

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM RICHLAND COUNTY  
COURT OF COMMON PLEAS  
G. Thomas Cooper, Circuit Court Judge

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Case No. 2013-CP-40-0572  
Appellate Case No. 2013-001607

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

v.

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

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**REPLY TO RETURN TO  
MOTION TO CONSOLIDATE**

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**INTRODUCTION**

The Respondent's opposition to consolidation reflects a misconception of the issues before this Court. The fundamental question presented here is whether the Administrative Law Court (ALC) or the Circuit Court has subject matter jurisdiction to review the decision of the Respondent, South Carolina State Energy Office (SEO). There are four possible answers to this question, and the analysis of those answers hinges largely on the intent of the General Assembly.<sup>1</sup>

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<sup>1</sup> IP also filed a Motion to Consolidate in the ALC appeal, Appellate Case No. 2013-000114. The SEO did not file a Return to that motion specifically, and it presumably is relying on its Return in the Circuit Court appeal as a response. Thus, IP files the instant Reply in the Circuit Court appeal only. To the extent that the SEO relies on its Return for both appeals, IP relies on this Reply for both appeals.

The first possible answer is that no court has the power to review the decisions of the SEO. At times, this appears to be the position of the SEO, but this is unclear.

The second possible answer is that the ALC has the power to review the SEO's decision as a "contested case," whereby the ALC conducts a de novo evidentiary hearing, finds its own facts, and makes its own conclusions. This is the primary position of IP – the ALC rejected this answer and IP has appealed that rejection.

The third possible answer is that the ALC has appellate jurisdiction to review the SEO's decision after the SEO issues a final agency decision. The ALC held that it had appellate jurisdiction but also held that the SEO had not yet afforded IP notice and an opportunity to be heard. Thus, the SEO had not yet issued a final agency decision. Accordingly, the ALC remanded to the SEO for a hearing and final agency decision. The SEO has not appealed this decision. If the ALC does not have jurisdiction to hear this matter as a "contested case," then IP agrees with the ALC's ruling on appellate jurisdiction.

The fourth possible answer is that the Circuit Court has the power to review the SEO's decision. This possibility arises only if the General Assembly did not grant exclusive subject matter jurisdiction to the ALC. If the ALC has no jurisdiction to review the ALC's decision in this matter, then IP submits that the Circuit Court has jurisdiction to do so, and the Circuit Court therefore erred in dismissing the Circuit Court action.

## **PROCEDURAL BACKGROUND**

### **I. The ALC Proceedings**

Initially, the SEO agreed in its Prehearing Statements filed with the ALC that the ALC had subject matter jurisdiction to review the SEO's decision in a contested case hearing. In the

midst of discovery, however, the SEO changed its position and moved to dismiss for lack of jurisdiction. IP responded with three alternative arguments:

First, IP's primary position was that the ALC had jurisdiction to review the SEO's decision in a contested case hearing. The ALC rejected this argument, and IP has appealed.

Second, IP's first alternative argument was that the ALC had appellate jurisdiction to review the SEO's decision, but the SEO had failed to provide IP with the required notice and an opportunity to be heard before issuing its decision. Rather than remand, IP requested the ALC to conduct a contested case under its appellate jurisdiction. The ALC agreed that the SEO was required to but had failed to provide IP with notice and an opportunity to be heard, but the ALC refused to correct this defect with a contested case hearing before the ALC.

Third, IP's second alternative argument was the same as the first alternative but, if the ALC declined to conduct a contested case hearing under its appellate jurisdiction, IP requested a remand for notice, hearing, and final decision from which IP could then appeal. The ALC accepted this argument and remanded the case. The SEO does not appeal this decision. Thus if the ALC has appellate jurisdiction over the SEO, it is the law of this case as to the SEO that there must be a remand so that the SEO can provide proper notice and an opportunity to be heard to IP and thereafter issue a final decision from which IP can then appeal to the ALC. *Charleston County Assessor v. LMP Props., Inc.*, 743 S.E.2d 88, 91 n.2 (S.C. App. 2013) (unchallenged ruling by the ALC is the law of the case). If the ALC does not have jurisdiction to hear this matter as a contested case, then IP agrees with the ruling of the ALC regarding its appellate jurisdiction.

## **II. The Circuit Court Action**

After appealing the ALC's decision, IP filed an action in the Circuit Court to review the SEO's decision in this matter. IP did so for the following reasons:

1. The lack of subject matter jurisdiction may be raised at any time – it may be raised for the first time on appeal – and the appellate courts have a duty to raise the issue *sua sponte* on appeal. *Sheila R. v. David R.*, 719 S.E.2d 682, 687-688 (S.C. App. 2011).
2. The statutes pertaining to the SEO do not provide an express answer to the question of whether the ALC has any subject matter jurisdiction over the SEO.
3. Thus, it is possible that this Court or the Supreme Court could rule in IP’s appeal from the ALC that the ALC has no subject matter jurisdiction over the SEO.
4. If the ALC has no subject matter jurisdiction over the SEO, then the statute of limitations for bringing an action in the Circuit Court could run during the pendency of IP’s appeal from the ALC.
5. Therefore, to protect against the foregoing possibilities, IP filed the Circuit Court action.

IP immediately filed a motion to stay the Circuit Court action pending the outcome of IP’s appeal of the ALC order. The SEO filed a motion to dismiss under Rule 12(b)(8), SCRCP.

In the Circuit Court, IP argued that the matter should be stayed rather than dismissed for the same reasons that IP filed the Circuit Court action. The Circuit Court denied IP’s motion to stay and granted the SEO’s motion to dismiss. IP has appealed those rulings.

### **REPLY ARGUMENT**

The SEO argues that the ALC and Circuit Court appeals do not share a common issue. This is simply wrong. The overriding question is whether the ALC or the Circuit Court has subject matter jurisdiction to review the SEO’s decision in this matter.

The SEO argues that IP abandoned the SEO’s process by seeking review in the ALC and, therefore, the “ALC question” is the statutory jurisdiction of the [ALC] after this abandonment. The SEO’s “abandonment” argument has no merit but, in any event, this argument is irrelevant to the question of the ALC’s jurisdiction. If the ALC has jurisdiction to review the SEO’s decision as a contested case (as argued by IP), then the result on appeal would be a remand to the

ALC for a contested case hearing. At that time, the SEO could present any defenses, including its so-called “abandonment” defense. This defense, however, does not affect the question of whether the ALC has jurisdiction – it is merely a defense to the exercise of that jurisdiction. The ALC never ruled on this question.

If the ALC has appellate jurisdiction to review the SEO’s decision (as held by the ALC), then the result on appeal under the law of this case is a remand to the SEO to give IP notice and an opportunity to be heard. Thereafter, the SEO would issue a final agency decision from which IP may then appeal.

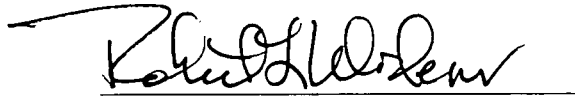
As to the Circuit Court appeal, the SEO argues that IP filed the Circuit Court action to obtain a “second bite at the apple” after losing in the ALC. This is simply false. IP’s position has always been that the ALC has jurisdiction but, if it does not have any jurisdiction, then the Circuit Court would have jurisdiction as the South Carolina court of general jurisdiction. The SEO also argues that the only issue in the Circuit Court appeal is the proper application of Rule 12(b)(8), SCRCF. This is a simplistic statement of the issue. If the ALC does not have jurisdiction, then the matter was never pending before the ALC and, therefore, the matter was properly in the Circuit Court and not subject to dismissal under Rule 12(b)(8), SCRCF.

In short, taken together, the ALC appeal and the Circuit Court appeal present the fundamental question of whether the ALC or the Circuit Court has subject matter jurisdiction to review the SEO’s decision in this matter. It is both logical and expedient to consolidate these appeals so that this fundamental question can be presented and decided under a single set of briefs, one Record on Appeal, one oral argument, and one decision by this Court.

**CONCLUSION**

For all of the foregoing reasons, and for the reasons set forth in the Motions to Consolidate filed in the ALC appeal and the Circuit Court appeal, it is respectfully submitted that this Court should grant the Motion(s) to Consolidate.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Robert L. Widener", written over a horizontal line.

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August 12, 2013  
Columbia, SC

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

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

v.

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

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CERTIFICATE OF SERVICE

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I, Ann Shuler, an employee of McNair Law Firm, certify that I served the Appellant's Reply to Return to Motion to Consolidate by placing a true and correct copy in the U.S. Mail, sufficient postage pre-paid to counsel of record at the addresses shown below, on August 12<sup>th</sup>, 2013:

Keith McCook, Esq.  
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Ann Shuler