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. 2013-CP-40-0572
Appellate Case No. 2013-000114 (formerly 2013-001607)

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

v.

South Carolina State Energy Office, ...Respondent.

APPEAL FROM THE ADMINISTRATIVE LAW COURT
Ralph King Anderson, III, Chief Administrative Law Judge

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FINAL BRIEF OF RESPONDENT

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Keith C. McCook
Frank S. Potts
Office of General Counsel
State Budget and Control Board
Post Office Box 11608
Columbia, South Carolina 29211
Attorneys for Respondent
803-734-1261

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Statement of Issues on Appeal

1. If the General Assembly did not vest jurisdiction in the Administrative Law Court to conduct de novo hearings regarding energy certification decisions made by the State Energy Office, did the Administrative Law Court err by dismissing the case brought solely for that purpose?

2. Should a court without subject matter jurisdiction of a case take any action in the case other than to dismiss the matter?

3. Are orders issued by a court without subject matter jurisdiction void?

4. Did the refusal of an applicant for tax credits to supply requested information to the certifying authority forgo any right to later claim that it was denied appropriate process by that agency?

5. Should an appellate court allow a party to assert inconsistent factual contentions to the lower and appellate courts?

6. Did the abandonment of the administrative process being provided by the certifying authority preclude a later claim that the administrative process was insufficient?

7. Is the possibility of certification as eligible for an energy incentive tax credit sufficient to create a constitutionally protected property interest, an entitlement?

8. Did the General Assembly delegate solely to the State Energy Office the discretion to determine whether certain energy expenditures should be certified as eligible for income tax credits under Section 12-6-3620?

9. Does the constitution mandate a trial-type hearing before the State Energy Office can decline to certify eligibility for a biomass energy tax credit?

10. Did the circuit court err by dismissing International Paper's second action between the same parties and regarding the identical subject matter while the first action was on appeal?

11. Did the Circuit Court abuse its discretion in refusing to grant a stay when the defendant will suffer prejudice and the moving party has an identical claim pending in another court?

Statement of the Case

In order to seek certification for a biomass resource tax credit for expenditures made during the 2010 calendar year, an application had to be filed no later than January 31, 2011. On January 31, 2011 the International Paper Company (IP) filed its application with the State Energy Office (SEO) requesting that various expenditures in calendar year 2010 be certified as eligible for a tax credit under S.C. Code Ann. §12-6-3620 (2014). International Paper's application consisted of approximately twenty-two pages and sought certification from the State Energy Office that $22,064,014.16 of equipment and labor expended by IP at two of its South Carolina mills in calendar year 2010 qualified for a 25% tax credit under Section 12-6-3620. (IP Application for Tax Credit for Calendar Year 2010.) (R. p. 70). Under the statute, the State Energy Office had thirty days (until March 1, 2011) in which to respond and tell International Paper whether it qualified for the credit and the specific amount for which it qualified. § 12-6-3620(D)(1).

Thirty days later, on March 1, 2011 the State Energy Office sent a letter by e-mail to IP attaching a review of its application for tax credit certification. In addition to advising that some expenditures appeared to qualify and others did not, the Energy Office asked that IP review the comments and provide the State Energy office with "the requested documentation as soon as possible so that we may move forward with processing your application." (Letter of A. Lancaster, Director of the SEO to R. Shands, State Tax Manager of IP dated March 1, 2011.) (R. p. 14). The letter also advised IP that the South Carolina Department of Revenue had been notified of the "pending application." Id.

The State Energy Office heard nothing further from the International Paper Company until March 25, 2011. On that date a copy of a letter from the McNair Law

Firm, legal counsel for International Paper, addressed to the Clerk of the Administrative Law Court was received by the SEO. The letter invoked Rule 11 (Request for a Contested Case Hearing) of the Rules of Procedure for the Administrative Law Court (SCALCR) and requested "a contested case hearing in response to the determination of the South Carolina State Energy Office ("Determination") issued on March 1, 2011." (Letter of March 25 to the ALC by E. Doerring) (emphasis added) (R. p. 466). The request did not seek to appeal a final agency decision. Such a request would have been made pursuant to Rule 33 (Notice of Appeal), SCALCR. The State Energy Office then tendered the matter to the Office of General Counsel of the Budget and Control Board.[1]

The matter was assigned a case number by the Administrative Law Court. The Prehearing Statement filed by International Paper five months later (August 15, 2011) requested that the Administrative Law Court order the State Energy Office to certify the expenditures identified in Petitioner's (January 31, 2011) Application for Biomass Resource Credit as qualified for the 25% tax credit provided in South Carolina Code §12-6-3620. (Petitioner's Prehearing Statement dated August 15, 2011 ¶4.) (R. p. 233 ¶ 4). At this point, IP was asking the ALC to provide it with a de novo contested case hearing and decide that $22,064,014.16 of expenditures qualified for a tax credit of over $5,500,000.00.

On that same day, the State Energy Office filed its Prehearing Statement acknowledging that it had received the International Paper application to certify $22,064,014.16 in expenditures and explaining that on March 1, 2011 it had asked

[1] The State Energy Office is a part of the State Budget and Control Board. S.C. Code Ann. § 48-52-410 (2008) amended by The South Carolina Restructuring Act of 2014, 2014 Act. No. 121. Under restructuring the State Energy Office will become a part of the Office of Regulatory Staff. 2014 Act No. 121, § 4(B) (to be codified at § 1-11-20(B)).

International Paper for additional information. (Respondent's Prehearing Statement, August 15, 2011.) (R. pp. 239 – 243). The Energy Office further noted in its Prehearing Statement that:

1. It requested additional information from the applicant on March 1st to decide the request on the merits; ¶2.
2. It could not certify the claim based upon "incomplete information…." ¶4.
3. "The State Energy Office requires additional and complete information from International Paper concerning the credits for which it has applied prior to being capable of making any final determination with regard to the amount of any tax credit that can be certified." ¶8.

Thereafter, discovery between the parties began on August 19, 2011 with the transmittal by International Paper to the State Energy Office of interrogatories and a request for production. Discovery continued throughout the remainder of 2011 and included the production of several thousand pages of documents by International Paper relating to its expenditure of the $22 million for which a tax credit of approximately $5.5 million was sought.

On December 14, 2011, the State Energy Office filed a motion to dismiss the action on the grounds that International Paper had failed to exhaust its administrative remedies because the State Energy Office had "not issued a final agency determination or decision with respect to the tax credit and the amount of credit, if any…" to be allowed International Paper based upon to its application of January 31, 2011[2] for the calendar year 2010. (Notice of Motion and Motion to Dismiss dated December 14, 2011.) (R. p. 49). The Motion explained that:

> [t]he South Carolina Energy Office previously did not receive sufficient information from the Petitioner to render a final agency determination as required by § 12-6-3620 of the South Carolina Code. The majority of

[2] The application date was January 31, 2011 but was erroneously stated to be January 28, 2011 in the Motion to Dismiss filed December 14, 2011. Email from T. Bolger to E. Myers attaching the application dated January 31, 2011. (R. p. 465).

> such information has now been received and the State Energy Office is now capable of making a final agency decision and determination concerning the statutory tax credit.

Id.

International Paper opposed the motion to dismiss contending that "[t]he State Energy Office issued a final agency determination on March 1, 2011." (Petitioner's Response in Opposition to Respondent's Motion to Dismiss at pages 11 and 12, December 28, 2011.) (R. pp. 60 – 61). ("The SEO Determination was a final agency determination by the State Energy Office.")

While the motion to dismiss was pending, two events occurred. International Paper filed another application for certification of expenditures to obtain additional tax credits on January 30, 2012. This time the application was for calendar year 2011 (the first was for calendar year 2010). This second application for certification was subsequently denied on March 1, 2012 (with no requests (or need) for additional information). The State Energy Office issued this final determination declining to certify any of the claimed ($19,192,356) 2011 calendar year expenditures as eligible for the tax credit.[3] A challenge of that decision was filed the following day (March 2, 2012) pursuant to Rule 11 of the Rules of Procedure for the Administrative Law Court seeking a de novo contested case hearing. (Letter to Jana Shealy of March 2, 2012.) (R. p. 467). No Notice of Appeal of the March 1, 2012 final determination was filed or served in accordance with Rule 33, SCALCR.

[3] Discovery materials provided in the latter part of 2011 and more robust application documents received from International Paper permitted the State Energy Office to make the 2012 decision in a timely manner and without requesting additional information. At no point did IP request a meeting, a hearing, an opportunity to present live testimony, or any additional process whatsoever.

The second event occurred when, the State Energy Office learned[4] that the ALC had decided to consider the March 1, 2011 letter from the State Energy Office a final determination and intended to deny the motion. The State Energy Office filed another motion (February 21, 2012) asking the court to remand the matter "for the purpose of correcting errors, omissions and mistakes therein, including any purported decisions or determinations with regard to any tax credits to which the International Paper Company may be or is entitled…." (Notice of Motion and Motion to Remand for the Purpose of Correcting Error, Mistake or Omission filed February 21, 2012.) (R. p. 135). This latter motion, which was accompanied by an affidavit of the Director of the Energy Office,[5] was never ruled upon, though it was effectively resolved by the order regarding the motion to dismiss.[6]

On March 5, 2012, the Administrative Law Court denied the SEO Motion to Dismiss and concluded that the SEO's letter of March 1, 2011 "was a final determination." (Order of March 5, 2010, at p.2) (R. p. 12). Despite finding this determination final, the Court expressly authorized the Energy Office - for the 2010 calendar year expenditures only - "leave to file an Amended Final Decision with the Court on or before March 16, 2012 regarding its tax credit certification based upon the new evidence received…." (Order of March 5, 2012, at p. 3.) (R. p. 13).

In accord with this permission, the State Energy Office exercised its statutory

[4] Judge Anderson had, prior to issuing his written order, informed both parties that he intended to deny the SEO motion of December 14, 2011 to dismiss because, agreeing with IP's contention, he considered the March 1, 2011 letter a final decision of the SEO.
[5] The Director's affidavit was later supplemented with a second affidavit from E. Myers who was no longer an employee of the State Energy Office and had moved out-of-state. (Affidavit of E. Myers, Dec. 16, 2011.) (R. pp. 271-273).
[6] The March 5, 2012 Order denying the December 14, 2011 Motion to Dismiss referenced the subsequent motion to remand but did not otherwise purport to rule on it. See Order of March 5, 2012, p. 1 n.1. (R. p. 11, n. 1).

authority to issue its (then-amended) determination regarding the International Paper application for certification of a tax credit for the calendar year 2010.[7] (SEO Determination dated March 15, 2012.) (R. p. 388). This final determination was based upon the January 31, 2011 application and the thousands of pages of documents that had been obtained by the State Energy Office pursuant to the then-conducted discovery between the parties. The determination denied certification of a tax credit for any of the expenditures ($22,064,014.16) claimed for the calendar year 2010.[8]

On April 25, 2012 International Paper moved to consolidate the two pending cases. The Administrative Law Court granted the request by Order dated May 1, 2012, consolidated the two cases together with the documents pertaining to each and assigned it a single docket number, to wit: 12-ALJ-30-0192-CC.

Thereafter discovery continued in the cases (primarily depositions) into early October, 2012 when several non-dispositive motions were filed. On October 3, 2012 the State Energy Office filed a second Motion to Dismiss based upon a lack of (subject matter) jurisdiction of the Administrative Law Court ("for a want of authority [of the Administrative Law Court] to adjudicate the matters involved."). The motion of the State Energy Office explained that the Budget and Control Board, of which the State Energy Office was a part, was not an executive agency and that Title 1, Chapter 23 of the South Carolina Code did not provide the court with jurisdiction to grant the relief requested by the International Paper Company and that the court lacked the jurisdiction necessary to conduct a de novo contested case hearing on the question whether the claimed

[7] As far as the State Energy Office was concerned, this was its first final agency decision regarding the 2011 application; however, the court's order of March 5, 2012 agreed with International Paper's contention and decreed that the March 1, 2011 letter was a final determination.

[8] With regard to the March 15, 2012 determination (R. p. 388), International Paper filed neither a Request for a Contested Case Hearing pursuant to Rule 11, SCALCR, nor a Notice of Appeal pursuant to Rule 33, SCALCR.

expenditures by IP qualified for the biomass energy tax credit under the statute (a Rule 11, SCALCR case).

International Paper opposed the motion, again contending that the ALC had jurisdiction to conduct a de novo trial-type "contested case" hearing on its application for certification of a tax credit and for the first time, IP contended that it was also entitled to have the matter heard as an appeal (Rule 33, SCALCR). International Paper requested the court to issue its order that "it has de novo and/or appellate jurisdiction over the State Energy Office in these proceedings." (Petitioner's Memorandum in Opposition to Respondent's Motion to Dismiss for Lack of Jurisdiction at p.15, October 15, 2012.) (R. p. 159). International Paper's memorandum made no reference to its refusal to complete the review process being provided by the SEO in February-March 2011.

The Administrative Law Court, Chief Judge Anderson presiding, heard oral argument on the motion on October 17, 2012. The next day, Judge Anderson requested that in addition to supplemental briefs, the parties each respond to a series of questions. (E-mail of H. Fair dated October 18, 2012 to counsel for the parties) (R. p. 468). The parties did so.

On December 19, 2012 the Administrative Law Court issued its Order and dismissed the matter for a lack of jurisdiction. (Order of December 19, 2012, at p. 9) (R. p. 9). The Order recognized that International Paper had commenced both actions under Rule 11, SCALCR and had not appealed either decision of the State Energy Office. (Order, at p. 8) (R. p. 8) ("Clearly, this matter was not filed as an appeal of a decision of the State Energy Office."). The court also articulated its belief that if International Paper had appealed the two decisions (under Rule 33, SCALCR) it would have had appellate jurisdiction. (Order, at p. 8) (R. p. 8) ("Therefore, though this matter is not properly

before the ALC as a contested case, this matter . . . could be heard as an appeal under Section 1-23-600(D).") The court expounded on its belief that an applicant seeking a government tax credit has an entitlement to a hearing before certification of such a credit can be refused. (Order, at p. 7.) (R. p. 7) ("[P]arties seeking certification from the State Energy Office of their applications for the Biomass Resource Credit are entitled to notice, a hearing (an opportunity to be heard in a meaningful way) before an impartial and unbiased adjudicator, and judicial review."). The court then remanded the case to the State Energy Office while declaring void its previous decision that the March 1, 2011 letter was a final determination (of the request for certification for calendar year 2010). The court did not address the decision of March 1, 2012 regarding calendar year 2011 expenditures) (which was never appealed but instead, IP sought a de novo contested case (Rule 11, SCALCR) hearing as it had done previously). The ALC also made no reference to the fact that in March of 2011, instead of providing the information requested by the SEO or asking for a hearing or other relief, IP filed with the ALC and asked it to assume the statutory biomass resource tax credit certification process. International Paper then filed its Notice of Appeal with this Court on January 17, 2013.

On January 30, 2013 while its appeal was pending before this Court, International Paper initiated another action against the SEO seeking virtually identical relief to that sought before the Administrative Law Court. The action was filed with the Court of Common Pleas in Richland County. (Complaint of International Paper, January 30, 2013.) (R. pp. 482 – 488). The case was assigned to the Honorable G. Thomas Cooper, Jr.

After service of the Complaint was effected, the State Energy Office filed a Motion to Dismiss the action pursuant to the South Carolina Rules of Civil Procedure,

Rules 12(b)(6) and 12(b)(8). (Motion to Dismiss filed March 21, 2013.) (R. pp. 545 – 546). On April 1, 2013, International Paper filed a Motion to Stay Proceedings.

The motions of the parties were heard by Judge Cooper on May 16, 2013 in the Richland County Judicial Center. On May 23, 2013 the circuit court granted the State Energy Office's Motion to Dismiss and denied International Paper's Motion to Stay.

Pursuant to International Paper's motion to reconsider its decision, the circuit court heard oral argument a second time on July 15, 2013 and issued its Order denying the requested relief on July 16, 2013. International Paper thereafter filed its Notice of Appeal with this Court.

While the appeal from the Administrative Law Court and the Court of Common Pleas matter was pending, International Paper on May 21, 2013 filed a motion with the Supreme Court requesting that its appeal of the December 19, 2012 Administrative Law Court decision be heard by it instead of the Court of Appeals.[9] The motion to have the appeal heard by the Supreme Court was denied on July 12, 2013.

On July 25, 2013 International Paper filed its motion with this Court to consolidate the appeals from the Administrative Law Court and the Court of Common Pleas. This motion was granted on September 20, 2013. The Appellant, International Paper, filed its initial brief on December 12, 2013.

Statement of Facts

Statutory History and Executive Discretion

In 2006 the General Assembly enacted a statute (Section 12-6-3620) which allowed taxpayers a 25% tax credit for costs incurred for the "use of methane gas taken

[9] During this period of time, this Court granted the request of International Paper to hold appellate timelines in abeyance and as a result, no briefs were filed.

from a landfill to provide power for a manufacturing facility." 2006 Act. No. 386 §38 (originally codified at § 12-6-3620). The credit was limited to 50% of taxes imposed by another statute. Id. At the time the statute did not define with any specificity which expenses could be relied upon by the taxpayer to determine what was included in the costs claimed.

The following year the statute was greatly expanded. 2007 Act. No. 83 §16 (again codified at § 12-6-3620). The tax credit was no longer just for methane gas from landfills used by a manufacturing facility but applied to the use of a "biomass resource" (which was defined in the statute.) Id. The amendment completely re-wrote the statute and required the State Energy Office "in consultation with the Department of Agriculture and the South Carolina Institute for Energy Studies" to certify those expenditures which qualified for the credit. Id. at (A). The total amount of the credits which could be awarded was limited to $650,000 for all qualified applicants combined.

The next year the statute was amended again, this time into its current form. 2008 Act No. 261 (currently codified at S.C. Code Ann. § 12-6-3620 (2014)). This amendment made further substantial changes, and broadened the definition of a "biomass resource." Also, the State Energy Office was no longer required to consult with either the Department of Agriculture or the Institute for Energy Studies on standards for certifying claimed costs. S.C. Code Ann. §12-6-3620(A) (2014). The amount of the potential tax credit was greatly expanded (from a total for all taxpayers of $650,000 to $650,000 per taxpayer per year for up to fifteen years ($9,750,000 per taxpayer)). §12-6-3620(B). The amendment further required the State Energy Office to notify the taxpayer of the "amount" of the credit and authorized the Department of Revenue to "require any documentation that it deems necessary to administer the credit." §12-6-3620(D). Also

newly added was a provision by which the General Assembly indicated that in the future it could reduce the maximum amount of the credit and if it did so, any statutory language to the contrary would be considered null and void. §12-6-3620(D)(3).

The statute had begun in 2006 as one solely to provide a tax credit for a very specific purpose: to provide a credit for costs involved in the use of methane gas extracted from a landfill used solely to provide power for a manufacturing facility. 2006 Act No. 386 (A). Two years later the tax credit could be sought by any taxpayer who created energy from landfills, sewage, agricultural and animal waste and other "organic materials" including noncommercial wood, the by-products of wood processing and even including demolition debris containing wood as long as the resulting energy was created for a profit from a 90% "biomass resource." 2008 Act No. 261.

In its expansion of the statute, the General Assembly recognized the need for a gatekeeper with expertise in both energy and the State's policies regarding its use and development. See, e.g., S.C. Code Ann. § 48-52-410 (Supp. 2008) (The "primary purpose [of the State Energy Office] is to develop and implement a well-balanced energy strategy and to increase the efficiency of use of all energy sources. . . ."). The Legislature specifically granted the State Energy Office discretionary authority to decide which expenditures would qualify for the tax credit, subject only to the statutory guidelines. Between 2007 and 2008 the General Assembly made any consultation optional but granted authority for the same.

As this history reflects, the discretionary nature of the decisions involved was clearly embodied in the statute. When first enacted, Section 12-6-3620 applied to only one type of circumstance and involved four necessary elements: 1) a landfill; 2) a manufacturing facility; 3) methane gas; and, 4) power. If a manufacturing facility

derived its power from methane gas that came from a landfill, it would receive a tax credit for the costs involved. 2006 Act. No. 386. A minimal amount of discretion was involved and the State Energy Office was not involved in that process.

However, when the General Assembly expanded the law in 2007, it recognized that it was no longer a simple matter to apply the statute but that the possibility of numerous types of applications would require both expertise and the exercise of discretion with respect to the certification of expenditures for tax credits. Thus, when the General Assembly first amended the statute beyond the simple use of methane gas from landfills for manufacturing facilities, it specified that the State Energy Office be responsible (in conjunction with two other entities) for exercising the necessary discretion. It then expanded that discretion in 2008 and delegated the sole authority for its exercise to the State Energy Office. 2008 Act No. 261.

Both the type of discretion and the expertise necessary to decide whether to certify expenditures under the statute may be found in the actual decisions of the State Energy Office in this matter. Those decisions are dated March 1, 2012 (for calendar year 2011) and March 15, 2012 (for calendar year 2010). (Decisions of the SEO dated March 1, 2012 & March 15, 2012.) (R. pp. 48 and 388). They explain why the millions expended by IP on maintenance, chemical recovery equipment and repair and the replacement of obsolete equipment with no appreciable creation of energy did not qualify for certification by the State Energy Office. Those decisions set forth the standards the SEO applied in making its decisions despite the apparent disqualification of the application for the reason that "black liquor" from a paper mill does not qualify under the terms of the statute. Id.

ARGUMENT

Summary of Argument

IP filed two requests for de novo contested case hearings, one each regarding two tax credit applications. In response to a motion filed by the SEO, the ALC dismissed those requests for lack of jurisdiction. The ALC also observed that IP had yet to file any appeals. The ALC proceeded to then analyze his potential appellate jurisdiction and conclude that such jurisdiction would exist (if a future appeal were filed), that SEO had provided IP inadequate process, that until such process were afforded a final decision could not exist, and that after such a decision were issued, IP could then exercise its rights to appeal. The order then concludes with a remand. However, once the ALC concluded he lacked jurisdiction, he lacked any authority to proceed further. Accordingly, the remand was void and this court should affirm that fact by vacating that portion of the order accordingly. Likewise, everything else in the order not necessary to rule on the motion to dismiss was dicta and does not bind the parties. [10]

IP asks this Court to reverse the ALC and rule that the ALC has the authority, after a de novo trial-type hearing, to certify eligibility of IP's application for biomass resource energy tax credits and to determine the amounts of any such credits. Not the SEO. However, the ALC lacks authority to conduct a contested case hearing under Section 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." Accordingly, the ALC's

[10] If the court concludes the remand is valid, then the IP's entire appeal must be dismissed because a valid order remanding a case for additional proceedings is not directly appealable. Bone v. U.S. Food Service, 399 S.C. 566, 571, 733 S.E.2d 200, 202 (2012) ("In [granting the respondent's motion to dismiss the appeal in Montjoy v. Asten–Hill Dryer Fabrics, 316 S.C. 52, 446 S.E.2d 618 (1994)], we relied upon the final judgment rule articulated in section 1–23–390 of the APA and observed that 'we have consistently held that an order of the circuit court remanding a case for additional proceedings before an administrative agency is not directly appealable.' Although Montjoy involved a Commission case, its holding applies to all administrative agencies subject to the APA.") (footnotes and citations omitted).

dismissal of IP's request for a contested case hearing should be affirmed.

If this Court affirms the ALC on this point, IP then asks this Court to rule that the ALC has jurisdiction to hear an appeal under Section 1-23-600(D); however, IP has never invoked the ALC's appellate jurisdiction – it simply never filed an appeal of any decision of any agency. Accordingly, a ruling on the ALC's potential appellate jurisdiction is unnecessary to affirm or reverse the order on appeal.

IP also asks this court to effectively rule on the merits of such an appeal, had it been filed; IP asks this court to conclude that the process afforded by SEO was inadequate, that due to the (later contended) alleged deficiencies of that process, the SEO has not yet issued a final agency decision, and that IP's right to appeal to the ALC has thus not yet been triggered. As relief, IP asks this court to validate a void remand, order SEO to conduct a contested case hearing after notice, and issue a final decision – all so IP can then appeal (for the first time) to the ALC. Some of these issues might be proper for review, had any appeal ever been filed. In the absence of an appeal to the ALC, these issues should not be addressed.

If this Court finds it necessary to address the ALC's potential future appellate jurisdiction, this Court should rule that the ALC lacks jurisdiction to hear an appeal under Section 1-23-600(D) because neither law nor constitution mandates that a hearing be conducted by the State Energy Office before it can decline to certify eligibility for a biomass resource energy tax credit. In order for the ALC to have appellate authority, some legal authority – either a law or constitution – must require a hearing – not just notice and an opportunity to be heard, but a hearing. No law so provides. With regard to Art. 1, § 22, our Supreme Court has recently adopted a Due Process Clause analysis. South Carolina Ambulatory Surgery Center Assoc. v. South Carolina Workers'

Compensation Comm'n, 389 S.C. 380, 699 S.E.2d 146 (2010). Under that analysis, notice and an opportunity to be heard are not constitutionally necessary unless a protected interest is at stake, i.e., life, liberty, or property. If such an interest exists, appellate authority at the ALC still does not exist unless the minimum process required by the constitution is a hearing. Only then is the statutory prerequisite (the requirement that some law requires a hearing) satisfied, such that the ALC would have appellate jurisdiction. The interest at issue is IP's interest in a tax credit made possible by compliance with an energy statute. Only if that statute creates an entitlement would IP have an interest sufficient to trigger the constitution. No court has ever found the possibility of eligibility for a tax credit to create an entitlement. Even if this court should conclude otherwise, this Court should not conclude that the State must conduct a hearing on every application for this tax credit before it may decide whether or not to exercise its discretion to certify expenditures – that the minimal process required by the constitution is a hearing.

International Paper also filed an action in circuit court seeking the same relief sought before the ALC. If Rule 12(b)(8), SCRCP, is to have any meaning, Judge Cooper must be affirmed. Rule 12(b)(8) provides for dismissal if there is "another action pending between the same parties for the same claim." IP represented as much to the court.[11]

I. The ALC correctly determined that it lacked jurisdiction under Section 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.

The Administrative Law Court is an agency of the executive branch of the State

[11] Transcript of Record of hearing held May 16, 2013 at p. 27, ll. 19-21. (R. p. 604, ll. 19-21). At the first hearing before Judge Cooper on May 16, 2013, counsel for International Paper advised the court that "there's an identity of parties and an identity of issues. Of course there are. It's the identical parties and the identical issues." Id.

of South Carolina. S.C. Code Ann. §1-23-500 (Supp. 2013). As an administrative agency, the court has only such powers as have been conferred on it by law and must act within the authority created for that purpose. Bazzle v. Huff, 319 S.C. 443, 445, 462 S.E.2d 273, 274 (1995).

Section 1-23-600(A), which is a general grant of jurisdiction to the ALC regarding non-appellate contested case hearings, provides the ALC with authority to:

> 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 . . ..

S.C. Code Ann. § 1-23-600(A) (Supp. 2013). Therefore, in order for the ALC to assume jurisdiction over a contested case under this grant of jurisdiction, the case must involve one of the "departments of the executive branch of government as defined in Section 1-30-10. . . ."

In this case, it is indisputable that the State Energy Office is not a department within the executive branch of government as defined in Section 1-30-10(A). Section 1-30-10(A) defines the departments of the executive branch by listing them; neither the Budget and Control Board nor the State Energy Office is identified. Consistently, the other two entities with which it is authorized to consult about the biomass energy tax credits are also not part of the executive departments subject to ALC jurisdiction.

The Administrative Law Court's December 19, 2012 decision that it lacked jurisdiction to grant International Paper a de novo contested case hearing pursuant to Rule 11, SCALCR, was correct and should be sustained. There was no statutory authority for the ALC to continue.

II. International Paper never filed an appeal of any agency decision; in the absence of authority to hear an appeal under Section 1-23-600(D) or to conduct a contested case hearing under Section 1-23-600(A), the ALC's order

of remand is void and should be vacated for lack of jurisdiction.

A. Remand is void.

Without any express instruction, the Order on appeal concludes by remanding to the State Energy Office. As the ALC acknowledged in his order, International Paper never filed an appeal of any agency decision.[12] In the absence of an appeal, and assuming the ALC has no contested case jurisdiction (see argument above), the ALC lacked any basis for jurisdiction over the matters pending – a conclusion expressly adopted by the ALC. (Order of December 19, 2012, at p. 8) (R. p. 8). ("Therefore, this Court has neither contested case subject matter jurisdiction nor appellate jurisdiction in this matter."). Without an appeal, an administrative body lacks the authority to hear the appeal. S.C. Coastal Conservation League v. S.C. Dep't of Health and Envtl. Control, 380 S.C. 349, 377, 669 S.E.2d 899, 914 (Ct. App. 2008) ("Because the appeal was untimely and the DHEC Board lacked jurisdiction, the ALC could not invoke jurisdiction to hear the matter.") overruled on other grounds 390 S.C. 418, 702 S.E.2d 246 (2010); Mears v. Mears, 287 S.C. 168, 169, 337 S.E.2d 206, 207 (1985) ("Service of the notice of intent to appeal is a jurisdictional requirement, and this Court has no authority to extend or expand the time in which the notice of intent to appeal must be served."). In the absence of authority to hear a matter, a court lacks authority to take any action other than dismissal. Ross v. Richland County, 270 S.C. 100, 101, 240 S.E.2d 649, 650 (1978) ("We conclude a court without jurisdiction only has authority to dismiss the action."); Triska v. Department of Health and Environmental Control, 292 S.C. 190, 194, 355 S.E.2d 531,

[12] International Paper has not argued otherwise. (Brief of Appellant, p. 2) ("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. . . . 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.").

533 (1987) ("DHEC is a state administrative agency and can only exercise those powers which have been conferred upon it by the South Carolina General Assembly. . . . Any action taken by DHEC outside of its statutory and regulatory authority is null and void."). Accordingly, the ALC's order of remand is void and should be vacated. Allison v. W.L. Gore & Associates, 394 S.C. 185, 189, 714 S.E.2d 547, 550 (2011) ("Since the Full Commission lacked jurisdiction to hear respondent's appeal, the decision of that Commission as well as the master's order are VACATED.").[13]

B. Even if this Court concludes that the ALC, despite its lack of jurisdiction, had authority to order a remand, a remand had no practical effect and was unwarranted.

But for the remand, no hint of potential ambiguity would remain regarding the finality of the agency's determinations in this matter and the expiration of the administrative appeal periods associated with each. For all the reasons offered above, this matter would be concluded – at least for purposes of any further administrative review.[14] The State Energy Office had already issued final decisions regarding both tax credit certification requests. Nevertheless, with the remand, at least a question remains as to why the Administrative Law Court issued a remand, particularly when the order included no instructions on remand (the State Energy Office was not ordered to do anything).

A remand served no practical purpose unless at least one of the agency's decisions was not considered final – giving IP an entirely new opportunity to appeal. Such a goal is suggested by dicta from the order stating that "a contested case hearing was required before any final determination could have been issued." (Order dated

[13] In its Brief, Appellant repeatedly observes that that "[t]he SEO did not appeal these rulings." (e.g., Appellant's Brief, at p. 4-5). Much of the order below, including the remand, was unnecessary to decide whether to dismiss the request for a contested case hearing. Accordingly, that portion of the order is not the law of the case. Weil v. Weil, 299, S.C. 84, 382 S.E.2d 471 (Ct. App. 1989) ("The doctrine of the law of the case is not applicable to a statement by the court which does not constitute a binding adjudication.").
[14] Obviously, proceedings in circuit court are a separate matter.

December 19, 2012, at p. 9 n. 10) (R. p. 9, n. 10). Despite acknowledging the lack of authority to determine whether or not the March 1, 2011 letter was final, the ALC appears to be attempting to offer International Paper a second bite at the apple. Whatever the ALC's intent, this is exactly the solution IP now seeks, as clearly reflected in its appellate brief:

> As noted earlier, the ALC held that it has 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. . . . 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.

(Initial Brief of Appellant, at p. 17.). Even if this Court concludes that the ALC, despite its lack of jurisdiction, had authority to order a remand, a remand has no practical effect because the agency had, in fact, issued final agency decisions for which the administrative appeal periods long ago expired.

1. Even if valid, the remand had no practical effect because the time to appeal from the agency's final decisions has expired.

On January 31, 2011, International Paper filed an application with the State Energy Office requesting that various expenditures in calendar year 2010 be certified as eligible for the biomass resource tax credit. On March 1, 2011, the State Energy Office issued a letter that International Paper has claimed "was a final agency determination by the State Energy Office." International Paper had thirty days to appeal that determination to the ALC. (Rule 33, SCALCR.) Having never appealed that decision, the time to do so has passed.

On January 30, 2012, International Paper filed another application with the State

Energy Office requesting that various expenditures be certified as eligible for the biomass resource tax credit. This application regarded expenditures made during calendar year 2011. On March 1, 2012, the State Energy Office issued a final agency decision regarding this application (reiterated on March 15, 2012 with an additional explanatory footnote). Again, International Paper had thirty days to appeal to the ALC. (Rule 33, SCALCR) Having never appealed that decision, the time to do so has passed.

Because the appeal period for both decisions had already passed, the remand had no practical effect. Once the agency issued final decisions, nothing further remained for it to do on a remand.

a. International Paper is now judicially estopped from arguing that the March 1, 2011 determination is not a final agency decision.

International Paper reverses itself and now claims that the March 1, 2011 letter was not a final decision regarding its 2011 tax credit application. In its appellate brief, International Paper contends that "SEO has not yet issued a final decision that triggered IP's right to appeal to the ALC." (Brief of Appellant, at p. 4-5). International Paper should be judicially estopped from asserting this position. The State Energy Office filed a motion to dismiss, seeking to terminate the proceedings initiated by IP's first request for a contested case on the grounds that the March 1, 2011 letter was not a final determination. International Paper opposed that motion by contending that "[t]he State Energy Office issued a final agency determination on March 1, 2011." (Petitioner's Response in Opposition to Respondent's Motion to Dismiss at pages 11 and 12, December 28, 2011.) (R. pp. 60 – 61). ("The SEO Determination was a final agency determination by the State Energy Office.") As late as October 29, 2012, IP was stating: "Pursuant to ALC Rule 11 International Paper requested contested case hearings in

response to the State Energy Office's final determinations on March 25, 2011 and March 2, 2012." (Petitioner's Supplemental Memorandum of October 29, 2012 at p. 20.) (R. p. 180). International Paper was successful in pressing that position; the Administrative Law Court denied the motion and held that the March 1, 2011 letter was a final agency decision. Had International Paper not taken that position, the matter would have been dismissed and, presuming IP provided the requested documentation, the State Energy Office could have provided a truly final determination. Having argued to the court below that the March 1, 2011 letter was a final agency decision, and having successfully maintained that position to its benefit, International Paper should not now be allowed to take a totally inconsistent position on appeal and argue that the exact same letter is NOT a final agency decision. Hayne Federal Credit Union v. Bailey, 327 S.C. 242, 251, 489 S.E.2d 472, 476 (1997) (Judicial estoppel precludes a party from adopting a position in conflict with one earlier taken in the same or related litigation.); Cothran v. Brown, 357 S.C. 210, 592 S.E.2d 629 (2004) (adopting the factors used to evaluate application of judicial estoppel).

In addition, International Paper has not been particularly forthcoming on this point. In its response to SEO's December 14, 2011 (first) motion to dismiss, International Paper represented to the ALC that the State Energy Office had never contended that the March 1, 2011 letter was anything but a final agency determination. (Petitioner's Response in Opposition to Respondent's Motion to Dismiss, dated December 28, 2011, at p. 12.) (R. p. 61). ("The SEO Determination was a final agency determination by the State Energy Office. The State Energy Office did not contend otherwise in its pre-hearing statement filed with this Court.") International Paper has made this inaccurate representation twice. (Petitioner's Response in Opposition to Respondent's Motion to

Dismiss, dated December 28, 2011, at p. 7.) (R. p. 56) ("The State Energy Office did not claim that it had not made a final determination in its pre-hearing statement . . . .") As reflected in the SEO's prehearing statement, this assertion was incorrect. (Respondent's Prehearing Statement, dated August 15, 2011 at ¶'s 2 & 8) (R. p. 239, ¶2 and R. p. 242 ¶8) ("On March 1st, Energy requested additional information as a decision of the amount of credit to be allowed could not be made with the information previously supplied by IPC." and "The State Energy Office requires additional and complete information from International Paper concerning the credits for which it has applied prior to being capable of making any final determination with regard to the amount of any tax credit that can be certified.").[15]

b. *Even if the March 1, 2011 determination was not final, and even if International Paper is not judicially estopped from denying that decision's finality, the State Energy Office issued an amended decision on March 15, 2012 and the time to appeal from the agency's March 15, 2012 final decision has expired.*

Even if International Paper were not judicially estopped to deny the finality of the March 1, 2011 letter, an amended version of that determination was issued on March 15,

[15] In its Order dated December 19, 2012, the Administrative Law Court vacated the Order which had held that the March 1, 2011 letter was final and that the case should not be dismissed. (Order dated December 19, 2012, at p. 9) (R. p. 9) ("This Court issued a previous Order in this case, finding that State Energy Office had issued a 'final determination.' 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."). The December 19, 2012 Order purported to make no finding regarding the finality of the March 1, 2011 letter – having professed no jurisdiction to so rule, but the Order clearly concluded that the Administrative Law Court had no appellate jurisdiction, not because the agency's determinations were not final, but "[b]ecause IP failed to adhere to the Court's rules of appellate procedure, and instead filed a request for a contested case hearing . . .." (Order dated December 19, 2012, at p. 8) (R. p. 8). Consistent with that statement, the Order also states that "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 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." (Order dated December 19, 2012, at p. 8) (emphasis added) (R. p. 8). Given that Section 1-23-600(D) makes a final agency decision a predicate to the ALC having appellate jurisdiction, the Court's explanation – that the matter could have been heard as an appeal, if only IP had appealed - presumes that the agency's decisions were, in fact, final at the time they were issued. Otherwise, IP would have had nothing to appeal.

2012. On its face, that amendment is indisputably final and so states. While the amendment was issued with permission of the ALC, it was issued by the State Energy Office pursuant to its statutory authority. If International Paper now takes the position that the March 1, 2011 determination lacked finality (and was thus unappealable), then it should have appealed from the March 15, 2012 amendment of that determination which was stated therein to be final. International Paper had thirty days to appeal that determination to the ALC. (Rule 33, SCALCR) Having never appealed that decision, the time to do so has now passed.

c. *No viable justification is given for why the decisions are not final.*

Prior to filing its brief with this Court, International Paper had never asserted that the agency's determinations were not final. To the contrary, until it filed its appellate brief, International Paper continued to tell the ALC otherwise. On October 29, 2012, International Paper represented to the ALC that the SEO's March 1st decisions were "binding as no further administrative procedures with the State Energy Office were authorized or prescribed."(Petitioner's Supplemental Memorandum in Opposition to Respondent's Motion to Dismiss for Lack of Jurisdiction, dated October 29, 2012, at p. 6) (R. p. 166). (See also Petitioner's Memorandum in Opposition to Respondent's Motion to Dismiss dated October 15, at p.1 n.1) (R. p. 145, n. 1). ("The Court denied this Motion to Dismiss on the grounds that the March 1, 2011 [sic] was a final determination 'on its face' . . . ."). In its appellate brief, and for the first time, International Paper now asserts that "[t]he SEO has not issued a final agency decision . . . ." (Initial Brief of Appellant, at p. 3) Only one rationale is offered for why the agency's determinations are not final – that they cannot be final until IP has been afforded notice and an opportunity to be heard. (Brief of Appellant, at pp. 4-5) ("The ALC also correctly held that the SEO was required

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.") As IP correctly observes, this is the rationale provided by the ALC – though not in a holding. In its Order of December 19, 2012, the ALC observes that "it is now clear that a contested case hearing was required before any final determination could have been issued." (Order dated December 19, 2012, at p. 9 n. 10) (R. p. 9, n. 10).

Again, this is the only rationale offered by either the ALC or IP for why any of the agency's determinations are not final, such that IP's time to appeal will not yet have expired. This rationale is fundamentally flawed. If a Workers' Compensation Commissioner issues an order denying a claimant's request for benefits, the claimant can appeal that denial – notwithstanding the fact that the Commissioner may have ruled without ever having held a hearing. The very right to appeal is the means by which the claimant can seek redress for the Commissioner's failure to provide her the process due. Likewise for a professional license. If an application for a professional license is rejected without a statutorily required hearing, the applicant's time to appeal begins immediately. The right to appeal is not denied because the licensing board failed to have the required hearing. When the right to appeal arises, the time period for appealing begins. The rationale for why the agency's determinations are not final – "a contested case hearing was required before any final determination could have been issued" - turns this fundamental premise on its head.

As a factual matter, the agency has issued decisions which finally and completely deny IP certification. A simple review of the record reflects that the State Energy Office has unambiguously determined that it will not certify International Paper's expenditures as qualifying for the biomass resource tax credit. Those determinations were issued years

ago, and any opportunity to administratively appeal from them expired long ago - even if, conceptually, the ALC would have had appellate jurisdiction over an appeal from a denial to certify some taxpayer's expenditures for the biomass resource tax credit.

2. A remand for additional due process is unwarranted because International Paper abandoned the process it was afforded.

Late in January, the International Paper Company (IP) filed an application with the State Energy Office (SEO) seeking a tax credit of approximately $5,500,000 for an expenditure of approximately $22,000,000. There was no limitation on the amount of material, evidence or information that IP was allowed to provide in support of its application for the credit. IP submitted a total of 22 pages including the printed application form. (January 31, 2011 Application) (R. p. 70). As reflected in the statute, International Paper was aware that the State Energy Office had to certify an amount regarding every expenditure involved in the twenty-two million dollar expenditure.

Then on March 1, 2011, the State Energy Office wrote to International Paper advising that it appeared that certain of the projects would probably qualify for the credit while others would probably not but, more information was needed. However, instead of providing <u>any</u> of the information requested and without contacting or speaking with anyone at the State Energy Office from March 1st through March 24th, the International Paper Company filed with the ALC requesting a contested case hearing. This occurred twenty-four days later on March 25, 2011. Then, over eighteen months later, on October 14, 2012, in a brief opposing the motion to dismiss, and for the first time, the International Paper Company took the position that it did not receive due process from the State Energy Office despite the fact that it abandoned the process it was being provided and sought to replace the decision-maker designated by the General Assembly with an Administrative Law Judge.

Abandonment and the New Claim for Due Process

In International Paper's Prehearing Statement filed with the ALC on August 25, 2011 (the first of a total of three in this matter), the only issue presented for determination at a de novo contested case hearing was as follows:

> Whether the equipment identified in Petitioner's Application for Biomass Resource Credit qualifies for the credit provided [in] S.C. Code Ann. §12-6-3620.

(Paragraph 3 of Petitioner's Prehearing Statement dated August 15, 2011.) (R. p. 233, ¶ 3). International Paper elaborated on this issue further by contending that the SEO erroneously determined that credits were only allowable for equipment that came in contact with biomass energy production equipment and for the creation of new biomass energy generation. The prehearing statement made no reference to the South Carolina Constitution, Article I, §22, nor did it refer to any alleged denial of due process. In fact, it was the International Paper Company that decided to end the SEO review on March 25, 2011 and seek a de novo contested case hearing from the Administrative Law Court under Rule 11, SCALCR.

Only after the filing of the second Motion to Dismiss on October 3, 2012 did the International Paper Company contend – for the first time – that the procedures employed by the State Energy Office did not provide it with sufficient due process. IP contended, citing Garris v. Governing Board of South Carolina Reinsurance Facility, 333 S.C. 432, 511 S.E.2d 48 (1998) that it was entitled to adversarial hearings mandated by Article 1, Section 22 of the South Carolina Constitution. (Petitioner's Memorandum in Opposition to Respondent's Motion to Dismiss for Lack of Jurisdiction, at p.13.) (R. p. 173).

As the courts have stated "[i]t is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be

preserved for appellate review." South Carolina Department of Motor Vehicles v. Brown, 406 S.C. 626, 753 S.E.2d 524, 529 (2014) (Beatty, J. dissenting). There is nothing in the record showing any complaint to the State Energy Office (or anyone else) of any denial of due process until October 14, 2012, not even "vague comments" about "some constitutional claims" to anyone. Durant v. South Carolina Department of Health and Environmental Control, 361 S.C. 416, 424, 604 S.E.2d 704, 709 (Ct. App. 2004).

Other courts agree with the law expressed in DuRant. See, e.g., Lehmann v. Department of Children and Family Services, 342 Ill.App.3d 1069, 796 N.E.2d 1165 (2003) (issues not placed before the administrative agency will not be considered for the first time on administrative review). Reed v. South Carolina State University, No. 5:08-3022-MBS, 2010 WL 3730907 (D.S.C. September 20, 2010.) ("[I]n order to state a claim for failure to provide due process, a plaintiff must have taken advantage of the processes that are available to him or her, unless those processes are unavailable or patently inadequate." (quoting Alvin v. Suziki, 227 F.3d 107, 116 (3d Cir. 2000))). In Vukelic v. Bartz, 245 F.Supp.2d 1068, 1083 (D. N.D. 2003), the court determined that a failure to invoke the process available precludes the later claim that due process has been denied. See also Walsh v. Lugoff-Elgin Water District of Kershaw County, No. 3:08-3122-CMC, 2009 WL 1044631at ¶9 (D.S.C. April 20, 2009). A party cannot leave the court in the middle of a hearing and later complain about what happened in their absence. See Freeman v. FDIC, 56 F.3d 1394 (C.A.D.C. 1995) where the court stated as follows:

> We do not know, and cannot speculate, what the outcome would have been had the Freemans exhausted their administrative remedies.
>
> * * *
>
> The Freemans might have won relief at the agency level. Even if they won no relief at that stage, the factual and legal issues might have appeared in a wholly differently light by the time they sought judicial review.

Id. at 1405.

III. The ALC lacks jurisdiction to hear an appeal under Section 1-23-600(D) because neither law nor constitution mandates that a hearing be conducted before the State Energy Office can decline to certify eligibility for a biomass energy tax credit.

For the reasons set forth above, the State Energy Office contends the ALC lacked authority to hear these matters as either appeals (no appeals were filed) or contested cases (SEO is not a department, as defined) and, thus, lacked authority to remand. If this Court agrees, no other decision is needed.[16] Should this Court conclude otherwise, the Court may then conclude that it should determine whether the ALC would have appellate authority should some future appeal be filed.

The Administrative Law Court is granted appellate authority by section 1-23-600(D), which currently provides (in pertinent part) as follows:

> (D) An administrative law judge also 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. . . .

S.C. Code Ann. § 1-23-600(D) (Supp 2013). The foregoing provision grants jurisdiction only over appeals from final decisions of proceedings that meet the definition of a "contested case." To meet this definition, some binding legal authority - law or constitution - must necessitate an opportunity for a "hearing."

> "Contested case" means 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 or by Article I, Section 22, Constitution of the State of South Carolina, 1895, to be determined by an agency or the Administrative Law Court after an opportunity for hearing.

[16] Futch v. McAllister Towing of Georgetown, Inc., 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding an appellate court need not address an issue if the resolution of a prior issue is dispositive); Arnal v. Fraser, 371 S.C. 512, 523, 641 S.E.2d 419, 424 (2007) ("Because the contempt issue can be resolved without reaching Father's due process claims, we decline to address the constitutional issues raised by Father. It is our firm policy to decline to rule on constitutional issues unless such a ruling is required.").

S.C. Code Ann. §1-23-505(3) (Supp. 2013) (emphasis added). Cf. Garris v. Governing Board, 333 S.C. 432, 440, 511 S.E2d 42, 52 (1998) (applying Section 1-23-310(2), which reads similarly, but which omits reference to Art. I, § 22) ("No statute explicitly requires Facility to hold a hearing before revoking an agent's status as a designated agent; therefore, Garris' case is not a 'contested case' as defined in the APA."). See also South Carolina Ambulatory Surgery Center Assoc. v. South Carolina Workers' Compensation Comm'n, 389 S.C. 380, 388, 699 S.E.2d 146, 151 (2010) ("Although they reference the term in their brief, Surgery Centers do not identify the necessary South Carolina or Federal law that would warrant their entitlement to a "contested case" hearing. See Triska v. Dep't of Health & Envtl. Control, 292 S.C. 190, 355 S.E.2d 531 (1987) (recognizing that a "contested case" does not exist where there is no requirement deriving from South Carolina or Federal law that there be an opportunity for a hearing)."). As outlined below, no binding legal authority mandates that the State Energy Office conduct a "hearing" before granting or denying certification of an application for a biomass resource energy tax credit. Accordingly, the certification process administered by the State Energy Office does not meet the definition of a contested case, and Section 1-23-600(D) does not grant the Administrative Law Court appellate jurisdiction.[17]

A. No Statute or Regulation requires a hearing before the State Energy Office can decline to certify eligibility for a biomass resource energy tax credit.

No statute or regulation mandates a hearing with regard to the certification process applicable to IP's application for a tax credit. Section 12-6-3620 requires only that an application for the credit "must be certified by the State Energy Office." See

[17] As noted elsewhere, IP did not file an appeal pursuant to Section 1-23-600(D) under Rule 33, SCALCR, as it would have been required to do in order to invoke such appellate authority, if it even existed.

Garris v. Governing Board, 333 S.C. 432, 440, 511 S.E.2d 42, 44 (S.C. 1998) ("No statute explicitly requires Facility to hold a hearing before revoking an agent's status as designated agent; therefore Garris' case is not a 'contested case' as defined in the APA.") (emphasis added). Nor is the decision to certify expenditures under Section 12-6-3620 a tax matter which is subject to review by the Department of Revenue.[18]

B. Art. I, §22 does not require a hearing before the State Energy Office can decline to certify eligibility for a biomass resource energy tax credit because the General Assembly, by permitting a business to apply for the tax credit, did not create an entitlement.

With regard to Article I, Section 22, our Supreme Court has recently adopted a traditional Due Process Clause analysis for determining when the protections afforded by that clause will apply. South Carolina Ambulatory Surgery Center Assoc. v. South Carolina Workers' Compensation Comm'n, 389 S.C. 380, 391, 699 S.E.2d 146, 152-153 (2010) ("Although our appellate courts have not always used the term 'due process rights' when discussing Article I, Section 22, we have consistently indicated that the protections provided under this section are the equivalent of those afforded by the Due Process Clause of our state and federal constitution. . . . Given the absence of distinction [between the due process protections afforded by the Due Process Clause and Art. I, § 22] in our jurisprudence, we conclude a traditional due process analysis is required to assess whether the Commission's actions deprived Surgery Centers of constitutionally-

[18] Prior to its expansion and amendment, Section 12-6-3620 was subject to administration solely by the Department of Revenue. However, since the statute was twice expanded and broadened to include numerous types of energy other than just methane gas from a landfill by a manufacturing facility, all discretion to certify biomass/energy tax credits has resided solely in the State Energy Office. Once the Legislature reposed the decision to certify certain expenditures to the discretion of the State Energy Office, such decisions could not result in "a dispute with the Department of Revenue...." See e.g. S.C. Code Ann. §12-60-20 (setting forth the legislative intent and Section 12-60-30(9) and (10) which specifically provides the Act applies to a "final determination within the ... [South Carolina Department of Revenue] from which a person may request a contested case hearing before the Administrative Law Court." The South Carolina Revenue Procedures Act does not apply to the State Energy Office and only to some decisions of the Department of Revenue. Id. at §12-60-30(2), (4), (9) (10). See also B&A Development, Inc. v. Georgetown County, 372 S.C. 261, 641 S.E2d 888 (2007).

protected interests. Applying this analysis, we hold Surgery Centers have not established the requisite liberty or property interests to invoke the due process protections of Article I, Section 22.") (emphasis added). Under a traditional due process analysis, notice and an opportunity to be heard are not constitutionally necessary unless a protected interest is at stake, i.e., life, liberty, or property.

"[A]n interest in property which is protected by due process arises only when there is a legitimate claim of entitlement, as created and defined by independent sources and a person clearly must have more than an abstract need or desire for it. And the person must have more than a unilateral expectation of it."[19]

To state a claim for deprivation of a property interest without due process, plaintiff must demonstrate that: (1) the party had a constitutionally protected property interest, (2) the party suffered loss of that interest amounting to deprivation, and (3) deprivation occurred without due process of law. National Railroad Passenger Corporation v. Peoples Gas Light and Coke Company, 776 F.Supp.2d 759 (N.D. Ill. 2011).

The International Paper Company did not have any constitutionally protected property interest in its hope or expectation of qualifying for a tax credit under Section 12-6-3620. A tax credit is a matter of legislative grace. See Centex International Inc. v. South Carolina Department of Revenue, 406 S.C. 132, 140, 750 S.E.2d 65, 69 (2013); SCANA Corporation v. South Carolina Department of Revenue, 384 S.C. 388, 394 n.4,

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[19] 16C C.J.S. Constitutional Law § 1516 (2010) quoted in South Carolina Ambulatory Surgery Center Ass'n v. South Carolina Workers' Compensation Com'n, 389 S.C. 380, 392, 699 S.E.2d 146, 153 (2010). The South Carolina Supreme Court has unequivocally stated that when discussing "due process rights" under Article I, §22 it is "the equivalent of those afforded by the Due Process Clause of our state and federal Constitution." Id., 699 S.E.2d at 152.

683 S.E.2d 468, 471 n. 4 (2009) (Beatty, J., dissenting).[20]

In the case DeHarder Inv. Corp. v. Indiana Housing Finance Authority, 909 F. Supp. 606 (S.D. Ind. 1995), the plaintiff sued because his applications for federal tax credits were rejected by a state agency. Previously the plaintiff had sought a written explanation from the state agency regarding which of his projects were rejected and the rationale for the rejections.[21] The state agency refused to do so and the plaintiff filed suit. Id. at 610. The plaintiff claimed that the failure to provide a written explanation violated the Due Process Clause. Id. at 613. In rejecting his claim to the claimed tax credits the court found that the existence of the type of property interest that is protected by the Constitution depends upon explicit mandatory language, in connection with the establishment of specified substantive predictions to limit discretion. Id. at 614. To have a constitutionally protected property interest, "a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." Id. at 613 (citing to Board of Regents v. Roth, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709 (1972) ("In other words, property "is what is securely and durably yours under state [or federal] law, as distinct from what you hold subject to so many conditions as to make your interest meager, transitory, or uncertain." Id.)).

In the case of American Manufacturer's Mutual Insurance Company v. Sullivan, 526 U.S. 40, 119 S.Ct. 977 (1999) the United States Supreme Court chided the Third Circuit Court of Appeals because it did not address the question whether the respondents

[20] "Grace" is defined to be "that which a person is not entitled to by law, but something extended to him as a favor." Donald v. Life Ins. Co., 4 S.C. 321, 4 Richardson 321 (1873). No case from any jurisdiction has been found which holds that an application for a tax credit vests an applicant with a due process property interest.

[21] This was what the State Energy Office was attempting to provide the Petitioner in this case when it requested more information on March 1, 2011.

had a protected property interest in workers' compensation medical benefits and just presumed that such an interest existed. In fact, the Court took the very unusual step of stating that although it had already decided an issue sufficient to reverse the Court of Appeals, it went on to say that "We believe the Court fundamentally misapprehended the nature of respondents' property interest at stake in this case . . .." Id. at 58, 119 S.Ct. at 989. The Court then continued,

> The first inquiry in every due process challenge is whether the plaintiff has been deprived of a protected interest in "property" or "liberty". Only after finding the deprivation of a protected property interest do we look to see if the State's procedures comport with due process.

Id. at 59, 119 S.Ct. at 989 (citations omitted). The Supreme Court explained that the Court of Appeals had apparently considered the withholding of workers' compensation medical benefits to be similar to the protected interests in Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011 (1970) and Mathews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893 (1976). The Court explained that Goldberg and Mathews were cases where an individual's entitlement to benefits had been established and "the question presented was whether predeprivation notice and a hearing were required before the individual's interest in **continued** payment of benefits could be terminated." Id. at 60, 119 S.Ct. at 990 (citing to Goldberg and Mathews). The court went on to say that the Respondent's property interest "in this case, however, is fundamentally different." Id. The reason for this distinction was described as follows:

> Thus, for an employee's property interest in the payment of medical benefits to attach under state law, the employee must clear two hurdles: First, he must prove that an employer is liable for a work-related injury, and second, he must establish that the particular medical treatment at issue is reasonable and necessary. Only then does the employee's interest parallel that of the beneficiary of welfare assistance in Goldberg and the recipient of disability benefits in Mathews. While respondents have cleared the first hurdle, they have yet to satisfy the second. Consequently, they do not have the property interest they claim.

Id. at 60-61, 119 S.Ct. at 990 (citations omitted).While the injured employees had established their "initial **eligibility** for medical treatment" they had not yet established that their particular treatment was reasonable and necessary and "[c]onsequently, they do not have a property interest...." Id. (emphasis, the Court). Thus, because there was no vested entitlement, they did not have a sufficient property interest in the payment of the medical benefit which was protected by the Due Process Clause "we need go no further." Id.

Filing an application for the certification of expenditures does not convert the application for or the hope or expectancy of receiving a tax credit into a property interest protected by the Due Process Clause. There is simply no deprivation of property because being authorized to apply for a tax credit does not vest a cognizable interest, the refusal of which deprives one of a property interest protected by either the federal or state the constitutions.[22]

When International Paper submitted its application for the biomass resource tax credit, it had no constitutionally protected interest. When it was told that more information was needed to continue to review its application, its failure to provide that information and to abandon the review process certainly did not transform its application for a benefit from the Legislature to a constitutionally protected interest under the Due Process Clause.

1. The Statute Does Not Create an Entitlement.

Section 12-6-3620 is not an entitlement statute. The law requires that the State

[22] For a discussion of both American Manufacturer's and the more recent case of Lujan v. G&G Fire Sprinklers, Inc., 532 U.S. 189, 121 S.Ct. 1446 (2001), as they apply to prerequisites for a constitutionally protected property interest, see, Pappas v. City of Lebanon, 313 F.Supp.2d 311, 316 (M.D. Pa. 2004).

Energy Office make a decision whether or not to certify expenditures as being eligible for a biomass resource tax credit. The State Energy Office is also required to set forth the (exact) amount of any credit allowed. As outlined above (under the heading Statutory History and Executive Discretion), these decisions can involve the exercise of considerable discretion. In exercising its discretion as to the standards to be applied in deciding whether or not to certify any given expenditure, the SEO is specifically permitted to consult two other entities but, only if it elects to do so (which it did).

Even if the SEO certifies an amount as a credit, the taxpayer still has no right to those funds. The credit is conditional unless and until an equal amount is owed for taxes to the State. If no taxes are owed, the applicant receives no benefit from the certification no matter how large or small the amount certified.

Even the route to being certified as eligible to take advantage of the biomass tax credit is subject to many conditions; the expenditures must first fall within certain statutory guidelines and must meet the purpose of the statute's language to "create" energy.[23] These are decisions which require an expertise not otherwise found in State government and which the Legislature specifically delegated to the state energy planning agency. The discretionary nature of the decision is obvious from the express authorization to consult with other entities when, in determining the standards to be applied and in its sole discretion, the State Energy Office decides to do so.

Finally, if there were any doubt about whether a right to the biomass credit could be a "vested property interest," the Legislature gave notice that it was not. It did so by stating that the credit amount could be repealed and to the extent that any language in the

[23] International Paper disagrees with how the State Energy Office interprets the statutory term "create". IP claims that it should be entitled to the credit for expenditures that do nothing more than continue to produce the same energy it has always produced. The State Energy Office does not agree.

Act argued to conflict with such a repeal will be null and void. §12-6-3620(D)(3) ("To the extent the maximum amount of the credit contained in this section is repealed, the elimination of the maximum amount shall be seen as the last expression of the legislature and to the extent any language in this act conflicts with that repeal, it shall be considered null and void."). Thus, even to the extent an amount of credit is certified by the State Energy Office, the statutory language forewarns that any right to the amount certified as a credit is most certainly not vested but is subject to legislative grace continuing in the future.

2. Even if the General Assembly created a statutory entitlement by enacting the biomass resource energy tax credit, Art. I, §22 does not require the State to provide applicants with a hearing before declining to certify eligibility for the tax credit.

Assuming arguendo that IP has a constitutionally protected property interest in its application for a tax credit – such that Art. I, §22 applies and requires notice and an opportunity to be heard, the state constitution does not mandate that SEO conduct a "hearing" – as that term is used in the definition of "contested case" – prior to making a decision regarding certification of IP's application for a biomass resource energy tax credit. Rather, the due process protections afforded by the South Carolina Constitution, Art. I, §22, if applicable at all, would only entitle IP to the process afforded by the statute under which it claims.

a. As used in Section 1-23-505(3), the term "hearing" means a "trial-type" hearing.

Section 1-23-600(D) grants the ALC appellate authority "over all appeals from final decisions of contested cases. . . ." As a precondition of appellate authority, the "proceedings" to be appealed from must the meet the definition of the phrase "contested case." A "contested case" is a proceeding in which the legal rights of a party are

determined after an opportunity for a hearing.

> "Contested case" means 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 or by Article I, Section 22, Constitution of the State of South Carolina, 1895, to be determined by an agency or the Administrative Law Court after an opportunity for hearing.

§1-23-505 (emphasis added). As used in Section 1-23-505(3), the term "hearing" means some variation of a trial-type proceeding, not simply an opportunity to be heard.[24]

The Rules of Procedure for the Administrative Law Court, which apply to all matters within the ALC's jurisdiction,[25] recognize that "contested cases" involve some variation of a trial-type process. Rule 2(E), SCALCR, defines contested case as follows:

> Contested Case is defined in Section 1-23-505. It is a case for which a hearing is conducted pursuant to Article 3, Chapter 23 of Title 1, the South Carolina Administrative Procedures Act, and includes hearings conducted

[24] The ALJ and IP contend otherwise – that the definition of a contested case captures processes limited to little more than notice and an opportunity to be heard. (Petitioner's Supplemental Memorandum in Opposition to Respondent's Motion to Dismiss for Lack of Jurisdiction, at p. 3 n.3) (R. p. 163, n. 3) ("While Respondent [SEO] argues in its Memorandum in Support of Motion to Dismiss that a trial-type hearing is required in order to have a contested case hearing, no support is provided for this stated position . . . The plain language of S.C. Code § 1-23-505(3) requires only a hearing, not necessarily a 'trial-type' hearing."). The ALC clearly concluded that a "contested case hearing" sufficient to create ALC jurisdiction is something far less than some variation of a trial-type proceeding. The ALC expressly noted that he was not deciding whether applicants for the biomass energy tax credit are entitled to a trial-type hearing. (Order dated December 19, 2012, at p. 8 n.8) (R. p. 8, n. 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.") (emphasis omitted) (indicating "a hearing" is the same as "an opportunity to be heard in a meaningful way"). Nevertheless, the ALC did conclude that those tax applicants are entitled to a contested case hearing, such that the ALC would have appellate jurisdiction. (Order dated December 19, 2012, at p. 7-8) (R. p. 7 – 8) ("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.") (emphasis added). Broadening the concept of a contested case hearing to include every instance in which the constitution requires notice and an opportunity to be heard – the position articulated by the ALC, would dramatically expand the ALC's appellate jurisdiction, particularly if the Due Process Clause concept of "entitlement" is pushed to its limits.

[25] Rule 1, SCALCR (2009 Revised Notes) ("These Rules are applicable to all matters within the jurisdiction of the Court, whether they are contested cases under the Administrative Procedures Act or heard pursuant to a constitutional command for a hearing.").

> by the Administrative Law Court pursuant to Section 1-23-600(A), hearings required by due process under the South Carolina or United States Constitutions, or as otherwise provided by law.

Rule 2(E), SCALCR (emphasis added). While these rules do not actually define the term "hearing," subsection A (Order of Proceedings) of Rule 29 (Contested Case Hearings) explains the ALJ "shall conduct the hearing [as outlined therein]. . . ." Rule 29(A), SCALCR. As reflected in the comments, "[s]ubsection (A) describes the procedure at the hearing which follows the standard civil trial format." Even if the ALJ decides to order some type of simplified procedure, the matter remains a quasi-judicial, evidentiary proceeding presided over by a judge, i.e., a trial-type hearing.[26]

The Administrative Procedures Act – in Article 3 of Title 1, Chapter 23[27] - also recognizes that contested cases involve some variation of a trial-type process. For example, section 1-23-320 provides that "[i]n a contested case, all parties must be afforded an opportunity for hearing after notice of not less than thirty days. . . ." S.C. Code Ann. § 1-23-320(A) (emphasis added). It also provides that an "[o]pportunity must be afforded all parties to respond and present evidence and argument on all issues involved." § 1-23-320(E). Depositions and subpoenas are expressly contemplated. § 1-23-320(C) & (D). With one exception, the rules of evidence apply. § 1-23-330. Clearly, the process envisioned for a "contested case" under Article 3 is a trial-type process.[28]

[26] The rules allow an ALJ to order procedures involving limited pre-hearing procedures and a simplified pre-hearing exchange of materials. Nevertheless, the rules still contemplate the introduction of proof at a hearing presided upon by an administrative law judge. Rule 10, SCALCR.
[27] As it appears in the ALC's rules of court, the definition of contested case expressly references "Article 3, Chapter 23 of Title 1." Rule 2(E), SCALCR.
[28] The State Energy Office does not contend that the concept of a "hearing" as used in the definitions of "contested case" encompasses only those proceedings that follow the exact procedures established in Article 3. See Owen Steel Co. v. S.C. Tax Commission, 281 S.C. 80, 313 S.E.2d 636 (Ct. App. 1984) ("[Section 1-23-310] does not incorporate the requirements of § 1-23-320 in the definition of 'contested case.' Nor does it contain a definition of the word 'hearing.' Therefore, the word 'hearing' should be construed according to its ordinary meaning."). Nevertheless, "[s]ections which are part of the same general statutory law of the state should be construed together. . . ." Glover v. Suitt Construction Company, 318

While no judicial opinion definitively resolves the issue, South Carolina appellate courts have indicated that a contested case is some variation of a trial-type hearing, not simply notice and an opportunity to be heard. Triska v. Department of Health and Environmental Control, 292 S.C. 190, 197, 355 S.E.2d 531, 534 (1987) (suggesting that the APA concept of "contested case" is limited to an adjudicatory hearing) ("There is no requirement in South Carolina law or Federal law that there be an opportunity for a hearing in a 401 Certification, and therefore, a "contested" case does not exist in which an adjudicatory hearing is required."); Stono River Environmental Protection Ass'n v. South Carolina Dept. of Health and Environmental Control, 305 S.C. 90, 93 n.2 , 406 S.E.2d 340, 341 n. 2, (S.C. 1991) (with reference to 1-23-320, observing that "[i]f a case is a 'contested case,' an adjudicatory hearing must be held to address issues raised by aggrieved parties.").

Read in context, the term "hearing" means some variation of a trial-type process – at least when the term "hearing" is used with reference to "contested cases" conducted by the Administrative Law Court pursuant to Article 3 of the APA, the Court's rules, or Section 1-23-600(A). Unless the term "hearing," and thus the term "contested case" means something significantly different a few paragraphs later - in Section 1-23-600(D), the term "contested case" used in Section 1-23-600(D) also references some variation of a trial-type process.

b. *Art. I, §22 does not require the State to provide applicants with an opportunity for a trial-type proceeding before declining to certify eligibility for the tax credit; only notice and a meaningful opportunity to be heard is*

S.C. 465, 469, 458 S.E.2d 535, 537 (1995). Likewise, "within a single statutory scheme, the same word should be given consistent meaning." Sparks v. Palmetto Hardwood, Inc., 406 S.C. 124, 129, 750 S.E.2d 61, 63 (2013). Here, the concept of "hearing" should be given a consistent meaning, i.e., some variation of a trial-type process.

constitutionally mandated – not a trial-type hearing.

> At its core, due process is about fundamental fairness.
>
> For all its consequence, "due process" has never been, and perhaps can never be, precisely defined. "[U]nlike some legal rules," this Court has said, due process "is not a technical conception with a fixed content unrelated to time, place and circumstances." Cafeteria Workers v. McElroy, 367 U.S. 886, 895, 81 S.Ct. 1743, 1748, 6 L.Ed.2d 1230. Rather, the phrase expresses the requirement of "fundamental fairness," a requirement whose meaning can be as opaque as its importance is lofty. Applying the Due Process Clause is therefore an uncertain enterprise which must discover what "fundamental fairness" consists of in a particular situation by first considering any relevant precedents and then by assessing the several interests that are at stake.

Lassiter v. Department of Social Services, 452 U.S. 18, 101 S.Ct. 2153 (1981).

Procedurally, due process requires only such protections as the particular situation demands.

> Procedural due process imposes constraints on governmental decisions which deprive individuals of liberty or property interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment of the United States Constitution. Mathews v. Eldridge, 424 U.S. 319, 332, 96 S.Ct. 893, 47 L.Ed. 18 (1976). The fundamental requirements of due process include notice, an opportunity to be heard in a meaningful way, and judicial review. S.C. Const. Art. I, §22; Stono River Envtl. Protection Ass'n v. S.C. Dep't of Health and Envtl. Control, 305 S.C. 90, 94, 406 S.E.2d 340, 342 (1991). Due process does not require a trial-type hearing in every conceivable case of government impairment of a private interest. First Fed. Sav. Loan Ass'n of Walterboro v. Bd. of Bank Control, 263 S.C. 59, 65, 207 S.E.2d 801, 804 (1974) (quoting Cafeteria and Restaurant Workers Union v. McElroy, 367 U.S. 886, 894, 81 S.Ct. 1743, 6 L.Ed.2d 1230 (1961)). Rather, due process is flexible and calls for such procedural protections as the particular situation demands. S.C. Dep't of Soc. Servs. v. Wilson, 352 S.C. 445, 452, 574 S.E.2d 730, 733 (2002).

Kurschner v. City of Camden Planning Com'n, 376 S.C. 165, 171-172, 656 S.E.2d 346, 350 (2008). Accordingly, even when due process is constitutionally required, the constitution does not always require a trial-type process. For instance, the court in Ogburn-Matthews v. Loblolly Partners, 332 S.C. 551, 505 S.E.2d 598 (Ct.App. 1998), reversed on other grounds, Brown v. South Carolina Dept. of Health and Environmental

Control, 348 S.C. 507, 560 S.E.2d 410 (2002), addressed the question of how much process was due to a party regarding the issuance of an agency determination on a certification of consistency. Initially, the court noted that due process is flexible and calls for "such procedural protections as the particular situation demands." Id. at 562, 505 S.E.2d 603. "The fundamental requirements of due process include notice, an opportunity to be heard in a meaningful way and judicial review." 376 S.C. at 172, 656 S.E.2d at 350.[29]

The court continued by addressing the question whether a party objecting to a consistency certification was required "to be afforded a trial-type, adversarial proceeding, with an opportunity to confront and cross-examine witnesses?" Id. at 563, 505 S.E2d at 604. Citing to Mathews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893 (1976) the court stated three identifiable factors for assessing the constitutional requirements of due process as follows:

> First, the private interest that will be affected by official action;
>
> [S]econd the risk of erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and
>
> [F]inally, the [g]overnment's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

332 S.C. at 564, 505 S.E.2d at 604. Then, quoting from First Federal Savings and Loan Ass'n v. Board of Bank Control, 263 S.C. 59, 65, 207 S.E.2d 801, 804 (1974), the court stated:

> It is recognized that due process "does not require a trial-type hearing in every conceivable case of government impairment of private interest;" and

[29] Citing to S.C. Cont. Art. I, §22 and Stono River Envtl. Protection Ass'n v. S.C. Dep't of Health and Envtl. Control, 305 S.C. 90, 406 S.E.2d 340 (1991).

"consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action."

Id. The court concluded that under the circumstances, all the due process that was necessary was an "opportunity to respond in writing to the Agency's proposed action before a final decision is reached. . . ."[30] 332 S.C. at 656, 505 S.E.2d at 598.

Regarding the process involved in the biomass resource tax credit application, the taxpayer may submit any documentation it believes supports its application,[31] and the State Energy Office may request additional information which it believes will assist in determining the taxpayer's eligibility.[32] In the overall context, there is limited value – and great expense involved – in conducting a trial-type hearing. For these reasons, Art. I, §22 should not be interpreted to mandate that SEO conduct a trial-type hearing in order to decline certification of an expenditure for a tax credit.

IV. The Circuit Court Properly Dismissed the Case Because there was Another Action Pending Between the Same Parties for the Same Claim

The action filed by International Paper in the Court of Common Pleas for Richland County on January 30, 2013 sought the same relief it sought from the Administrative Law Court.[33] International Paper wanted the circuit court to "have a hearing on the certification process and to have the Court determine what the amount of

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[30] Twenty-four days after the State Energy Office asked for additional information. International Paper filed for a contested case hearing with the Administrative Law Court.

[31] In this case the Appellant did not even supply information that was specifically requested by the printed application form.

[32] As previously noted, SEO requested additional information. This request was totally ignored and the process abandoned by International Paper on March 25, 2011. See Walsh v. Lugoff-Elgin Water District of Kershaw County, No. 3:08-3122-CMC, 2009 WL 1044131 at ¶9 (D.S.C. April 20, 2009).

[33] Transcript of Record of hearing held May 16, 2013 at p. 27, ll. 19-21. (R. p. 578, ll. 19-21) At the first hearing before Judge Cooper on May 16, 2013, counsel for International Paper advised the court that "there's an identity of parties and an identity of issues. Of course there are. It's the identical parties and the identical issues." Id.

credit should be certified." (Transcript of Testimony at ll. 17-19, May 16, 2013.) (R. p. 578, ll. 17-19). In other words, do what the General Assembly delegated the authority to the State Energy Office to do—presumably hoping for a better outcome than from the statutorily designated authority.[34] However, by that time the Court of Appeals had exclusive jurisdiction over the appeal and all matters necessarily included as a part thereof. See, generally, Metts v. Mims, 384 S.C. 491, 682 S.E.2d 813 (2009).

After two hearings the circuit court dismissed the action filed by International Paper because it was between the same parties and sought the same relief. See Cricket Cove Ventures, LLC v. Gilland, 390 S.C. 312, 321, 701 S.E.2d 39, 44 (Ct.App. 2010). Not dismissing the case would have prejudiced the State. As was pointed out to the court, the State would suffer prejudice by a stay of the case (which was required in order to avoid two duplicate actions proceeding concurrently) because of employee turnover and loss, as well as pending restructuring.[35] While the circuit court relied upon only one primary basis for its dismissal of the action, there were at least two grounds upon which it could have exercised its discretion to dismiss the case. The first was the basis upon which it dismissed the action – Rule 12(b)(8) SCRCP. The second is offered herein as an additional sustaining ground for the circuit court's decision. In addition, by its dismissal, the circuit court also had to make an initial determination as to whether, rather than dismissal of the action, it should issue a stay of the action.

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[34] That has been the whole theme of this entire litigation. These cases are an attempt to have an entity other than the one designated by the General Assembly make the certification decision (to the exact dollar amount) because it cannot get the State Energy Office to do its bidding.

[35] See TR at p. 14, l. 11 & p. 36, l. 5. (R. p. 591, l.11 & p. 613 l. 5). Restructuring has occurred and as of July 1, 2015 the State Energy Office becomes a part of the Office of Regulatory Staff—another entity which is not subject to the jurisdiction of the ALC under its Rule 11, SCALCR authority. See note 10, infra. Further, IP did not establish any "most exceptional circumstances" which would justify the grant of a stay which could delay resolution of the case for years. Carolina Water Serv. v. Lexington County Joint Municipal Water and Sewer Comm'n, 367 S.C. 141, 153, 625 S.E.2d 227, 233 (Ct.App. 2005).

Prior to the filing of its Complaint on January 30, 2013, International Paper had previously invoked the jurisdiction of other courts. The first was on March 25, 2011 when it filed with the ALC seeking a de novo contested case hearing under Rule 11, SCALC. The second was on March 2, 2012 when it filed a new case with the ALC under Rule 11 (which was later consolidated with the first). The third time it invoked the jurisdiction of a court was on January 17, 2013 when it filed a Notice of Appeal of the consolidated action with this Court. Thus, by the time of its fourth attempt to invoke the jurisdiction of the courts, this Court had jurisdiction of both the parties and the issues.

If, instead of its insistence upon appealing the ALC decision of December 19, 2012, IP had instead taken its case to the Court of Common Pleas, absent its abandonment of the SEO process in March 2011, it would have had a sound basis to claim that the circuit court should hear its case. But, it did not. It waited until about two weeks after it had filed an appeal and invoked the jurisdiction of this Court to file its case in Richland County.

Judge Cooper was faced with a party which, by its appeal, had just claimed that the other court's well-reasoned decision on statutory grounds was wrong. IP was contending that the ALC had jurisdiction under Rule 11 and that the ALC was erroneously refusing to give it a de novo contested case hearing. He also had before him a Rule of Court that addressed the exact issue and circumstance. IP admitted as much – agreeing that both the claim and the parties were identical.

IP did not want the matter heard by the circuit court; rather, IP wanted to have the matter stayed and to remain on the docket until there was a final resolution of its first bite of the jurisdictional apple. Its preference was the administrative law court but, just in case the ALC was correct and lacked jurisdiction, it wanted the circuit court to hold a

place for it.

If alternative courts may be utilized for place-holding, both the applicable rules and the process should be modified. Issues such as concurrent discovery process will need to be addressed, and the coordination of other court functions will need to be synchronized. But, until that happens, courts have to do what Judge Cooper did in this case; apply the simple and straight forward language of Rule 12(b)(8) which is to not permit one action when "another action is pending between the same parties for the same claim" in another court. This was the status admitted to by International Paper.

Additional Sustaining Ground for the Dismissal by the Circuit Court[36]

When two courts have concurrent jurisdiction (as appears to be the contention of International Paper in this case by filing the matter concurrently in two courts), South Carolina has adopted the "Principle of Priority" which is explained as follows:

> As a rule the exercise of concurrent jurisdiction is controlled by the principle of priority. According to this principle the court of concurrent jurisdiction that first exercises it thereby acquires exclusive jurisdiction to further proceed in the case. In other words, once a court of concurrent jurisdiction has begun to exercise its jurisdiction over a case its authority to deal with the action is, subject to appellate review, exclusive until it is completely disposed of, and no other court of concurrent jurisdiction may interfere with the proceedings thus pending . . ..

Tucker v. Tucker, 264 S.C. 172, 213 S.E.2d 588 (1975). See also, McDonald v. McDonald, 276 S.C. 573, 281 S.E.2d 109 (1981). See Nascimiento v. Boire, No. 3D13-1641, ---So.2d---, 2014 WL 541161 (Fla.App.3 Dist, February 12, 2014) ("The principle of priority rests not only upon comity between courts of concurrent jurisdiction, but also acts to prevent unnecessary litigation and a multiplicity of suits.").

The rule generally provides that when two courts have concurrent jurisdiction

[36] While characterized as an additional sustaining ground, this issue was presented to the circuit court. See, Proposed Order of Respondent, filed July 15, 2013, at p. 3. (R. p. 619).

over a matter, once a court has begun to act, its jurisdiction is exclusive until the matter is completely disposed of by appeal or otherwise. In South Carolina "it is a legal duty of a court to abide by it…." Id. If the circuit court had not, it would have been nothing more than a placeholder maintaining a case while International Paper kept its opposing party in two courts, possibly for years. IP had a choice – it could either contend (as it had done for two years) that the ALC had jurisdiction and was in error or, it could have recognized its error and sought appropriate relief in the Court of Common Pleas. It was not entitled to do both. It was not entitled to multiple bites of the apple.

Conclusion

The litigation began because the State Energy Office was closely examining International Paper's application for a tax credit. International Paper decided it wanted the ALC to make that decision instead of the SEO, so IP initiated the litigation to send the issue to an Administrative Law Judge to determine the amount of its tax credit. Thus, how the litigation began was entirely the decision of International Paper. The reason for the current status of this appeal of two cases from two courts is that, when it had total control of deciding how it would seek review of the SEO's decision(s), International Paper ignored statutory law and case law[37] and shopped for a different forum in which to argue its claim. International Paper is responsible for the predicament in which it finds itself. The Administrative Law Court had no choice—the General Assembly did not vest the ALC with jurisdiction to decide what expenditures qualified for a biomass energy tax credit. Only the State Energy Office had that authority. Then, in January 2013, instead of recognizing the decision of the ALC and seeking appropriate judicial review,

[37] See e.g., Liberty Investments, Inv. v. South Carolina State Housing Finance and Development Authority, No. 98-ALJ-xx-0385-cc, 1998 WL 954800 (S.C. ALC, Oct. 7, 1998).

International Paper has appealed it asking this Court to find a way to give it another bite at the taxpayers' apple through the Administrative Law Court.

The Administrative Law Court had to dismiss the actions brought by International Paper because it had no jurisdiction to hear either matter under any legal theory. The court's contention that the right to apply for certification of expenditures to qualify for a tax credit was a property interest was mistaken and is based upon the same type of error the circuit court of appeals made in American Manufacturer's Mutual Insurance Company v. Sullivan, 526 U.S. 40, 119 S.Ct. 977 (1999) but in this case, it constituted an extra-judicial statement. The same applies to the court's purported "remand" of the case to the State Energy Office.[38]

The appeals before this Court concern the dismissal by both lower courts of the actions initiated before them by the International Paper Company. Although for different reasons, each court did what it had to do. By taking its application for a tax credit certification to the ALC before finishing with the SEO, International Paper consciously elected to abandon the process it was being given by the State Energy Office and looked for greener pastures in an ALC courtroom, a forum with no expertise in state energy policies. Then, when its removal was challenged on finality grounds, IP adopted a position that permitted no retreat and got the Administrative Law Court to sustain that

[38] The remand is relevant because it was an attempt to give IP a "do-over". While the Administrative Law Court said in its Order of December 19, 2012 that, because it lacked jurisdiction, its previous order of March 5, 2012, which ruled that the March 1, 2011 letter constituted a final decision, was a nullity, it did not explain how or why it changed its belief that it was a final decision—order or no order. But it used that alteration of circumstance to effectively reach the exact opposite conclusion and remand the "now not-so-final" decision back to the State Energy Office. The only reason for it to do so was an attempt to give International Paper another opportunity to litigate the matter because it was not done correctly the first time. The problem is that even if the March 1, 2011 letter is deemed to not be final, which IP told the ALC it was, the decisions of March 1, 2012 and March 15, 2012 were unarguably final and no "do-overs" are available. Those decisions were simply never appealed either to the ALC or the Circuit Court.

position – that the March 1, 2011 letter was a final agency decision. Regardless of the fact that the March 1, 2011 letter was obviously not a final decision since the SEO was asking for more information and had never certified an "amount" as the statute required (and had even advised the Department of Revenue that IP had a "pending" application), both International Paper and the Administrative Law Court were determined that both cases were going to be heard de novo and without further proceedings at the SEO.

Even if that decision had been correct – that IP had exhausted its administrative remedies, the General Assembly simply never granted the ALC jurisdiction to conduct a "contested case" hearing regarding a matter involving the State Energy Office. Likewise, the General Assembly never granted the ALC the discretionary authority to make energy tax credit standards or decisions. The only matters before the ALC – two contested case requests - were requests for the ALC to do that which it had no power to do. It was at that point that International Paper realized that the law did not permit the relief sought—a de novo hearing before the ALC.[39]

Thus, after the motion seeking dismissal for a lack of subject matter jurisdiction was filed, new issues surfaced. International Paper then contended that it had been denied procedural due process because it had not been given a hearing—this from an applicant who never requested a hearing, would not wait for a final decision, and

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[39] This change of position becomes obvious because IP starts then contending that it was never accorded due process by the SEO and starts promoting the concept that maybe its Rule 11 hearing request might also be considered a Rule 33 appeal request – anything to avoid the mandatory dismissal. See, Memorandum of IP in Support of Denial of the SEO Motion to Dismiss of October 15, 2012 (R. pp. 145 – 160) and Petitioner's Supplemental Memorandum in Opposition to Respondent's Motion to Dismiss for Lack of Jurisdiction at p.20, Oct. 29, 2012 (R. p. 180) (in which IP asks that it be permitted to convert its hearing request to an appeal (which was refused by the ALC in its Order)—the refusal of which was not appealed by IP. As the ALC recognized (Order dated Dec. 19, 2012, at p. 8) (R. p. 8), the Court also lacked any authority to transfer these cases. See Norton v. Everhart, 895 S.W.2d 317, 319 (Tenn. 1995) where, citing to various authorities, including Ross v. Richland County, 270 S.C. 100, 240 S.E.2d 649 (1978) it noted that the general rule is that unless a statute, rule or constitutional provision specifically confers the authority, a court lacking jurisdiction over a case has no authority to transfer it.

abandoned the process it was being given. The contention required the fiction that an act of legislative grace was transformed into a property (personal) interest to each and every potential applicant for a biomass resource tax credit certification.

The ALC opined that the tax credit applicants had been granted the equivalent of an entitlement—a constitutionally protected property interest.[40] The ALC believed that applicants were therefore entitled to receive due process before they could be denied the requested tax credit. And, despite its lack of jurisdiction and the fact that, by its own admission, it lacked jurisdiction, it purported to remand the case to the State Energy Office for it to start its process all over again and treat IP's request for legislative grace as a constitutionally protected property interest.

While this remand was supposed to be occurring, International Paper appealed the ALC order to this Court and, shortly thereafter, filed a new action seeking relief from the circuit court that was effectively identical to that sought from the ALC. The action was therefore properly dismissed by the Court of Common Pleas pursuant to Rule 12(b)(8), SCRCP.

Now International Paper is asking this Court to find a way to ignore the decisions of the State Energy Office and to designate someone else to decide if it is entitled to the biomass resource income tax credit for advancing the cause of energy in South Carolina. International Paper was given several such opportunities but chose to ignore them all by

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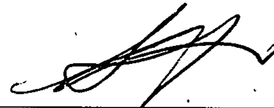
[40] The ALC appears to do this because "millions of dollars are at stake" (over $10,000,000 of taxpayer dollars in fact in the 2011 and 2012 applications.) Order of December 19, 2012 at p. 6 (R. p. 6). This comment suggests that the ALC may have placed undue weight on the amount of money involved and too little in the purpose of the legislation and the role of the SEO in implementing the Legislature's policies regarding the creation of new and alternative sources of energy. In this regard, the ALC noted that "it would seem an absurdity that a situation in which millions of dollars are at stake for a tax credit applicant" there would not be "procedural protections to safeguard such an interest. ... ." (Order dated December 19, 2012, at p. 6) (R. p. 6). The ALC does not address the treatment of others with less at stake, like a citizen who believes his refrigerator should be certified as energy efficient.

seeking an entity other than the one designated by the Legislature to certify access to taxpayer funds.

The State Energy Office respectfully requests that this Court affirm the holdings of the Administrative Law Court and the Court of Common Pleas, and vacate the Administrative Law Court's void remand. The result is an affirmance of the ALC on the ground that it properly dismissed the action for a lack of subject matter jurisdiction to conduct de novo hearings on biomass resource tax credit certifications, and, that the Court of Common Pleas correctly dismissed the suit against the State Energy Office while an identical suit was pending before this Court between the same parties.[41]

Respectfully submitted,



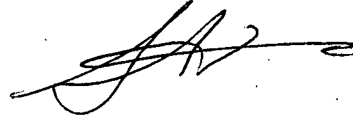
Keith C. McCook
Frank S. Potts
Office of General Counsel
State Budget and Control Board
Post Office Box 11608
Columbia, South Carolina 29211
Attorneys for Respondent

Columbia, South Carolina
September 15, 2014

[41] As an aside, the State Energy Office does not contend that no judicial review is available of a decision declining to certify the costs incurred by a taxpayer as qualifying for the biomass resource tax credit. See, generally, Randolf R. Lowell, South Carolina Administrative Practice and Procedure 542 (S.C. Bar-CLE Div. 3d ed. 2013) (discussing other paths for judicial review of agency decisions besides the APA).

CERTIFICATE OF COUNSEL

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



Keith C. McCook
Frank S. Potts
Office of General Counsel
State Budget and Control Board
Post Office Box 11608
Columbia, South Carolina 29211
(803)734-1261
Attorneys for Respondent

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THE STATE OF SOUTH CAROLINA
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SC Court of Appeals

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.

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. 2013-CP-40-0572
Appellate Case No. 2013-000114 (formerly 2013-001607)

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

v.

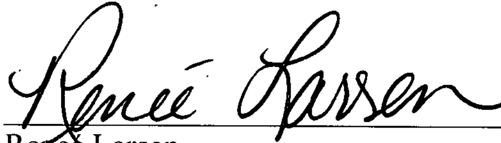
South Carolina State Energy Office ....Respondent.

CERTIFICATE OF SERVICE

This will certify that I, Reneé Larsen, an employee of the South Carolina Budget and Control Board Office of General Counsel, certify that I served the Final Brief of Respondent by hand-delivering three (3) copies to counsel of record at the address shown below on September 15, 2014.

Erik P. Doerring Esquire
McNair Law Firm, P.A.
1221 Main Street, Suite 1700
Columbia, SC 29201

Robert L. Widener, Esquire
McNair Law Firm, P.A.
1221 Main Street, Suite 1700
Columbia, SC 29201



Renee Larsen
South Carolina Budget & Control Board
Office of General Counsel
1201 Main Street, Suite 350
Columbia, SC 29201
(803) 734-1261