

THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

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

SC Court of Appeals

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

International Paper Company, Inc.,Appellant,

v.

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

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

Case No. 12-ALJ-30-0086-CC
Appellate Case No. 2013-000114

International Paper Company, Inc.,Appellant,

v.

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

APPENDIX TO RECORD ON APPEAL

Robert L. Widener
Erik P. Doerring
Jeffrey Allen
MCNAIR LAW FIRM, P.A.
Post Office Box 11390
Columbia, South Carolina 29211
(803) 799-9800
ATTORNEYS FOR APPELLANT

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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International Paper Company, Inc

Petitioner,

South Carolina State Energy Office

Respondent

Docket No. 12ALJ30-0086-CC

RESPONDENT'S SECOND MEMORANDUM IN SUPPORT OF
MOTION TO DISMISS

FILED

OCT 29 2012

SC ADMIN LAW COURT

**STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT**

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

**RESPONDENT'S SECOND MEMORANDUM IN SUPPORT OF
MOTION TO DISMISS**

I. Background

The South Carolina Energy Efficiency Act is found at the S.C. Code Ann. §48-52-10 (2008). The Act establishes the State Energy Office (SEO) within the State Budget and Control Board to serve as the principal energy planning entity for the State. The statute provides that the primary purpose of the SEO is “to develop and implement a well-balanced energy strategy and to increase the efficiency of use of all energy sources throughout South Carolina through the implementation of the Plan for State Energy Policy.” § 48-52-410. Further, the Act provides what the SEO is mandated to do and lists some eleven general tasks. A review of the listed tasks establishes that none of the requirements involve supervision, licensing or control of the actions of others. Rather, the language used relates to promoting, cooperating, working, evaluating and certifying. § 48-52-420(1)-(11). Consistent with this statutory scheme, the statute specifically

provides that the State Energy Office “must not function as a regulatory body.” § 48-52-410¹. In authorizing SEO’s functions as an agency certifying products and processes for the purpose of energy efficiency (or lack thereof), the Legislature did not render its determinations subject to any statutory review procedure. Its function, with respect to §12-6-3620, is to exercise the broad grant of discretion delegated to the agency by the Legislature.

In this case the Petitioner, International Paper Corporation (IPC) has initiated an action before this Court seeking a contested case hearing. The reason for the requested hearing is because IPC disagrees with what the SEO did or did not do in response to a request for certification of costs for the purchase and installation of equipment alleged to have been incurred by IPC pursuant to the S.C. Code Ann. § 12-6-3620(A) (Supp. 2011).

II. The ALC lacks 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.

Section 1-23-600(A) grants an administrative law judge the authority to “preside over all hearings of contested cases . . . involving the departments of the executive branch of government as defined in Section 1-30-10 Neither the State Energy Office nor the Budget and Control Board are defined as a department of the executive branch of government by Section 1-30-10. Accordingly, Section 1-23-600(A) does not grant this honorable court authority over the State Energy Office’s action in this matter, even assuming this matter regards a “contested case.” See generally Liberty Investments, Inc., v. South Carolina State Housing Finance and Development Authority, 1998 WL 954800, Docket No. 98-ALJ-XX-0385-CC (S.C.A.L.C. 1998).

¹ The South Carolina Energy Office was established by statute in 1992. S.C. Act No. 449, Part II, § 1. The statutes establishing the Office not only set forth its mission in language clearly making it advisory, cooperative and promotional. See S.C. Code Ann. §48-52-420. The SEO provides various *reports* to the executive branch and the Legislature with regard to its activities and recommendations for the future. It does not regulate and is specifically prohibited by its enabling legislation from doing so. Id. at § 48-52-410.

III. The ALC lacks any jurisdiction under Section 1-23-600(D) because the proceeding before the State Energy Office is not a contested case.

Section 1-23-600(D) currently provides (in pertinent part) as follows:

(D) An administrative law judge . . . shall preside over all appeals from final decisions of contested cases pursuant to the Administrative Procedures Act, Article I, Section 22, Constitution of the State of South Carolina, 1895, or another law, except . . .

The foregoing provision grants jurisdiction only over appeals from final decisions of contested cases.

"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.

S.C. Code Ann. § 1-23-505(3). To meet this definition, some law must mandate that the agency conduct a trial-type proceeding (a hearing) prior to rendering a final decision regarding the legal rights, duties, or privileges of a party. Cf. 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 a designated agent; therefore, Garris's case is not a 'contested case' as defined in the APA.") (applying section 1-23-310(2)). See also South Carolina Ambulatory Surgery Center Assoc. v. South Carolina Workers' Compensation Comm'n, 389 S.C. 380, 699 S.E.2d 146 (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 law mandates that the State Energy Office conduct a trial-type

proceeding before denying certification of an application for a biomass 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 this Court appellate jurisdiction.²

A. No statute requires the State Energy Office conduct a hearing.

No statute or regulation mandates a hearing with regard to the certification process applicable to IPC'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." In its memorandum of October 15th, IPC admits as much.

No statute specifically authorizes a single hearing officer to hear cases involving decisions of the State Energy Office. Article I, Section 22 also does not authorize a single hearing officer, or an administrative law judge, to hear cases. S.C. Code § 1-23-600(A) *should apply even in the absence of express statutory language.*

Petitioner's Memorandum In Opposition To Respondent's Motion To Dismiss For Lack Of Jurisdiction, at p.8 (emphasis added) (footnote omitted). See 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 a designated agent; therefore, Garris's case is not a 'contested case' as defined in the APA.") (emphasis added).³

B. By permitting an application to be filed for a tax credit, Section 12-6-3620 has not created a constitutionally protected property interest; accordingly, Art. I, § 22 neither applies nor requires a hearing.

² As explained below in part ____, IPC has not filed an appeal pursuant to Section 1-23-600(D).

³ Although several statutes which rely upon the certification of the SEO were previously subject to the jurisdiction of the Department of Revenue, some have since been amended as is the case of Section 12-6-3620. However, once the legislature reposed the decision to certify certain expenditures to the discretion of the State Energy Office, any such decisions ceased to result in "a dispute with the Department of Revenue..." as is required to invoke the South Carolina Revenues Procedures Act. 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 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.E.2d 888 (2007).

“[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.”⁴

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 SCANA Corporation v. South Carolina Department of Revenue, 384 S.C. 388, 683 S.E.2d 468 (2009) at note 4, Beatty, J., dissenting.⁵

In the case of 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. The plaintiff sought a written explanation why his projects were rejected and the rationale for the rejections.⁶ Id. at 610. He claimed that the failure to provide the same violated the due process clause. Id. at 613. In rejecting his claim the court found that the existence of the

⁴ 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, 391, 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 Constitutions. Id., 699 S.E.2d at 152.

⁵ *See also* the cases cited in footnote 3 in the Memorandum in Support of Motion to Dismiss dated October 17, 2012. No cases have been found which hold that an application for a tax credit vests an applicant with a due process property interest of any kind.

⁶ This was what the State Energy Office was providing the Petitioner in this case while requesting more information (except it had not finished evaluating the application) as of March 1st.

type of property interest that is protected by the Constitution depends upon explicit mandatory language, in connection with the establishment of specified substantive predicates to limit discretion. *Id.* at 614.

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 had a protected property interest in workers' compensation medical benefits and just presumed that such an interest existed. In fact, the Court stated that although it had already decided an issue sufficient to reverse the Court of Appeals, "We believe that the Court fundamentally misapprehended the nature of respondent's 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". [Citations omitted.] 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.

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 (1970) and Mathews v. Eldridge, 424 U.S. 319 (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 a deprivation notice and a hearing was required before the individual's interest in **continued** payment of benefits could be terminated. *Id.* [Emphasis, the Court.] 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: He must prove (1) that an employer is liable for a work-related injury, and (2) that the particular medical treatment at issue is reasonable and necessary. While respondents have cleared the first hurdle, they have yet to satisfy the second. Consequently, they do not have the property interest they claim. [Citations omitted.] *Id.* at 989-990.

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 "consequently, they do not have a property interest." Thus, because there was no vested entitlement, they did not have a sufficient property interest in the payment of the medical benefit protected by the due process clause "and we need go no further." *Id.* [Emphasis, the Court.]

Filing an application for the certification of expenditures does not convert the application of 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 does not vest any cognizable interest.

When International Paper submitted its application for the biomass 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.

The Statute

Section 12-6-3620 is not an entitlement statute. The law requires that the State Energy Office make a decision whether or not to certify expenditures as being eligible for a biomass tax credit. The Energy Office is also required to set forth the (exact) amount of any credit allowed. In exercising its discretion as to the standards to be applied in deciding whether or not to certify

an amount, the SEO is specifically permitted to consult two other entities but, only if it elects to do so.

Even if the SEO certifies an amount as a credit, the taxpayer has no right to the benefit of those funds unless and until they are owed to the State under other laws. If the taxpayer owes no taxes, it receives no benefit from the certification of any amount no matter how large or small the amount certified.

The route to being certified as even being 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. These are decisions which require an expertise not otherwise found in State government which the Legislature specifically delegated to the state energy planning agency. The discretionary nature of the decision is obvious from the specific 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.

The very earliest that any property interest could conceivably vest with an applicant would be after an amount of money is finally certified by the SEO as meeting the requirements for the credit with an amount owed by the taxpayer being sufficient to apply as an offset.⁷

Finally, if there were any doubt about whether a right to the biomass tax credit could be a "vested property interest," the Legislature gave notice that it was not by advising that the credit amount could be repealed and to the extent that any language in the Act could be argued to conflict with such a repeal would be considered null and void. *Id.* at § 12-6-3620(D)(3) (Supp. 2011). Thus, even to the extent an amount of credit is certified by the State Energy Office, the

⁷ Even under circumstances such as those described the courts have not been prone to consider any tax credit as a vested interest protected by the due process clause. See the cases cited in note 3 of the Respondent's Motion to Dismiss of October 17, 2012.

statutory language forewarns that any right to the amount certified as a credit is most certainly not vested.

C. Even if it applies, Art. I, § 22 does not mandate the SEO to provide applicants with an opportunity for a trial-type proceeding prior to making a decision regarding a tax credit certification; accordingly, Art. I, §22 does not require a hearing.

Assuming *arguendo* that IPC 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 trial-type proceeding prior to making a decision regarding certification of IPC's application for a biomass energy tax credit. Rather, the due process protections afforded by Art. I, § 22, if applicable at all, only entitle IPC to the process afforded by the statute under which it claims. 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, 24, 101 S.Ct. 2153, 2158, reh'g denied, 453 U.S. 927, 102 S.Ct. 889 (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.2d 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. 1, § 22; Stono River Env'tl. Protection Ass'n v. S.C. Dep't of Health and Env'tl. 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, 656 S.E.2d 346, 350 (S.C. 2008) (emphasis added). Accordingly, even when constitutional due process is 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 by 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 of 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 requirements of due process include notice, an opportunity to be heard in a meaningful way and judicial review." Id.⁸

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.E.2d 604. Citing to Mathews v. Eldridge, 424 U.S. 319 (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;

⁸ Citing to S.C. Constitution, Article 1, §22 and Stono River Environmental Protection Association v. South Carolina Department of Health and Environmental Control, 305 S.C. 90, 406 S.E.2d 340 (1991).

and [F]inally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."⁹ 332 S.C. at 563, 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, 207 S.E.2d 801 (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 "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.

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. . . ." ¹⁰ Id.

To obtain the "maximum amount" of a tax credit the request must be made by January 31st of each year. The taxpayer's application is then reviewed by the State Energy Office to determine if the expenditures claimed by the taxpayer meet the requirements of the Energy Office's standards. During this process the State Energy Office "may consult with the Department of Agriculture and the South Carolina Institute for Energy Studies on standards for certifying the costs incurred by the taxpayer." S.C. Code Ann. § 12-6-3620. The review involves a dialogue and exchange of information between the Energy Office and the taxpayer.¹¹ If

⁹ Critical to the evaluative process is whether the interest being evaluated is one which has vested such as a continuation of benefits as contrasted to a benefit which has never vested and is therefore not an established property right.

¹⁰ Twenty-four days after the State Energy Office asked for additional information its jurisdiction and ability to proceed with its continuing review was ended by Petitioner's filing for a contested case hearing with this Court.

¹¹ In this case it even involved personnel from the Energy Office going to one of the Petitioner's mills in Georgetown to become familiar with the type of operation for which the application was going to be made. This trip to visit the Petitioner's mill was in advance of the Petitioner filing its application.

sufficient information is not initially provided,¹² it may be requested (as was done in this case). During this process the taxpayer may submit any additional documentation it believes supports its application and the Energy Office requests additional information which it believes will assist in determining the taxpayer's eligibility.¹³ In large measure, the information involved is technical in nature and can be communicated by professionals capable of effectively presenting their positions in writing. In the overall context, there is limited value – and great expense involved – in conducting an evidentiary hearing, or even a limited oral presentation. For these reasons, Art. I, § 22 does not mandate that SEO conduct a trial-type process in order to decline certification of a tax credit application.

V. Questions from the Bench

A. If due process requires a review of International Paper's claims by the State Energy Office, what type of review should be required? More specifically, must that review [by the State Energy Office] be a testimonial type hearing for International Paper to receive "an opportunity to be heard in a meaningful way"?

No. Even if IPC has a constitutionally protected property interest, a testimonial type hearing is not required for IPC to receive all the process to which it is due. As explained above, IPC is entitled to the process afforded by the statute enacted by the General Assembly.

B. If due process requires a review of International Paper's claims by the State Energy Office, what type of review should be required? More specifically, must the review [by the State Energy Office] be by an impartial fact finder?

The requirement for a neutral or "unbiased" decision-maker only applies when the adjudication concerns a property or liability interest protected by due process. See, e.g., Garris v. Governing

¹² In this case the Petitioner did not even supply information that was specifically requested by the printed application form.

¹³ In this case the process was abandoned by the taxpayer on March 25, 2011. See Walsh v. Lugoff-Elgin Water District of Kershaw County, 2009 WL 1044131 at ¶9 (D.S.C. 2009) and the cases referenced on page 3.

Board of South Carolina Reinsurance Facility, 333 S.C. 48, 511 S.E.2d 48 (1998). It is rare for an individual to have a due process right to a claim for a benefit, particularly in a claim subject to discretion. The property interest must generally relate to a continuing entitlement. See Cleveland Bd. Of Educ. V. Loudermill, 470 U.S. 532, 538-39 (1985).¹⁴

“An indispensable component of procedural due process is that the persons legally responsible for making a decision must be informed and unbiased.” Young v. Charleston County School, 397 S.C. 303, 310, 725 S.E.2d 107, 110 (2012) (citing Garris v. Governing Board of South Carolina Reinsurance Facility, 333 S.C. 432, 511 S.E.2d 48 (1998) (“Due Process requires an administrative board, when acting in a quasi-judicial capacity, to consider all the evidence before deciding a particular question.”)). If IPC has a constitutionally protected property interest such that the due process protections afforded by Art. I, § 22 apply, then IPC was entitled to an impartial adjudicator.

C. If due process requires a review of International Paper’s claims by the State Energy Office, what type of review should be required? More specifically, if not testimonial, to what extent must the State Energy Office grant review of this matter?

Part B above discusses the type of process to which IPC is entitled, whether or not IPC’s interest in a tax credit is a constitutionally protected property interest. Specifically, IPC is entitled to the process afforded by the statute under which it claims.

Taken in context, the question appears to inquire about the process IPC would be due if this court finds that it has appellate jurisdiction. For the reasons that follow, IPC has been afforded all the process to which it is entitled.

¹⁴ For instance, see McGuire v. City of Moraine, 178 F.Supp.2d 882, 893 (S.D. Ohio 2001) noting that it is well-settled that to establish a violation of substantive or procedural due process because of bias, prejudice and partiality, the complainant must first establish that the requisite constitutionally protected property interest exists. (“This Court has recognized that “a fair and impartial decision is part of the process that is due [if a property interest is at stake], instead of the property interest being deprived.”Id.

1. IPC Abandoned the process it was given.

On the last day, the International Paper Company (IPC) 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. The date was January 31, 2011. There was no limitation on the amount of material, evidence or information that IPC could provide in support of its application for the credit. IPC submitted a total of 21 pages including the printed application form.

IPC had been working for approximately a year and had thousands of documents which it could have submitted with the application had it chosen to do so.¹⁵ In addition, IPC did not submit information which was required by the application because IPC made the unilateral decision that although they were requested on the application form, the law did not mandate that they be provided.¹⁶

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, that more information was needed. Most of the information requested was information that IPC had been asked to provide with the initial application but did not. However, instead of providing any of the information requested and without contacting or speaking with anyone at the State Energy Office, the International Paper Company filed with this Court requesting a contested case hearing. This occurred on March 25, 2011. Now, as of

¹⁵ Well over 6,000 documents were eventually supplied by International Paper in discovery with the great majority being documents related to the expenditures for which credit was sought in the application. Many of the documents supplied in discovery were requested by the Energy Office in its March 1, 2011 letter which requested further information from which International Paper appealed. Most of the documents not submitted described the projects for which claims made as maintenance. None of these documents were among the 21 pages. The Court subsequently ruled that the March 1, 2011 letter was a final determination. Order denying Motion to Dismiss, March 5, 2012.

¹⁶ See, e.g., Deposition of Tracy Bolger, C.P.A., Sept. 27, 2012 at page 30 lines 1-8 where, in response to a question why information requested on the application form was not provided with the application, she said, "the application isn't part of the law. This [application] is just a guide of what they were looking for." See also the deposition at pages 36, 44, 51, 67, 70, 75, 81-84, & 97 for similar remarks as to why instructions to provide information were not followed.

October 14, 2012 and for the first time, the International Paper Company is taking the position before this Court that it did not receive due process despite the fact that it abandoned the process it was provided.

2. Abandonment and the New Claim for Due Process

In the Petitioner's Prehearing Statement filed with this Court on August 25, 2011 (the first of a total of three in this matter), the only issue presented to this Court for determination at a 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 25, 2011.

The Petitioner elaborated on this issue by further stating 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 generation. The prehearing statement made no reference to the South Carolina Constitution, Article 1, §22, nor did it refer to any alleged denial of due process.

On October 14, 2012, the International Paper Company contended—for the first time—that the procedure employed by the State Energy Office from January 31, 2012 through March 25, 2012 did not provide it with sufficient due process. IPC contended that, “the State Energy Office should have provided International Paper with procedural due process . . .”, citing Garris v. Governing Board of South Carolina Reinsurance Facility, 333 S.C. 432, 511 S.E.2d 48 (1998). Petitioner's Memorandum in Opposition to Respondent's Motion to Dismiss for Lack of Jurisdiction at page 13.

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. DuRant v. South Carolina Department of Health and Environmental Control, 361 S.C. 416, 604 S.E.2d 704 (Ct.App. 2004) certiorari denied (2006). In the case before this Court, there is no evidence of any complaint of any denial of due process until October 14, 2012, not even “vague comments” about “some constitutional claims” to anyone. *Id.* at 424, 604 S.E.2d at 709. In fact, it was the Petitioner who voluntarily abandoned the administrative process on March 25, 2011.

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). In Vukelic v. Bartz, 245 F.Supp.2d 1068 (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. *Id.* at 1083. See also Walsh v. Lugoff-Elgin Water District of Kershaw County, 2009 WL 1044131 at ¶ 9 (D.S.C. 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 different light by the time they sought judicial review.

Id. at 1405.

D. If review of this case is appellate, can the ALC convert a request [by International Paper] for a contested case review to [a request by International Paper for] an appeal?

No provision of authority can be found which gives this Court the authority to convert an action for a contested case hearing to an appeal.

When the case was filed, it was the responsibility of the Petitioner to determine the relief sought. In this case, the Petitioner represented that this Court had jurisdiction pursuant to S.C. Code Ann §1-23-600, but because the State Energy Office is not an executive agency under S.C. Code Ann. §1-30-10 nor was a hearing required, this Court does not have either appellate or *de novo* hearing jurisdiction.¹⁷

E. The State Energy Office was granted leave to file an amended tax credit certification, which the State Energy Office subsequently issued. [Assuming this matter is heard by the ALC in its appellate capacity.] would the review of this matter be based upon the State Energy's Office's Final Determination as it existed on the date of the filing of the case with the ALC or as subsequently amended?

It is the position of the State Energy Office that, but for the amendment of the March 1, 2011 letter pursuant to this Court's Order in 2012,¹⁸ the bulk of the Record which would have been appealed are documents submitted to and from the State Energy Office from January 31, 2011 (the application) through March 25, 2011 (the date that the SEO lost jurisdiction of this matter to this Court). These documents are in the Court's file.

F. If appellate review of this case is conducted solely upon the record, what action should be taken to develop a record?

The documents comprising the record are already filed with the Court and can be readily identified.

VI. Cases Cited by International Paper on October 16, 2012

The Petitioner presented two cases in its letter of October 16, 2012 which it contends are applicable to the case before this Court. The first is ESA Services, LLC v. South Carolina Department of Revenue, Docket No. 08-ALJ-17-0047-CC (February 9, 2009) affirmed 392 S.C.

¹⁷ The concept of converting from one type of process (de novo hearing) to another is not supported by any statutory authority nor do the applicable Court Rules indicate such a conversion is possible.

¹⁸ On March 5, 2012, this Court made a determination that the March 1, 2011 letter was "a final determination" and the matter was "ripe for judicial review."

11, 707 S.E.2d 431 (Ct.App. 2011) and the second is Blackbaud, Inc. v. South Carolina Department of Revenue, Docket No. 07-ALJ-11-0317-CC (May 15, 2008) modified 386 S.C. 446, 688 S.E.2d 150 (Ct.App 2010).

Both ESA Services and Blackbaud were job development tax credit cases brought against the Department of Revenue. They were not brought against the “Advisory Coordinating Council for Economic Development for the State of South Carolina (the “Council”)—this is a critical and key difference.

In both cases the Petitioners had to file an application with the Council and request to participate in the Program. As part of the application process, Blackbaud (and ESA Services) negotiated the terms for an RVA (Revitalization Agreement) with the Council. Blackbaud at pp. 1-2. This negotiation was for the parties to hopefully arrive at a contract pursuant to which the business, by achieving certain goals, would be entitled to tax credits for job development in the State. If the negotiations were successful, the parties (the Council and the business) would end up with an agreement as to what the business had to achieve and what tax credits would result. The Department of Revenue would then review each such agreement to determine if, pursuant to the terms of the agreement, the business had been entitled to the tax credit actually taken. The disputes arose over how the contracts between the businesses and Council were interpreted. The two cases relate to the procurement of agreements that resulted from the applications of ESA Services and Blackbaud, not from the application process. If these cases held that Blackbaud and ESA Services had a constitutionally protected entitlement to an agreement with the Council and Council violated the law by not entering into such an agreement, the two cases would have some relevance to the matter now before this Court. But, they do not.

As it is, these cases are essentially contract interpretation cases between the two businesses and how the Department of Revenue interpreted the terms of these two separate agreements. They have no application to the issues before the Court in this case.

VII. Conclusion

The State Energy Office is not an executive department of government subject to the jurisdiction of the Administrative Law Court under S.C. Code Ann. §1-23-600(A) nor does it conduct proceedings that are contested cases under S.C. Code Ann. §1-23-505(3), nor is there any law which requires that the SEO conduct any type of hearing—it cannot regulate or control the acts of any other agency or citizen of the State. It is a planning, advisory and certifying agency with special expertise in helping to decide the State's direction within the field of creation and development of energy resources and planning. S.C. Code Ann. § 48-52-410.

It cannot be controverted that at the time the International Paper Company ended the Energy Office's ability to consider its application, the Energy Office was waiting to receive additional information from International Paper. Some of the information had previously been requested on the printed application form but never provided. As a result, there is no way of knowing what further steps, investigation or review would have been given to the IPC application for the tax credits. The filing of the action occurred before this Court's jurisdiction terminated the SEO's review. Thus, the IPC cannot complain about the process it was receiving from the SEO because it broke off the review without notice of any kind.

Now, for the first time, IPC has decided that because there is no statutory law or rule giving this Court jurisdiction, this Court should hear the matter as an appeal from an uncompleted process as if it were a decision from a contested case. There is no known authority

to convert an action from one filed for a contested case hearing to an appeal from a contested case decision even if the March 1, 2011 letter fell into that category.

If this Court did have jurisdiction to hear an appeal from a final determination of the State Energy Office, the review would be in accordance with the S.C. Code Ann. §1-23-380 and the March 1, 2011 letter would be treated as a final determination in a contested case. In the event the Record was insufficient, the question of remand might arise.¹⁹

In this matter, however, the Court lacks the necessary jurisdiction to hear or review the decisions of the State Energy Office about whether or not it will certify the expenditures of IPC as being in conformity with the Legislature's requirements for consideration as an appropriate energy project which meets the statutory requirements of S.C. Code Ann. §12-6-3620. The contention that the International Paper Company was somehow deprived of a due process property interest when it abandoned the application review being provided is not one of them.

The IPC position lacks merit and this matter should be dismissed.

Respectfully submitted,



Keith McCook
Frank S. Potts
Office of General Counsel
State Budget and Control Board
1201 Main Street, Suite 410
Post Office Box 11608
Columbia, South Carolina 29211

Attorneys for Respondent

¹⁹As noted in Randolph R. Lowell, Editor, *South Carolina Administrative Practice and Procedure*, Second Edition (S.C. Bar 2008), the writ of *certiorari* "may be used to seek judicial review of any final agency decision where the APA does not apply, however, and should be pled as an alternative vehicle for review where applicability of the APA is doubtful." *Id.* at 493 [citing to *League of Women Voters of Georgetown County v. Litchfield-by-the-Sea*, 305 S.C. 424, 409 S.E.2d 378 (1991); *South Carolina Wildlife Federation v. South Carolina Coastal Council*, 256 S.C. 187, 371 S.E.2d (1988). Unfortunately, it was not done in this case.]

EXHIBIT

A

STATE ENERGY OFFICE

SC SCH. ETC-50
(UPDATED 10/09)

APPLICATION FOR BIOMASS RESOURCE CREDIT

2010

Under Code Section 12-6-3620

Name as Shown on Tax Return				Fed EI No.	
Mailing Address				Contact Person	
STREET				Contact Person's Title	
CITY	COUNTY	STATE	ZIP	Telephone Number	
Physical Address				()	
STREET				Fax Number	
CITY				()	
COUNTY	STATE	ZIP	Email		

1. Has the taxpayer applied for and/or received the biomass resource credit under S.C. Code 12-6-3620 in prior tax years? If yes, please list the tax years and the amount of the credit received.

2. Give a description of the project including:

- what the energy will be used for;
- duration the equipment is expected to be used at the facility;
- name and location of company installing the equipment;
- name and location(s) where the equipment will be installed; and
- type of biomass feedstock
- did the facility maintain an average of 90 percent biomass feedstock over the tax year?

Be as specific as possible and attach additional pages if necessary.

3. List purchase price of equipment and installation costs needed to create heat, power, steam, electricity, or another form of energy for commercial use from a fuel consisting of at least 90% biomass resource. Include:

- name, type, and cost of the equipment;
- manufacturer of equipment;
- length of warranty for equipment (if applicable);
- what state or country the equipment will be purchased from;
- for electricity production how many MW capacity the system will produce and on average how many kWh will produce per year. For thermal energy how many therms the system will produce

000020

and on average how many decatherms the system will produce per year. For any equipment that is displacing electricity or thermal energy, how many units of energy is it displacing;

- cost for labor and installation charges;
- cost for shipping; and
- other relevant costs (if applicable).

Be as specific as possible and attach additional pages if necessary.

For assistance with this form, contact the State Energy Office at (803) 737-8030.

Date

Signature of Officer (or other appropriate official)

Print Officer's Name

Mall To: State Energy Office
ATTN: Renewable Energy
1200 Senato Street
408 Wade Hampton Building
Columbia, SC 29201

Title

NOTE: All claims generated between July 1, 2008 and December 31, 2009 must be received by January 31, 2010. The State Energy Office will send the Department of Revenue the maximum amount the taxpayer may claim. The State Energy Office will then notify each taxpayer of the maximum amount of credit allowed. Any unused part of the actual credit amount can be carried forward for up to 15 years.

General Information

Section 12-6-3620. For taxable years beginning after 2007, and ending before taxable year 2020, there is allowed a credit against the income tax imposed pursuant to Section 12-6-530 or license fees imposed pursuant to Section 12-20-50, or both, for twenty-five percent of the costs incurred by a taxpayer for the purchase and installation of equipment used to create heat, power, steam, electricity, or another form of energy for commercial use from a fuel consisting of no less than ninety percent biomass resource. Costs incurred by a taxpayer and qualifying for the credit allowed by this section must be certified by the State Energy Office. The State Energy Office may consult with the Department of Agriculture and the South Carolina Institute for Energy Studies on standards for certifying the costs incurred by the taxpayer. The credit may be claimed in the year in which the equipment is placed in service and may be claimed for all expenditures incurred for the purchase and installation of the equipment. A taxpayer may use up to six hundred fifty thousand dollars of credit for a single taxable year. The tax credit is nonrefundable but unused credits may be carried forward for fifteen years.

To obtain the maximum amount of credit available to a taxpayer, a taxpayer must submit a request for credit to the State Energy Office by January thirty-first for all qualifying equipment placed in service in the previous calendar year and the State Energy Office must notify the taxpayer that it qualifies for the credit and the amount of credit allocated to the taxpayer by March first of that year. A taxpayer may claim the maximum amount of the

000021

credit for its taxable year which contains the December thirty-first of the previous calendar year. The Department of Revenue may require any documentation that it deems necessary to administer the credit.

The period from July 1, 2008 through December 31, 2009

For the state's fiscal year beginning July 1, 2008, the maximum amount of the credit is to be determined based on an eighteen-month period beginning July 1, 2008, through December 31, 2009. Applications are to be made by January 31, 2010, for the previous eighteen-month period commencing July 1, 2008, and ending December 31, 2009. A taxpayer allocated a credit for this eighteen-month period may claim the credit for its tax year which contains December 31, 2009. Attach the State Energy Office letter of certification or keep with your tax records if filing electronically.

NOTE: If a facility stops using biomass resources as at least 90% of its primary fuel source, any unused credit is suspended until the facility resumes using biomass resources as at least 90% of its fuel source. A suspension of unused credit does not extend the 15-year carryforward period.

Definitions:

A "biomass resource" is defined as noncommercial wood, by-products of wood processing, demolition debris containing wood, agricultural waste, animal waste, sewage, landfill gas, and other organic materials, not including fossil fuels.

A "commercial use" is a use intended to generate profit.

The State Energy Office reserves the right to request more information from the taxpayer if deemed necessary.

000022

APPLICATION FOR BIOMASS RESOURCE CREDIT

2012

Under Code Section 12-6-3620

Name as Shown on Tax Return				Fed EI No.	
Mailing Address				Contact Person	
STREET				Contact Person's Title	
CITY	COUNTY	STATE	ZIP	Telephone Number	
Physical Address				()	
STREET				Fax Number	
CITY COUNTY STATE ZIP				()	
				Email	

1. Has the taxpayer applied for and/or received the biomass resource credit under S.C. Code 12-6-3620 in prior tax years? If yes, please list the tax years and the amount of the credit received.

2. Give a description of the project including:

- what the energy will be used for;
- duration the equipment is expected to be used at the facility;
- name and location of company installing the equipment;
- name and location(s) where the equipment will be installed; and
- type of biomass feedstock
- did the facility maintain an average of 90 percent biomass feedstock over the tax year?

Be as specific as possible and attach additional pages if necessary.

3. List purchase price of equipment and installation costs needed to create heat, power, steam, electricity, or another form of energy for commercial use from a fuel consisting of at least 90% biomass resource. Include:

- name, type, and cost of the equipment;
- manufacturer of equipment;
- length of warranty for equipment (if applicable);
- what state or country the equipment will be purchased from;
- for electricity production how many MW capacity the system will produce and on average how many kWh will produce per year. For thermal energy how many therms the system will produce

and on average how many decatherms the system will produce per year. For any equipment that is displacing electricity or thermal energy, how many units of energy is it displacing;

- cost for labor and installation charges;
- cost for shipping; and
- other relevant costs (if applicable).

Attach documentation such as invoices, paid receipts, and spreadsheets. Be as specific as possible and attach additional pages if necessary. The SC Energy Office maintains the right to schedule a site visit prior to approval.

For assistance with this form, contact the State Energy Office at (803) 737-8030.

Date

Signature of Officer (or other appropriate official)

Print Officer's Name

**Mail To: State Energy Office
ATTN: Renewable Energy
1200 Senate Street
408 Wade Hampton Building
Columbia, SC 29201**

Title

NOTE: All claims generated between January 1, 2011 and December 31, 2011 must be received by **January 31, 2012**. The State Energy Office will send the Department of Revenue the maximum amount the taxpayer may claim. The State Energy Office will then notify each taxpayer of the maximum amount of credit allowed. Any unused part of the actual credit amount can be carried forward for up to 15 years.

General Information

Section 12-6-3620. For taxable years beginning after 2007, and ending before taxable year 2020, there is allowed a credit against the income tax imposed pursuant to Section 12-6-530 or license fees imposed pursuant to Section 12-20-50, or both, for twenty-five percent of the costs incurred by a taxpayer for the purchase and installation of equipment used to create heat, power, steam, electricity, or another form of energy for commercial use from a fuel consisting of no less than ninety percent biomass resource. Costs incurred by a taxpayer and qualifying for the credit allowed by this section must be certified by the State Energy Office. The State Energy Office may consult with the Department of Agriculture and the South Carolina Institute for Energy Studies on standards for certifying the costs incurred by the taxpayer. The credit may be claimed in the year in which the equipment is placed in service and may be claimed for all expenditures incurred for the purchase and installation of the equipment. A taxpayer may use up to six hundred fifty thousand dollars of credit for a single taxable year. The tax credit is nonrefundable but unused credits may be carried forward for fifteen years.

To obtain the maximum amount of credit available to a taxpayer, a taxpayer must submit a request for credit to the State Energy Office by January thirty-first for all qualifying equipment placed in service in the previous calendar year and the State Energy Office must notify the taxpayer that it qualifies for the credit and the amount of

credit allocated to the taxpayer by March first of that year. A taxpayer may claim the maximum amount of the credit for its taxable year which contains the December thirty-first of the previous calendar year. The Department of Revenue may require any documentation that it deems necessary to administer the credit.

Attach the State Energy Office letter of certification or keep with your tax records if filing electronically.

NOTE: If a facility stops using biomass resources as at least 90% of its primary fuel source, any unused credit is suspended until the facility resumes using biomass resources as at least 90% of its fuel source. A suspension of unused credit does not extend the 15-year carryforward period.

Definitions:

A "biomass resource" is defined as noncommercial wood, by-products of wood processing, demolition debris containing wood, agricultural waste, animal waste, sewage, landfill gas, and other organic materials, not including fossil fuels.

A "commercial use" is a use intended to generate profit.

The State Energy Office reserves the right to request more information from the taxpayer if deemed necessary.

EXHIBIT

B

Lancaster, Ashlie

From: Myers, Erika
Sent: Tuesday, March 01, 2011 3:47 PM
To: Joy Causey (CAUSEYJ@sclax.org)
Cc: Lancaster, Ashlie
Subject: SCEO Approved ETC tax credits
Attachments: 2011 ETC Spreadsheet 3-1-11.xls

Joy,

Per my earlier voicemail message, I have attached the spreadsheet of approved tax credits for 2010 related to the tax forms TC-40, TC-41, and TC-50. We did not approve any credits for the TC-49. We expect to approve two additional tax credits for the TC-50, but have requested additional information from the taxpayers and I so should have that for you in the next several weeks.

If I need to send this to someone else within the SC Department of Revenue, please let me know.

Thank you again,
Erika

Erika H. Myers
Manager, Renewable Energy Programs
South Carolina Energy Office
1200 Senate Street
408 Wade Hampton Building
Columbia, SC 29201
(803) 737-7951 - direct
(803) 737-9846 - fax
emyers@energy.sc.gov

Name of Company	Taxpayer ID Number	Brief Description of Equipment
International Paper Company	13-0872805	Modifications/retrofits to existing black liquor recovery boiler and digester, improvements to woodyard Addition of a biomass cogenerator turbine, electricity handling equipment, modifications to existing biomass boilers, and installation of electricity motors to reduce steam load
Domtar Corporation	20-5901152	

Amount of Credit Approved

\$10,379,393.80

RP 8883-19-06

NIKKI R. HALEY, CHAIR
GOVERNOR

CURTIS M. LOFTIS, JR.
STATE TREASURER

RICHARD ECKSTROM, CPA
COMPTROLLER GENERAL



SC BUDGET AND CONTROL BOARD

SC ENERGY OFFICE
ASHLIE LANCASTER
DIRECTOR

TELEPHONE: (803) 737-8030
FAX: (803) 737-9846

HUGH K. LEATHERMAN, SR.
CHAIRMAN, SENATE FINANCE
COMMITTEE

DANIEL T. COOPER
CHAIRMAN, HOUSE WAYS AND MEANS
COMMITTEE

ELEANOR KITZMAN
EXECUTIVE DIRECTOR

******Keep with your tax records******

March 1, 2011

Mr. Steven P. Burns
US Tax Manager
Domtar Corporation
100 Kingsley Park Drive
Fort Mill, SC 29715

RE: SC SCH. ETC-50 Application

Mr. Burns:

The State Energy Office has reviewed the application for the Biomass Resource Credit, SC SCH. ETC-50. The State Energy Office has determined that the taxpayer with the Federal EI Number of 20-5901152 has been allocated the tax credit of \$10,379,393.80. According to South Carolina Code Section 12-6-3620, the taxpayer may only use up to \$650,000.00 of credit for a single taxable year and the credit may be used against income tax pursuant to 12-6-530 or license fees imposed pursuant to 12-20-50, or both.

In order to claim the credit, the taxpayer must submit SC SCH. TC-50 and keep this letter with tax records. The taxpayer may carry forward any unused part of the credit amount for up to 15 years. For more information about this credit, please refer to the state code or the South Carolina Department of Revenue form SC SCH. TC-50. For any further questions concerning the tax implications of the credit, please consult your tax preparer.

Sincerely,

Ashlie Lancaster
Director
State Energy Office

NIKKI R. HALEY, CHAIR
GOVERNOR

CURTIS M. LOFTIS, JR.
STATE TREASURER

RICHARD ECKSTROM, CPA
COMPTROLLER GENERAL



SC BUDGET AND CONTROL BOARD

SC ENERGY OFFICE
ASHLIE LANCASTER
DIRECTOR

TELEPHONE: (803) 737-8030
FAX: (803) 737-9846

HUGH K. LEATHERMAN, SR.
CHAIRMAN, SENATE FINANCE
COMMITTEE

DANIEL T. COOPER
CHAIRMAN, HOUSE WAYS AND MEANS
COMMITTEE

ELEANOR KITZMAN
EXECUTIVE DIRECTOR

******Keep with your tax records******

March 10, 2011

Mr. Sid Tiwari
Mill Controller
U.S. Corrugated Inc.
139 Price Farm Road
Cowpens, SC 29330

RE: SC SCH. ETC-50 Application

Mr. Tiwari:

The State Energy Office has reviewed the application for the Biomass Resource Credit, SC SCH. ETC-50. The State Energy Office has determined that the taxpayer with the Federal EI Number of 58-1392513 has been allocated the tax credit of \$128,167.49. According to South Carolina Code Section 12-6-3620, the taxpayer may only use up to \$650,000.00 of credit for a single taxable year and the credit may be used against income tax pursuant to 12-6-530 or license fees imposed pursuant to 12-20-50, or both.

In order to claim the credit, the taxpayer must submit SC SCH. TC-50 and keep this letter with tax records. The taxpayer may carry forward any unused part of the credit amount for up to 15 years. For more information about this credit, please refer to the state code or the South Carolina Department of Revenue form SC SCH. TC-50. For any further questions concerning the tax implications of the credit, please consult your tax preparer.

Sincerely,

Ashlie Lancaster
Director
State Energy Office

EXHIBIT

C

1350



STATE OF SOUTH CAROLINA
DEPARTMENT OF REVENUE
**BIOMASS RESOURCE
CREDIT**
Attach to your Income Tax Return

SC SCH.TC-50
(Rev. 6/07/10)
3440
20

Name As Shown On Tax Return

FEIN

- 1. Enter the amount of credit indicated by the State Energy Office 1. \$ _____
- 2. Credit carried forward from previous years 2. \$ _____
(Unused credits may be carried forward for 15 years.)
- 3. Add lines 1 and 2 3. \$ _____
- 4. Annual credit limit 4. \$ **\$650,000.00**
- 5. Enter your current year tax liability 5. \$ _____
- 6. Enter the smallest of lines 3, 4 and 5 6. \$ _____
This is the amount of credit you may use in the current year.
- 7. Line 3 minus line 6 7. \$ _____
Unused credits may be carried forward for 15 years.

General Information

For tax years beginning after 2007 and ending before 2020, Code Section 12-6-3620 provides a credit against corporate income tax and license fees for 25% of the costs incurred by a taxpayer for the purchase and installation of equipment used to create heat, power, steam, electricity or another form of energy for commercial use from a fuel consisting of no less than 90% biomass resource.

Costs incurred by the taxpayer must be certified by the State Energy Office. The Office may consult with the Department of Agriculture and the South Carolina Institute for Energy Studies on standards for certifying the costs incurred by the taxpayer. The credit may be claimed in the year in which the equipment is placed in service and may be claimed for all expenditures incurred for the purchase and installation of the equipment.

A taxpayer may use up to \$650,000 of credit for a single tax year. Unused credit may be carried forward for 15 years.

If the equipment ceases to use biomass resources as its primary fuel source before the entire credit has been utilized, the taxpayer is ineligible to utilize any remaining credit until it resumes using biomass resources as its primary fuel source (at least 90%). The 15-year carry forward period is not extended because of periods of noncompliance.

Certification by the State Energy Office

Each taxpayer must submit a request for credit to the State Energy Office by January 31st for all qualifying equipment placed in service in the previous calendar year. The Office's form for requesting credit is available at www.energy.sc.gov or by calling 803-737-8030. The Office will notify the taxpayer that it qualifies for the credit and the amount of credit allocated to the taxpayer by March 1st of that year. The taxpayer may claim the allocated amount of credit for its tax year that includes December 31st of the previous calendar year. The Department of Revenue may require any documentation that it deems necessary to administer the credit.

Note: Attach the State Energy Office letter of certification and this form to your Income Tax Return, or keep with your tax records if filing electronically.

Definitions

"Biomass resource" means noncommercial wood, by-products of wood processing, demolition debris containing wood, agricultural waste, animal waste, sewage, landfill gas, and other organic materials, not including fossil fuels.

"Commercial use" means a use intended for the purpose of generating a profit.

34401018

EXHIBIT

D

Milton Kimpson

From: Bob Thomas
Sent: Thursday, August 30, 2012 11:19 AM
To: Milton Kimpson
Cc: Sylvan D. Proser (ProserS@sctax.org)
Subject: FW: Update on tax credit applications
Attachments: Approval Letter ETC-40 Taylor 4-11-12 .doc.pdf; milliken 2011 final.pdf; lockhart 2011 final.pdf

From: Vanden Houten, Catherine [mailto:chouten@energy.sc.gov]
Sent: Friday, April 13, 2012 9:11 AM
To: Bob Thomas
Cc: Joy Causey; Sylvan D. Proser; Jerilynn VanStory; Lancaster, Ashlie
Subject: Update on tax credit applications

Hello, Bob --

I am writing to provide you with an update on the status of several tax credit applications that were submitted to our office. Thus far, our office has made determinations the following tax credit applications:

ETC-40 Ethanol or Biodiesel Production Credit

- [REDACTED]

ETC-50 Biomass Resource Credit (Please note that our director, Ashlie Lancaster, has already informed Jerilynn Van Story of these particular determinations.)

- [REDACTED]
- [REDACTED]

For the following applications, we have requested additional documentation from each of these applicants in support of their respective application and are still awaiting that documentation.

ETC-41 Renewable Fuels Property Credit

- [REDACTED]
- [REDACTED] applications for 2 separate facilities)
- [REDACTED]
- [REDACTED]

As soon as we receive the requested documentation and can make a determination, we will contact you. In the meanwhile, please contact me with any questions. Thanks very much!

Best regards,
Catherine

Catherine Vanden Houten
South Carolina Energy Office
1200 Senate Street, 408 Wade Hampton Bldg
Columbia, SC 29201
803.737.9852, phone
803.737.9846 fax

cvandenhouten@energy.sc.gov

From: Bob Thomas [mailto:THOMARO@sctax.org]
Sent: Monday, March 05, 2012 12:47 PM
To: Vanden Houten, Catherine
Cc: Joy Causey; ProserS@sctax.org
Subject: RE: Status of tax credit applications

Catherine,

Thank you!

Bob Thomas, Tax Analyst
Research and Review
S.C. Department of Revenue
803-898-5786
thomaro@sctax.org

From: Vanden Houten, Catherine [mailto:chouten@energy.sc.gov]
Sent: Monday, March 05, 2012 12:31 PM
To: Bob Thomas
Subject: FW: Status of tax credit applications
Importance: High

Hello, Bob –

Although I know that both Thomas and Terrance forwarded this information to you last week, I wanted to follow up directly to let you know that we are currently still reviewing these applications listed below. At this point, we have requested additional documentation from each of these applicants and are awaiting that additional information. Once we have received sufficient documentation to determine eligibility, we will be back in touch with you.

Thanks very much!

Best regards,
Catherine

Catherine Vanden Houten
South Carolina Energy Office
1200 Senate Street, 408 Wade Hampton Bldg.
Columbia, SC 29201
803.737.9852 phone
803.737.9846 fax
cvandenhouten@energy.sc.gov

From: Vanden Houten, Catherine
Sent: Thursday, March 01, 2012 12:11 PM
To: Thomas McCrorey; Fredia Cunningham
Cc: Terrance Foulks; Lancaster, Ashlie
Subject: Status of tax credit applications
Importance: High

Hello, Thomas and Fredia:

I am writing to make you aware of the status of several tax credit applications that were submitted to our office. The following is a list of applications for various tax credits that are currently pending. Our office has requested additional documentation from each of these applicants in support of their respective application and are awaiting that documentation.

ETC-40 Ethanol or Biodiesel Production Credit

- [REDACTED]
- [REDACTED]

ETC-41 Renewable Fuels Property Credit

- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]

ETC-50 Biomass Resource Credit

- [REDACTED]
- [REDACTED]

As soon as we receive the requested documentation and can make a determination, we will contact you. In the meanwhile, please contact me with any questions.

Thanks very much!

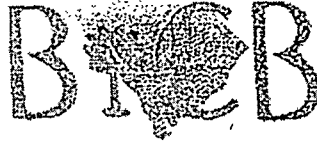
Best regards,
Catherine

Catherine Vanden Houten
South Carolina Energy Office
1200 Senate Street, 408 Wade Hampton Bldg.
Columbia, SC 29201
803.737.9852 phone
803.737.9846 fax
cvandenhouten@energy.sc.gov

NIKKI R. HALEY, CHAIR
GOVERNOR

CURTIS M. LÖFTIS, JR.
STATE TREASURER

RICHARD ECKSTROM, CPA
COMPTROLLER GENERAL



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COMMITTEE

W. BRIAN WHITE
CHAIRMAN, HOUSE WAYS AND MEANS
COMMITTEE

MARCIA S. ADAMS
EXECUTIVE DIRECTOR

MEMORANDUM

To: [REDACTED]

From: Ashlie Lancaster

RE: 2011 Application for Biomass Resource Credit

Date: April 10, 2012

Thank you for submitting [REDACTED] application for a Biomass Resource Credit under S.C. Code Ann. § 12-6-3620. In addition to the on-site visit conducted by me and Jones Herring of the South Carolina Energy Office at the [REDACTED] April 3, 2012, an analysis of the claimed expenses for which a credit was requested in comparison to the eligibility requirements detailed in the law was conducted.

The following tests were used in this assessment:

Test 1. § 12-6-3620 (A), eligible equipment must "create" energy using a "fuel consisting of no less than ninety percent biomass resource." The project consisted of retrofitting three existing boilers to run off of landfill gas which is a "fuel consisting of no less than ninety-percent biomass resource" as detailed in § 12-6-3620 (C) (1). While the boilers are now capable of running off of both natural gas and landfill gas, the expenditures incurred were only to retrofit the existing boilers to run off of landfill gas and landfill gas is the primary fuel source as long as there is adequate supply to maintain continuous operations. Please note that pursuant to § 12-6-3620 (C) (3), "if the equipment ceases to use biomass resources as its primary fuel source before the entire credit has been utilized, the taxpayer is ineligible to utilize any remaining credit until it resumes using biomass resources as its primary fuel source."

Test 2. § 12-6-3620 (A), eligible equipment must "create heat, power, steam, electricity, or another form of energy for commercial use." The equipment and installation expenses claimed are for costs incurred to create energy for commercial use within the manufacturing facility.

Test 3. § 12-6-3620 (A), "the credit may be claimed in the year in which the equipment is placed in service and may be claimed for all expenditures incurred for the purchase and installation of the equipment." Equipment was placed in service on June 22, 2011 and is functioning as of the site visit date. Installation costs were documented in the information provided and correlate to the project. While the boilers are now capable of running off of both natural gas and landfill gas, the expenditures incurred were only to retrofit the existing boilers to run off of landfill gas and landfill gas is the primary fuel source as long as there is adequate supply to maintain continuous operations. Additionally, the control system installed allows for the continuous production of energy through switching fuel sources based on availability. Without this function, [REDACTED] could not have implemented the project.

Based on these criteria, all items for which the credit is requested appear to be eligible. As such, the South Carolina Energy Office certifies total eligible expenses of \$693,126.93. The 25% tax credit on this amount is \$173,281.73.

NIKKI R. HALEY, CHAIR
GOVERNOR

CURTIS M. LOFTIS, JR.
STATE TREASURER

RICHARD ECKSTROM, CPA
COMPTROLLER GENERAL



SC BUDGET AND CONTROL BOARD

SC ENERGY OFFICE
ASHLIE LANCASTER
DIRECTOR

TELEPHONE: (803) 737-8030
FAX: (803) 737-9846

HUGH R. LEATHERMAN, SR.
CHAIRMAN, SENATE FINANCE
COMMITTEE

W. BRIAN WHITE
CHAIRMAN, HOUSE WAYS AND MEANS
COMMITTEE

MARCIA S. ADAMS
EXECUTIVE DIRECTOR

MEMORANDUM

To: [REDACTED]
From: Ashlie Lancaster
Re: 2011 Application for Biomass Resource Credit
Date: April 11, 2012

Thank you for submitting [REDACTED] application for a Biomass Resource Credit for the [REDACTED] project under S.C. Code Ann. § 12-6-3620. In addition to the on-site visit conducted by me and Jones Herring of the South Carolina Energy Office at the [REDACTED] landfill on April 3, 2012, an analysis of the claimed expenses for which a credit was requested in comparison to the eligibility requirements detailed in the law was conducted.

The following tests were used in this assessment:

Test 1. § 12-6-3620 (A), eligible equipment must "create" energy using a "fuel consisting of no less than ninety percent biomass resource." The project consisted of the installation of a generator and related electrical and control equipment to run off of landfill gas which is a "fuel consisting of no less than ninety-percent biomass resource" as detailed in § 12-6-3620 (C) (1). Please note that pursuant to § 12-6-3620 (C) (3), "if the equipment ceases to use biomass resources as its primary fuel source before the entire credit has been utilized, the taxpayer is ineligible to utilize any remaining credit until it resumes using biomass resources as its primary fuel source."

Test 2. § 12-6-3620 (A), eligible equipment must "create heat, power, steam, electricity, or another form of energy for commercial use." The equipment and installation expenses claimed are for costs incurred to create energy for commercial use. The power generated is currently sold to the locally connected electric utility for resale to its customers.

Test 3. § 12-6-3620 (A), "the credit may be claimed in the year in which the equipment is placed in service and may be claimed for all expenditures incurred for the purchase and installation of the equipment." Equipment was placed in service in the summer of 2011 and is functioning as of the site visit date. Installation costs were documented in the information provided and correlate to the project. Miscellaneous construction costs incurred for reimbursables and per diem expenses will be capitalized into the cost of the equipment. Additionally, the control system installed allows for the continuous monitoring of energy production.

Based on these criteria, all items for which the credit is requested appear to be eligible. As such, the South Carolina Energy Office certifies total eligible expenses of \$3,027,848.19. The 25% tax credit on this amount is \$756,962.05. Please note that pursuant to § 12-6-3620 (B), "a taxpayer may use up to six hundred fifty thousand dollars of credit for a single taxable year. The tax credit is nonrefundable but unused credits may be carried forward for fifteen years."

EXHIBIT

E

Milton Kimpson

From: Bob Thomas
Sent: Thursday, August 30, 2012 11:17 AM
To: Milton Kimpson
Cc: Sylvan D. Proser (ProserS@sctax.org)
Subject: FW: Updated ETC forms for energy projects

From: Myers, Erika [mailto:emyers@energy.sc.gov]
Sent: Monday, October 19, 2009 9:34 AM
To: Bob Thomas
Subject: RE: Updated ETC forms for energy projects

Bob,
All of our forms are posted at <http://www.energy.sc.gov/index.aspx?m=1&i=5>.
Thanks again for all your help!
Erika

Erika H. Myers
Manager, Renewable Energy Programs
South Carolina Energy Office
1200 Senate Street
408 Wade Hampton Building
Columbia, SC 29201
(803) 737-7951 - direct
1-800-851-8899 - toll free
(803) 737-9846 - fax
emyers@energy.sc.gov

From: Bob Thomas [mailto:THOMARO@sctax.org]
Sent: Monday, October 19, 2009 9:00 AM
To: Myers, Erika
Cc: Jerilynn VanStory; Sylvan D. Proser; Maggie Glass; Linda May
Subject: RE: Updated ETC forms for energy projects

Erika,

We will link to your page when you set them up on your site. (That way we won't have to worry about hosting different versions of the same forms.)

Bob

Bob Thomas, Tax Analyst
Research and Review
S.C. Department of Revenue
803-898-5786
thomaro@sctax.org

Note: This is my personal opinion. It is not to be construed as the Department's official position regarding this matter. It is not binding on the Department or its employees. If a formal, binding ruling is necessary, please see the Information Guide found on our website, which explains our procedures for requesting a private revenue opinion.

From: Myers, Erika [mailto:emyers@energy.sc.gov]
Sent: Friday, October 16, 2009 5:04 PM
To: Bob Thomas
Cc: Jerilynn VanStory; Sylvan D. Proser
Subject: RE: Updated ETC forms for energy projects

Bob,
Thank you for the additional amendments. Attached are the final ETC forms with your recommended changes. Could you please post these on www.sctax.org near the comparable tax forms? We will also be posting these at www.energy.sc.gov under Tax Incentives.
Thanks again for all your help!
Erika

Erika H. Myers
Manager, Renewable Energy Programs
South Carolina Energy Office
1200 Senate Street
408 Wade Hampton Building
Columbia, SC 29201
(803) 737-7951 - direct
1-800-851-8899 - toll free
(803) 737-9846 - fax
emyers@energy.sc.gov

From: Bob Thomas [mailto:THOMARO@sctax.org]
Sent: Friday, October 09, 2009 2:21 PM
To: Myers, Erika
Cc: Jerilynn VanStory; Sylvan D. Proser
Subject: FW: Updated ETC forms for energy projects
Importance: High

Erika,

I mentioned before that ETC-40, lines 6 and 7 should include a statement to exclude any gallons sold as distilled spirits. I still think you need that statement.

ETC-49 does not have the deadline for applying the credit in bold. I would go ahead and in bold it in the ETC-50 instructions as well. You did that for -40 and -41.

Also, based on ETC-40, you need to amend § 12-6-3600(B)(3) to remove the provision saying that name plate design capacity can be specified in bushels of grain ground.

Have a great weekend!

Bob

Bob Thomas, Tax Analyst
Research and Review
S.C. Department of Revenue
803-898-5786
thomaro@sctax.org

Note: This is my personal opinion. It is not to be construed as the Department's official position regarding this matter. It is not binding on the Department or its employees. If a formal, binding ruling is necessary, please see the Information Guide found on our website, which explains our procedures for requesting a private revenue opinion.

From: Myers, Erika [mailto:emyers@energy.sc.gov]
Sent: Wednesday, October 07, 2009 2:33 PM
To: Bob Thomas
Cc: Jerilynn VanStory
Subject: Updated ETC forms for energy projects
Importance: High

Bob,
I made all the changes that you and Jerilynn had requested to ETC 40, 41, 49 and 50. Please review to make sure they are correct. Also, I couldn't exactly remember why I had to change the dates on TC-40 to January 1st - do I need to do that for all of the forms?
Thank you!
Erika

Erika H. Myers
Manager, Renewable Energy Programs
South Carolina Energy Office
1200 Senate Street
408 Wade Hampton Building
Columbia, SC 29201
(803) 737-7951 - direct
1-800-851-8899 - toll free
(803) 737-9846 - fax
emyers@energy.sc.gov

EXHIBIT

F

1 when I get to her questions.

2 We can go off the record.

3 - - -

4 (Discussion off the record.)

5 - - -

6 MR. DOERRING: Back on the record.

7 BY MR. DOERRING:

8 Q Ms. Myers, I'm showing you Petitioner's
9 Exhibit 7, a copy of 12-6-3620. As counsel
10 observed, a couple portions are highlighted for
11 your reference.

12 As part of your duties, Ms. Myers, as a
13 coordinator of renewable energy resources at the
14 State Energy and then as manager of renewable
15 energy resources at State Energy, describe your
16 duties and responsibilities at that office when an
17 application for tax credits under this section was
18 filed.

19 A Well, to begin, once this legislation
20 passed, we were contacted by the Department of
21 Revenue. And we jointly developed the application
22 for Biomass Resource Credits to ensure that it was
23 compatible with the required information from the
24 Department of Revenue.

25 Q So it's your understanding that when

1 the -- this tax credit legislation was approved by
2 our General Assembly, that the Department of
3 Revenue contacted State Energy or the State Energy
4 contacted the Department of Revenue first?

5 A I don't know who contacted who first
6 since we were always in communication.

7 Q So there was a constant level of
8 communication between the Energy Office and the
9 Department of Revenue?

10 A At this period of time.

11 Q And your communications were related to
12 the preparation primarily of forms; is that your
13 recollection?

14 A Correct. So the Department of Revenue
15 needed to create an amendment to their existing
16 Landfill Gas Tax Credit form to accommodate the
17 changes in the Biomass Resource Tax Credit.

18 Q Now, were -- was State Energy preparing
19 the initial drafts of the Biomass Energy Tax Credit
20 form, the ETC-50, or was this being done by the
21 Department of Revenue?

22 A The forms were jointly developed. I
23 would say it was a collaborative effort.

24 Q Uh-huh. Uh-huh.

25 A Again, to ensure the smooth passage of

EXHIBIT

G

1 A I don't recall the other applications as
2 well, so I do not recall.

3 Q Do you recall that -- at any time, did
4 Ms. Lancaster disagree with your legal
5 interpretation or views of what was required with
6 the tax credit statute?

7 A As I mentioned earlier, I do not recall a
8 disagreement.

9 Q At the time you were reviewing and
10 considering the 2010 tax credit applications, did
11 you consult with anyone concerning your legal
12 requirements of the tax credit statute?

13 A Sorry. Repeat the question.

14 Q I'll withdraw and restate.

15 At the time you were reviewing the 2010
16 tax credit applications, Ms. Myers, did you consult
17 with anyone else concerning what you thought to be
18 the legal requirements of the statute?

19 A I actually did. I spoke to Jerilynn
20 VanStory with the South Carolina Department of
21 Revenue.

22 Q And would that have been prior to
23 January 31st, 2011 when the tax credit applications
24 were filed?

25 A Yes, sir. I spoke with her the day after

1 I got the call from International Paper in
2 December.

3 Q In December of 2010?

4 A Yes, sir.

5 Q And that would have been a call from whom
6 at International Paper?

7 A From Tracy Bolger -- Bolger.

8 Q Tell me what your conversation was with
9 Ms. VanStory at the Department of Revenue in
10 December of 2010.

11 A Sure. I spoke to Jerilynn about the
12 application and -- or the pending application,
13 because it had not yet been submitted, and I had
14 some initial concerns. And I wanted to get her
15 opinion on the matter.

16 And she, essentially, told me that she
17 had concerns that this would not qualify as a
18 commercial use.

19 Q And why did she express her belief it
20 didn't qualify as a commercial use?

21 A Because in her interpretation of the
22 statute, commercial use wouldn't require that the
23 taxpayer be able to accrue revenue from the
24 modifications or installations of biomass energy
25 equipment.

EXHIBIT H

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

International Paper Company)	Docket No.: 11-ALJ-30-0192-CC.
)	
Appellant/Petitioner,)	
)	
vs.)	AFFIDAVIT OF TRACY BOLGER
)	
SC State Energy Office)	
)	
Respondent.)	
<hr/>		

Personally appeared before me, Tracy Bolger, who, first being duly sworn, deposes and says that:

1. I am competent to testify in this matter, the statements made herein are based on my own personal knowledge, and if called to testify in this matter would testify to the statements that follow.
2. I am employed as a Senior State Income Tax Analyst in the Tax Department for International Paper Company ("International Paper"), and have been employed by International Paper as a state income tax analyst since May 2006.
3. I am a certified public accountant, with a Bachelors of Science Degree in Accounting, and possess over 10 years of experience consisting of tax preparation, planning, audit resolution, financial analysis, and auditing and accounting. Prior to my employment with International Paper, I was employed as a public accountant for Jackson, Howell & Associates and Deloitte & Touche, LLC.
4. In my position as Senior State Income Tax Analyst, my duties and responsibilities generally include state income tax compliance; state income tax audit, examination, and review;

state income tax accounting; and state income tax project management. I directly report to, Robert Shands, the State Tax Manager for International Paper.

5. My duties as Senior State Income Tax Analyst included research, analysis and preparation of International Paper's 2010, Application for Biomass Resource Credit, Form SC SCH. ETC-50, filed with the South Carolina State Energy Office (the "Application"). A copy of this application with 18 pages of narrative explanation, attachments, and equipment listing and cost schedules is attached as Exhibit A. The Application lists equipment costs for International Paper's Georgetown and Eastover, South Carolina paper mill production facilities based on project classifications. The Application specifically identifies 20 capital upgrade and improvement projects for equipment at the Georgetown facility and 25 capital upgrade and improvement projects for the Eastover facility.

6. The Application was filed with the South Carolina State Energy Office ("State Energy") on January 31, 2011. To my knowledge, this was the first such application or claim for a credit filed by International Paper under South Carolina Code Section 12-6-3620 (the "Biomass Resource Credit").

7. Prior to the filing of the Application, I researched and analyzed the Biomass Resource Credit and communicated with and received information from managers and engineers at our Georgetown and Eastover, South Carolina paper mill facilities concerning equipment that may qualify for the Biomass Resource Credit.

8. In November 2010, I called the State Energy office and spoke with Erika Myers, Manager, Renewable Power Programs, to gain a better understanding of the Biomass Resource Credit, including State Energy Office's requirements for the credit, and whether equipment upgrades and improvements located at process areas at International Paper's South Carolina

plants would qualify. This was the first of several telephone conversations I had with Ms. Myers, where I called her, asked her questions about plant areas and equipment upgrades and improvements, and she responded with general guidance about whether equipment upgrades and improvements at International Paper's plants would qualify for the Biomass Resource Credit. In my conversations with Ms. Myers, she never made any comment or provided any guidance that the Biomass Resource Credit was limited to equipment that produced new or added energy, that the credit was limited to new or existing plants or facilities in South Carolina, or that for the credit to apply qualifying equipment must be in physical contact with a biomass resource. I prepared the Application relying, in part, on the guidance provided by Ms. Myers.

9. During one of my calls with Erika Myers, I notified her of the intent of International Paper to file a 2010 application for equipment upgrades and improvements at the Georgetown and Eastover, South Carolina facilities. I offered to arrange an inspection of International Paper's Georgetown facility so that we could meet with State Energy representatives to discuss the Biomass Resource Credit; and so State Energy representatives could inspect the equipment, ask questions, and receive any additional information they needed in order to evaluate the equipment for purposes of the Biomass Resources Credit.

10. On December 3, 2010, I followed up my call to Erika Myers with an email to her, proposing dates for the Georgetown facility inspection visit. A copy of this email is attached as Exhibit B.

11. On December 8, 2010, I sent a follow-up email to Erika Myers attempting to confirm a date for State Energy's inspection of the Georgetown facility. A copy of this email is attached as Exhibit C.

12. On December 9, 2010, I received a reply email from Erika Myers stating she wished to invite Ralph Jenkins, a staff engineer for State Energy, to the Georgetown facility inspection, and confirming dates of availability. A copy of this email is attached as Exhibit D.

13. On December 9, 2010, I replied to Erika Myers' email and inquired whether the South Carolina Department of Revenue could attend the Georgetown facility inspection, and discussed dates for the inspection. A copy of this email is attached as Exhibit E.

14. Later in the day on December 9, 2010, I emailed Erika Myers again, advised her there that we would be unable to schedule the inspection in December, and proposed dates in January. In the same email, I asked for her to call me to discuss how she would like the plant inspection to be arranged, and how long she expected the tour to take so I could schedule with the plant engineering staff to show the improvement projects and the equipment used in the papermaking process. I also asked her how she may wish to see listings of the fixed asset additions (the equipment subject to the claimed credit) or projects of a certain dollar amount to help with her review. A copy of this email is attached as Exhibit F.

15. Attached are a series of emails between Erika Myers and me later on December 9, 2010, where we discussed whether the Department of Revenue would attend the Georgetown facility inspection, and scheduled a call between us for the next day, December 10, 2010, to plan for the Georgetown facility inspection. I offered to prepare reports for her to assist at the inspection tour. A copy of this email chain is attached collectively as Exhibit G.

16. We were unable to speak on December 10, 2010, but I did speak with Erika Myers by phone on December 13, 2010 concerning what equipment listings and reports she needed for purposes of the Georgetown facility inspection.

17. Because I had not received information from Erika Myers or the State Energy Office concerning whether representatives of the South Carolina Department of Revenue would be attending the Georgetown facility inspection, I called the South Carolina Department of Revenue, speaking with different representatives, including Ricky Taylor and Jerrylynn Van Story.

18. On January 5, 2011, I emailed Erika Myers, representing that January 26, 2011 was a good date for the Georgetown facility inspection, and stating that the Department of Revenue had not yet decided whether to attend. A copy of this email and Erika Myer's January 6, 2011 email response are collectively attached is attached as Exhibit H.

19. I eventually spoke with Duncan Rogers at the Department of Revenue who advised me that he would be attending the Georgetown facility inspection on behalf of the Department of Revenue. At his request, I sent Mr. Rogers information concerning the paper making process and the black liquor fuel process at the plant.

20. On January 11, 2011, I emailed Erika Myers offering to provide her with project cost summaries for the equipment at the Georgetown facility inspection, as well as a description memo giving a description of the project and a listing of the equipment for each project and equipment cost. I reminded her that the project cost summaries can be lengthy and run between 50-150 pages each, and offered to provide her with these summaries at the end of the month. A copy of this email is attached as Exhibit I.

21. Erika Myers replied by email dated January 13, 2011, stating that providing our project memo should be sufficient for the Georgetown facility inspection, and if there are any components for which she had specific questions she would coordinate after the tour and get additional back-up material. She also represented that she was scheduling a similar plant tour of

Domtar, another pulp paper producer in South Carolina who had submitted a credit application for \$42 million and that she would be very busy the next several months. A copy of this email is attached as Exhibit J.

22. Following Erika Myers' January 13, 2011 email, I sent to her equipment improvement and upgrade lists including descriptions and project explanations for the Georgetown facility.

23. Attached is an email from me to Erika Myers confirming the Georgetown facility inspection tour for January 26, 2011, giving directions to the Georgetown facility, including safety instructions, and follow-up emails between us scheduling a conference call to discuss the upcoming inspection tour. Copies of these emails are attached collectively as Exhibit K.

24. The Georgetown facility inspection was held on January 26, 2011 as scheduled, and was attended by me, Robert Shands, and International Paper engineers and plant representatives; Erika Myers and Ralph Jenkins on behalf of State Energy; and Duncan Rogers from the South Carolina Department of Revenue. State Energy and Department of Revenue representatives were given an extensive tour of the Georgetown facility, were able to view and asked questions about the equipment for which International Paper was seeking the Biomass Resource Equipment Credit; asset/equipment and related cost information were provided to State Energy; and State Energy representatives were allowed and did take pictures of the equipment at the facility.

25. International Paper filed the Application with State Energy on January 31, 2011.

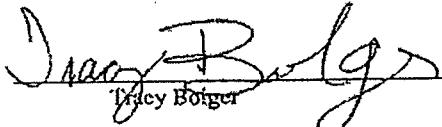
26. Also on January 31, 2011, I participated in a conference call with Roberts Shands and me on behalf of International Paper, and Erika Myers and Ralph Jenkins on behalf of State

Energy. During the call, Erika Myers requested additional information concerning steam production at International Paper's facilities in Georgetown and Eastover.

27. I followed up with International Paper's Georgetown and Eastover plant representatives to obtain the information requested by Erika Myers and on February 16, 2011, I provided additional information to State Energy through an email to Erika Myers containing comparative steam production data for 2009 and 2010 at both the Georgetown and Eastover facilities, as well as information concerning the percentage yields of paper fibers to biomass energy from dry logs at both the Georgetown and Eastover facilities. I also responded to certain specific follow-up questions from Erika Myers concerning certain equipment identified in the Application. A copy of this email is attached as Exhibit L.

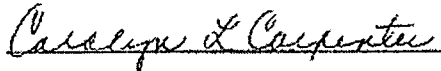
28. On March 1, 2011 I received the State Energy response to the Application by email. A copy of this email is attached as Exhibit M.

FURTHER AFFIANT SAITH NOT.


Tracy Botger

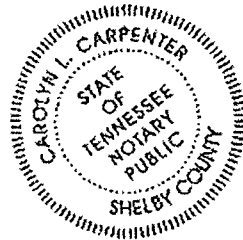
SWORN to and subscribed before me

this 28th day of December, 2011.



Notary Public for State of Tennessee

My Commission Expires: 3/1/2014



EXHIBIT

I

0007101-0044

From: Myers, Erika
Sent: Thursday, April 07, 2011 10:45 AM
To: Lancaster, Ashlie
Subject: FW: The recent contested case filing concerning the biomass credit

Erika H. Myers
Manager, Renewable Energy Programs
South Carolina Energy Office
1200 Senate Street
408 Wade Hampton Building
Columbia, SC 29201
(803) 737-7951 - direct
(803) 737-9846 - fax
emyers@energy.sc.gov

From: Jerilynn VanStory [mailto:VanStoJ@sctax.org]
Sent: Thursday, April 07, 2011 10:30 AM
To: Myers, Erika
Cc: Milton Kimpson
Subject: The recent contested case filing concerning the biomass credit

Department of Revenue was copied on Erik Doerring's request for a contested case hearing involving the taxpayer who wants to claim the biomass credit for certain replacement property as well as other property. Was there a general counsel's opinion issued on this matter and can we get a copy? Also, who will be handling the matter for SC Energy Office? I think the line by line discussion of each piece of equipment as well as the corroborating letters you obtained from Clemson University and the SC Department of Agriculture were very well done. I am passing on our copy to Milton Kimpson, our general counsel for litigation. Although, I don't think we will be involved in the determination of whether the equipment is qualifying equipment, I am going to give him a brief overview of this matter so he will be prepared if the Department is interpleaded.

EXHIBIT

J

From: Lancaster, Ashlie
To: Betts, Frank
Subject: lockhart Power
Date: Wednesday, April 11, 2012 4:45:00 PM
Attachments: lockhart etc 50 2011.doc

Can you please review the attached? I talked with Revenue and all expenses prior to the equipment being placed in service are eligible even if from prior calendar years. I also talked with them about the food and travel expenses and DOR indicated that if the expenses are capitalized as part of the eligible equipment expenses (which they are) then they should be counted. AL

Ashlie Lancaster
SC Energy Office
1200 Senate Street
408 Wade Hampton Building
Columbia, SC 29201
803-737-9822

THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

RECEIVED

SEP 09 2014

SC Court of Appeals

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

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

International Paper Company, Inc.,Appellant,

v.

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

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

Case No. 12-ALJ-30-0086-CC
Appellate Case No. 2013-000114

International Paper Company, Inc.,Appellant,

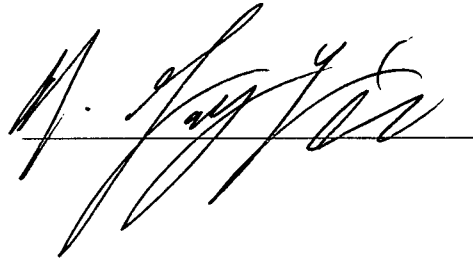
v.

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

CERTIFICATE OF SERVICE

The undersigned, N. Gary Lewis, being duly sworn, says that he served the Appendix to Record on Appeal, in the above captioned appeal, by hand delivering a true and correct copy to counsel for the Respondent at the address shown below, on September 9, 2014:

Keith McCook, Esq.
Frank S. Potts, Esq.
Office of General Counsel
State Budget and Control Board
1201 Main Street, Suite 410
Columbia, South Carolina 29211

A handwritten signature in black ink, appearing to read "F. S. Potts", is written over a horizontal line. The signature is stylized and cursive.