate regulations is clearly an attribute of the powers of a state agency. See Sloan v. S.C. Bd. of Physical Therapy Examiners, 370 S.C. 452, 474, 636 S.E.2d 598, 609 (2006) ("Under the APA, a '[r]egulation' means each agency statement of general public applicability that implements or prescribes law or policy or practice requirements of any agency. . . S.C. Code Ann. § 1-23-10(4) (2005)."). Moreover, the State Energy Office has statewide functions and responsibilities given to it by the General Assembly.

The State Energy Office's primary purpose is to develop and implement a well-balanced energy strategy and to increase the efficiency of use of all energy sources throughout South Carolina through the implementation of the Plan for State Energy Policy. S.C. Code Ann. § 48-52-410 (2011). The State Energy Office also has the duties and responsibilities over the administration of state tax credit certifications in the statute at issue here and in other statutes. See S.C. Code Ann. §§ 12-6-3600, -3610, -3620, -3631. For these reasons, the State Energy Office is a state administrative agency under the APA.[3]

Furthermore, though I disagree with the State Energy Office that this Court lacks subject matter jurisdiction because this matter does not involve a contested case, I agree with the State Energy Office that this Court lacks subject matter jurisdiction to hear this matter as a contested case in the ALC. Although a matter may not be heard by this Court as a "contested case," when appropriate, that same matter clearly can be reviewed as a contested case in a state agency and subsequently heard by this Court in its appellate jurisdiction. A cursory review of Section 1-23-600 (A) to (D) establishes that some cases are heard as contested cases only in the state agency and others only in the ALC.

Nevertheless, under Section 1-23-600(A), this Court can only preside over hearings of contested cases involving the departments of the executive branch of government **as defined in Section 1-30-10**. Though the Budget and Control Board and the State Energy Office are state agencies, neither is a department listed under Section 1-30-10. Therefore, IP's case cannot be heard as a contested case before this Court. Consequently, since IP filed a request for a contested case with this Court, this Court has no subject matter jurisdiction to hear this case and must therefore dismiss it.

Appellate Jurisdiction

The issue of the Court's appellate jurisdiction is a separate question from its subject matter jurisdiction to hear this case as a contested case. Allison v. W.L. Gore & Assocs., 394 S.C. 185, 188, 714 S.E.2d 547 549 (2011) ("the question of compliance with rules, regulations, and statutes governing an appeal is one of appellate jurisdiction."). Under S.C. Code Ann. § 1-

[3] State Energy Office has even acknowledged, in its Notice of Motion and Motion to Dismiss filed with this Court regarding IP's January 28, 2011 request for the Biomass Resource Credit for the tax year 2010, that it is capable of making a final agency decision and determination concerning the [Biomass Resource Credit.]" That position is thus binding upon State Energy Office is this matter. Binkley v. Burry, 352 S.C. 286, 295-96, 573 S.E.2d 838, 843 (Ct. App. 2002) ("Judicial estoppel precludes a party from adopting a position in conflict with one earlier taken in the same or related litigation.").

23-600(D), with several exceptions not applicable to this case, "[a]n administrative law judge . . . shall preside over **all** appeals from final decisions of contested cases pursuant to the Administrative Procedures Act, Article I, Section 22, Constitution of the State of South Carolina, 1895, or another law . . . ." (emphasis added).

The State Energy Office argues that this Court lacks appellate jurisdiction because this matter is not a contested case under Section 1-23-600(D). However, as expressed above, Section 1-23-600(D) sets forth that the ALC hears all appeals from final decisions of contested cases pursuant to the APA or Article I, Section 22. A review of the jurisdiction of the ALC is instructive as to the inclusion of Article I, Section 22. Under the APA, S.C. Code Ann. § 1-23-310 (3) (2011) defines "contested case" as "a proceeding including, but not restricted to, ratemaking, price fixing, and licensing, in which the legal rights, duties, or privileges of a party are required by law to be determined by an agency after an opportunity for hearing." In Garris v. Governing Bd. of S.C. Reinsurance Facility, the South Carolina Supreme Court found that "Article I, Section 22 [of the Constitution of the State of South Carolina] requires an administrative agency to give procedural due process to parties that come before it even though a matter may not be a 'contested case' as defined in the APA." 333 S.C. 432, 440-41, 511 S.E.2d 48, 52 (1998).[4] Article I, Section 22 of the S.C. Constitution states: "No person shall be finally bound by a judicial or quasi-judicial decision of an administrative agency affecting private rights except on due notice and an opportunity to be heard; . . . nor shall he be deprived of liberty or property unless by a mode of procedure prescribed by the General Assembly, and he shall have in all such instances the right to judicial review."[5]

With the creation of the Administrative Law Court, the right to either a contested case or Article I, Section 22 hearing has evolved. Under Section 1-23-310(3), a "contested case" is still defined as "a proceeding, including but not restricted to, ratemaking, price fixing, and licensing,

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[4] Notably, though the courts have treated the due process requirement under Article I, Section 22 as distinct from a "contested case," Article 1, Section 22 of the South Carolina Constitution appears to be a **law** which requires an administrative agency to hold a hearing regarding a person's "private rights."

[5] The Court notes that South Carolina Constitution, Art. I, Section 22 seems to provide due process rights beyond the basic due process protections afforded under the Due Process Clauses of the South Carolina and United States Constitutions (S.C. Const. art. I, § 3 and U.S. Const. amend. XIV, §1, respectively). S.C. Const. Art. I, Section 22 protects "private rights" by requiring "due notice and an opportunity to be heard" before a judicial or quasi-judicial decision of an administrative agency affecting those rights can bind a person. This Section then separately provides for the standard, minimum due process protection of "liberty or property," requiring that any deprivation thereof be by a "procedure prescribed by the General Assembly" and have judicial review thereof.

in which the legal rights, duties or privileges of a party are required by law to be determined by an agency after an opportunity for hearing." However, in 2008, the General Assembly specifically defined a "contested case" under the jurisdiction of ALC. S.C. Code Ann. § 1-23-505(3) (2011). Section 1-23-505(3) added Article I, Section 22 to the definition of "contested case." Specifically, the phrase, "or by Article I, Section 22, Constitution of the State of South Carolina, 1895," was added after "required by law," and "or the Administrative Law Court" was added after "by an agency" in Section 1-23-505(3). The inclusion of Article I, Section 22 in the language reflects the intent of the General Assembly to incorporate into contested cases what the Supreme Court required in Garris, which is that an agency provide at the very least a procedural due process hearing. This new definition is consonant with the Supreme Court's interpretation of the old definition of "contested case" – "one in which an agency is required by law to determine a party's rights after an opportunity for a hearing." Garris, 333 S.C. 432 at 440, 511 S.E.2d at 52.

Here, while there is presently no statutory law that specifically states that the State Energy Office is to hold hearings, because the State Energy Office is a state agency, Article I, Section 22 of the S.C. Constitution nevertheless requires, by way of S.C. Code Ann. § 1-23-505(3) (2011), a procedural-due-process contested case hearing. Thus, the State Energy Office was required to afford IP an opportunity for a hearing to determine whether a party's application for a Biomass Resource Credit will be certified. The State Energy Office nonetheless argues that the certification of a tax credit is not a vested property interest for due process purposes. First, due process under Art. I, Section 22 of the S.C. Constitution is not limited to the protection of property (or liberty) interests, but also includes the protection of "private interests." As the State Energy Office points out, "due process is flexible and calls for such procedural protections as the particular situation demands." Kurschner v. City of Camden Planning Comm'n, 376 S.C. 165, 172, 656 S.E.2d 346, 350 (2008). It would seem an absurdity that a situation in which millions of dollars are at stake for a tax credit applicant would not call for any procedural protections to safeguard such an interest, especially in light of the broad due process protection afforded by Art. I, Section 22.

Secondly, the Supreme Court in Garris cited two cases involving statutory and regulatory certification processes that were not "contested cases" as defined by the APA, and thus did not entitle the parties seeking certification a hearing under the APA, but nevertheless gave rise to an

entitlement to notice, a hearing, and judicial review under Art. I, Section 22. See Garris, 333 S.C. at 440, 511 S.E.2d at 52 (citing League of Women Voters of Georgetown County v. Litchfield-by-the-Sea, 305 S.C. 424, 409 S.E.2d 378 (1991) (vacated on other grounds by Brown v. S.C. Dep't of Health and Envtl. Control, 348 S.C. 507, 522 n.14, 560 S.E.2d 410, 418 n.14 (2002);[6] Stono River Envtl. Prot. Ass'n v. S.C. Dep't of Health and Envtl. Control, 305 S.C. 90, 93, 406 S.E.2d 340, 342 (1991)). See also Smith v. S.C. Dep't of Mental Health, 329 S.C. 485, 500, 494 S.E.2d 630, 638 (Ct. App. 1997) ("Administrative agencies are required to meet minimum standards of due process") (citing S.C. Const. art. 1, § 3; Stono River Envtl. Prot. Ass'n, supra). Therefore, parties seeking certification from the State Energy Office of their applications for the Biomass Resource Credit are entitled to at least notice, a hearing (an opportunity to be heard in a meaningful way) before an impartial and unbiased adjudicator, and judicial review.[7] Kurschner, 376 S.C. at 350, 656 S.E.2d at 171 ("The fundamental requirements of due process include notice, an opportunity to be heard in a meaningful way, and judicial review."); Young v. Charleston County Sch. Dist., 397 S.C. 303, 310, 725 S.E.2d 107, 110

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[6] It is worth noting that in League of Women Voters of Georgetown County, the South Carolina Coastal Council's certification determinations were not binding upon DHEC, the permitting agency. Yet the Supreme Court nevertheless concluded that as an administrative agency, the Coastal Council had to comport with the standards of due process set forth in Art. I, Section 22 of the S.C. Constitution, reasoning that "we are constrained to safeguard the interests of the parties at all stages of the application process since Council's certification determination may be accorded significant weight by the permitting agency in deciding whether or not to grant a permit." In the instant case, the State Energy Office's certification decision is not merely advisory, but is **determinative** of whether a tax credit can be granted. If the State Energy Office declines to certify an application for the Biomass Resource Credit, for instance, then the applying party cannot receive that tax credit. Therefore, this Court is all the more constrained to safeguard, at all stages of the application process, the interests of parties applying to the State Energy Office for certification for tax credits.

[7] In Respondent's Second Memorandum in Support of Motion to Dismiss, the State Energy Office cites Garris, supra, Triska v. Dep't of Health and Envtl. Control, 292 S.C. 190, 355 S.E.2d 531 (1987), and S.C. Ambulatory Servs. Surgery Center Assoc. v. S.C. Workers' Comp. Comm'n, 389 S.C. 380, 699 S.E.2d 146 (2010) in arguing that some law must mandate that the agency conduct a hearing prior to rendering a final decision regarding the legal rights, duties, or privileges, of a party. Garris and Triska relied on the definition of "contested case" under then Section 1-23-310(2), which required a hearing that was required by law only. The major change that took place when Section 1-23-505(3) was enacted, was that hearings required pursuant to S.C. Const. art. I, § 22 were included in the definition of "contested cases" so that if no hearing was otherwise required under any other law, one would still be necessary if Article I, Section 22 so required. Therefore, though the rule cited from Garris and Triska – that "a 'contested case' does not exist where there is no requirement deriving from South Carolina or Federal law that there be no opportunity for a hearing" – is still good law, this rule may be misleading in their contexts. Now, a statutory law does exist (Section 1-23-505(3)) that requires in contested cases a hearing when appropriate under Art. I, Section 22 of the S.C. Constitution, even when no other law provides for a hearing by a state agency, which is consistent with the very holding in Garris. As for the citation to S.C. Ambulatory Servs., the Court simply pointed out that Surgery Centers only mentioned "contested case" hearing in its brief, but did not provide a legal basis for its entitlement thereto. Indeed, Surgery Centers "failed to set forth any specific argument establishing that" a contested case was required." S.C. Ambulatory Servs., 389 S.C. at 388, 699 S.E.2d at 151.

(2012) ("An indispensable component of procedural due process is that the persons legally responsible for making a decision must be informed and unbiased.") (internal citation omitted). Moreover, "[i]n cases where important decisions turn on questions of fact, due process at least requires an opportunity to present favorable witnesses." Smith, 329 S.C. at 500, 494 S.E.2d at 638 (citing Brown v. S.C. State Bd. of Educ., 301 S.C. 326, 391 S.E.2d 866 (1990).[8]

Therefore, though this matter is not properly before the ALC as a contested case, this matter would be a contested case as defined in Section 1-23-505(3) (2011) and thus could be heard as an appeal under Section 1-23-600(D). Nevertheless, the Court lacks appellate jurisdiction in this matter. Clearly, this matter was not filed as an appeal of a decision of the State Energy Office. IP nonetheless argues that Rule 18(C), SCALCR would allow the Court to convert IP's request for a contested case into a notice of appeal. This rule states that "[a]ny pleading, paper or document can be amended at any time upon motion and for good cause shown, unless the amendment would substantially prejudice any other party in the presentation of its case." However, to apply Rule 18(C), SCALCR would go beyond a mere amendment of a pleading, paper, or document, and would instead allow substitution of an entirely different document and implicate entirely different procedural rules.[9] Because IP failed to adhere to the Court's rules of appellate procedure, and instead filed a request for a contested case hearing in this Court, the Court has no appellate jurisdiction in this matter.

Therefore, this Court has neither contested case subject matter jurisdiction nor appellate jurisdiction in this matter.

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[8] The Court does not decide in the instant case whether due process requires that tax-credit applicants before the State Energy Office be given trial-type hearings, as "[d]ue process does not require a trial-type hearing in every conceivable case of government impairment of a private interest." Kurschner, 376 S.C. at 172, 656 S.E.2d at 350. Nevertheless, at a fundamental level, due process requires that tax-credit applicants before the State Energy Office must, **at the very least**, be given notice, a hearing (an opportunity to be heard in a meaningful way) before an impartial and unbiased adjudicator, and judicial review. And if important decisions turn on questions of fact, then the applicants must also be given an opportunity to present favorable witnesses.

[9] Not only could this lead to abuse of the rules but it would also undermine the timeliness safeguards of the Court's appellate procedure. For instance, if Rule 18(C) were interpreted as IP suggests, nothing could prevent an unscrupulous attorney seeking to appeal to the ALC, who knows that he or she cannot have the case heard as a contested case at the ALC, from purposefully filing a case as a request for a contested hearing in order to buy himself or herself more time to prepare for the appeal.

Previous Order

This Court issued a previous Order in this case, finding that State Energy Office had issued a "final determination."[10] However, because this Court has no subject matter jurisdiction to hear this matter as a contested case, the Court therefore had no subject matter jurisdiction when it issued its previous Order. Therefore, the Court must vacate its prior Order and remand this case back to State Energy Office. See, e.g., Rowe v. City of West Columbia, 334 S.C. 400, 411, 513 S.E.2d 379 (Ct. App. 1999) (citing Allen v. Foss, 255 S.C. 336, 339, 178 S.E.2d 659, 660 (1971) ("Since the court below was without jurisdiction of the subject matter, it follows that its orders are void and must be vacated.")).

The State Energy Office's Remaining Motions

The State Energy Office also filed a Motion to Quash Subpoena and a Motion for Protective Order. Nevertheless, because the Court has granted the State Energy Office's Motion to Dismiss, which is dispositive, the Court need not address the remaining Motions.

ORDER

IT IS THEREFORE ORDERED that State Energy Office's Motion to Dismiss is **GRANTED** and that this case is **REMANDED** to State Energy Office.

AND IT IS SO ORDERED.

Ralph King Anderson, III
Chief Administrative Law Judge

December 19, 2012
Columbia, South Carolina

[10] State Energy Office had argued in its Notice of Motion and Motion to Dismiss filed prior to the Court's previous Order that "the available administrative remedies ha[d] not been exhausted in that [it had] not issued a final agency decision with respect to the tax credit and its amount, if any to be allowed the International Paper Company . . . [,]" and that the case should be remanded to the State Energy Office for further proceedings. The Court's previous decision that the State Energy Office had issued a final determination was made before the State Energy Office challenged this Court's contested case review. In light of the discussion above, it is now clear that a contested case hearing was required before any final determination could have been issued.