THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
G. Thomas Cooper, Jr., Circuit Court Judge

Case No. 2007-CP-23-3206
Appellate Case No. 2013-001607

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

v.

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

APPEAL FROM THE ADMINISTRATIVE LAW COURT
Ralph King Anderson, III, 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.

FINAL BRIEF OF APPELLANT

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2. Whether the SEO has the power to hold "contested case" hearings.

3. Whether the ALC has "appellate" jurisdiction over the "biomass tax credit" determinations by the SEO.

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6. Whether the circuit court erred in not staying the case during the pendency of the appeal from the ALC rather than dismissing it.

STATEMENT OF THE CASE

This is a tax case. The fundamental question is whether the Administrative Law Court (ALC) or the circuit court has the power to review tax credit determinations by the South Carolina State Energy Office (SEO – respondent here). Thus far, the ALC and the circuit court have refused to review the SEO's determinations.

The South Carolina Income Tax Act (the Income Tax Act)[1] grants corporations a tax credit for equipment and installation costs incurred to produce energy for commercial use from biomass resources. S.C. Code Ann. § 12-6-3620 (A) (Supp. 2012).[2] The Income Tax Act sets forth the following process for claiming this "biomass tax credit" on a corporation's tax return:

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[1] S.C. Code Ann. § 12-6-10 (Rev. 2000) (Chapter 6 of Title 12 is the South Carolina Income Tax Act).

[2] The tax credit is limited to corporations by virtue of § 12-6-3620(A)'s provision that the credit is allowed against the tax imposed by § 12-6-530 (Rev. 2000) (corporate income tax) or license fees imposed by § 12-20-50 (Rev. 2000 & Supp. 2012) (corporate license fees).

1. The corporation must submit a "request for credit" to the SEO by January 31 of the year after the previous calendar year in which the qualifying equipment is placed into service. § 12-6-3620(D)(1).

2. The SEO "must notify" the corporation that it "qualifies for the credit and the amount of the credit" by March 1. *Id.*

3. After the SEO certifies the tax credit, the corporation may claim the tax credit on its tax return and, thereafter, the South Carolina Department of Revenue (the DOR) may require "any documentation that it deems necessary to administer the tax credit." *Id.*[3]

The January 31 and March 1 deadlines are critical, because a corporation's tax return must be filed by March 15. S.C. Code Ann. § 12-6-4970(B) (Rev. 2000).

In January 2011, Appellant International Paper (IP) submitted a tax credit request to the SEO for the 2010 calendar year. (R-I. 71-91). The SEO failed to certify the tax credit by the March 1 statutory deadline. (See R-I. 125-134). In March 2011, IP filed a request for a contested case hearing before the ALC to challenge the SEO's failure to certify the requested tax credit. (R-I. 466).

In January 2012, Appellant International Paper (IP) submitted a tax credit request to the SEO for the 2011 calendar year. (R-I. 414-464). The SEO failed to certify the tax credit by the March 1 statutory deadline. (See R-I. 413). In March 2012, IP filed a request for a contested case hearing before the South Carolina Administrative Law Court (the ALC) to challenge the SEO's failure to certify the requested tax credit. (R-I. 467). This case was consolidated with the 2011 case. (R-I. 10).

Initially, the SEO conceded that the ALC had "contested case" jurisdiction to review the SEO's actions. (R-I. at 240, 253, 264). In the midst of discovery, however, the

[3] Granting the DOR the authority to administer the tax credit dovetails with the general provisions of the South Carolina Tax Code (Title 12) and the Act (Chapter 6 of Title 12). See S.C. Code Ann. § 12-4-10 (Rev. 2000) (creating the DOR to "administer and enforce the revenue laws of this State") and § 12-6-20 (Rev. 2000) (the DOR "shall administer and enforce the taxes imposed by [the Act]").

SEO changed its position and moved in October 2012 to dismiss the consolidated action, contending the SEO was not subject to the jurisdiction of the ALC. (R-I. 49).

The ALC held that it did not have "contested case" jurisdiction over the SEO's decisions in this case. (R-I. 3-4). The ALC further held that it would have "appellate" jurisdiction over the SEO's decisions in this case but, first, the SEO had to give IP notice and an opportunity to be heard on the failure to certify the requested tax credits and, second, the SEO had to then issue a "final agency decision" from which IP could then appeal. (R-I. 4-9). The SEO has not issued a final agency decision, and there appears to be no rules or procedures for obtaining any such decision. IP timely appealed the ALC's order.

In January 2013, IP filed a petition for review of the SEO's action in the Circuit Court. (R-II. 482-488). IP moved to stay the circuit court action during the pendency of the appeal from the ALC on the following grounds:

1. The SEO appeared to take the position that its determinations were not subject to any type of review by the ALC, and it was unclear whether the ALC had any jurisdiction over the SEO.

2. If the ALC had no jurisdiction over the SEO, then any judicial review must be had in the circuit court.

3. IP filed the circuit court action to avoid the danger of the appellate courts finding the ALC had no jurisdiction over the SEO and the statute of limitations for a circuit court action running during the pendency of the appeal from the ALC's Order.

The SEO moved to dismiss the circuit court action. (R-II. 545-546). The circuit court denied IP's motion to stay and granted the SEO's motion to dismiss. (R-II. 472-480). IP moved to reconsider. (R-II. 490-494). The circuit court granted the motion and issued a new order, but nevertheless dismissed the action under Rule 12(b)(8), SCRCP, finding that the ALC action was substantially the same as the circuit court action. (R-II. 469-471). IP

timely appealed the circuit court's order. This Court granted IP's motion to consolidate the ALC and circuit court appeals.

SUMMARY OF ARGUMENTS

These consolidated appeals present the fundamental question of whether the SEO's biomass tax credit determinations are subject to judicial review by the ALC or the circuit court. The relevant statutes do not answer this question expressly and, therefore, the answer must be gleaned from the State Constitution and the General Assembly's intent as found in the relevant statutes.

The ALC erred in finding it did not have subject matter jurisdiction to hold a "contested case" regarding the SEO's biomass tax credit determinations. The relevant statutes, their purpose, and their structure demonstrate a legislative intent that disputes between the SEO and a biomass tax credit applicant be resolved by a contested case before the ALC.

Assuming the ALC correctly held that it does not have "contested case" jurisdiction over the SEO's biomass tax credit determinations, then the ALC correctly held that it has "appellate" jurisdiction over those determinations. The ALC also correctly held that the SEO was required to but had not yet given IP notice and an opportunity to be heard in a contested case and, therefore, the SEO had not yet issued a final decision that triggered IP's right to appeal to the ALC. The SEO did not appeal these rulings.

Assuming the ALC does not have "contested case" or "appellate" jurisdiction over the SEO's biomass tax credit determinations, judicial review must be afforded in the circuit court.

ARGUMENTS

I. The ALC has jurisdiction to review the SEO's biomass tax credit determinations.

Article I, Section 22 of the South Carolina State Constitution mandates that any judicial or quasi-judicial determination by an executive agency is subject to judicial review:

> 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 opportunity to be heard, nor shall he be subject to the same person for both prosecution and adjudication, 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.*

(All emphasis added). Here, the SEO's failure to certify the requested tax credit is a quasi-judicial decision that affects IP's private right to a tax credit for which it qualifies. That decision by the SEO is an "instance" for which the Constitution guarantees the right to judicial review. The ALC held that IP was entitled to notice and a hearing under Article I, Section 22. (R-I. 6). The SEO did not appeal this ruling.

Section 1-23-505(3) (Supp. 2012) defines a "contested case" as a proceeding in which "legal rights, duties, or privileges" are required by Article I, Section 22 of the South Carolina Constitution are to be determined by the agency or the ALC "after an opportunity for hearing." Section 1-23-600(A) (Supp. 2012) mandates that the ALC "shall preside over all hearings of contested cases" as defined in Article I, Section 22 of the South Carolina Constitution involving the executive branch departments defined in § 1-30-10 (Supp. 2012). Section 1-23-600(D) further provides that the ALC "also shall preside over all appeals from final decisions of contested cases" held pursuant to Article I, Section 22 of the South Carolina Constitution with specific exceptions not relevant here. Thus, it is clear that IP is entitled to a "contested case" hearing after notice and an opportunity for hearing.

The only remaining question is whether the "contested case" is to be held before the SEO or the ALC.

A. The ALC has "contested case" jurisdiction to review the SEO's biomass tax credit determinations.

Here, the ALC held it did not have "contested case" jurisdiction, because the SEO is not listed in § 1-30-10 (Supp. 2012). (R-I. 4). While this is true, it is also true that no law authorizes the SEO to determine a contested case, and § 48-52-410 (Rev. 2008) expressly provides that the SEO "must not function as a regulatory body." Thus, the SEO does not meet the general APA definitions of an agency, to-wit: an executive branch department or officer "authorized by law to make regulations or to determine contested cases." § 1-23-10(1) (Rev. 2005); see also § 1-23-310(2) (Supp. 2012) (each state department or officer "authorized by law to determine contested cases"). Accordingly, whether the SEO or the ALC must provide IP the contested case hearing required by Article I, Section 22 of the South Carolina Constitution is a question that must be answered by gleaning the General Assembly's intent from the relevant statutes, which include the statutes creating the SEO, creating the ALC, and creating the biomass tax credit at issue here. As demonstrated below, those statutes demonstrate a legislative intent that the ALC has "contested case" jurisdiction over the SEO's tax credit determinations.

1. The Creation of the SEO and the Biomass Tax Credit

In 1992, the General Assembly enacted the "South Carolina Energy Efficiency Act," which is set forth in Chapter 52 of Title 48. § 48-52-10 (Rev. 2008). This Act implements the State policy of having a "comprehensive state energy plan." *Id.*; § 48-52-210(A) (Supp. 2012). The purpose of the "Plan for State Energy Policy" is to maximize environmental quality, maximize energy conservation and efficiency, and minimize the

cost of energy in South Carolina, including the development and use of "renewable energy sources." § 48-52-210(A) and -210(B)(4) (Supp. 2012). Renewable energy sources include "biomass energy." § 48-52-220 (Supp. 2012). The tax credit at issue here is part of the plan to encourage the development and use of energy from a "biomass resource." § 12-6-3620(A) (Supp. 2012).

As part of the "South Carolina Energy Efficiency Act," the General Assembly also created the SEO as the "principal energy planning entity for the State," and its "primary purpose is 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). To that end, the General Assembly imposed numerous duties upon the SEO related to energy planning and use, including the following:

1. assist in "residential, commercial, governmental, industrial, and transportation conservation and efficiency" and encourage the use of renewable energy sources, § 48-52-420(1) (Rev. 2008);

2. promote "continued and expanded energy research and development programs geared toward the energy needs of the State," *id.* at (2);

3. "evaluate and certify energy conservation products," *id.* at (3);

4. develop mechanisms to promote "cost-effective energy" and the use of renewable energy sources, *id.* at (4);

5. assist in developing financial incentives for electric and gas utilities to use "cost-effective demand-side options in meeting future energy needs," *id.* at (5);

6. promote the "adoption and use of energy efficient building codes and certification procedures for builders, heating and cooling specialists, and building inspectors," *id.* at (6);

7. promote "energy efficiency in manufactured housing," *id.* at (7);

8. promote pollution reduction and energy efficiency in transportation and vehicles, including the reduction of vehicle travel, *id.* at (8);

9. ensure that governmental bodies establish energy efficiency plans and become models for energy efficiency, including assisting the Department of Education in achieving energy efficiency in public schools, *id.* at (9);

10. be a "clearinghouse" for energy information and conduct long-range energy planning, *id.* at (10);

11. assist the Governor and General Assembly in issues related to "energy production, transportation, and use, *id.* at (11);

12. ensure that "any future energy strategy that promotes carbon-free, nongreen-house gas emitting sources includes nuclear energy, renewable energy resources, and energy conservation and efficiency, *id.* at (12) (Supp. 2012);

13. submit an annual, detailed "state energy action plan" to the Governor and General Assembly, § 48-52-430 (Supp. 2012);

14. approve funding for any alternative energy usage or conservation studies by any state agency, § 48-52-435 (Rev. 2008);

15. develop "energy efficient code standards for state-owned and leased buildings," § 48-52-610 (Rev. 2008);

16. approve and monitor the "energy conservation plan" for every state agency and public school district, § 48-52-620 (Supp. 2012);

17. certify an agency's savings from an "energy conservation measure," § 48-52-635 (Rev. 2008);

18. approve any "energy conservation products" to be purchased by state government, § 48-52-640 (Supp. 2012);

19. establish a "revolving loan fund for state agencies and political subdivisions of the State to use for energy conservation measures, " §48-52-650 (Rev. 2008);

20. assist numerous governmental bodies, including all governmental bodies subject to the Consolidated Procurement Code, in the identification and procurement of "energy efficient" goods, drafting and enforcing "energy conservation standards" for the design and construction of buildings that are owned or leased-purchased by governmental bodies, and evaluating energy costs for buildings to be leased in whole or in part by governmental bodies, § 48-52-680 (Rev. 2008); and

21. receive reports regarding energy use and conservation by each agency. § 48-52-910 (Supp. 2012).[4]

Despite the breadth and depth of these duties, the General Assembly limited the funding and personnel available to the SEO for carrying out these duties: "Funding for the [SEO] must be derived from existing financial resources available to the State" and "[p]ersonnel for the [SEO] must be derived from the consolidation of existing state government personnel slots with no new FTE's [full-time equivalents]." § 48-52-470 (Rev. 2008). As noted later, the imposition of these numerous duties, combined with the limitation on funding and personnel, make it exceedingly difficult – if not impossible – for the SEO to conduct a contested case hearing.

All of the foregoing duties and powers are imposed upon and granted to the SEO by the "South Carolina Energy Efficiency Act," which is set forth in Chapter 52 of Title 48. In stark contrast, the General Assembly created and placed the tax credit at issue here in the "South Carolina Income Tax Act."[5] This Act empowers the South Carolina Department of Revenue (DOR), not the SEO, to administer and enforce the provisions of the Act. § 12-6-20 (Rev. 2000). This power dovetails with the statutes creating the DOR, which expressly provide that the DOR "is created to administer and enforce the revenue laws of this State," § 12-4-10 (Rev. 2000), and grant the DOR, not the SEO, the power to compromise and settle any tax liability. § 12-4-320(3), (4) (Rev. 2000). To that end, the

[4] The only "tax credit" power granted to the SEO in the Energy Efficiency Act relates to the $750.00 tax credit granted to persons who purchase manufactured housing designated by federal agencies as meeting their energy efficiency requirements. § 48-52-870(A) (Supp. 2012). For this tax credit, the General Assembly authorized the SEO to "adopt rules *pursuant to this article* [Article 10 of Chapter 52, Title 48] to develop tax credit applications and administer the issuance of tax credits." § 48-52-870(A) (Supp. 2012) (emphasis added). As shown later, the administration of the biomass tax credit at issue here is reserved unto the Department of Revenue, not the SEO. See nn.9-10 and accompanying text, *infra*.

[5] The "South Carolina Income Tax Act" is set forth in Chapter 6 of Title 12. § 12-6-10 (Rev. 2000). The tax credit at issue here is also set forth in Chapter 6 of Title 12. § 12-6-3620 (Supp. 2012).

General Assembly granted the DOR, not the SEO, the power to administer the tax credit and to require the taxpayer to provide supporting documentation. § 12-6-3620(D)(1) (Supp. 2012).

2. It will be exceedingly difficult – if not impossible – for the SEO to conduct the contested case (notice and hearing) required in this case.

As noted earlier, the funding and personnel available to the SEO is strictly limited by statute to existing funds and existing personnel – no new funding sources and no new personnel slots can be created for the SEO's operations. § 48-52-470 (Rev. 2008). According to its website (www.energy.sc.gov/contact), the SEO has sixteen principal employees.[6] Nothing indicates the SEO has any employees with any experience or training in conducting a contested case. At least seven of these employees *a priori* would not be qualified by experience or training to conduct a contested case hearing on IP's request for a biomass tax credit.[7] Thus, at most, the SEO apparently has nine employees that *might* be qualified to make the initial determination on a tax credit request and decide any subsequent contested case challenging that determination.

The limited funding and personnel available to the SEO, coupled with the multitude of duties expressly imposed upon the SEO (see Arg. I(A)(1), *supra*), and the absence of any statute authorizing or directing the SEO to conduct contested case hearings (or any type of hearing), makes it very unlikely that the General Assembly intended the SEO to conduct any contested case hearings. Moreover, given the extremely limited number of employees that might be qualified to be involved in the initial determination on a tax credit

[6] Director; Dep. Director for Admin. and Finance; Dep. Director for Programs; Auditor; Grant Coordinator 1; Internal Auditor; Project Coordinators (3); Program Asst.; Intern; Technical Assistance Manager; Public Info. Coordinator; Fiscal Analyst; Exec. Administrator; and Administration and Finance Coordinator.

[7] Deputy Director for Administration and Finance; Grant Coordinator 1; Internal Auditor; Intern; Public Information Coordinator; Executive Administrator; and Administration and Finance Coordinator

request and any subsequent contested case challenging that determination, there is a significant danger of violating the State Constitution.[8]

Article I, Section 22 of the State Constitution provides that no one "shall be subject to the same person for both prosecution and adjudication." In other words, any SEO employees involved in making the initial determination on a tax credit request cannot be involved in any subsequent contested case challenge to that determination. See *Babcock Centers, Inc. v. Office of Audits*, 334 S.E.2d 112, 114 (S.C. 1985) (constitution not violated if employees deciding the challenge to an initial determination are different from the employees that made the initial decision). Thus, each tax credit request will need two different groups of employees available to make the initial determination and decide any subsequent challenge. Again, the limited funding and personnel available to the SEO, coupled with the multitude of duties expressly imposed upon the SEO (see Arg. I(A)(1), *supra*), and the absence of any statute authorizing or directing the SEO to conduct contested case hearings (or any type of hearing), makes it very unlikely that the General Assembly intended to place this burden on the SEO.

The drain on the SEO's limited resources will be exacerbated by the fact that any contested case hearing must be a trial-type hearing. The determination of qualifying costs for the purchase and installation of equipment that uses biomass fuel under § 12-6-3620 involves a detailed and technical understanding of the specialized equipment and processes used by IP at its facilities to create energy from a biomass resource, as well as knowledge of financial, accounting and tax principles related to the claimed costs. An adjudicator

[8] The SEO has no administrative regulations that govern or set forth the procedures for a contested case hearing, and the General Assembly has mandated that the SEO "must not functions as a regulatory body." § 48-52-410 (Rev. 2008).

must review and comprehend potentially thousands of pages of equipment descriptions, functional and technical design specifications, process flow diagrams and descriptions, and engineering and cost detail to simply understand the basic energy production process before applying the law to the facts to reach a decision. The inquiry in this case focuses on a specialized industry, the paper mill industry, which can hardly be expected to present evidence limited to written form that effectively addresses all relevant questions an adjudicator may have regarding its equipment, processes, and entitlement to a credit. The SEO is also not a taxing agency and has no institutional knowledge in tax or the related accounting and financial matters. IP cannot determine the tax and accounting principles applied by the SEO, relevant to the costs associated with the installation of the equipment, without cross-examining witnesses. IP must be able to question the SEO on the development and application of its alleged policies in considering a tax credit application on the record, as applied not only to IP but to other tax credit applicants seeking certification of the same credit for the same tax periods from the SEO. In sum, IP will suffer grave deprivation and relevant facts would go undiscovered without the right to a trial-type hearing.

3. The General Assembly's placement of the biomass tax credit statute in the South Carolina Income Tax Act reflects a legislative intent that the ALC review the SEO's initial determination in a contested case hearing.

As noted earlier, the General Assembly created the SEO as part of the South Carolina Energy Efficiency Act, which is set forth in Chapter 52 of Title 48. §§ 48-52-10 and -410 (Rev. 2008). As also noted earlier, the General Assembly created a tax credit of $750.00 for persons who purchased an energy efficient manufactured home in the Energy Efficiency Act. § 48-52-870(A) (Supp. 2012). Also in that Act, the General Assembly

authorized the SEO to "adopt rules *pursuant to this article* [Article 6, Chapter 52, Title 48] to develop tax credit applications and administer the issuance of tax credits." § 48-52-870(B) (Supp. 2012) (emphasis added).[9]

In stark contrast, the General Assembly created the biomass tax credit at issue here (§ 12-6-3620) as part of the South Carolina Income Tax Act, which is set forth in Chapter 6 of Title 12 S.C. Code Ann. § 12-6-10 (Rev. 2000). Also in this Act, the General Assembly authorized the DOR to administer the provisions of the Act generally (§ 12-6-20 (Rev. 2000)) and specifically to administer the biomass tax credit at issue here. § 12-6-3620(D)(1) (Supp. 2012). Nothing in the Energy Efficiency Act or the Income Tax Act authorizes the SEO to make any rules regarding the biomass tax credit or to administer that tax credit. See generally §§ 12-6-10 *et seq.* (Rev. 2000 & Supp. 2012) and §§ 48-52-10 *et seq.* (Rev. 2008 & Supp. 2012).[10] And as noted earlier, no law authorizes the SEO to conduct a contested case hearing or any type of hearing regarding the biomass tax credit.

Under all of the foregoing circumstances, the General Assembly intended that the SEO certify the biomass tax as an adjunct to and in support of the DOR and its authority and duty to "administer and enforce" the South Carolina Income Tax Act, § 12-6-20 (Rev. 2000), which includes the biomass tax credit granted by §12-6-3620 (Supp. 2012). The SEO's certification is a preliminary tax credit determination that uses the SEO's knowledge about renewable energy sources and the equipment needed to use those sources to produce power for commercial use, which is part of the knowledge that the General Assembly

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[9] See n.4, *supra* (discussing tax credit for energy efficient manufactured homes).

[10] The General Assembly also placed several other "alternative energy" tax credits in the South Carolina Income Tax Code and expressly provides that the DOR, not the SEO, was to administer the tax credit even though the SEO, as with the biomass tax credit, was directed to "certify" the tax credit amount. See § 12-6-3600(H)(1) (Supp. 2012) (tax credit for producing corn-based ethanol or soy-based biodiesel); § 12-6-3610(C)(1) (Supp. 2012) (tax credit for property used in distributing or dispensing renewable fuel); and § 12-6-3631(E)(1) (Supp. 2012) (tax credit for research and development costs related to certain types of biofuels).

directed the SEO to acquire and apply to a wide variety of energy issues. (See Arg. I(A)(1), *supra*). The administration of that tax credit, however, both generally and specifically, is mandated by the General Assembly to be the power and duty of the DOR, not the SEO. Thus, in making its preliminary tax credit determination, the SEO acts on behalf of the DOR.[11]

The ALC has "contested case" jurisdiction over tax determinations by the DOR, because the DOR is listed in § 1-30-10(A)(17) (Supp. 2012). See § 1-23-600(A) (Supp. 2012). The SEO makes its preliminary tax credit determination on behalf of the DOR and, therefore, it is only logical that its determinations should be challenged in the same manner as if the DOR had made the determination. This best serves at least two important goals of the relevant statutes. First, it promotes uniformity and simplicity for taxpayers in challenging tax determinations. Thus, it furthers the General Assembly's goal and intent,

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[11] The facts learned in discovery before the SEO ended discovery by filing its motion to dismiss demonstrate that the SEO is acting on behalf of the DOR under § 12-6-3620:

1. The SEO regularly requests DOR's guidance regarding § 12-6-3620, specifically including the development and preparation of the tax credit form, SC SCH. ETC-50, Application for Biomass Resource Credit. (Appx. 035-036, 043-046, 047-049).

2. Erika Myers (SEO) has consulted with Jerilynn Van Story (DOR) regarding the statutory requirements of § 12-6-3620. (Appx. 050-052).

3. A DOR employee toured IP's facility with Erika Myers and Ralph Jenkins (SEO) in connection with IP's tax credit application. (Appx. 053-060, §§ 22 and 24).

4. Jerilynn Van Story (DOR) emailed Erika Myers (SEO) on April 7, 2011 regarding this contested case hearing. (Appx. 061-062).

5. Ashlie Lancaster (SEO Director) has consulted with DOR with representatives regarding the legal requirements for qualification of certain costs under § 12-6-3620. (Appx. 063-064).

6. The DOR has issued the only public guidance interpreting and construing § 12-6-3620 in S.C. Private Letter Ruling #11-6.

It is thus clear that the DOR is administering § 12-6-3620, as specifically required by the statute, and it is also clear that the SEO is acting with and for the DOR in making the SEO's tax credit determination.

as made clear in the South Carolina Revenue Procedures Act, "to provide the people of this State with a straightforward procedure to determine a dispute with the [DOR]." § 12-60-20 (Supp. 2012). Second, it protects the statutorily-limited resources (funding and personnel) available to the SEO to fulfill its primary mission of energy planning and the earlier-noted multitude of duties imposed upon the SEO by the General Assembly. (See items 1-21 in Arg. I(A)(1), *supra*). For the SEO to hold and manage contested case hearings and issue formal final decisions sufficient for judicial review, it will have to divert those statutorily-limited resources from that mission and those numerous duties, despite having few, if any, employees qualified to do so.

4. Summary and Conclusion.

IP is entitled to challenge the SEO's biomass tax credit determination in a "contested case" (notice and hearing), but no statute expressly gives the SEO or the ALC the power to conduct such a "contested case." Thus, the courts must review the relevant statutes and determine the General Assembly's intent from a "practical, reasonable, and fair interpretation [of the relevant statutes], consonant with the purpose, design, and policy of lawmakers." *Regions Bank v. Strawn*, 732 S.E.2d 230, 236 (S.C. App. 2012). In so doing, the court must construe the statutes "in the light of the intended purpose of the statute" and must avoid "an absurd result the legislature could not have intended." *Id.*

Here, the General Assembly created the biomass tax credit in the Income Tax Act, over which the DOR has general and specific power to enforce and administer, including the specific power to administer the biomass tax credit and request supporting documentation. The SEO has no general power over taxes or tax credits, and its involvement in the biomass tax credit is limited to a preliminary certification role that is

adjunct to and made on behalf of the DOR. At the same time, the General Assembly has charged the SEO with numerous energy planning duties – its primary purpose – but nevertheless statutorily limited the funding and personnel available to carry out those duties. Under these circumstances, it would be absurd for the General Assembly to impose the burden of "contested cases" upon the SEO, particularly when the SEO has few if any personnel qualified to conduct a contested case hearing. Moreover, since the SEO acts on behalf of the DOR in making the preliminary tax certification determination, it is more practical and reasonable that those determinations be challenged in the same manner as a DOR determination, *i.e.*, by contested case hearing before the ALC.

For all of the foregoing reasons, as earlier explained more fully, the only logical conclusion from the "purpose, design, and policy of lawmakers" as expressed in the relevant statutes is that the General Assembly intended any challenge to the SEO's biomass tax credit determination be by contested case hearing before the ALC.

B. Assuming the ALC does not have "contested case" jurisdiction to review the SEO's biomass tax credit determinations, the ALC correctly held it would have "appellate" jurisdiction once the SEO provided IP with notice and an opportunity to be heard in a contested case before the SEO and thereafter issued a final decision.

As noted earlier, the ALC held that it had appellate jurisdiction over the SEO's tax credit determinations under the following analysis: (1) the SEO's determinations in this case triggered a right held by IP that it be given notice and an opportunity to be heard; (2) the SEO had not yet given the required notice and hearing; (3) after notice and a hearing, the SEO could issue a final decision; and (4) after the SEO issued its final decision, IP could then appeal to the ALC.

Assuming the ALC does not have "contested case" jurisdiction over the SEO's biomass tax credit determinations, the ALC correctly held that it had "appellate" jurisdiction over those determinations after a contested case (notice and hearing) held by the SEO and the issuance of the SEO's final decision in the contested case.[12] Thus, if this Court agrees that the ALC does not have "contested case" jurisdiction, then the matter must be remanded to the SEO for a contested case hearing after notice. The SEO must thereafter issue a final decision, and then IP can appeal to the ALC.

II. Assuming the ALC does not have "contested case" or "appellate jurisdiction to review the SEO's biomass tax credit determinations, the circuit court has jurisdiction to do so.

As noted earlier, and as found by the ALC and not appealed by the SEO, IP has a right to judicial review of the SEO's biomass tax credit determination. Thus, assuming the General Assembly did not intend that the ALC would review the SEO's tax credit determinations, either in a contested case before the ALC or by appellate review of a contested case held by the SEO, then IP's right to judicial review must be given in the circuit court.

Under the particular circumstances of this case, the circuit court erred in dismissing the action before it rather than staying the action during the pendency of the appeal of the ALC's order. If, as the SEO apparently contends, the ALC has no jurisdiction to review the SEO's determinations, then the action before the ALC was and is void *ab initio*. *Turner v. Malone*, 24 S.C. 398 (1886). Accordingly, there was not another action pending between the parties and, therefore, the circuit erred in dismissing the action under Rule 12(b)(8), SCRCP.

[12] The SEO did not appeal this ruling or any other ruling by the ALC.

Admittedly, the circuit court could not itself resolve the question of the ALC's jurisdiction, because that question had already been decided by the ALC and was pending before this Court in IP's appeal from the ALC's order. But rather than dismiss the action, the circuit court should have stayed it until the issue of the ALC's jurisdiction was resolved in the appellate process. Issuing a stay would have avoided any potential interference with the ALC action and appeal while protecting IP from the danger that the appeal would yield a result that the ALC has no jurisdiction over the SEO's determination and the statute of limitations running on a circuit court action before receiving that appellate decision. See *Nerco Minerals Co. v. Morrison Knudsen Corp.*, 976 P.2d 457, 462 (Idaho Sup. Ct. 1999) (proper to stay an action rather than dismiss under Rule 12(b)(8) when jurisdiction of other court is in question); *Zaleha v. Rosholt, Robertson & Tucker, CHTD.*, 927 P.2d 925, 927 (Idaho Ct. App. 1996) (same).[13]

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that this Court should reverse the ALC and remand for a contested case hearing before the ALC, which would yield an affirmance of the circuit court. Assuming the ALC does not have contested case jurisdiction, then this Court should affirm the ALC, which again would yield an affirmance of the circuit court. Assuming the ALC has no jurisdiction over the SEO, then this Court should reverse the circuit court and remand for further proceedings.

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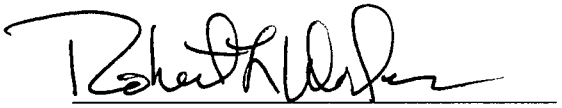
[13] In its first order, the circuit court also granted the motion to dismiss under Rule 12(b)(6), SCRCP, finding that the action could interfere with the appeal of the ALC's ruling. (R-II. 476-477). Thereafter, the circuit court issued a substitute order in response to IP's 59(e) motion and deleted any reference to Rule 12(b)(6). (R-II. 469-471, *passim*). It thus appears the circuit court did not dismiss the complaint pursuant to Rule 12(b)(6). In any event, and to the extent necessary, IP challenges any dismissal under Rule 12(b)(6) for the same reasons as the dismissal under Rule 12(b)(8). Moreover, there is no question that the complaint states a cause of action and, thus, dismissal under Rule 12(b)(6) was improper. The only question is whether the action should be heard in the ALC or the circuit court. Finally, the rulings made in the first order under Rule 12(b)(6) were relevant to the motion under Rule 12(b)(8) but not Rule 12(b)(6).

Respectfully Submitted,



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The undersigned certifies that this Final Brief of Appellant complies with Rule 211(b) SCACR and the Supreme Court Order of August 13, 2007.

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
G. Thomas Cooper, Jr., Circuit Court Judge

Case No. 2007-CP-23-3206
Appellate Case No. 2013-001607

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

v.

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

APPEAL FROM THE ADMINISTRATIVE LAW COURT
Ralph King Anderson, III, 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.

CERTIFICATE OF SERVICE

I, Ann Shuler, an employee of McNair Law Firm, certify that I served the **Final Brief of Appellant** and **Final Reply Brief of Appellant** by placing true and correct copies in the U.S. Mail, sufficient postage pre-paid to counsel of record at the addresses shown below, on September 10, 2014:

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