THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

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

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

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

v.

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

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

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

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

v.

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

RECORD ON APPEAL – VOLUME II
(Proceedings Before The Circuit Court)

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NOTE: This Record on Appeal includes several motions and memoranda that have duplicative attachments and exhibits. To avoid significant duplication in this Record, any lengthy attachments and exhibits have been reproduced only once and cross-references to where the document may be found in this Record have been inserted.

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STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)))	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT Civil Action No.: 2013-CP-40-0572
International Paper Company, Plaintiff, v. South Carolina State Energy Office, Defendant.	))))))))	**ORDER GRANTING DEFENDANT'S MOTION TO DISMISS AND DENYING PLAINTIFF'S MOTION TO STAY**

RICHLAND COUNTY
2013 JUN 16 PM 4: 25
FILED
JEANETTE W. McBRIDE
CLERK OF COURT & C.C.P.

This matter is before the Court upon Defendant's Motion to Dismiss pursuant to SCRCP 12(b)(6) and 12(b)(8) and Plaintiff's Motion to Stay. At hearings on May 16, 2013 and June 15, 2013 attended by counsel for the parties, this Court heard oral argument on the parties' motions. Based on the pleadings and arguments of counsel, this Court finds that Defendant's Motion to Dismiss should be granted and Plaintiff's Motion to Stay should be denied.

Under SCRCP 12(b)(8) dismissal is ordinarily appropriate when another action is pending between the same parties for the same claim. "[T]he claim must be precisely or substantially the same in both proceedings in order for the drastic remedy of dismissal to be appropriate under Rule 12(b)(8)." Cricket Cove Ventures, LLC v. Gilland, 390 S.C. 312, 701 S.E.2d 39, 45 (Ct. App. 2010).

Plaintiff's Complaint alleges:

18. On or before January 31, 2011 International Paper filed an Application for Biomass Resource Credit with the State Energy Office requesting that the State Energy Office certify that the 2010 Costs qualified for the Biomass Resource Credit ("2010 Application").

19. On March 1, 2011 the State Energy Office responded to International Paper's 2010 Application by email ("2010 Decision").

20. The 2010 Decision did not certify that the 2010 Costs qualified for the Biomass Resource Credit.

SCANNED

21. On March 25, 2011 International Paper filed a request for a contested case hearing with the South Carolina Administrative Law Court ("ALC"), stating that the 2010 Decision should have certified that the 2010 Costs qualified for the Biomass Resource Credit ("2010 Case").

26. On or before January 31, 2012 International Paper filed an Application for Biomass Resource Credit with the State Energy Office requesting that the State Energy Office certify that that the 2011 Costs qualified for the Biomass Resource Credit ("2011 Application").

27. On March 1, 2012 the State Energy Office responded to International Paper's 2011 Application for Biomass Resource Credit by email ("2011 Decision").

28. The 2011 Decision did not certify that the 2011 Costs qualified for the Biomass Resource Credit.

29. On March 2, 2012 International Paper filed a request for a contested case hearing with the ALC, stating that the 2011 Decision should have certified that the 2011 Costs qualified for the Biomass Resource Credit ("2011 Case").

34. On December 19, 2012 the ALC issued an order, a copy of which is attached as Exhibit A, granting the State Energy Office's October 3, 2012 Motion to Dismiss and remanding to the State Energy Office ("ALC Order").

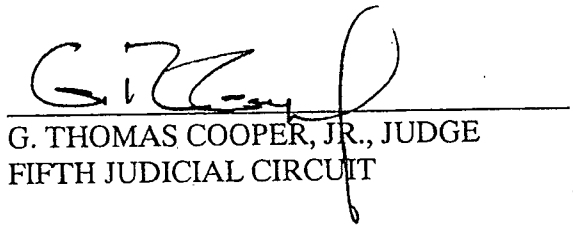
37. On January 17, 2013 International Paper appealed the ALC Order ("Appeal").

39. Upon information and belief, either this Court or the ALC has jurisdiction over the State Energy Office when it performs its functions under S.C. Code Ann. § 12-6-3620.

42. The time limit for commencing a civil action in this Court may expire before the Appeal is resolved and International Paper may then have no opportunity for judicial review if it does not commence an action with this Court and a court ultimately determines that the ALC does not have jurisdiction over the State Energy Office.

As can be seen by the allegations of the Complaint, Plaintiff admits that the current action involves the same claim made before the ALC, which is presently pending on appeal. Dismissal under SCRCP 12(b)(8) is therefore appropriate and Defendant's Motion to Dismiss is granted and Plaintiff's Motion to Stay is denied.

IT IS SO ORDERED:



G. THOMAS COOPER, JR., JUDGE
FIFTH JUDICIAL CIRCUIT

July 16, 2013
Columbia, South Carolina

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT
International Paper Company, Inc., Plaintiff, v. South Carolina State Energy Office, Defendant.	)	Civil Action No.: 2013-CP-40-0572 **ORDER GRANTING DEFENDANT'S MOTION TO DISMISS AND DENYING PLAINTIFF'S MOTION TO STAY**

2013 MAY 23 PM 4:23
JEANETTE W. McBRIDE
C.C.P. & G.S.

This matter is before the Court upon Defendant South Carolina State Energy Office's ("SEO") Motion to Dismiss pursuant to SCRCP 12(b)(6) and 12(b)(8) and Plaintiff International Paper Company, Inc.'s ("IP") Motion to Stay. At a hearing on May 16, 2013 attended by counsel for the parties, this Court heard oral argument on the parties' motions. For the reasons stated below, and based on the pleadings, arguments of counsel and the parties' written submissions, this Court finds that Defendant's Motion to Dismiss should be granted and Plaintiff's Motion to Stay should be denied.

I. BACKGROUND

Plaintiff International Paper Company, Inc. brings this declaratory judgment action alleging it is entitled to a declaration that Plaintiff's 2010 and 2011 costs qualify for the Biomass Resource Credit pursuant to S.C. Code Ann. § 12-6-3620 and that the State Energy Office is required to certify that such costs qualify for the Biomass Resource Credit. (Complaint ¶¶ 44-49). As can be seen by the allegations of Plaintiff's Complaint, Plaintiff initially submitted these identical issues to the Administrative Law Court ("ALC").

Plaintiff's Complaint alleges:

SCANNED

18. On or before January 31, 2011 International Paper filed an Application for Biomass Resource Credit with the State Energy Office requesting that the State Energy Office certify that the 2010 Costs qualified for the Biomass Resource Credit ("2010 Application").

19. On March 1, 2011 the State Energy Office responded to International Paper's 2010 Application by email ("2010 Decision").

20. The 2010 Decision did not certify that the 2010 Costs qualified for the Biomass Resource Credit.

21. On March 25, 2011 International Paper filed a request for a contested case hearing with the South Carolina Administrative Law Court ("ALC"), stating that the 2010 Decision should have certified that the 2010 Costs qualified for the Biomass Resource Credit ("2010 Case").

. . .

26. On or before January 31, 2012 International Paper filed an Application for Biomass Resource Credit with the State Energy Office requesting that the State Energy Office certify that that the 2011 Costs qualified for the Biomass Resource Credit ("2011 Application").

27. On March 1, 2011 the State Energy Office responded to International Paper's 2011 Application for Biomass Resource Credit by email ("2011 Decision").

28. The 2011 Decision did not certify that the 2011 Costs qualified for the Biomass Resource Credit.

29. On March 2, 2012 International Paper filed a request for a contested case hearing with the ALC, stating that the 2011 Decision should have certified that the 2011 Costs qualified for the Biomass Resource Credit ("2011 Case").

Plaintiff's Complaint further alleges that the above cases were consolidated by the ALC and that the State Energy Office moved to dismiss the action alleging that the ALC did not have jurisdiction.

The Complaint further alleges that by an order dated December 19, 2012 (the "Order"), the ALC granted the State Energy Office's motion. The Order, which was attached to and

incorporated into the Complaint as Exhibit A, found that while the ALC did not have jurisdiction over the case as a contested case, the ALC would have had appellate jurisdiction over the case pursuant to S.C. Code Ann. §1-23-600(D) (2011). However, because Plaintiff failed to file the action as an appeal, the ALC found that it had no appellate jurisdiction. (Order at 8).

The ALC's order stated:

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

(Order at 8).

Unhappy with the result in the ALC, on January 17, 2013, Plaintiff appealed the ALC's Order to the South Carolina Court of Appeals where the appeal is still pending. Plaintiff then filed this declaratory judgment action. Defendant subsequently filed a Motion to Dismiss pursuant to SCRCP 12(b)(6) and 12(b)(8) and Plaintiff moved to stay the case.

II. DISCUSSION

A. Defendant's Motion To Dismiss Pursuant To SCRCP 12 (b)(8).

The Court finds that Plaintiff's Complaint should be dismissed pursuant to SCRCP 12 (b)(8) in that the issues Plaintiff seeks to litigate in the present case are the identical issues pending in the ALC case that is on appeal to the S.C. Court of Appeals. Under Rule 12(b)(8),

dismissal is appropriate when another action is pending between the same parties for the same claim. To prevail on a motion to dismiss pursuant to Rule 12(b)(8), the movant must show that the actions in question are between the same parties in their same capacities. Cricket Cove Ventures, LLC. v. Gilland, 390 S.C. 312, 701 S.E.2d 39 (Ct. App. 2010). "[T]he claim must be precisely or substantially the same in both proceedings in order for the drastic remedy of dismissal to be appropriate under Rule 12(b)(8)." Id. at 45.

As can be seen by the allegations of the Complaint, Plaintiff admits that the current action is the same action that is pending on appeal to the S.C. Court of Appeals. First, the parties to the present action and the ALC action are identical. Second, the relief requested in the present case, is precisely the same relief requested in the ALC case. In the present case, Plaintiff requests that the following relief:

> 43. Upon information and belief, this Court can remedy the State Energy Office's violation of S.C. Code Ann. § 12-6-3620 by determining that the 2010 Costs and 2011 Costs qualify for the Biomass Resource Credit and issuing an order to the State Energy Office directing it to certify that the costs so qualify.
>
> . . .
>
> 49. Upon information and belief, International Paper is entitled to a declaration that its 2010 Costs and 2011 Costs qualify for the Biomass Resource Credit and that the State Energy Office is required to certify that such costs qualify for the Biomass Resource Credit.

This relief is precisely the same relief Plaintiff alleges in its Complaint that it requested in the ALC. Plaintiff alleged:

> 21. On March 25, 2011 International Paper filed a request for a contested case hearing with the South Carolina Administrative Law Court ("ALC"), stating that the 2010 Decision should have certified that the 2010 Costs qualified for the Biomass Resource Credit ("2010 Case").
>
> . . .
>
> 29. On March 2, 2012 International Paper filed a request for a

contested case hearing with the ALC, stating that the 2011 Decision should have certified that the 2011 Costs qualified for the Biomass Resource Credit ("2011 Case").

Accordingly, the Court finds that Plaintiff's Complaint should be dismissed pursuant to SCRCP 12 (b)(8) in that there is a pending case between the same parties for the same claims that Plaintiff seeks to litigate in the present case.

The Court also finds that a declaratory judgment action is not proper when an identical action is already pending between the same parties involving the same issues. As the South Carolina Court of Appeals held in Medical University of South Carolina v. Taylor, 294 S.C. 99, 362 S.E.2d 881 (Ct. App. 1987):

> The general rule followed by most jurisdictions is that a court will not entertain a declaratory judgment action "if there is pending, at the time of the commencement of the declaratory action, another action or proceeding to which the same persons are parties [and] in which are involved and may be adjudicated the same identical issues that are involved in the declaratory judgment action." The general rule is especially applicable '"where a special statutory remedy has been provided, or where another remedy will be more . . . appropriate under the circumstances.'" (Citations omitted).

Id. at 883-884. Plaintiff's appeal from the ALC's order is still on appeal to the South Carolina Court of Appeals. Therefore, it would be improper for this Court to entertain a declaratory judgment action between these same parties in a different forum.

B. Defendant's Motion To Dismiss Pursuant to SCRCP 12 (b)(6).

The Court also finds that Plaintiff's attempt to circumvent the administrative process by bringing a complaint for declaratory relief fails as a matter of law. In reviewing a 12 (b)(6) motion, the Court is to construe the complaint in a light most favorable to the nonmovant and determine if the facts alleged and the inferences reasonably deducible from the pleadings would entitle the plaintiff to relief on any theory of the case. Rydde v. Morris, 381 S.C. 643, 646, 675 S.E.2d 431, 433 (2009). If the facts alleged and inferences deducible therefrom would entitle the

plaintiff to any relief, then dismissal under Rule 12(b)(6) is improper. Sloan Constr. Co. v. Southco Grassing, Inc., 377 S.C. 108, 113, 659 S.E.2d 158, 161 (2008).

As was previously discussed, Plaintiff initiated an action before the ALC for the identical relief it seeks here. That case is currently on appeal at the S.C. Court of Appeals. A court ordinarily will refuse to grant a declaratory judgment where a special statutory remedy has been provided. "Gratuitous interference" in the administrative process should be avoided. Williams Furniture Corp. v. Southern Coatings & Chem. Co., 216 S.C. 1, 7-8, 56 S.E.2d 576, 579 (1949) (dismissing complaint holding that a declaratory judgment was not appropriate where plaintiff company's claim that it was not liable for worker's compensation benefits was more appropriately handled by the workers compensation board); Smith v. S.C. Ret. Sys., 336 S.C. 505, 520 S.E.2d 339 (Ct. App. 1999)(dismissing former wife's declaratory judgment claim seeking benefits under a QDRO holding that a declaratory judgment would interfere with wife's administrative remedy before the S.C. Ret. Sys. and possible subsequent appeal to the ALC). The Court, therefore, should not serve as a substitute for "a tribunal of original jurisdiction in issues that are ripe for litigation by the usual processes." Williams Furniture Corp., 216 S.C. at 8, 56 S.E.2d at 579; see also Garris v. Governing Bd. of S.C. Reinsurance Facility, 319 S.C. 388, 390, 461 S.E.2d 819, 821 (1995) ("Declaratory relief will ordinarily be refused where another remedy will be more effective or appropriate under the circumstances," as "relief is not generally available to one who has not exhausted administrative remedies."). Because Plaintiff's administrative action is on appeal to the S.C. Court of Appeals, and a declaratory judgment action could interfere with that appeal, Plaintiff's complaint should be dismissed pursuant to SCRCP 12 (b)(6).

The Court further finds that Plaintiff's declaratory judgment action should be dismissed

in that it is merely an attempt at procedural fencing by Plaintiff to resurrect a failed administrative appeal. Rather than live with the results of the administrative process that Plaintiff initiated, lost and now appealed, Plaintiff seeks to hedge its bets and forum shop by bringing a declaratory judgment action to avoid any potentially unfavorable outcome at the S.C. Court of Appeals. The South Carolina Supreme Court has held that a declaratory judgment action cannot be used as a procedural mechanism to secure delay or forum shop. Williams Furniture Corp. v. Southern Coatings & Chem. Co., 216 S.C. 1, 7-8, 56 S.E.2d 576, 579 (1949) ("[t]he wholesome purposes of declaratory acts would be aborted by its use as an instrument of procedural fencing either to secure delay or to choose a forum.") Plaintiff's bringing a declaratory judgment in an attempt to avoid the consequences of the ALC's holding that Plaintiff failed to properly invoke the ALC's appellate jurisdiction is exactly the type of procedural fencing that is prohibited by the South Carolina Supreme Court. "A declaratory judgment cannot resurrect substantive claims that are defeated by jurisdictional, exhaustion, mootness, or other defenses." Shariff v. Coombe, 655 F.Supp.2d 274, 297 (S.D.N.Y. 2009). Accordingly, the Court finds that Plaintiff's complaint should be dismissed in that it is an improper attempt at procedural fencing.

C. Plaintiff's Motion For Stay.

Based on the circumstances of this case, the Court finds a dismissal is more appropriate than a stay. Granting a motion for stay of proceedings rests entirely within the discretion of the trial judge. Spartanburg v. Belk's Dep't Store, 199 S.C. 458, 20 S.E.2d 157 (1942). As was previously discussed, the ALC found that while the underlying case was not properly before the ALC as a contested case, the case would have been properly before the ALC as an administrative appeal. However, Plaintiff failed to adhere to the ALC's rules of appellate procedure and properly perfect its appeal. (Order at 8). "Dismissal rather than a stay has been approved where

there is assurance that no party is prejudiced thereby." United States v. Michigan National Corp., 419 U.S. 1, 5 (1974); Englehardt v. Consolidated Rail, 756 F.2d 1368 (2d Cir. 1985) (holding a complaint may be dismissed when all relief sought may be obtained before the administrative agency or in a reinstituted proceeding); Hansen v. Norfolk and western Railway Co., 689 F.2d 707 (7th Cir. 1982) (holding the same).

If Plaintiff prevails on its appeal of the ALC Order, the case will be remanded back to the ALC as either a contested case or an ALC appeal. Therefore, Plaintiff will have its remedy through the administrative process and Plaintiff will suffer no prejudice by the dismissal of this declaratory judgment action which seeks the same relief Plaintiff seeks before the ALC. Because the relief Plaintiff seeks may be obtained administratively if Plaintiff prevails on appeal, a dismissal of the declaratory action is more appropriate than a stay. See Unisys Corp. v. S.C. Budget & Control Bd., 346 S.C. 158, 551 S.E.2d 263 (2001) (where the South Carolina Supreme Court upheld the dismissal of the plaintiff's complaint pursuant to SCRCP 12(b)(6) and 12(b)(8) because it found exhausting administrative remedies under the S.C. Procurement Code constituted the plaintiff's remedy). If Plaintiff loses on appeal, the case may be forever ended with prejudice because Plaintiff failed to perfect its appeal at the ALC level. Because Plaintiff cannot use this declaratory judgment action to resurrect the failed appeal, dismissal is appropriate. Even assuming for the sake of argument that after Plaintiff lost on appeal it could presumably bring an action in the circuit court, Plaintiff has failed to call to the Court's attention any alleged statute of limitation that would bar such an action. Accordingly, because Plaintiff would suffer no prejudice under any of the above scenarios, the Court finds that dismissal is appropriate.

III. CONCLUSION

For the foregoing reasons, Defendant's Motion to Dismiss is granted and Plaintiff's Motion to Stay is denied.

IT IS SO ORDERED:

G. THOMAS COOPER, JR., JUDGE
FIFTH JUDICIAL CIRCUIT

May 23, 2013
Columbia, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	Case No.
International Paper Company,	)	
Plaintiff,	)	
v.	)	**SUMMONS**
	)	(non-jury)
South Carolina State Energy Office,	)	
	)	
Defendant.	)	

RICHLAND COUNTY
FILED
2013 JAN 30 PM 12:07
JEANETTE W. McBRIDE
C.C.P. & G.S.

TO: THE DEFENDANT, SOUTH CAROLINA STATE ENERGY OFFICE:

YOU ARE HEREBY SUMMONED and required to answer the Complaint, herein, a copy of which is herewith served upon you, and to serve a copy of your answer to said complaint upon the subscriber at his office, which is physically located at 1221 Main Street, Suite 1800, Columbia, South Carolina and whose mailing address is Post Office Box 11390, Columbia, South Carolina, 29211, within thirty (30) days after service hereof, exclusive of the day of such service. If you fail to answer the complaint within the time aforesaid, the Plaintiff will apply to the Court for the relief demanded therein, and judgment by default will be rendered against you for the relief demanded in the Complaint.

MCNAIR LAW FIRM, P.A.

By: _____

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Attorneys for Plaintiff
International Paper Company

Dated: January 30, 2012
Columbia, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	Case No.
International Paper Company, Plaintiff,	)	
v.	)	**COMPLAINT** (non-jury)
South Carolina State Energy Office, Defendant.	)	

RICHLAND COUNTY FILED 2013 JAN 30 PM 12:17 JEANETTE W. McBRIDE C.C.P. & G.S.

The Plaintiff, International Paper Company ("International Paper") hereby submits its Complaint of the Defendant South Carolina State Energy Office ("State Energy Office") as follows:

1. International Paper is a corporation organized under the laws of the State of New York with its principal place of business in Memphis, Tennessee.

2. International Paper is qualified to do business in South Carolina and conducts business in Richland County, South Carolina.

3. Upon information and belief, the State Energy Office is an executive agency of the State of South Carolina established within the State Budget and Control Board by S.C. Code Ann. § 48-52-410 (2008).

4. This Court has personal jurisdiction over the parties as each is a resident of, located in, or does business in Richland County, South Carolina.

5. Upon information and belief, this Court may have subject matter jurisdiction.

6. This Complaint relates to actions taken by State Energy Office in Richland County and venue is proper in Richland County.

FACTS

7. International Paper operates two paper production mills in South Carolina, one in Georgetown, South Carolina ("Georgetown Mill") and one in Eastover, South Carolina ("Eastover Mill").

8. The paper and energy production processes used at each of the mills is the same. Wood, an organic material, is brought to a woodyard at the mill in the form of logs or woodchips. Logs are debarked and chipped at the mill. Wood chips travel from the woodyard to digesters. The wood chips are cooked in the digesters to separate the wood's two primary elements, cellulose and lignin. Once separated, the cellulose is further processed to produce paper at the mill. The separated lignin, together with cooking chemicals from the digester, are sent through an evaporator to a recovery boiler which burns the lignin to produce steam. The cooking chemicals are recovered in the lignin burning process, reconstituted, and sent back to the digesters for reuse in a continuous cycle. The steam produced by the recovery boilers is used as process steam at the mills and to power turbine generators.

9. The mills also utilize separate power boilers to power their turbine generators, and the power boilers use bark from the logs, coal, chipped tires, and other items as fuel.

10. Steam produced by the power boilers and recovery boilers is used for the commercial purpose of generating a profit.

11. More than 90% of the fuel used in the recovery boilers consists of organic material and by-products of wood processing.

12. Organic materials and by-products of wood processing are biomass resources.

13. S.C. Code Ann. § 12-6-3620 provides a tax credit for the costs of purchasing and installing equipment used to create energy for commercial use from a fuel consisting on no less than 90% biomass resource ("Biomass Resource Credit").

14. Costs incurred by a taxpayer which qualify for the Biomass Resource Credit must be certified by the State Energy Office under S.C. Code Ann. § 12-6-3620.

15. To obtain the maximum amount of Biomass Resource Credit available to a taxpayer under S.C. Code Ann. § 12-6-3620, the 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.

16. In calendar year 2010 International Paper incurred costs of $17,783,622.64 at the Georgetown Mill and $4,280,391.52 at the Eastover Mill for the purchase and installation of equipment used in its process of creating steam for a commercial use from a fuel consisting of no less than 90% organic materials and by-products of wood processing ("2010 Costs").

17. Upon information and belief, the 2010 Costs qualify for the Biomass Resource Credit.

18. On or before January 31, 2011 International Paper filed an Application for Biomass Resource Credit with the State Energy Office requesting that the State Energy Office certify that the 2010 Costs qualified for the Biomass Resource Credit ("2010 Application").

19. On March 1, 2011 the State Energy Office responded to International Paper's 2010 Application by email ("2010 Decision").

20. The 2010 Decision did not certify that the 2010 Costs qualified for the Biomass Resource Credit.

21. On March 25, 2011 International Paper filed a request for a contested case hearing with the South Carolina Administrative Law Court ("ALC"), stating that the 2010 Decision should have certified that the 2010 Costs qualified for the Biomass Resource Credit ("2010 Case").

22. On December 14, 2011 the State Energy Office filed a Motion to Dismiss the 2010 Case, alleging that the State Energy Office had not issued a final agency determination.

23. On March 5, 2012 the ALC issued an order denying the State Energy Office's Motion to Dismiss the 2010 Case but granting the State Energy Office leave to amend its 2010 Decision.

24. In calendar year 2011 International Paper incurred costs of $7,474,976.94 at the Georgetown Mill and $13,448,869.22 at the Eastover Mill for the purchase and installation of

equipment used in its process of creating steam for a commercial use from a fuel consisting of no less than 90% organic materials and by-products of wood processing ("2011 Costs").

25. Upon information and belief, the 2011 Costs qualify for the Biomass Resource Credit.

26. On or before January 31, 2012 International Paper filed an Application for Biomass Resource Credit with the State Energy Office requesting that the State Energy Office certify that that the 2011 Costs qualified for the Biomass Resource Credit ("2011 Application").

27. On March 1, 2011 the State Energy Office responded to International Paper's 2011 Application for Biomass Resource Credit by email ("2011 Decision").

28. The 2011 Decision did not certify that the 2011 Costs qualified for the Biomass Resource Credit.

29. On March 2, 2012 International Paper filed a request for a contested case hearing with the ALC, stating that the 2011 Decision should have certified that the 2011 Costs qualified for the Biomass Resource Credit ("2011 Case").

30. On March 14, 2012 the State Energy Office issued an amended response to the 2010 Application by email ("2010 Amended Decision").

31. On March 21, 2012 the State Energy Office issued an amended response to the 2011 Application by email ("2011 Amended Decision").

32. The ALC consolidated the 2010 Case and 2011 Case on May 1, 2012 ("Consolidated Case").

33. The State Energy Office filed a Motion to Dismiss the Consolidated Case on October 3, 2012, alleging that the ALC did not have jurisdiction over the State Energy Office in the proceedings.

34. On December 19, 2012 the ALC issued an order, a copy of which is attached as Exhibit A, granting the State Energy Office's October 3, 2012 Motion to Dismiss and remanding to the State Energy Office ("ALC Order").

35. The ALC Order found that Article I, Section 22 of the South Carolina Constitution required the State Energy Office to provide notice and an opportunity for hearing before an impartial adjudicator prior to issuing a final decision under S.C. Code Ann. § 12-6-3620 and the ALC had appellate jurisdiction to review final decisions of the State Energy office.

36. On December 28, 2012 International Paper requested an administrative hearing before the State Energy Office related to the 2010 Application and the 2011 Application.

37. On January 17, 2013 International Paper appealed the ALC Order ("Appeal").

38. The jurisdiction of the ALC over the State Energy Office is at issue in the Appeal.

39. Upon information and belief, either this Court or the ALC has jurisdiction over the State Energy Office when it performs its functions under S.C. Code Ann. § 12-6-3620.

40. Upon information and belief, only the ALC has jurisdiction over decisions of the State Energy Office under S.C. Code Ann. § 12-6-3620 if decisions of the State Energy Office are contested cases within the meaning of S.C. Code Ann. § 1-23-600(D) (Supp. 2012).

41. Upon information and belief, only this Court has jurisdiction over decisions of the State Energy Office under S.C. Code Ann. § 12-6-3620 if decisions of the State Energy Office are not contested cases within the meaning of S.C. Code Ann. § 1-23-600(D).

42. The time limit for commencing a civil action in this Court may expire before the Appeal is resolved and International Paper may then have no opportunity for judicial review if it does not commence an action with this Court and a court ultimately determines that the ALC does not have jurisdiction over the State Energy Office.

43. The State Energy Office did not and has not provided International Paper with notice and an opportunity for hearing with respect to the 2010 Decision, 2010 Amended Decision, 2011 Decision, or 2011 Amended Decision.

FOR A FIRST CAUSE OF ACTION
(Violation of S.C. Code Ann. § 12-6-3620)

44. Allegations set forth in Paragraphs 1 through 43 are incorporated by reference in this claim.

45. Upon information and belief, the State Energy Office has violated S.C. Code Ann. § 12-6-3620 by failing to certify that the 2010 Costs and 2011 Costs qualify for the Biomass Resource Credit.

46. Upon information and belief, this Court can remedy the State Energy Office's violation of S.C. Code Ann. § 12-6-3620 by determining that the 2010 Costs and 2011 Costs qualify for the Biomass Resource Credit and issuing an order to the State Energy Office directing it to certify that the costs so qualify.

FOR A SECOND CAUSE OF ACTION
(Declaratory Judgment)

47. Allegations set forth in Paragraphs 1 through 46 are incorporated by reference in this claim.

48. S.C. Code Ann. § 15-53-20 (2005) authorizes this Honorable Court to declare the rights of International Paper under S.C. Code Ann. § 12-6-3620.

49. Upon information and belief, International Paper is entitled to a declaration that its 2010 Costs and 2011 Costs qualify for the Biomass Resource Credit and that the State Energy Office is required to certify that such costs qualify for the Biomass Resource Credit.

PRAYER FOR RELIEF

WHEREFORE, International Paper prays for the following relief:

1. For a determination that the State Energy Office has violated S.C. Code § 12-6-3620 by failing to certify that International Paper's 2010 Costs and 2011 Costs qualify for the Biomass Resource Credit;

2. For a declaration that International Paper is entitled to receive the Biomass Resource Credit for the 2010 Costs and 2011 Costs;

3. For an order directing the State Energy Office to certify the costs included in the 2010 Application and 2011 Application and to notify International Paper that it qualifies for the credits so claimed and is allocated the amount of the credit so claimed;

4. For such other and further relief as this Court deems just and proper.

MCNAIR LAW FIRM, P.A.

By: _____

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Jeffrey T. Allen
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Post Office Box 11390
Columbia, SC 29211
803.799.9800
803.753.3278
Attorneys for Plaintiff
International Paper Company

Dated: January 30, 2012
Columbia, South Carolina

EXHIBIT A

Administrative Law Court Order – December 19, 2012
See R-I at 1-9

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)))	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT Civil Action No.: 2013-CP-40-0572
International Paper Company, Inc., Plaintiff, v. South Carolina State Energy Office, Defendant.	))))))))))	**MOTION TO RECONSIDER, ALTER, OR AMEND**

2013 JUN 10 PM 2:22
JEANETTE W. McBRIDE
C.P. & G.S.

Pursuant to Rules 52 and 59, SCRCP, the Plaintiff respectfully submits this motion to reconsider, alter or amend this Court's order dated and filed May 23, 2013, in which this Court granted the Defendant's motion to dismiss and denied the Plaintiff's motion to stay. The Plaintiff received written notice of the entry of this order on May 30, 2013. This motion is based upon the grounds set forth below, and upon the grounds set forth in the Plaintiff's proposed orders which were submitted to this Court and which are attached hereto (Tabs C and D) and incorporated herein by reference as grounds for the instant motion.

1. This Court's Order misinterprets the ALC's Order regarding appellate jurisdiction.

This Court's Order (drafted by the Defendant) finds that the ALC found it would have had appellate jurisdiction over this matter if the Plaintiff had properly filed a notice of appeal. (Order at 3, 7). While there is language in the ALC order to that effect, a full and complete reading of the ALC order demonstrates that the ALC did not so hold. Had the ALC ruled as interpreted by this Court's order, then the ALC would have dismissed the case outright. The ALC, however, remanded the case back to the Defendant. (Tab A at 9). The reason for the remand was as follows:

(a) the Defendant was required to but did not give the Plaintiff notice and opportunity to be heard and challenge the Defendant's refusal to grant the Plaintiff a biomass resource credit (Tab A at 5-8);

(b) the ALC's appellate jurisdiction is limited to "appeals from final decisions of contested cases pursuant to the APA" (Tab A at 5); and

(c) since the Defendant did not grant the Plaintiff a contested case hearing, there has never been a final determination entered in this case. (Tab A at 9, n.10).

In short, the ALC remanded the case back to the Defendant for a hearing and final determination from which the Plaintiff could then appeal. The Plaintiff has requested such a hearing and determination, but the Defendant has failed and refused to grant the hearing ordered by the ALC.

2. The Plaintiff has not engaged in "procedural fencing," is not attempting to "circumvent the administrative process," is not seeking to "secure delay or forum shop," and has not otherwise acted improperly in bringing the instant action.

This Court's Order (drafted by the Defendant) finds throughout that the Plaintiff, by bringing the instant action, has engaged in "procedural fencing," is attempting to "circumvent the administrative process," and is seeking to "secure delay or forum shop." (Tab A at 5-8, *passim*). Respectfully, nothing could be further from the truth.

There is no definitive law on the procedure for challenging the Defendant's refusal to grant the biomass resource credit sought by the Plaintiff. The appeal from the ALC's order involves questions of subject matter jurisdiction. The lack of jurisdiction can be raised at any time, and an appellate court will raise such issues on its own motion for the first time on appeal. It is thus possible that the Court of Appeals or Supreme Court, in the appeal from the ALC's order, will rule that the ALC does not have and can never have jurisdiction over any biomass resource credit decisions by the Defendant and, therefore, any challenge to the Defendant's

refusal here must be brought in the Circuit Court. It is for this reason that the Plaintiff brought the instant action and not for any ulterior purpose.

3. The Plaintiff specifically and repeatedly raised the potential statute of limitations problem at every possible opportunity.

This Court's Order (drafted by the Defendant) finds that, even if the Plaintiff lost on appeal, it could then bring an action in this Court and "Plaintiff has failed to call to the Court's attention any alleged statute of limitations that would bar such an action." (Tab A at 8). Again, respectfully, nothing could be further from the truth.

The Plaintiff has repeatedly raised the issue that the statute of limitations for bringing an action in this Court could expire during the pendency of the appeal from the ALC order:

(a) The Plaintiff raised the potential statute of limitations problem in its Complaint. (Tab B at 5, ¶¶ 41-42).

(b) The Plaintiff again raised the potential statute of limitations problem in its first proposed order to this Court, which was submitted at this Court's request and prior to the hearing in this matter. (Tab C at 2-3, *passim*).

(c) The Plaintiff again raised the potential statute of limitations problem at oral argument before this Court.

(d) Finally, the Plaintiff again raised the potential statute of limitations problem in its revised proposed order, which the Plaintiff submitted after the hearing at this Court's request. (Tab D at 2-6, *passim*).

In short, the Plaintiff has raised the potential statute of limitations problem at every possible opportunity. As noted earlier, an appellate court may find that the ALC does not have and can never have jurisdiction over the Defendant's refusal to grant the biomass resource credit. If an appellate court so rules, then the filing of the ALC action would not toll the statute of limitations

for bringing an action in this Court, and the statute of limitations for doing so could expire during the pendency of the appeal and before an appellate court rules. It is for this reason, and not for any ulterior purpose, that the Plaintiff brought the instant action. It is also for this reason that this Court's Order is in error when it finds that the Plaintiff will not suffer any prejudice under any scenario presented in this case. (Tab A at 8).

4. Granting the stay requested by the Plaintiff is the appropriate action under the unique circumstances of this case.

As shown above, no law provides any definitive guidance on how or where (which forum) to challenge the Defendant's refusal to grant a biomass resource credit, and an appellate court may ultimately rule that any relief must be obtained in this Court rather than in any proceedings before the ALC. Under these circumstances, staying the present action rather than dismissing it is the appropriate action, as recognized by the authorities cited in this Court's Order. (Tab A at 7-8, *citing* three federal cases that approved dismissal rather than a stay IF: there was assurance that no party would be prejudiced by the dismissal and all relief sought can be obtained in administrative proceedings) (See also authorities cited by Plaintiff in its proposed orders at Tab C, page 3, and Tab D, page 3, holding that a stay rather than dismissal is appropriate when jurisdiction is uncertain (as it is here) and a plaintiff may be barred from commencing a case if an action is dismissed (a danger that is also present here)).

Granting a stay rather than a dismissal will best preserve judicial resources and the resources of the parties. Under a stay, no court and no party will have to expend any resources on this matter, if at all, until after the appellate courts rule definitively in the appeal of the ALC order. Under this Court's Order of dismissal, however, the appellate courts and the parties will have to expend resources in an appeal from this Court's Order. If the appellate courts rule in the Plaintiff's favor in the ALC appeal, then the present action can be dismissed. If the appellate

courts rule that the ALC can never have jurisdiction over the issues presented here, then this action can proceed. In short, staying the present action pending the outcome of the ALC appeal best protects the resources of the entire judiciary, including the appellate courts, and the parties.

CONCLUSION

For all of the foregoing reasons, and for the reasons set forth in the Plaintiff's proposed orders, which are attached hereto at Tabs C and D, and incorporated herein as additional grounds for the instant motion, it is respectfully submitted that this Court should withdraw its May 23, 2013 Order and issue an amended order that stays the current action during the pendency of the appeal from the ALC order. In the alternative, the Plaintiff requests an amended order that corrects the errors identified herein and explains why, in light of those corrections, the instant actions should nevertheless be dismissed.

Respectfully submitted,

McNair Law Firm, P.A.

Erik P. Doerring
Jeffrey T. Allen
McNair Law Firm, P.A.
1221 Main Street, 18th Floor
Post Office Box 11390
Columbia, South Carolina 29211
(803) 799-9800

Attorneys for Plaintiff

June 10, 2013
Columbia, South Carolina

EXHIBIT A

Circuit Court Order – May 23, 2013
See R-II at 472-480

EXHIBIT B

Appellant's Complaint in Circuit Court Action
See R-II at 482-488

C

MCNAIR
ATTORNEYS

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May 9, 2013

The Honorable Jeanette W. McBride
Richland County Clerk of Court
Richland County Judicial Center
1701 Main Street, Room 205 (29201)
Post Office Box 2766
Columbia, South Carolina 29202

RICHLAND COUNTY
FILED
2013 MAY 15 PM 3:45
JEANETTE W. McBRIDE
C.C.P. & G.S.

Re: International Paper Company v. South Carolina State Energy Office
Case No. 2013-CP-40-0572

Dear Ms. McBride:

For Judge Cooper's consideration in advance of the motions hearings scheduled for May 16, 2013, at 9:30 a.m., International Paper Company submits the enclosed cases and proposed order. A courtesy copy of these materials is being provided to Judge Cooper by email, and is also being served upon opposing counsel by copy of this letter.

Please file the originals and return the file-stamped copies to me in the postage paid envelope provided.

Sincerely,

McNAIR LAW FIRM, P.A.

Erik P. Doerring
Shareholder

EPD:jr
Enclosures

cc: Theodore D. Willard, Jr., Esq.
Frank S. Potts, Esq.
The Honorable G. Thomas Cooper, Jr.

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

Mailing Address
Post Office Box 11390
Columbia, SC 29211

mcnair.net

COLUMBIA 1104088v3

Doerring, Erik

'm:	Rath, Jennifer
.it:	Thursday, May 09, 2013 5:31 PM
To:	'G. Thomas Cooper Jr. (gcooperj@sccourts.org)'; 'G. Thomas Cooper Jr. LC (gcooperLC@sccourts.org)'
Cc:	'Theodore D. Willard Jr. Esq. (tdw@montgomerywillard.com)'; 'tds@montgomerywillard.com'; Doerring, Erik; Allen, Jeff
Subject:	International Paper v. State Energy Office (13-CP-40-572)
Attachments:	Letter and cases.pdf; COLUMBIA-#1114334-v1-IPC_v__SEO__Plaintiff_s_Proposed_Order.DOCX
Contacts:	G. Thomas Cooper Jr.

Dear Judge Cooper,

Attached is a copy of International Paper's submission and proposed order with regard to the motions hearing which is scheduled to be heard before Your Honor on Thursday, May 16, 2013 at 9:30 a.m. Opposing counsel is copied on this email.

MCNAIR
ATTORNEYS

Jennifer L. Rath
Legal Secretary to Erik P. Doerring
jrath@mcnair.net | 803 753 3311 Direct

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Columbia Office 1221 Main Street | Suite 1800 | Columbia, SC 29201
803 799 9800 Main | 803 933 1502 Fax
Mailing Post Office Box 11390 | Columbia, SC 29211
VCard | Web site

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT
International Paper Company, Inc., Plaintiff, v. South Carolina State Energy Office, Defendant.	)	Civil Action No.: 2013-CP-40-0572 **ORDER GRANTING PLAINTIFF'S MOTION TO STAY AND DENYING DEFENDANT'S MOTION TO DISMISS**

This matter is before the Court upon Plaintiff International Paper Company, Inc.'s ("International Paper") Motion to Stay and Defendant South Carolina State Energy Office's ("State Energy Office") Motion to Dismiss pursuant to SCRCP 12(b)(6) and 12(b)(8). At a hearing on May 16, 2013 attended by counsel for the parties, this Court heard oral argument on the parties' motions. For the reasons stated below, and based on the pleadings, arguments of counsel and the parties' written submissions, this Court finds that Plaintiff's Motion to Stay should be granted and Defendant's Motion to Dismiss should be denied.

I. BACKGROUND

International Paper alleges that the State Energy Office has improperly failed to certify that International Paper's 2010 and 2011 costs qualify for the Biomass Resource Credit pursuant to S.C. Code Ann. § 12-6-3620 ("Credit").

International Paper submitted timely applications for the Credit to the State Energy Office for qualifying equipment placed in service in calendar years 2010 and 2011 ("Applications"). (Complaint ¶¶ 18, 26). The State Energy Office did not certify that the equipment in the Applications qualified for the Credit. (Complaint ¶¶ 19-20, 27-28).

International Paper filed requests for contested case hearings with the South Carolina Administrative Law Court ("ALC"), contesting the State Energy Office's failure to certify that the costs included in the Applications qualified for the Credit. (Complaint ¶¶ 21, 29). The cases were consolidated ("Consolidated Case"). (Complaint ¶ 32).

After the initial request for a contested case hearing had been pending for more than a year and a half, the State Energy Office filed a Motion to Dismiss the Consolidated Case arguing that the ALC lacked jurisdiction over the State Energy Office. (Complaint ¶ 33). The ALC granted the State Energy Office Motion to Dismiss, finding that the ALC only had jurisdiction to hear appeals from decisions of the State Energy Office (not contested case hearings involving the State Energy Office) and that International Paper had not properly invoked the ALC's appellate jurisdiction. (Complaint ¶ 34). International Paper appealed the decision of the ALC to the South Carolina Court of Appeals ("Appeal"). (Complaint ¶ 37). The appeal is presently pending.

On January 30, 2013 International Paper filed a Summons and Complaint with this Court. The basis for filing the action with this Court is set forth in the Complaint:

> 42. The time limit for commencing a civil action in this Court may expire before the Appeal is resolved and International Paper may then have no opportunity for judicial review if it does not commence an action with this Court and a court ultimately determines that the ALC does not have jurisdiction over the State Energy Office.

The State Energy Office subsequently filed a Motion to Dismiss pursuant to SCRCP 12(b)(6) and 12(b)(8) and International Paper filed a Motion to Stay.

II. DISCUSSION

Consideration of the Defendant's Motion to Dismiss based on SCRCP 12(b)(6) and 12(b)(8) is premature at this time because the jurisdiction of the ALC, and the availability of any forum for International Paper to be heard, is in question. Instead, the Court finds that

International Paper's Motion to Stay should be granted pending the outcome of the Appeal.

Although a Complaint will ordinarily be dismissed under SCRCP 12(b)(8) when another action is pending between the same parties for the same cause, courts have recognized that granting a motion to stay proceedings is appropriate where jurisdiction is uncertain and a plaintiff may be barred from commencing a case if an action is dismissed. Nerco Minerals Company v. Morrison Knudsen Corp., 976 P.2d 457 (Idaho 1999), Zaleha v. Rosholt, Robertson & Tucker, CHTD., 927 P.2d 925 (Idaho Ct. App. 1996).

The jurisdiction of the ALC over the State Energy Office is uncertain. The presently pending Appeal may result in a finding that the ALC does not have jurisdiction over the State Energy Office.

Civil actions may only be commenced within the periods set forth in Title 15, subject to statutory exceptions. S.C. Code Ann. § 15-3-20(A). These time periods vary from one year to more than ten years. The period of limitations applicable for bringing a cause of action against the State Energy Office relating to its administration of S.C. Code Ann. § 12-6-3620 is uncertain.

The Court finds that International Paper may never have its day in court and would be denied a forum in which to proceed if Defendant's Motion to Dismiss were granted. The Court is not required to dismiss a Complaint under SCRCP 12(b)(8) in this unique circumstance.

The Court also finds that it would be premature to consider whether dismissal under SCRCP 12(b)(6) is warranted. The Appeal may result in a finding that International Paper does not have any statutory or administrative remedy to contest decisions of the State Energy Office made under S.C. Code Ann. § 12-6-3620. In that case, this Court would be the appropriate tribunal to adjudicate the issues raised in the Complaint.

III. CONCLUSION

For the foregoing reasons, Plaintiff's Motion to Stay is granted and Defendant's Motion to Dismiss is denied.

IT IS SO ORDERED:

_____
G. THOMAS COOPER, JR.
PRESIDING JUDGE

May ____, 2013
Columbia, South Carolina

D

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RECEIVED
JUN 03 2013
McNair Law Firm, P.A.

May 28, 2013

The Honorable Jeanette W. McBride
Richland County Clerk of Court
Richland County Judicial Center
1701 Main Street, Room 205 (29201)
Post Office Box 2766
Columbia, South Carolina 29202

RICHLAND COUNTY
FILED
2013 MAY 30 AM 11:44
JEANETTE W. McBRIDE
C.C.P. & G.S.

Re: International Paper Company v. South Carolina State Energy Office
Case No. 2013-CP-40-0572

Dear Ms. McBride:

Pursuant to Judge Cooper's Form 4 order dated May 22, 2013, enclosed is International Paper Company's revised proposed order regarding the hearing held on May 16, 2013, at 9:30 a.m. Additionally enclosed is a copy of International Paper Company's Motion to Certify Appeal to the South Carolina Supreme Court. A courtesy copy of these materials is being provided to Judge Cooper by email, and is also being served upon opposing counsel by copy of this letter.

Please file the originals and return the file-stamped copies to me in the postage paid envelope provided.

Sincerely,

McNAIR LAW FIRM, P.A.

Erik P. Doerring
Shareholder

EPD:jr
Enclosures

cc: Theodore D. Willard, Jr., Esq.
Frank S. Potts, Esq.
The Honorable G. Thomas Cooper, Jr. (via email)

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

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Post Office Box 11390
Columbia, SC 29211

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STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT
International Paper Company, Inc., Plaintiff, v. South Carolina State Energy Office, Defendant.	)	Civil Action No.: 2013-CP-40-0572 **ORDER GRANTING PLAINTIFF'S MOTION TO STAY AND DENYING DEFENDANT'S MOTION TO DISMISS**

This matter is before the Court upon Plaintiff International Paper Company, Inc.'s ("International Paper") Motion to Stay and Defendant South Carolina State Energy Office's ("State Energy Office") Motion to Dismiss pursuant to SCRCP 12(b)(6) and 12(b)(8). At a hearing on May 16, 2013 attended by counsel for the parties, this Court heard oral argument on the parties' motions. For the reasons stated below, and based on the pleadings, arguments of counsel and the parties' written submissions, this Court finds that Plaintiff's Motion to Stay should be granted and Defendant's Motion to Dismiss should be denied.

I. BACKGROUND

International Paper alleges that the State Energy Office has improperly failed to certify that International Paper's 2010 and 2011 costs qualify for the Biomass Resource Credit pursuant to S.C. Code Ann. § 12-6-3620 ("Credit").

International Paper submitted timely applications for the Credit to the State Energy Office for qualifying equipment placed in service in calendar years 2010 and 2011 ("Applications"). (Complaint ¶¶ 18, 26). The State Energy Office did not certify that the equipment in the Applications qualified for the Credit. (Complaint ¶¶ 19-20, 27-28).

International Paper filed requests for contested case hearings with the South Carolina Administrative Law Court ("ALC"), contesting the State Energy Office's failure to certify that the costs included in the Applications qualified for the Credit. (Complaint ¶¶ 21, 29). The cases were consolidated by the ALC ("Consolidated Case"). (Complaint ¶ 32).

After the initial request for a contested case hearing had been pending for more than a year and a half, the State Energy Office filed a motion to dismiss the Consolidated Case arguing that the ALC lacked jurisdiction over the State Energy Office. (Complaint ¶ 33). In an order dated December 19, 2012 ("ALC Order"), the ALC granted the State Energy Office motion to dismiss, finding that the ALC only had jurisdiction to hear appeals from decisions of the State Energy Office, not contested case hearings involving the State Energy Office, and that International Paper had not properly invoked the ALC's appellate jurisdiction. (Complaint ¶ 34). The ALC Order, which was attached to and incorporated into the Complaint as Exhibit A, also found that the State Energy Office had not issued a final determination to International Paper and the ALC remanded the case to the State Energy Office.

On December 28, 2012, International Paper requested an administrative hearing before the State Energy Office. (Complaint ¶ 36). On January 17, 2013 International Paper appealed the ALC Order to the South Carolina Court of Appeals ("Appeal"). (Complaint ¶ 37). International Paper's request for an administrative hearing before the State Energy Office and the Appeal are both currently pending.

On January 30, 2013 International Paper filed a Complaint with this Court, which is the subject of the motions now before this Court. The basis for the action filed with this Court is set forth in the Complaint:

> 42. The time limit for commencing a civil action in this Court may expire before the Appeal is resolved and International Paper may then have no opportunity for

judicial review if it does not commence an action with this Court and a court ultimately determines that the ALC does not have jurisdiction over the State Energy Office.

The State Energy Office subsequently filed a Motion to Dismiss pursuant to SCRCP 12(b)(6) and 12(b)(8) and International Paper filed a Motion to Stay.

II. DISCUSSION

Consideration of the Defendant's Motion to Dismiss based on SCRCP 12(b)(6) and 12(b)(8) is premature at this time because the jurisdiction of the ALC, and the availability of any forum for International Paper to be heard, is in question.

International Paper does not contest that this case and the ALC proceedings, including the Appeal, involve the same parties and involve the same cause of action. Although a complaint will ordinarily be dismissed under SCRCP 12(b)(8) when another action is pending between the same parties for the same cause of action, courts have recognized that granting a motion to stay proceedings is appropriate where jurisdiction is uncertain and a plaintiff may be barred from commencing a case if an action is dismissed. Nerco Minerals Company v. Morrison Knudsen Corp., 976 P.2d 457 (Idaho 1999), Zaleha v. Rosholt, Robertson & Tucker, CHTD., 927 P.2d 925 (Idaho Ct. App. 1996).

The jurisdiction of the ALC over the State Energy Office is uncertain. The Appeal is expected to resolve the jurisdictional issues. A decision relating to the Appeal may find that: (1) the ALC has jurisdiction over the State Energy Office and only the ALC has jurisdiction over decisions of the State Energy Office; or (2) that the ALC does not have jurisdiction over the State Energy Office and only this Court has jurisdiction over the State Energy Office.

Ordinarily, claims relating to taxes are governed by the South Carolina Revenue Procedures Act, S.C. Code Ann. §§ 12-60-10 et seq. The South Carolina Revenue Procedures Act sets forth procedures and periods of limitation for contesting property taxes and tax

determinations made by the South Carolina Department of Revenue.[1] The Revenue Procedure Act, however, does not specifically reference disputes with the State Energy Office.

Civil actions may only be commenced within the periods set forth in Title 15, Chapter 3, subject to statutory exceptions. S.C. Code Ann. § 15-3-20(A). These time periods vary from one year to more than ten years. S.C. Code Ann. § 15-3-530 requires most actions, other than those involving recovery of real estate, to be brought within three years. S.C. Code Ann. § 15-3-530(2) requires an action to be brought within three years upon a liability created by statute other than a penalty or forfeiture. S.C. Code Ann. § 15-3-550(2) requires an action to be brought within two years upon a statute for a forfeiture or penalty to the State. An action for relief not otherwise provided in Title 15, Chapter 3, must be commenced within ten years after the cause of action shall have accrued. S.C. Code Ann. § 15-3-600. Title 15, Chapter 3, does not specifically reference disputes with the State Energy Office.

The period of limitations applicable for bringing a cause of action against the State Energy Office relating to its certification role under S.C. Code Ann. § 12-6-3620 has not been determined by any court and no South Carolina statute directly addresses the period of limitations for challenging administrative decisions of the State Energy Office. While this Court believes that either a three year statute of limitations under S.C. Code Ann. § 15-3-530 or a ten year statute of limitations under S.C. Code Ann. § 15-3-600 may likely apply to a cause of action brought against the State Energy Office in connection with its certification role under S.C. Code Ann. § 12-6-3620, this Court also recognizes that this is an issue of first impression and there is a risk that a shorter statute of limitations could be found to apply, such as the two year statute of

[1] The South Carolina Revenue Procedures Act provides procedures to appeal tax determinations prior to assessment and payment of the tax. If the preassessment procedures in the Act are not followed, a taxpayer may also be able to obtain a tax refund if the tax is paid and a claim for refund is filed within the periods set forth in S.C. Code Ann. § 12-54-85 (Supp. 2012).

limitations under S.C. Code Ann. § 15-3-550(2).

The Court finds that there is a risk that International Paper may never have its day in court and would be denied a forum in which to proceed if Defendant's Motion to Dismiss were granted at this time. The Court is not required to dismiss the Complaint under SCRCP 12(b)(8) in this circumstance.

The Court also finds that it would be premature to consider whether dismissal under SCRCP 12(b)(6) is warranted. The Appeal may result in a finding that International Paper cannot contest S.C. Code Ann. § 12-6-3620 certification decisions of the State Energy Office before the ALC or administratively before the State Energy Office. In that case, this Court would be the appropriate tribunal to adjudicate the issues raised in the Complaint. This is not a case where International Paper is "forum shopping", but a matter where a litigant is earnestly seeking guidance on the correct court in which to maintain an action for judicial review of a decision of a state agency affecting its rights to a state tax credit.

The Court also finds that the State Energy Office will not be prejudiced by staying this case. If the Appeal is resolved in favor of International Paper, with the Court of Appeals determining that the ALC does have contested case jurisdiction over the State Energy Office and its certification actions related to International Paper's 2010 and 2011 Credit applications, this case would then be dismissed. If the Appeal results in the ALC Order being upheld, International Paper has made a request for an administrative hearing with the State Energy Office following the ALC's remand, and the State Energy Office would then provide International Paper with an administrative hearing, which could be reviewed by the ALC utilizing its appellate review jurisdiction. This case would then also be dismissed at that time. If the Appeal ends with a determination that the ALC lacks jurisdiction and this Court has jurisdiction, the dispute

between the parties would proceed forward in this Court. In any of these outcomes, staying this case does not prejudice the State Energy Office. Finally, the Court recognizes that a stay would delay adjudication of this case in this Court, but the jurisdictional issues must first be addressed by our Court of Appeals. Proceeding to trial in this Court now, with the potential that the Court of Appeals may determine that this Court does not have jurisdiction, would not benefit the time and resources of the parties and this Court.

III. CONCLUSION

For the foregoing reasons, Plaintiff's Motion to Stay is granted and Defendant's Motion to Dismiss is denied.

IT IS SO ORDERED:

_____
G. THOMAS COOPER, JR.
PRESIDING JUDGE

May ____, 2013
Columbia, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE FIFTH JUDICIAL CIRCUIT
COUNTY OF RICHLAND	)	Civil Action No.: 2013-CP-40-0572
International Paper Company,	)	
	)	
Plaintiff,	)	**MEMORANDUM IN SUPPORT OF MOTION TO RECONSIDER, ALTER, OR AMEND**
	)	
v.	)	
	)	
South Carolina State Energy Office,	)	
	)	
Defendant.	)	

I. BACKGROUND

Plaintiff International Paper Company ("International Company") filed a complaint with the Court on January 30, 2013. On March 21, 2013 Defendant South Carolina State Energy Office ("State Energy") filed a Motion to Dismiss pursuant to SCRCP 12(b)(8) and 12(b)(6). On April 1, 2013 International Paper filed a Motion to Stay Proceedings. A hearing was held on both motions on May 16, 2013. Prior to the hearing both parties filed proposed orders with Court. At the conclusion of the May 16, 2013 hearing, the Court directed counsel for the parties to review their proposed orders and make any changes consistent with the issues and argument addressed at the hearing and to submit these proposed to the Court by May 26, 2013 (within 10 days following the May 16, 2013 hearing). On May 23, 2013 the Court issued an order granting State Energy's Motion to Dismiss. On Tuesday May 28, 2013 International Paper filed a revised proposed order with the Court. On May 30, 2013 International Paper received the Court's May 23, 2013 order. On June 10, 2013 International Paper filed a Motion to Reconsider, Alter, or Amend.

II. PRIMARY POSITION

As set forth in each of the proposed orders filed by International Paper, copies of which are attached hereto (Tabs A and B), International Paper's Motion to Stay should be granted and the State Energy's Motion to Dismiss should be denied as this will best protect the resources of the entire judiciary, including the appellate courts, and the parties. International Paper has sought judicial review of actions taken by State Energy before the South Carolina Administrative Law Court ("ALC"). State Energy filed a motion to dismiss the ALC action alleging that the ALC lacked subject matter jurisdiction over State Energy. A copy of a December 19, 2012 Order of the ALC dismissing the action and remanding the matter to State Energy was attached to International Paper's complaint ("ALC Order"). International Paper appealed the ALC Order to the South Carolina Court of Appeals ("Appeal"). Subsequently, International Paper filed a Motion to Certify Appeal to Supreme Court on May 21, 2013, a copy of which is attached hereto (Tab C). State Energy filed Respondent's Return to Motion to Certify Appeal and agreed that the matter should certified, a copy of which is attached hereto (Tab D, p. 4).

Staying the present action will allow the pending Appeal to be decided, definitively answering the jurisdictional uncertainties surrounding the actions of State Energy, without imposing additional expenses and burdens on the parties or the courts. Dismissing this action would result in International Paper being required to file an appeal to so that the statute of limitations would not present a bar to this action in the event the Appeal results in a determination that this Court, not the ALC has jurisdiction over the actions of State Energy. International Paper respectfully requests that this Court enter an order in the form of Tab B granting International Paper's Motion to Stay. A proposed order granting International Paper's Motion to Reconsider, Alter, or Amend is attached hereto (Tab E).

III. ALTERNATIVE POSITION

In the event the Court determines that International Paper's Motion to Stay should not be granted, International Paper respectfully submits that this Court should withdraw its May 23, 2013 Order. The May 23, 2013 Order mirrors the proposed order submitted by State Energy and contains arguments, interpretations, and alleged facts which are not in the record or relevant to the Motion to Dismiss. These erroneous insertions include:

1. Characterizing the case solely as a declaratory judgment action. (Order p.1)
2. Providing misleading and incomplete citations to the ALC Order that omit any reference to the fact that the ALC Order not only dismissed the ALC action, but also remanded the action to State Energy and found that State Energy needed to provide International Paper with a hearing, required by the South Carolina Constitution, before it could issue a final decision from which an appeal would properly lie with the ALC. (Order p. 2-3, 7-8)
3. Discussing the propriety of a declaratory judgment action when analyzing whether this action should be dismissed under SCRCP 12(b)(8). (Order p. 5)
4. Inserting speculative and argumentative conclusions not supported by the record, including "Unhappy with the result in the ALC..." (Order p. 3), "Plaintiff's attempt to circumvent the administrative process by bringing a complaint for declaratory relief..." (Order p. 5), and "Plaintiff's declaratory judgment action should be dismissed in that it is merely an attempt at procedural fencing by Plaintiff to resurrect a failed administrative appeal. Rather than live with the results of the administrative process that Plaintiff initiated, lost and now appealed, Plaintiff seeks to hedge its bets and forum shop...to avoid any potentially unfavorable outcome...Plaintiff's...attempt to avoid the consequences of the ALCS's holding..." (Order pp. 6-7)

5. Speculating on the outcome of the ALC appeal and failing to acknowledge that the ALC appeal may result in a finding that this Court is the only Court with jurisdiction to hear an appeal of an action taken by State Energy. (Order p. 8)
6. Stating that International Paper has failed to call the Court's attention to any statute of limitations and concluding definitively that International Paper would not suffer any prejudice without any discussion of the potential statute of limitation bars. (Order p. 8)

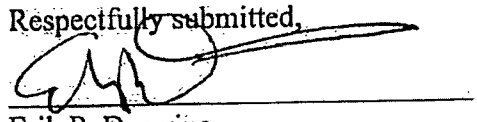
International Paper does not dispute that the same issues raised in the Complaint were submitted to the ALC and that this Court has discretion to grant or deny a motion to stay. As the same issues were presented in the Complaint and submitted to the ALC, dismissal under SCRCP 12(b)(8) may be appropriate should a stay not be granted. If the Court believes that it is proper to deny International Paper's Motion to Stay, International Paper respectfully requests that the May 23, 2013 order be withdrawn and substituted with an order granting State Energy's Motion to Dismiss but specifically under SCRCP 12(b)(8), and without discussion of erroneous arguments, interpretations, and alleged facts which are not in the record or relevant to the Motion to Dismiss. Analysis of SCRCP 12(b)(6) is premature at this juncture as it is entirely dependent on outcome of the Appeal and the jurisdiction of the ALC or this Court over the actions of State Energy. A proposed order granting State Energy's Motion to Dismiss based on SCRCP 12(b)(8) is attached hereto (Tab F).

IV. CONCLUSION

For the forgoing reasons, Plaintiff's Motion to Reconsider, Alter, or Amend should be granted. The Court should withdraw its prior May 16, 2013 order, and either (1) Plaintiff's Motion to Stay should be granted and Defendant's Motion to Dismiss should be denied, or (2) a new order granting Defendant's Motion to Dismiss should be issued but the basis on the

Complaint and SCRCP 12(b)(8) and the allegations in the Complaint and evidence in the record in this case.

Respectfully submitted,



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ATTORNEYS FOR PLAINTIFF

July 10, 2013
Columbia, South Carolina

TAB A

Appellant's Proposed Order in Circuit Court Action
See R-II at 498-503

TAB B

Appellant's Revised Proposed Order in Circuit Court Action
See R-II at 505-511

TAB C

Appellant's Motion to Certify Appeal to Supreme Court
See R-II at 633-637

Tab D

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM SOUTH CAROLINA ADMINISTRATIVE LAW COURT

Ralph King Anderson, III, Chief Administratrive Law Judge

RECEIVED
JUN 10 2013
SC Court of Appeals

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

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

v.

South Carolina Energy Office ..... Respondent.

RESPONDENT'S RETURN TO MOTION TO CERTIFY APPEAL

This is not a case primarily about taxes or even whether the International Paper Company should have qualified for a tax credit. This case began and continued only because the International Paper Company refused to supply the State Energy Office with information requested to support its application for a credit, deciding instead to file for a contested case hearing with the Administrative Law Court.

On January 31, 2011 the International Paper Company (IP) filed a nineteen page application with the State Energy Office seeking certification of a tax credit of $5,516,003.54 for expenditures made in calendar year 2010. By submitting an application, IP asked that the State Energy Office ("Energy Office") certify $22,064,014.16 worth of expenditures. The documents supplied did not include the information required by the Energy Office application form.[1] Nor

[1] The application form required, in addition to other information, a listing of the name, type and cost of equipment; the manufacturer of equipment; the length of warranty; how much electrical energy it would produce and the KWH per year and energy displacement; the cost of labor and installation charges (in addition to other information). Application For Biomass Resource Credit, S.C. SCH.ETC-50 (Updated 10/09) 2010.

did the application include the many thousands of documents which IP possessed. Rather, IP delivered only 19 pages to substantiate the certification of over $22,000,000 in purchases.[2]

On March 1, 2011, 29 days after the submission of IP's application, Ashlie Lancaster, Director of the Energy Office, wrote to IP and attached a Review of its 2011 application advising that some of the expenditures appeared to be allowable but others did not. IP was told in the cover letter to "provide the SCEO with the requested documentation [described in the review] as soon as possible so that we can move forward with processing your application. In addition, we have notified the South Carolina Department of Revenue of your pending application."[3] The Review also requested various types of documentation from "percentage of new steam production from biomass energy" to "invoices, receipts, cancelled checks and/or other supporting documentation" for various of the submitted projects.[4]

The March 1, 2011 letter with the attached Review was delivered to IP on that same date. No response to the letter or the Review was received by the Energy Office. There was no further communication between IP and the Energy Office from that date until March 25, 2011.

On March 25, 2011, IP served the Energy Office with a "Request for Contested Case Hearing" which was filed with the Clerk of the Administrative Law Court.[5] The filing of the request for a Contested Case Hearing ended further action by the Energy Office concerning IP's 2011 application.

---

[2] When subsequently asked why IP had not provided the information requested in the application, IP's accountant explained as follows:

> Q: So you submitted the application that did not provide the information requested because it was not required by the statute [§12-6-3620] and you don't think Erica [Energy Office employee] cared?
>
> A: Right

Deposition of Tracy Bolger, CPA, September 27, 2012 at p. 32, l. 17.

[3] Letter to R. Shands and T. Bolger from A. Lancaster dated March 1, 2011.

[4] Review attached to A. Lancaster letter to Shands and Bolger of March 1, 2011.

[5] Letter of E. Doerring to Hon. J. E. Shealy of March 25, 2011.

IP filed a Prehearing Statement on August 15, 2011 requesting that the Administrative Law Court "issue an order requiring the Respondent to certify the equipment" as being eligible for the credit under §12-6-3620. The Prehearing Statement of the Energy Office denied that it had issued a final decision and sought discovery for the following reason: "The State Energy office requires additional and complete information from International Paper concerning the credits for which it has applied prior to being capable of making any final determination with regard to the amount of any tax credit that can be certified."[6]

On December 14, 2011, the Energy office moved to dismiss the appeal of IP on the grounds that "available administrative remedies have not been exhausted in that the Respondent has not issued a final agency determination or decision with respect to the [2010] tax credit and the amount of credit, if any, to be allowed...."[7] International Paper opposed the motion to dismiss contending that the March 1, 2011 Review was "a final agency determination by the State Energy Office."[8] In doing so, IP argued that it "has clearly exhausted all available administrative remedies."[9]

On March 5, 2012 the Administrative Law Court ruled against the Energy Office on its Motion to Dismiss and determined that "it appears on its face that Respondent's [March 1, 2011] Notification was a final determination [regarding the 2010 tax credit] and this matter is ripe for judicial review."[10] However, the Court, relying upon affidavits filed in support of a second motion by the Energy Office to remand the matter for the purpose of correcting error, mistake or omission, granted the Energy Office "leave to file an amended Final Decision with the Court on or before March 16, 2012." Id. at 3. By March 16, 2012, the Energy Office subsequently issued its final decision on the 2010 tax credit to International Paper advising that it would not certify

[6] Respondent's Prehearing Statement dated August 15, 2011.
[7] Motion to Dismiss by Respondent filed December 14, 2011.
[8] Petitioner's Response in Opposition to Respondent's Motion to Dismiss filed December 28, 2011.
[9] Id.
[10] Order Denying Motion to Dismiss filed March 5, 2012.

any of its submitted expenditures for calendar year 2010 as being eligible for the 25% tax credit pursuant to S.C. Code Ann. §12-6-3620 (Supp. 2010).

In the interim, International Paper filed for tax credits regarding expenditures made in calendar year 2011. That application was filed in January 2012, and on March 1, 2012 the Energy Office notified IP of its decision denying certification of the same.[11] On March 2, 2012, having offered no complaint regarding the process provided, IP served the Energy Office with a "Request for Contested Case Hearing." With the consent of the parties, both cases were thereafter consolidated by Order of the court dated May 1, 2012.

The case continued with the conduct of discovery until October 3, 2012 when the Energy office moved to dismiss the consolidated cases for a lack of subject matter jurisdiction. In response to the Energy Office assertion that the Administrative Law Court lacked jurisdiction, IP contended-- for the first time -- that it had previously been denied its constitutional rights of due process regarding its 2011 application.[12] Thus, some 584 days after it voluntarily terminated the 2011 tax credit application process with the Energy Office, the International Paper Company was contending it had not received sufficient process.

Following the submission of briefs and hearing oral arguments, the court granted the motion of the Energy Office with its order dated December 19, 2012. IP filed its appeal thereafter.

The Energy Office joins with International Paper to have this matter heard by this Court. Due to the amount of taxpayer funds involved; the first interpretation of a statute; and, the issue of jurisdiction, the matter is best decided by this Court. But, this appeal is not about the application of a tax statute and it should not be characterized as one. It is a case where the Appellant abandoned the process afforded by the agency that was processing its 2011 application

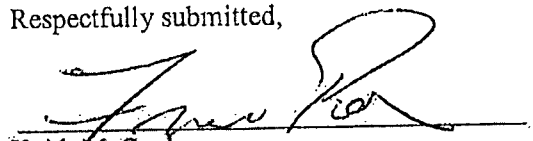
[11] The claimed expenditure for 2011 was $20,923,846 for a potential tax credit of $5,230,961.
[12] Petitioner's Memorandum in Opposition to Motion to Dismiss, October 15, 2012.

for $5,516,003.54 of taxpayer funds, selected the wrong way to do so, and now seeks a second opportunity.

The Appellant's latest action in this dispute, the filing of an identical action in the Court of Common Pleas for Richland County, has been dismissed by the Hon. T. Cooper by Order dated May 23, 2013 (copy attached). The State Energy Office anticipates a further motion will be made to consolidate the appeals once International Paper notices its appeal in that case. Any consolidation of the appeals will only expand some of the issues to be argued.

expand some of the issues to be argued.

Respectfully submitted,



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Attorneys for Respondent

June 10, 2013

APPENDIX

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT
International Paper Company, Inc., Plaintiff, v. South Carolina State Energy Office, Defendant.	)	Civil Action No.: 2013-CP-40-0572 **ORDER GRANTING DEFENDANT'S MOTION TO DISMISS AND DENYING PLAINTIFF'S MOTION TO STAY**

2013 MAY 23 P 4:23
JEANNETTE W. McBRIDE
C.C.C.P. & G.S.
RICHLAND COUN

This matter is before the Court upon Defendant South Carolina State Energy Office's ("SEO") Motion to Dismiss pursuant to SCRCP 12(b)(6) and 12(b)(8) and Plaintiff International Paper Company, Inc.'s ("IP") Motion to Stay. At a hearing on May 16, 2013 attended by counsel for the parties, this Court heard oral argument on the parties' motions. For the reasons stated below, and based on the pleadings, arguments of counsel and the parties' written submissions, this Court finds that Defendant's Motion to Dismiss should be granted and Plaintiff's Motion to Stay should be denied.

I. BACKGROUND

Plaintiff International Paper Company, Inc. brings this declaratory judgment action alleging it is entitled to a declaration that Plaintiff's 2010 and 2011 costs qualify for the Biomass Resource Credit pursuant to S.C. Code Ann. § 12-6-3620 and that the State Energy Office is required to certify that such costs qualify for the Biomass Resource Credit. (Complaint ¶¶ 44-49). As can be seen by the allegations of Plaintiff's Complaint, Plaintiff initially submitted these identical issues to the Administrative Law Court ("ALC").

Plaintiff's Complaint alleges:

SCANNED

18. On or before January 31, 2011 International Paper filed an Application for Biomass Resource Credit with the State Energy Office requesting that the State Energy Office certify that the 2010 Costs qualified for the Biomass Resource Credit ("2010 Application").

19. On March 1, 2011 the State Energy Office responded to International Paper's 2010 Application by email ("2010 Decision").

20. The 2010 Decision did not certify that the 2010 Costs qualified for the Biomass Resource Credit.

21. On March 25, 2011 International Paper filed a request for a contested case hearing with the South Carolina Administrative Law Court ("ALC"), stating that the 2010 Decision should have certified that the 2010 Costs qualified for the Biomass Resource Credit ("2010 Case").

. . .

26. On or before January 31, 2012 International Paper filed an Application for Biomass Resource Credit with the State Energy Office requesting that the State Energy Office certify that that the 2011 Costs qualified for the Biomass Resource Credit ("2011 Application").

27. On March 1, 2011 the State Energy Office responded to International Paper's 2011 Application for Biomass Resource Credit by email ("2011 Decision").

28. The 2011 Decision did not certify that the 2011 Costs qualified for the Biomass Resource Credit.

29. On March 2, 2012 International Paper filed a request for a contested case hearing with the ALC, stating that the 2011 Decision should have certified that the 2011 Costs qualified for the Biomass Resource Credit ("2011 Case").

Plaintiff's Complaint further alleges that the above cases were consolidated by the ALC and that the State Energy Office moved to dismiss the action alleging that the ALC did not have jurisdiction.

The Complaint further alleges that by an order dated December 19, 2012 (the "Order"), the ALC granted the State Energy Office's motion. The Order, which was attached to and

incorporated into the Complaint as Exhibit A, found that while the ALC did not have jurisdiction over the case as a contested case, the ALC would have had appellate jurisdiction over the case pursuant to S.C. Code Ann. §1-23-600(D) (2011). However, because Plaintiff failed to file the action as an appeal, the ALC found that it had no appellate jurisdiction. (Order at 8).

The ALC's order stated:

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

(Order at 8).

Unhappy with the result in the ALC, on January 17, 2013, Plaintiff appealed the ALC's Order to the South Carolina Court of Appeals where the appeal is still pending. Plaintiff then filed this declaratory judgment action. Defendant subsequently filed a Motion to Dismiss pursuant to SCRCP 12(b)(6) and 12(b)(8) and Plaintiff moved to stay the case.

II. DISCUSSION

A. Defendant's Motion To Dismiss Pursuant To SCRCP 12 (b)(8).

The Court finds that Plaintiff's Complaint should be dismissed pursuant to SCRCP 12 (b)(8) in that the issues Plaintiff seeks to litigate in the present case are the identical issues pending in the ALC case that is on appeal to the S.C. Court of Appeals. Under Rule 12(b)(8),

dismissal is appropriate when another action is pending between the same parties for the same claim. To prevail on a motion to dismiss pursuant to Rule 12(b)(8), the movant must show that the actions in question are between the same parties in their same capacities. Cricket Cove Ventures, LLC. v. Gilland, 390 S.C. 312, 701 S.E.2d 39 (Ct. App. 2010). "[T]he claim must be precisely or substantially the same in both proceedings in order for the drastic remedy of dismissal to be appropriate under Rule 12(b)(8)." Id. at 45.

As can be seen by the allegations of the Complaint, Plaintiff admits that the current action is the same action that is pending on appeal to the S.C. Court of Appeals. First, the parties to the present action and the ALC action are identical. Second, the relief requested in the present case, is precisely the same relief requested in the ALC case. In the present case, Plaintiff requests that the following relief:

> 43. Upon information and belief, this Court can remedy the State Energy Office's violation of S.C. Code Ann. § 12-6-3620 by determining that the 2010 Costs and 2011 Costs qualify for the Biomass Resource Credit and issuing an order to the State Energy Office directing it to certify that the costs so qualify.
>
> . . .
>
> 49. Upon information and belief, International Paper is entitled to a declaration that its 2010 Costs and 2011 Costs qualify for the Biomass Resource Credit and that the State Energy Office is required to certify that such costs qualify for the Biomass Resource Credit.

This relief is precisely the same relief Plaintiff alleges in its Complaint that it requested in the ALC. Plaintiff alleged:

> 21. On March 25, 2011 International Paper filed a request for a contested case hearing with the South Carolina Administrative Law Court ("ALC"), stating that the 2010 Decision should have certified that the 2010 Costs qualified for the Biomass Resource Credit ("2010 Case").
>
> . . .
>
> 29. On March 2, 2012 International Paper filed a request for a

> contested case hearing with the ALC, stating that the 2011 Decision should have certified that the 2011 Costs qualified for the Biomass Resource Credit ("2011 Case").

Accordingly, the Court finds that Plaintiff's Complaint should be dismissed pursuant to SCRCP 12 (b)(8) in that there is a pending case between the same parties for the same claims that Plaintiff seeks to litigate in the present case.

The Court also finds that a declaratory judgment action is not proper when an identical action is already pending between the same parties involving the same issues. As the South Carolina Court of Appeals held in Medical University of South Carolina v. Taylor, 294 S.C. 99, 362 S.E.2d 881 (Ct. App. 1987):

> The general rule followed by most jurisdictions is that a court will not entertain a declaratory judgment action "if there is pending, at the time of the commencement of the declaratory action, another action or proceeding to which the same persons are parties [and] in which are involved and may be adjudicated the same identical issues that are involved in the declaratory judgment action." The general rule is especially applicable "'where a special statutory remedy has been provided, or where another remedy will be more . . . appropriate under the circumstances.'" (Citations omitted).

Id. at 883-884. Plaintiff's appeal from the ALC's order is still on appeal to the South Carolina Court of Appeals. Therefore, it would be improper for this Court to entertain a declaratory judgment action between these same parties in a different forum.

B. Defendant's Motion To Dismiss Pursuant to SCRCP 12 (b)(6).

The Court also finds that Plaintiff's attempt to circumvent the administrative process by bringing a complaint for declaratory relief fails as a matter of law. In reviewing a 12 (b)(6) motion, the Court is to construe the complaint in a light most favorable to the nonmovant and determine if the facts alleged and the inferences reasonably deducible from the pleadings would entitle the plaintiff to relief on any theory of the case. Rydde v. Morris, 381 S.C. 643, 646, 675 S.E.2d 431, 433 (2009). If the facts alleged and inferences deducible therefrom would entitle the

plaintiff to any relief, then dismissal under Rule 12(b)(6) is improper. Sloan Constr. Co. v. Southco Grassing, Inc., 377 S.C. 108, 113, 659 S.E.2d 158, 161 (2008).

As was previously discussed, Plaintiff initiated an action before the ALC for the identical relief it seeks here. That case is currently on appeal at the S.C. Court of Appeals. A court ordinarily will refuse to grant a declaratory judgment where a special statutory remedy has been provided. "Gratuitous interference" in the administrative process should be avoided. Williams Furniture Corp. v. Southern Coatings & Chem. Co., 216 S.C. 1, 7-8, 56 S.E.2d 576, 579 (1949) (dismissing complaint holding that a declaratory judgment was not appropriate where plaintiff company's claim that it was not liable for worker's compensation benefits was more appropriately handled by the workers compensation board); Smith v. S.C. Ret. Sys., 336 S.C. 505, 520 S.E.2d 339 (Ct. App. 1999)(dismissing former wife's declaratory judgment claim seeking benefits under a QDRO holding that a declaratory judgment would interfere with wife's administrative remedy before the S.C. Ret. Sys. and possible subsequent appeal to the ALC). The Court, therefore, should not serve as a substitute for "a tribunal of original jurisdiction in issues that are ripe for litigation by the usual processes." Williams Furniture Corp., 216 S.C. at 8, 56 S.E.2d at 579; see also Garris v. Governing Bd. of S.C. Reinsurance Facility, 319 S.C. 388, 390, 461 S.E.2d 819, 821 (1995) ("Declaratory relief will ordinarily be refused where another remedy will be more effective or appropriate under the circumstances," as "relief is not generally available to one who has not exhausted administrative remedies."). Because Plaintiff's administrative action is on appeal to the S.C. Court of Appeals, and a declaratory judgment action could interfere with that appeal, Plaintiff's complaint should be dismissed pursuant to SCRCP 12 (b)(6).

The Court further finds that Plaintiff's declaratory judgment action should be dismissed

in that it is merely an attempt at procedural fencing by Plaintiff to resurrect a failed administrative appeal. Rather than live with the results of the administrative process that Plaintiff initiated, lost and now appealed, Plaintiff seeks to hedge its bets and forum shop by bringing a declaratory judgment action to avoid any potentially unfavorable outcome at the S.C. Court of Appeals. The South Carolina Supreme Court has held that a declaratory judgment action cannot be used as a procedural mechanism to secure delay or forum shop. Williams Furniture Corp. v. Southern Coatings & Chem. Co., 216 S.C. 1, 7-8, 56 S.E.2d 576, 579 (1949) ("[t]he wholesome purposes of declaratory acts would be aborted by its use as an instrument of procedural fencing either to secure delay or to choose a forum.") Plaintiff's bringing a declaratory judgment in an attempt to avoid the consequences of the ALC's holding that Plaintiff failed to properly invoke the ALC's appellate jurisdiction is exactly the type of procedural fencing that is prohibited by the South Carolina Supreme Court. "A declaratory judgment cannot resurrect substantive claims that are defeated by jurisdictional, exhaustion, mootness, or other defenses." Shariff v. Coombe, 655 F.Supp.2d 274, 297 (S.D.N.Y. 2009). Accordingly, the Court finds that Plaintiff's complaint should be dismissed in that it is an improper attempt at procedural fencing.

C. Plaintiff's Motion For Stay.

Based on the circumstances of this case, the Court finds a dismissal is more appropriate than a stay. Granting a motion for stay of proceedings rests entirely within the discretion of the trial judge. Spartanburg v. Belk's Dep't Store, 199 S.C. 458, 20 S.E.2d 157 (1942). As was previously discussed, the ALC found that while the underlying case was not properly before the ALC as a contested case, the case would have been properly before the ALC as an administrative appeal. However, Plaintiff failed to adhere to the ALC's rules of appellate procedure and properly perfect its appeal. (Order at 8). "Dismissal rather than a stay has been approved where

there is assurance that no party is prejudiced thereby." United States v. Michigan National Corp., 419 U.S. 1, 5 (1974); Englehardt v. Consolidated Rail, 756 F.2d 1368 (2d Cir. 1985) (holding a complaint may be dismissed when all relief sought may be obtained before the administrative agency or in a reinstituted proceeding); Hansen v. Norfolk and western Railway Co., 689 F.2d 707 (7th Cir. 1982) (holding the same).

If Plaintiff prevails on its appeal of the ALC Order, the case will be remanded back to the ALC as either a contested case or an ALC appeal. Therefore, Plaintiff will have its remedy through the administrative process and Plaintiff will suffer no prejudice by the dismissal of this declaratory judgment action which seeks the same relief Plaintiff seeks before the ALC. Because the relief Plaintiff seeks may be obtained administratively if Plaintiff prevails on appeal, a dismissal of the declaratory action is more appropriate than a stay. See Unisys Corp. v. S.C. Budget & Control Bd., 346 S.C. 158, 551 S.E.2d 263 (2001) (where the South Carolina Supreme Court upheld the dismissal of the plaintiff's complaint pursuant to SCRCP 12(b)(6) and 12(b)(8) because it found exhausting administrative remedies under the S.C. Procurement Code constituted the plaintiff's remedy). If Plaintiff loses on appeal, the case may be forever ended with prejudice because Plaintiff failed to perfect its appeal at the ALC level. Because Plaintiff cannot use this declaratory judgment action to resurrect the failed appeal, dismissal is appropriate. Even assuming for the sake of argument that after Plaintiff lost on appeal it could presumably bring an action in the circuit court, Plaintiff has failed to call to the Court's attention any alleged statute of limitation that would bar such an action. Accordingly, because Plaintiff would suffer no prejudice under any of the above scenarios, the Court finds that dismissal is appropriate.

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM SOUTH CAROLINA ADMINISTRATIVE LAW COURT

Ralph King Anderson, III, Chief Administratrive Law Judge

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

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

v.

South Carolina Energy Office.....Respondent.

CERTIFICATE OF SERVICE

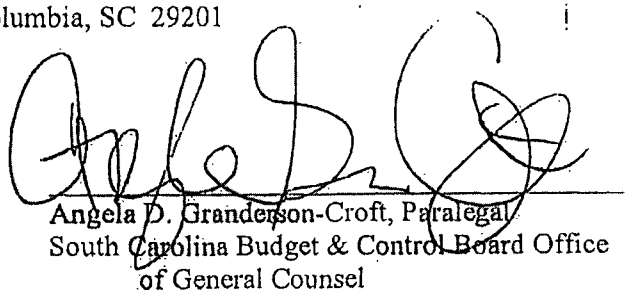
This will certify that I, Angela D. Granderson-Croft, an employee of the South Carolina Budget and Control Board Office of General Counsel, has this day delivered, via (X) hand-delivery ( ) via U.S. Mail, postage prepaid, a copy of Respondent's Return to Motion to Certify Appeal to:

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

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

RECEIVED
JUN 10 2013
SC Court of Appeals

This the 10th day of June, 2013.



Angela D. Granderson-Croft, Paralegal
South Carolina Budget & Control Board Office
of General Counsel
1201 Main Street, Suite 410
Columbia, SC 29201
Phone: (803) 734-1272
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Tab E

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)))	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT Civil Action No.: 2013-CP-40-0572
International Paper Company, Plaintiff, v. South Carolina State Energy Office, Defendant.	)))))))))	**ORDER GRANTING PLAINTIFF'S MOTION TO RECONSIDER, ALTER, OR AMEND**

In an order dated and filed May 23, 2013 this Court granted Defendant's motion to dismiss and denied Plaintiff's motion to stay. Plaintiff filed a motion to reconsider, alter or amend pursuant to SCRCP 52 and 59 on June 10, 2013. At a hearing on June 15, 2013 attended by counsel for the parties, this Court heard oral argument on Plaintiff's motion to reconsider, alter or amend.

This Court grants Plaintiff's Motion to Reconsider, Alter, or Amend and withdraws the Court's May 23, 2013 order. Based on the pleadings and arguments of counsel, it is apparent that the May 23, 2013 order reaches factual conclusions that are inconsistent with the allegations in the Plaintiff's complaint, which is the only pleading before the Court, and addresses unresolved legal issues that are pending before the South Carolina Court of Appeals and for which certification to the Supreme Court has been requested and consented to by both parties.

IT IS SO ORDERED:

_____
G. THOMAS COOPER, JR., JUDGE
FIFTH JUDICIAL CIRCUIT

July ____, 2013
Columbia, South Carolina

Tab F

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)))	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT Civil Action No.: 2013-CP-40-0572
International Paper Company, Plaintiff, v. South Carolina State Energy Office, Defendant.	)))))))))	**ORDER GRANTING DEFENDANT'S MOTION TO DISMISS AND DENYING PLAINTIFF'S MOTION TO STAY**

This matter is before the Court upon Defendant's Motion to Dismiss pursuant to SCRCP 12(b)(6) and 12(b)(8) and Plaintiff's Motion to Stay. At hearings on May 16, 2013 and June 15, 2013 attended by counsel for the parties, this Court heard oral argument on the parties' motions. Based on the pleadings and arguments of counsel, this Court finds that Defendant's Motion to Dismiss should be granted and Plaintiff's Motion to Stay should be denied.

Under SCRCP 12(b)(8) dismissal is ordinarily appropriate when another action is pending between the same parties for the same claim. "[T]he claim must be precisely or substantially the same in both proceedings in order for the drastic remedy of dismissal to be appropriate under Rule 12(b)(8)." Cricket Cove Ventures, LLC v. Gilland, 390 S.C. 312, 701 S.E.2d 39, 45 (Ct. App. 2010).

Plaintiff's Complaint alleges:

18. On or before January 31, 2011 International Paper filed an Application for Biomass Resource Credit with the State Energy Office requesting that the State Energy Office certify that the 2010 Costs qualified for the Biomass Resource Credit ("2010 Application").

19. On March 1, 2011 the State Energy Office responded to International Paper's 2010 Application by email ("2010 Decision").

20. The 2010 Decision did not certify that the 2010 Costs qualified for the Biomass Resource Credit.

21. On March 25, 2011 International Paper filed a request for a contested case hearing with the South Carolina Administrative Law Court ("ALC"), stating that the 2010 Decision should have certified that the 2010 Costs qualified for the Biomass Resource Credit ("2010 Case").

26. On or before January 31, 2012 International Paper filed an Application for Biomass Resource Credit with the State Energy Office requesting that the State Energy Office certify that that the 2011 Costs qualified for the Biomass Resource Credit ("2011 Application").

27. On March 1, 2011 the State Energy Office responded to International Paper's 2011 Application for Biomass Resource Credit by email ("2011 Decision").

28. The 2011 Decision did not certify that the 2011 Costs qualified for the Biomass Resource Credit.

29. On March 2, 2012 International Paper filed a request for a contested case hearing with the ALC, stating that the 2011 Decision should have certified that the 2011 Costs qualified for the Biomass Resource Credit ("2011 Case").

34. On December 19, 2012 the ALC issued an order, a copy of which is attached as Exhibit A, granting the State Energy Office's October 3, 2012 Motion to Dismiss and remanding to the State Energy Office ("ALC Order").

37. On January 17, 2013 International Paper appealed the ALC Order ("Appeal").

39. Upon information and belief, either this Court or the ALC has jurisdiction over the State Energy Office when it performs its functions under S.C. Code Ann. § 12-6-3620.

42. The time limit for commencing a civil action in this Court may expire before the Appeal is resolved and International Paper may then have no opportunity for judicial review if it does not commence an action with this Court and a court ultimately determines that the ALC does not have jurisdiction over the State Energy Office.

As can be seen by the allegations of the Complaint, Plaintiff admits that the current action involves the same claim made before the ALC, which is presently pending on appeal. Dismissal under SCRCP 12(b)(8) is therefore appropriate and Defendant's Motion to Dismiss is granted and Plaintiff's Motion to Stay is denied.

IT IS SO ORDERED:

_____
G. THOMAS COOPER, JR., JUDGE
FIFTH JUDICIAL CIRCUIT

July ____, 2013
Columbia, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF RICHLAND	)	Case No. 13-CP-40-0572
International Paper Company, Plaintiff,	)	
v.	)	**PLAINTIFF'S NOTICE OF MOTION AND MOTION TO STAY PROCEEDINGS**
South Carolina State Energy Office, Defendant.	)	

TO: Theodore D. Willard, Jr. and Frank S. Potts, Attorneys for Defendant:

YOU WILL PLEASE TAKE NOTICE that Plaintiff International Paper Company, by and through its undersigned counsel, will move before the Presiding Judge on the tenth (10th) day after service hereof, or as soon thereafter as the parties may be heard, for an order staying further proceedings in this case.

The grounds for this motion are as follows:

1. Either the South Carolina Administrative Law Court ("ALC") or this Court has jurisdiction over the State Energy Office for purposes of determining Plaintiff's entitlement to the relief it seeks – certification that certain costs qualify for the tax credits at issue.
2. The State Energy Office has argued before the ALC that the ALC does not have jurisdiction over the State Energy Office.
3. The ALC issued a nine-page order on December 19, 2012 finding that it did not have jurisdiction over the State Energy Office.
4. On December 28, 2012, International Paper Company appealed the ALC order to the South Carolina Court of Appeals ("Appeal").

5. Whether the ALC or this Court has jurisdiction over the State Energy Office is an issue of first impression that has not been decided by any court.
6. Defendant South Carolina State Energy Office has filed a motion to dismiss in this case pursuant to SCRCP 12(b)(8) arguing that there is another action pending between the parties for the same claim – the Appeal.
7. If Defendant's motion is granted and this case it dismissed, it will unnecessarily jeopardize International Paper's opportunity for judicial review. It is possible that the South Carolina Court of Appeals, or the South Carolina Supreme Court, if applicable, will ultimately determine that the ALC does not have jurisdiction over the State Energy Office. If such a conclusion is reached after the time limit for commencing a civil action in this Court has expired International Paper Company would be denied its opportunity for judicial review of the State Energy Office's tax credit determination.
8. Given the unresolved jurisdictional questions and the potential harm that could come to International Paper if this action is dismissed, International Paper requests that this Court issue an order staying this action until the Appeal is resolved. Such an order would conserve the time and resources of the parties and courts and preserve International Paper's opportunity for judicial review of its claim should its Appeal result in an ultimate determination that the ALC does not have jurisdiction over the State Energy Office.
9. Defendant's motion to dismiss also alleges that Plaintiff's complaint fails to state a cause of action in that declaratory relief is improper where Plaintiff was adjudicated by the ALC to have an administrative remedy.

10. Defendant's argument is dependent on the jurisdiction of the ALC over the State Energy Office, an issue squarely addressed in the Appeal. Rather than a valid basis for dismissal, Defendant's allegation supports International Paper's request that this matter by stayed while jurisdictional issues are addressed through the Appeal.

MCNAIR LAW FIRM, P.A.

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ATTORNEYS FOR PLAINTIFF

April 1, 2013
Columbia, South Carolina

STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)))	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT
International Paper Company, Inc., Plaintiff, v. South Carolina State Energy Office, Defendant.	))))))))))	Civil Action No.: 2013-CP-40-0572 **DEFENDANT'S NOTICE OF MOTION AND MOTION TO DISMISS**

TO: Erik P. Doerring, Esquire, Attorney for Plaintiff:

YOU WILL PLEASE TAKE NOTICE that Defendant South Carolina Energy Office, by and through its undersigned counsel, will move before the Presiding Judge on the tenth (10th) day after service hereof, or as soon thereafter as the parties might be heard, pursuant to SCRCP 12 (b) (6) and 12 (b) (8), for an order dismissing Plaintiff's Complaint.

The grounds for this motion are as follows:

1. Plaintiff's complaint should be dismissed pursuant to SCRCP 12(b)(8) in that there is another action pending between the same parties for the same claim; and

2. Plaintiff complaint fails to state a cause of action in that declaratory relief is improper where Plaintiff was adjudicated by the S.C. Administrative Law Court to have an administrative remedy.

This motion is supported by the pleadings, any memorandum in support and the applicable law.

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ATTORNEYS FOR DEFENDANT

March 20, 2013
Columbia, South Carolina

STATE OF SOUTH CAROLINA)
) COURT OF COMMON PLEAS
COUNTY OF RICHLAND) 2013-CP-40-0572

International Paper Company,)
)
Plaintiff,)
)
vs.) TRANSCRIPT OF RECORD
)
South Carolina State Energy)
Office,)
)
Defendant.)

July 15, 2013
Columbia, South Carolina

B E F O R E:

THE HONORABLE G. THOMAS COOPER, JUDGE.

A P P E A R A N C E S:

ERIK P. DOERRING, ESQ.
Attorney for the Plaintiff

FRANK S. POTTS, ESQ.
THEODORE DuBOSE WILLARD, ESQ.
KEITH C. McCOOK, ESQ.
Attorneys for the Defendant

DEBORAH M. McCURDY, RPR
Official Court Reporter

1 INDEX OF WITNESSES

2

3

4 (WHEREUPON, no witnesses were called

5 during these proceedings.)

6

7

8

9

10 EXHIBITS

11

12

13 (WHEREUPON, no exhibits were introduced

14 during these proceedings.)

15

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1 JULY 15, 2013

2 THE COURT: International Paper v. South
3 Carolina Energy Office.
4 MR. McCOOK: This is a motion to reconsider
5 the Court's May 23rd order, Your Honor.
6 International Paper requests in its motion to
7 reconsider, alter or amend that the Court
8 reconsider its prior order and grant International
9 Paper's motion to stay and deny the State Energy
10 Office's motion to dismiss; or, alternatively, to
11 issue a new order to more accurately reflect the
12 facts of the record in the case and grant the State
13 Energy Office's motion to dismiss.
14 International Paper, Your Honor, has submitted
15 a memorandum in support of its motion today with
16 the Court, and in connection with the filing of
17 this memorandum has submitted a proposed order
18 granting the motion to reconsider.
19 International Paper, Your Honor, has provided
20 in connection with the hearings in this case two
21 orders, proposed orders to the Court, granting the
22 motion to stay, one with the original hearing, and
23 one after the May 23rd -- or May 16th hearing, Your
24 Honor, granting its motion for the request to the
25 Court.

1 We have also provided for the Court's
2 convenience today a separate motion granting our
3 motion -- a separate order granting our motion for
4 reconsideration; and, in the alternative, should
5 the Court be inclined, a short formal order
6 granting State Energy's motion to dismiss under
7 Rule 12(b)(8), but a short formal order that more
8 accurately reflects the record in this case, Your
9 Honor.
10 The issues in this case concern International
11 Paper's request for state biomass credits for the
12 tax years 2010 and 2011, Your Honor, and whether
13 the State Energy Office performed its certification
14 obligations under the statute.
15 As set forth in the complaint in this case,
16 International Paper filed its initial tax credit
17 application with the State Energy Office for the
18 2010 year on January 31st, 2011.
19 The State Energy Office responded, Your Honor,
20 to that 2010 tax credit application with its
21 decision on March 1st, 2011.
22 International Paper thereafter filed a request
23 for a contested case proceedings with the
24 Administrative Law Court.
25 THE COURT: Repeat that.

1 MR. McCOOK: Yes, Your Honor?
2 THE COURT: Was that a final order of the
3 Energy Office? Isn't that what is in dispute here?
4 MR. McCOOK: Yes, Your Honor. If I could.
5 The initial decision of the State Energy Office,
6 which was issued on March 1st -- and that deals
7 with the 2010 application. There are two
8 applications for two years. There are two separate
9 State Energy Office decisions. Those are the
10 subject of the Administrative Law Court's decision
11 dismissing those cases.
12 But, for purposes of this case, and it is
13 important for purposes of our statute of
14 limitations argument so the Court can appreciate
15 why we are here in this court today, is that that
16 decision they issued on March 1st, 2011,
17 International Paper filed its first contested case
18 proceeding with the Administrative Law Court within
19 30 days on March 25th, 2011.
20 Now, International Paper's decision, Your
21 Honor, to file with the Administrative Law Court is
22 a function of that court's very, very limited
23 jurisdiction.
24 If a state agency is at all determined to have
25 issued a final agency determination, the Applicant

1 is required to file a contested case proceeding in
2 the Administrative Law Court within 30 days. There
3 are no exceptions. There are no tolling. There
4 are no options to go beyond that. It is a limited,
5 limited form of entry into that court.
6 If you don't file, if there is any possibility
7 that that is a final agency determination and you
8 don't file, you are irrevocably out of court.
9 There is no going back. So International Paper
10 filed its requested case proceeding in that court
11 for that period.
12 Now, International Paper, Your Honor, at the
13 time that that case was filed, International Paper
14 could have blanketed forms. We could have filed
15 the case here. We could have filed the case, I
16 imagine, with the original jurisdiction of the
17 Supreme Court, because it deals with an untested
18 statute with a state agency whose authority under
19 this tax credit statute has been untested. It has
20 been completely untested.
21 And rather than do that, and this being a
22 state tax credit statute under Title 12,
23 International Paper termed the file a contested
24 case proceeding with the Administrative Law Court.
25 Now, that contested case proceeding went

1 forward, and went forward and was -- went forward
2 with discovery, litigation. And the State Energy
3 Office initially filed a motion to dismiss that
4 proceeding, arguing it didn't issue a final agency
5 determination.
6 Ultimately, the Administrative Law Court
7 disagreed with it, Your Honor, and said no, what
8 you issued it on was a final agency determination
9 and I have jurisdiction over Judge Anderson.
10 But he allowed the State Energy Office to
11 amend that, and the case continued, into discovery,
12 into trial preparations. And then it went into the
13 fall.
14 And during this time period, the State Energy
15 Office filed prehearing statements, which of course
16 were required to be filed in the Administrative Law
17 Court, all the while contending that the
18 Administrative Law Court had both contested case
19 jurisdiction under its statutes and independently
20 jurisdiction of its State Revenue Procedures Act.
21 It filed two separate -- it filed prehearing
22 statements in both cases and amended prehearing
23 statements, arguing --
24 THE COURT: What became of the motion to
25 dismiss?

1 MR. McCOOK: And then the second application
2 was filed, Your Honor. And then after further
3 discovery and a trial date had been set and
4 depositions were in the middle of being taken, the
5 State Energy Office then filed its motion to
6 dismiss with the Administrative Law Court arguing
7 that the Administrative Law Court did not have
8 subject matter jurisdiction over it as a state
9 energy{sic} in that case.
10 Now, the reporter of the Administrative Law
11 Court, which is attached as an exhibit to the
12 complaint in this proceeding, Your Honor, is very
13 important, because Judge Anderson struggled with
14 this. He struggled mightily with this. We had
15 hearings, supplemental briefs, telephone calls.
16 And eventually what Judge Anderson determined
17 was is that he, the Administrative Law Court, did
18 not have specified contested case jurisdiction over
19 the State Energy Office here.
20 But the Administrative Law Court has two types
21 of jurisdiction over our state agencies. It has
22 specifically enumerated case jurisdiction, and then
23 it has constitutional appellate jurisdiction over
24 decisions of our state offices and agencies.
25 And it says -- the Administrative Law Court

1 says: And I do have jurisdiction over the State
2 Energy Office. However, it has to go through
3 certain procedures.
4 And it is very enumerating. And the proposed
5 order that the State Energy Office submitted to the
6 Court doesn't reference any of that.
7 And so a review of the Administrative Law
8 Court's order without reference to this part is a
9 very limited view.
10 And I quote, just for a limited purpose, Your
11 Honor, Page 6 of the Administrative Law Court's
12 order:
13 There is presently no statutory law that
14 specifically states the State Energy
15 Office is subject to hearing because the
16 State Energy Office is a state
17 energy{sic}. Article I, Section 20, to
18 the constitution nevertheless requires
19 by way of South Carolina Code Section
20 1-23-505(3) a procedural due process
21 contested case hearing. Thus, the State
22 Energy Office was required to afford
23 International Paper an opportunity for a
24 hearing to determine whether a party's
25 application for a biomass resource

1 credit will be served.
2 The Court then goes and continues, Your Honor,
3 on Page 8 with instructions in Footnote 8, which is
4 very important:
5 The Court does not decide in the instant
6 case whether due process requires that
7 tax credit applicants before the State
8 Energy Office be given trial type
9 hearings as due process does not require
10 a trial type hearing in every
11 conceivable case of government
12 impairment of a private interest.
13 Citing the Cutro case.
14 And concluding, though, nevertheless, at
15 a fundamental level a due process
16 requires that tax credit applicants over
17 the State Energy Office must -- and this
18 is in bold in the order, Your Honor --
19 at the very least be given notice, a
20 hearing, an opportunity to be heard in a
21 meaningful way before an impartial,
22 unbiased adjudicator and judicial
23 review.
24 And, if important decisions turn on
25 questions of fact, then the applicants

1 must also be given an opportunity to
2 present favorable witnesses.
3 Consistent with those determinations, Your
4 Honor, the Court in its last page:
5 It is therefore ordered the State Energy
6 Office's motion to dismiss is granted
7 and that the case is remanded to the
8 State Energy Office.
9 That is the present case. These allegations
10 are set forth clearly in our complaint. And the
11 State Energy -- and International Paper then
12 followed with a claim for a hearing in the State
13 Energy Office, which is pending.
14 Now, it is very important to understand the
15 date that this action was filed, Your Honor. This
16 action was filed January 30th, 2013. The initial
17 tax credit application was filed with the State
18 Energy Office January 31st, 2011. This lawsuit was
19 filed within two years of that date.
20 The statute of limitations that this Court has
21 jurisdiction and this Court most likely, if it does
22 have jurisdiction, it is constitutional in nature
23 under Article V, Section 11, the general civil
24 jurisdiction of this Court.
25 If it does have jurisdiction, what statute of

1 limitations might apply is itself again untested.
2 It may very well be a two year statute. And the
3 two year statutes that we have cited to the Court
4 in our revised order after our May 16th hearing,
5 Your Honor, order five potential statutes of
6 limitations.
7 International Paper contends that at a minimum
8 while at the earliest that a two year statute
9 applies, most likely a three year statute applies.
10 And in most tax cases, for instance, Your
11 Honor, under Title 12, a general three year statute
12 applies.
13 But if there is any chance that it is a two
14 year statute and International Paper is out of
15 court at the Administrative Law Court where the
16 Administrative Law Court or the Court of Appeals
17 are now, Your Honor, with a motion to certify
18 pending before the South Carolina Supreme Court for
19 which the State Energy Office has agreed and
20 concurred with that motion to certify. So both
21 parties have concurred with a motion to certify the
22 ALC's order to -- directly to the South Carolina
23 Supreme Court for hearing. And we're waiting for
24 that decision presently.
25 If the Supreme Court or the Court of Appeals

1 determines that the Administrative Law Court
2 doesn't have jurisdiction or State Energy, as an
3 administrative agency, doesn't, and it is this
4 Court that is the sole body for adjudicating this
5 decision, if it is a two year statute of
6 limitation, we may have just filed the day before
7 that statute ran.
8 Now, the Court can grant the motion to
9 dismiss, and then we'll go right into the appeal
10 process. We will be filing additional motions, we
11 will be filing appellate briefs, and we will be
12 further burdening our Court of Appeals system. By
13 the simple expedience of staying the case, putting
14 it aside, the Court of Appeals and our Supreme
15 Court will take judicial notice of it. The State
16 Energy Office has already notified them in their
17 papers of the pendency of this case. We will be
18 able to go forward, litigate those issues to the
19 Court of Appeals and the Supreme Court. With
20 finality, Your Honor, with finality we will be told
21 which court we are supposed to be in.
22 And the Administrative Law Court knows there
23 is a remedy. They know that State Energy has to
24 give some type of adjudicatory or administrative
25 hearing or administrative relief to tax credit

1 applicants. They just can't sit there as an
2 amorphous irresponsible state agency.
3 Now, finally, Your Honor, if the Court
4 contends -- if State Energy contends that in their
5 proposed order to International Paper's motion to
6 reconsider that the stay, in order for the Court to
7 grant the motion to dismiss -- excuse me, to grant
8 the stay, it must itself determine that it has
9 jurisdiction.
10 Oddly, the State Energy Office doesn't
11 recognize for the Court to be able to grant its
12 12(b)(8) motion, it must also determine that it has
13 jurisdiction. And the State Energy Office hasn't
14 illuminated the Court to that fact. Again,
15 International Paper believes the Court has
16 jurisdiction under either event, under either
17 motion, under Article V of our constitution,
18 Section 11, the general jurisdiction.
19 The State Energy Office, Your Honor, in its
20 proposed order to International Paper's motion for
21 reconsideration argues that there had been a case
22 between the parties at the Administrative Law Court
23 level and that there is a, quote, principle of
24 priority that should play here. Presumably, the
25 first case that is filed, that should go forward.

1 Now, those principles of priority may have
2 relevance where jurisdiction is not an issue but
3 are adjudicated issues, indeed 12(b)(6) -- 12(b)(8)
4 is important where you have related parties,
5 related cases, and you've got the issue being
6 adjudicated over at another court. Where it is the
7 seminal issue of which court you are supposed to be
8 in in the first place, those rules may not have
9 applicability.
10 And if the Court stays this, we can all sit
11 back, look, wait for the Court of Appeals and our
12 Supreme Court to make that decision. There will be
13 no prejudice of the State Energy Office. There is
14 no prejudice to International Paper. We can sit
15 and look back and be told where the basis for the
16 claim lies.
17 And if the Court is inclined to not grant our
18 motion for reconsideration, Your Honor, lastly, we
19 have provided a short form of an alternative motion
20 to grant the State Energy Office's motion to
21 dismiss, which is about a page and a half, and it
22 is strictly limited to the complaint and the
23 evidence in the record.
24 Thank you, Your Honor.
25 THE COURT: Mr. Potts?

1 MR. POTTS: Your Honor, I may not know when it
2 is time to sit down and shut up, but I want to take
3 a few minutes to address some of the issues.
4 THE COURT: Take your time.
5 MR. POTTS: May I haul this over?
6 (Moves podium.)
7 MR. POTTS: Let me make sure I introduce the
8 people that are here. You may know them already.
9 Bo Willard, sitting at the table with me. Keith
10 McCook, he is Deputy General Counsel for the Board.
11 And sitting over to your far left is Ashley
12 Lancaster, she is Deputy Director of General
13 Services Division and Director of the State Energy
14 Office for the Budget and Control Board. She is,
15 in essence, a client. She is the one you saw last
16 time but wasn't introduced.
17 Keith advises me and I think counsel misspoke
18 when he said that he didn't mean to say that we,
19 the State, had represented that the Administrative
20 Law Court had jurisdiction.
21 In four more days it will be seven months
22 since International Paper filed its notice. The
23 first brief is due to be filed. Seven months.
24 They have yet to file a brief in any court as to
25 why they are appealing. I don't know why the

1 delay.

2 In the meantime, we have had a bill introduced

3 from the General Assembly -- it didn't get out of

4 committee, but -- to change the statute. We have

5 had this case filed and at least five requests for

6 extension of appeals so they don't have to be

7 filed. I don't know what is going on. But it is

8 delay.

9 Now, he has even had -- he filed with the

10 Court of Appeals, and they don't even bother filing

11 a brief with them, he waits several months and then

12 files a motion to have it heard by the Supreme

13 Court.

14 Quite frankly, we don't care whether the Court

15 of Appeals hears it or whether the Supreme Court

16 hears it. We don't have any objection to it being

17 heard. But we would like it to be heard.

18 That is why the last time we were here we

19 said, if you are going to decide to take

20 jurisdiction of this matter, no stay, let's go

21 forward. Let's have the thing done.

22 But the problem is, last time we were here we

23 also made a mistake. I haven't had to do this very

24 often. As a matter of fact, I can't remember ever

25 having done it in this matter, but I made a mistake

1 in what was submitted to you. There was in fact
2 cases with the principle of priority that was
3 actually directly on point. And I was not familiar
4 with it. I had never heard of it before, did not
5 know about it.
6 And I want to take a few minutes to -- I don't
7 know how familiar the Court is with it. I think it
8 is something that does not come up very often. And
9 the reason it doesn't is because the answer is
10 somewhat obvious. But I -- and I even looked,
11 because I had never heard of it, I even looked in
12 Westlaw to say, is this something -- just for South
13 Carolina or is this something that is a viable
14 proposition.
15 Well, I ended up with 575 cases. And the last
16 decision using the principle of priority was in
17 California on the 10th, which is, what, 14 days
18 ago, whatever it is. It was on the 10th of July.
19 So it is not something -- it is still viable
20 and very much a principle of law. And we have a
21 case -- Your Honor, if I might hand this up.
22 (Complies.)
23 MR. POTTS: I'm giving you the wrong one.
24 Excuse me, Judge. It is the Tucker case. And just
25 for what it is worth, I went ahead and printed out

1 AmJur 2nd on principle. I have seen counsel's
2 documents. Your Honor, I have highlighted them,
3 the Tucker case, because it comes close as anything
4 else. Besides the law, which is good law, that we
5 cited earlier talking about this situation.
6 In this case, it was an issue between Probate
7 and Common Pleas. In a later case, which is the
8 McDonald case in South Carolina, it was an issue
9 between Family Court and Common Pleas, but the same
10 principle was utilized in the same way. This case
11 just explains it more clearly.
12 Will the Court permit me to read some of this,
13 Judge, or would you prefer that I not?
14 THE COURT: You have the floor.
15 MR. POTTS: We start on Page 3, Number 1,
16 where it says:
17 While it is true that Circuit Court has
18 general jurisdiction in civil matters,
19 once the forum for the administration of
20 the state has been chosen and the forum
21 or the court so assuming jurisdiction
22 has control of the administration of the
23 estate and the parties interested in the
24 estate matter should apply to the judge
25 or court. Administration of estate

1 cannot be in two courts simultaneously.
2 Then it drops down. It talks about the
3 priority principle.
4 As a rule, the exercise of concurrent
5 jurisdiction...
6 And I'm going to stop. That is presumably
7 what this Court has. At least that is what the
8 Plaintiff in this case is alleging.
9 ...is controlled by the principle of
10 priority. According to this principle,
11 a court of concurrent jurisdiction that
12 first exercises it thereby acquires
13 exclusive jurisdiction to further
14 proceed in the case.
15 In other words, once a court of concurrent
16 jurisdiction has begun to exercise its jurisdiction
17 over a case, its authority to deal with the action
18 is, subject to appellate review, exclusive until it
19 is completely disposed of, and no other court of
20 concurrent jurisdiction may interfere with the
21 proceedings thus pending.
22 And it goes on to further explain that.
23 THE COURT: I understand.
24 MR. POTTS: That is applicable in this case,
25 Judge. And it is very clearly applicable.

1 Now, the second case, the McDonald case, which
2 is an '81 case, I have with me, it was simply,
3 instead of being Probate to Common Pleas, it is
4 Family Court and Common Pleas. This is good law in
5 South Carolina. This is in addition to everything
6 we provided earlier.
7 And if the motion for reconsideration had not
8 been requested, we would simply, when this case is
9 appealed, I expect, intended to use it as an
10 additional sustaining ground. But we missed it the
11 first time, and for that, my apology. We shouldn't
12 have.
13 The Plaintiff has represented to you that this
14 case is before the Supreme Court or may be before
15 the Supreme Court, currently in the Court of
16 Appeals, and it is the same case. We have got the
17 same pleadings filed, for all practical purposes.
18 What I want to do for a minute is -- and I
19 think you'll find it in what the Plaintiff
20 submitted to you under Tab C. What I want to do is
21 tell you what the Supreme Court is being told about
22 this case by the Plaintiff.
23 It is the motion to certify appeal to Supreme
24 Court. Looking at Page 4 of that, Your Honor,
25 going down to the second full paragraph, the second

1 sentence:
2 The South Carolina Income Tax Act, of
3 which 12-6-3620 is a part, provides that
4 the Department of Revenue shall
5 administer and enforce provisions of the
6 act of Section 12-6-20. To that end,
7 the General Assembly has also enacted
8 the South Carolina Revenue Procedures
9 Act, quote, to provide the people of
10 South Carolina with a straightforward
11 procedure to determine any disputed
12 revenue liability.
13 And it cites the statute.
14 The Revenue Procedures Act specifically
15 provides that a taxpayer may challenge a
16 tax decision by the Department of
17 Revenue by requesting a contested case
18 hearing before the Administrative Law
19 Court.
20 And it cites the section for that.
21 Thus, this case presents the important
22 legal question of whether the General
23 Assembly intended that biomass tax
24 credit disputes also be resolved by
25 contested case proceedings in the

1 Administrative Law Court, particularly
2 given the absence of any law granting
3 the State Energy Office the power to
4 hold hearings regarding biomass fuel tax
5 credit or the numerous other tax credits
6 for renewable and alternative energy
7 resources.
8 This case presents important legal
9 issues concerning the jurisdiction of
10 the South Carolina Administrative Law
11 Court and its operation of the State
12 Energy Office in its role in
13 administering the tax statutes of this
14 state.
15 And it goes on.
16 That is what is being presented to the Supreme
17 Court as what this case represents. It is not a
18 matter of, we need to have it heard here and that
19 this Court has jurisdiction.
20 THE COURT: Well, address the issue of the
21 stay, if you will. That is what Mr. Doerring
22 wants.
23 MR. POTTS: You have to have jurisdiction to
24 issue the stay. It is that simple. Without
25 jurisdiction, you can't issue a stay. Absent that,

1 and all the law says, particularly the principle of
2 priority, there is no jurisdiction. You lose it.
3 It becomes exclusive. You can't issue a stay in
4 the same case that is now pending for the Court of
5 Appeals.
6 The ALC -- you are being asked to read from
7 another court that has assumed jurisdiction of the
8 case. And then we're not sure whether it was
9 dismissed for lack of jurisdiction because you have
10 that weird remand part. Without instructions, and
11 of course, if there is a remand -- and, of course,
12 he brought up the remand. If there is a remand in
13 it, then the remanding court still retains some
14 jurisdiction in order to control the remand. It
15 makes no sense. You would be assuming jurisdiction
16 over a case that has already been -- had
17 jurisdiction assumed over it by the Administrative
18 Law Court and the Court of Appeals and possibly now
19 the Supreme Court.
20 And contrary to what was implied earlier, when
21 we responded consenting to the Supreme Court
22 hearing, he indicated there may be another appeal
23 coming, which we would ask to be consolidated and
24 we would expand the issues because it would be a
25 question of whether this Court has jurisdiction or

1 whether this Court should have done anything.
2 So the stay cannot be issued absent
3 jurisdiction, absent this Court deciding to
4 exercise jurisdiction, which this Court should be
5 precluded from doing.
6 In addition, we have a right to have the case
7 heard. If we are going to have to try the case in
8 this court, let's try it. I'm not afraid of a
9 trial. The State is not afraid of a trial. But
10 the fact of the matter is, that is not where this
11 case is. This case is in the Court of Appeals on
12 its way, and they are the ones who started it.
13 They appealed it. They did not go back to the
14 Administrative Law Court and say, explain this
15 remand to us, explain what -- anything. They
16 simply appealed, just as they did from the ALJ
17 Office.
18 THE COURT: What about the -- do you have a
19 position on the statute of limitations issue? In
20 other words, due process requires we take that into
21 consideration.
22 MR. POTTS: Your Honor, I think it would be
23 great to be able to do it in every single case.
24 When I file a case in a court and it is possible
25 that I haven't thought it through and picked out

1 the right venue or the right jurisdiction to go
2 ahead and try to put place markers in other courts.
3 But the fact of the matter is, they are in one
4 case. They don't have a right to walk around to
5 other courts that don't have jurisdiction and ask
6 them to assume jurisdiction for the purpose of them
7 attempting to preserve the statute of limitations
8 argument. And they won't even come in here and
9 tell you what they believe is the appropriate
10 statute of limitations. They come up with two,
11 three, ten. And you know what Number 2 is. Number
12 2 is -- and they argue that this applies -- it is
13 for the purpose of forfeiture and penalties imposed
14 by the State. That is what the two year statute of
15 limitations they have cited is.
16 You know, perhaps if they had filed their
17 brief on time and simply moved on with the
18 appellate process that they started, we wouldn't be
19 here. But it is not right to come in here and seek
20 jurisdiction from you and attempt to involve this
21 Court in a case that is already pending to preserve
22 what? Their statutory right in the statute of
23 limitations in their benefit? I mean, they need to
24 file their brief. That is what they needed to do
25 around January 20th when it was due.

1 THE COURT: Your office has never argued that
2 the two year statute of limitations would apply in
3 this case, have you?
4 MR. POTTS: Absolutely not. Absolutely not.
5 And because it wasn't. If you look at it, it is
6 because we're not talking -- they are seeking a tax
7 credit. We're not talking about a penalty or a
8 forfeiture by the State against them. It has no
9 application whatsoever. And I think to argue it is
10 a waste of the Court's time. To even suggest it is
11 an attempt to confuse some issues. And if that is
12 what they were looking at as to why they filed on
13 the 30th, I can't help you.
14 THE COURT: All right.
15 MR. POTTS: Your Honor, the law we gave the
16 first time is good law as to why this case does not
17 belong in this court. Everything in your previous
18 order on the 23rd is good law. I regret the
19 principle of priority was not also included because
20 there are absolutely no -- from case law in South
21 Carolina, there is no exception whatsoever to that.
22 But that is an additional sustaining ground.
23 What we would simply ask you to do to end this
24 matter is to deny their motion on a Form 4 and we
25 will utilize when they appeal, as I'm sure they

1 will, the priority principle as an additional
2 sustaining ground. If the Court wishes to review
3 another order, we have submitted one including it.
4 THE COURT: All right.
5 MR. POTTS: Thank you.
6 THE COURT: Thank you.
7 Mr. Doerring?
8 MR. DOERRING: Briefly, Your Honor.
9 THE COURT: For the record, if you will
10 address the priority issue.
11 MR. DOERRING: That is the principal argument,
12 Your Honor, which can hopefully be dispensed
13 shortly.
14 The principle of priority issue cited in
15 Tucker itself deals where courts have concurrent
16 jurisdiction. We are arguing one of these courts
17 has exclusive jurisdiction. And the whole Tucker
18 principle, or the whole principle of priority,
19 there are cites on that crucial thing, crucial
20 point. In fact, I'm citing their own proposed
21 order.
22 THE COURT: Does that matter?
23 MR. DOERRING: I think it does, because the
24 Administrative Law Court is a court of limited
25 jurisdiction. It doesn't have, you know -- for

1 instance, general jurisdictional powers that this
2 Court does. I mean, it really does.
3 THE COURT: If it takes jurisdiction --
4 MR. DOERRING: Yes, sir.
5 THE COURT: -- what is the effect of that?
6 MR. DOERRING: If it -- and it is the two
7 types of jurisdiction, and as Mr. Potts concedes
8 and I'll concede as well, muddled somewhat by their
9 order, but it takes jurisdiction under direct
10 contested case jurisdiction and then it takes it
11 under its appellate function.
12 And the direct contested case jurisdiction,
13 Your Honor, is where a lot more of the cases are,
14 more of glossaries, more of guidances to
15 practitioners.
16 The appellate jurisdiction that is available
17 to it has far less interpretation. And so I think
18 here, International Paper contends it is either/or,
19 it is in the Administrative Law Court or it is
20 here, it is not both. And so the principle of
21 priority --
22 THE COURT: I think Mr. Potts will agree with
23 you on that one.
24 MR. DOERRING: Pardon?
25 THE COURT: I think Mr. Potts would agree with

1 you on that one.
2 MR. DOERRING: Well, if that is the case, then
3 his reliance on Tucker is misplaced I would
4 advance, Your Honor, because the premise of Tucker
5 is concurrent jurisdiction.
6 As a rule, the exercise of concurrent
7 jurisdiction is controlled by the principle of
8 priority.
9 According to this principle, the Court of
10 concurrent jurisdiction that first exercises it
11 thereby acquires exclusive jurisdiction to further
12 proceed in the case. That is heart of his
13 argument, Your Honor.
14 THE COURT: I've been in some disputes with
15 federal courts over that very issue too.
16 MR. DOERRING: Yes, Your Honor. There was a
17 quote by the Administrative Law Court judge in the
18 case in -- just on the transcript, so this is
19 just -- towards the end of the hearing on the
20 motion to dismiss, Judge Anderson indicated, quote:
21 I have no clarity as to how I am going
22 to rule at all right now. This case is
23 almost like a law school examination. I
24 told my staff that earlier.
25 THE COURT: I know the feeling. Anything

1 further?
2 MR. DOERRING: No, Your Honor.
3 THE COURT: Anything further?
4 MR. McCOOK: No, Your Honor.
5 THE COURT: Anything further?
6 MR. POTTS: I was going to add, the Plaintiff
7 represented to both you and the Administrative Law
8 Court that each of you have jurisdiction. I call
9 that concurrent.
10 THE COURT: All right, I'll take a look at it
11 one more time and I'll let you know.
12 Thank you very much.
13 MR. DOERRING: Thank you, Your Honor.
14 MR. POTTS: Thank you, Your Honor.
15 (WHEREUPON, the proceedings were concluded.)
16
17
18
19
20
21
22
23
24
25 (END OF TRANSCRIPT)

State of South Carolina | Court of Common Pleas

County of Richland | 2013-CP-40-00572

International Paper Company :
:
-VS- : TRANSCRIPT OF RECORD
:
South Carolina State Energy :
Office :

May 16, 2013
Columbia, South Carolina

B E F O R E:

The Honorable G. Thomas Cooper, Judge, Jr.

A P P E A R A N C E S:

Erik P. Doerring, Esquire
Jeffrey Allen, Esquire
Attorneys for the Plaintiff

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Attorneys for the Defendant

Daphne D. Helms
Circuit Court Reporter

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1 **The Court:** All right. Now International Paper.
2 **Court Reporter:** I don't know any of the attorneys.
3 **The Court:** All right. We'll -- we'll get them to
4 identify themselves and their clients.
5 **Court Reporter:** They all have on the same color ties
6 and the same color suits, almost.
7 **The Court:** Starting to my left.
8 **Mr. Willard:** Theodore Willard for the State Energy
9 Office.
10 **Mr. Potts:** Frank Potts, Your Honor.
11 **The Court:** Did you get... Come around so she can see
12 you, Mr. Potts.
13 **Mr. Potts:** Frank Potts.
14 **Court Reporter:** Oh, Potts. Okay.
15 **Mr. Potts:** And that fellow over there is Keith McCook.
16 **Court Reporter:** Hold on.
17 **The Court:** Who is who?
18 **Mr. Potts:** The gentleman seated in the red---
19 **The Court:** Oh.
20 **Mr. Potts:** He's Keith McCook.
21 **The Court:** Okay.
22 **Court Reporter:** You're Mr. Potts. Mr. Potts, if you're
23 going to speak, I'll need for you to go to the podium because
24 I can't see you back there.
25 **Mr. Potts:** I'm going to try not to speak.

1 **Court Reporter:** That'll work.

2 **Mr. Potts:** Only in the most exigent circumstances will

3 I arise. Judge Cooper doesn't like me standing up.

4 **Court Reporter:** Okay. And then on this side?

5 **The Court:** No comment.

6 **Mr. Doerring:** Good morning, Your Honor. Erik Doerring

7 for the plaintiff, International Paper.

8 **Mr. Allen:** Jeffrey Allen for International Paper.

9 **The Court:** All right. Have a seat, gentlemen. I have

10 read your briefs. How do you wish to proceed in terms of the

11 order of the motions? Does it matter to either one of you,

12 Mr. Willard?

13 **Mr. Willard:** Your Honor, since we filed first, we'd

14 like to have our motion heard first.

15 **The Court:** Certainly. You may proceed.

16 **Mr. Willard:** May it please the Court, Your Honor? Bo

17 Willard for the South Carolina Energy Office. Judge, the

18 issue we're dealing with today is: Do the South Carolina

19 Rules of Civil Procedure allow International Paper to bring

20 the same lawsuit over and over until it gets the result it

21 wants? We contend that they do not, Your Honor, and that's

22 why we moved to dismiss pursuant to 12(b)(8) and 12(b)(6).

23 **The Court:** What's the status of the appeal at this time

24 from the---

25 **Mr. Willard:** There's been---

1 **The Court:** ---Administrative Law Court?

2 **Mr. Willard:** There's been four extensions on the brief,
3 Your Honor. It's still pending at the Court of Appeals. No
4 briefs have been filed.

5 **The Court:** Okay.

6 **Mr. Willard:** The appellant has requested four
7 extensions.

8 **Court Reporter:** I'm sorry. Repeat that.

9 **Mr. Willard:** The appellant has requested four
10 extensions.

11 **The Court:** Okay. Go ahead. I didn't mean to interrupt
12 you.

13 **Mr. Willard:** Thank you, Your Honor. Your Honor,
14 examining the pleadings, having listed them at the motion to
15 dismiss stage, International Paper brings this current action
16 asking for a declaratory judgment that its 2010/2011 costs
17 qualify for the bioresource credit under South Carolina Code
18 12-6-3620. This is the same relief, Your Honor, requested
19 before the Administrative Law Court as pled in their
20 complaint. Exact same parties, exact same relief, exact same
21 recovery that they're requesting. Your Honor, if you examine
22 the complaint, Paragraphs 21, 29, 43 and 49, those set out
23 what was pled at the A.L.C. and what is pled in this action,
24 and it is the identical relief.

25 Additionally, Your Honor, as pled in the complaint, the

1 State Energy Office moved to dismiss the A.L.C. action, and
2 the Administrative Law Court issued a ruling, and that order
3 was attached to the complaint as Exhibit A. and incorporated
4 therein. And that ruling was made on December 19th, 2012,
5 and found that the A.L.C. did not have contested case
6 jurisdiction but found that it did have appellate
7 jurisdiction pursuant to 1-23-600(d).
8 The A.L.C. went on to find because International Paper
9 failed to adhere to the Court's rules of appellate procedure
10 and instituted a contested case hearing in this Court, this
11 Court has no appellate jurisdiction. So again, Your Honor,
12 it held it had jurisdiction. International Paper didn't
13 follow the rules and properly perfect this appeal. So again,
14 Your Honor, that is the order that is on appeal to the Court
15 of Appeals.
16 **The Court:** Give me that procedural history in the
17 A.L.C.
18 **Mr. Willard:** Your Honor, International Paper brought
19 the action as a contested case before the A.L.C.
20 **The Court:** What did they do? Did they fail to apply
21 for 2630 (verbatim)?
22 **Mr. Willard:** Mr. Potts, Your Honor, handled that part
23 of the case.
24 **The Court:** All right. Mr. Potts. Did they fail it --
25 initially did they fail to apply for the credit allowed under

1 3620?

2 **Mr. Potts:** No, Your Honor. Here is what happened.

3 **Court Reporter:** Will you stand here?

4 **Mr. Potts:** I'm sorry. I'll come up. I'll go to the

5 podium. Here is what happened. The statute says you have to

6 make your application by January 31st of the year and that

7 you're supposed to get a response, a decision, from the

8 agency as to whether you qualify or not for the credit by

9 March 1st.

10 **The Court:** From your agency.

11 **Mr. Potts:** Yes, sir, from the Budget and Control Board

12 State Energy Office.

13 **The Court:** All right.

14 **Mr. Potts:** The application was received. It was about

15 20 pages long. On March 1st or thereabouts, the Energy

16 Office wrote International Paper and said: We are thinking

17 and we pretty much believe you're going to get credit for

18 some things, but we have questions about them and we need

19 more information in order to make a decision. And they're

20 supposed to provide the amount so that the revenue department

21 knows exactly how much the credit is supposed to be.

22 **The Court:** This is for the equipment primarily?

23 **Mr. Potts:** Yes, Your Honor, and whatever expenses there

24 were. There were 22 million in this case, $22 million in the

25 first year of expenditures. They were claiming over a $5

1 million tax credit. That's for the first year. So---

2 **The Court:** Hold on a minute. Mr. Nitche, take care of

3 that gentleman.

4 **Mr. Potts:** Your Honor, after the application of 20

5 pages is received for this $22 million worth of expenditures

6 and they write back and say, "We don't have enough

7 information; we need more information," and that goes out

8 March 1st and we're---

9 **The Court:** We're talking about 2012?

10 **Mr. Potts:** Yes, sir, 2011.

11 **The Court:** '11.

12 **Mr. Potts:** March 1st this letter goes out saying it

13 looks like we're going to approve it in some areas. We have

14 questions in other areas. Don't think so in other areas.

15 But here is the information you need to provide us.

16 March 1st goes by, and nothing is heard from International

17 Paper. That letter goes out. Nothing is heard.

18 March 25th, without a phone call, without providing any

19 information, just nothing, the State Energy Office gets

20 notice that International Paper has filed with the

21 Administrative Law Court for a contested case hearing.

22 That's the start of all of this. So it goes into a contested

23 case hearing, and the hearing, of course, is never held.

24 Then in the fall the State Energy Office says to the

25 judge: Judge, you haven't got a final decision in this case.

1 All you've got is this March 1st letter asking for more
2 information and not making any decision as to any amount
3 they're entitled to receive or not receive.
4 Well, the administrative -- and, of course, that's
5 opposed by International Paper. International Paper says,
6 oh, no, no, that's a final decision. Well, the
7 Administrative Law Court---
8 **The Court:** You mean the 3/1 letter is the final
9 decision.
10 **Mr. Potts:** That's right. So the Administrative Law
11 Court agrees with them and says, yeah, that's a final
12 decision. So the State Energy Office - I do - make another
13 motion and say, okay, that's a final decision. Well, what
14 you've got is a gross mistake which needs to be fixed. The
15 judge does allow that, so it gets remanded back to the State
16 Energy Office where that gets fixed.
17 Then the second year, 2012, is also consolidated with
18 the first year. Discovery gets going. We take virtually all
19 of International Paper's witnesses. We depose them. We get
20 again an additional 6,000 documents in support of the
21 application as part of discovery.
22 **The Court:** This is the original application?
23 **Mr. Potts:** It's in support of the original application.
24 **The Court:** That's what I mean.
25 **Mr. Potts:** We got 20 in the first case.

1 **The Court:** But you're not -- you're not supplementing
2 it with more---
3 **Mr. Potts:** No.
4 **The Court:** ---requests for---
5 **Mr. Potts:** No. It's discovery. It's part of the
6 request for production.
7 **The Court:** Okay.
8 **Mr. Potts:** We're into discovery. We have some
9 discovery disputes, and at the same time the State Energy
10 Office files its motion to dismiss the case for lack of
11 jurisdiction. The State Energy Office contended that the
12 Administrative Law Court had no jurisdiction.
13 **The Court:** That's the first time you've made that---
14 **Mr. Potts:** Motion.
15 **The Court:** ---motion.
16 **Mr. Potts:** Yes, Your Honor.
17 **The Court:** 2012.
18 **Mr. Potts:** Correct.
19 **The Court:** Go ahead.
20 **Mr. Potts:** The judge has a hearing on -- he asks for
21 briefs. He gets -- we end up having oral argument on I think
22 it's October 17th of 2012, and he has supplemental memoranda
23 submitted. And then I think it was on December 17th he rules
24 that, yes, this Court does have jurisdiction but it only has
25 jurisdiction in the appellate capacity, that the appropriate

1 thing is you get a final decision and you appeal it. He does
2 not have the contested case hearing capacity in terms of
3 jurisdiction, and as a result he's dismissing the case.
4 So you've got another judge down at the end of this
5 street thinking he has jurisdiction, and his ruling is that
6 they just didn't file it properly and you can't convert it,
7 and that's the background in the---
8 **The Court:** All right. Is that---
9 **Mr. Potts:** I'm sorry. If you have any questions,
10 Judge...
11 **The Court:** The ruling of the A.L.J., is that part of
12 this file?
13 **Mr. Willard:** That is, Your Honor. That was Exhibit A.
14 to the complaint.
15 **Mr. Potts:** As a matter of fact, that's part of the
16 complaint. International Paper attached his decision to
17 their complaint.
18 **The Court:** Okay.
19 **Mr. Willard:** And, Your Honor, the---
20 **The Court:** Oh, wait a minute. I see it. Ralph King
21 Anderson?
22 **Mr. Potts:** Yes, Your Honor.
23 **The Court:** All right. I've got it.
24 **Mr. Willard:** And the language is on Page 8.
25 **Mr. Potts:** Your Honor, I also got handed a note where I

1 should note, in case you haven't read it, that Judge
2 Anderson's order says in it that where he said it was a final
3 decision, when we opposed that, he voided that in his order.
4 **The Court:** All right. Go ahead, Mr. Willard. I think
5 I understand---
6 **Mr. Willard:** Yes, Your Honor.
7 **The Court:** ---the background in this matter.
8 **Mr. Willard:** You know, what this does is it brings us
9 down -- this is on all fours with why we have Rule 12(b)(8),
10 this identical case between these identical parties asking
11 for the same relief that was before the A.L.C. and is
12 currently on appeal. Your Honor, that was based on the old
13 demurrer statute, as Your Honor may recall, where the key is
14 we don't want two courts at the same time making inconsistent
15 rulings. So again, Your Honor, that's why a 12(b)(8) motion
16 would be appropriate.
17 Additionally, Your Honor, our Supreme Court has said in
18 cases such as this, a Court should refuse to grant a
19 declaratory judgment when there's an administrative remedy,
20 and that was the White Furniture case cited in our brief.
21 And, in fact, it uses language that gratuitous interference
22 in the administrative process should be avoided. Here you
23 have the A.L.C. ruling that the administrative remedy is an
24 administrative appeal before the A.L.C. You just blew it.
25 Additionally, Your Honor, the Supreme Court in the same

1 case has held a declaratory judgment action cannot be used as
2 procedural fencing or forum shopping. In looking at the
3 dates involved, Your Honor, these are all in the complaint.
4 They bring the A.L.C. action March 25th, 2021.
5 December 19th, 2012, the A.L.C. issues this order.
6 January 17th, 2013, International Paper files an appeal to
7 the Court of Appeals, and then they file this D.J. action
8 January 30th, 2013. This is absolutely forum shopping, and
9 that's what Rule 12(b)(8) is for. It's absolutely
10 inappropriate.
11 Your Honor, it comes to the ultimate question: Why is
12 dismissal more appropriate than a stay? Judge, if we do not
13 dismiss this case, a stay absolutely guts and eviscerates
14 Rule 12(b)(8). You might as well take it out of a rule book.
15 Additionally, Your Honor, International Paper suffers no
16 prejudice by a dismissal. The case on appeal to the Court of
17 Appeals, if the Court upholds the ruling, the case is
18 probably gone forever. If International Paper wins anything
19 at the Court of Appeals, the case is going to go back to the
20 A.L.J.
21 If for some reason International Paper can get the case
22 back in the circuit court somehow, they have not been able to
23 point to Your Honor what would prohibit them from doing so,
24 what statute -- they do argue: We're worried about the
25 statute of limitations. However, Your Honor, if you look at

1 their proposed order -- I'm going to read the language. This
2 is on Page 3 of their proposed order to the Court. "The
3 period of limitations applicable for bringing a cause of
4 action against the State Energy Office relating to the
5 administration of South Carolina Code 12-6-3620 is
6 uncertain."
7 They can't point Your Honor to what statute they're
8 worried about. So again, Your Honor, they have the burden of
9 showing that they're prejudiced, yet they can't even in their
10 proposed order point to Your Honor what that burden is.
11 With all due respect to International Paper, they cite
12 two cases in their proposed order. Both of them are from
13 Idaho. Certainly they're not controlling, can absolutely be
14 distinguished. In fact, the elements from 12(b)(8) in Idaho
15 were different from what they are in South Carolina.
16 Additionally, Your Honor, in those cases the accepted
17 practice in Idaho is if you file a case in federal court with
18 pendent state claims, you simultaneously file an action in
19 state court in case the federal court doesn't accept
20 jurisdiction. Again, Your Honor, no application to this
21 current case.
22 So again, Your Honor, if they were really concerned
23 about the statute of limitations as they argue, when they
24 filed their A.L.C. case they would have also filed this case,
25 but instead, Judge, what they've done is they've waited over

1 a year and ten months to file this current case, only after
2 the Administrative Law Court ruled against them and only
3 after they appealed that order. So again, Your Honor, the
4 statute of limitations that they're worried about, that's a
5 red herring, absolutely a red herring. Finally, Your Honor,
6 and I can't emphasize this enough---
7 **The Court:** Yeah. Go ahead.
8 **Mr. Willard:** A stay severely prejudices the State.
9 Your Honor, if Your Honor feels that it's inappropriate to
10 dismiss this case, we would ask that this case -- that this
11 action proceed and I'll tell you why. There's over $5
12 million at issue, probably maybe about $7 million. If it's
13 tied up on appeal for two to five years, we're looking at
14 budget issues with respect to the State Budget and Control
15 Board. The State will -- it will be impossible, quite
16 frankly, for them to try this case in five years because of
17 employee turnovers, particularly at the administrative level.
18 Possible government restructuring. There may not even
19 be a State Energy Office in two to five years. So again,
20 Your Honor, if Your Honor says this case should not be
21 dismissed, we'd ask that this action proceed. Thank you,
22 Your Honor.
23 **The Court:** What are your budget concerns? These are
24 tax credits, are they not?
25 **Mr. Willard:** They are, Your Honor.

1 **The Court:** I'm sorry?

2 **Mr. Potts:** I'm sorry, Your Honor. That means they come

3 out of what's been paid.

4 **The Court:** Yeah.

5 **Mr. Potts:** They have to be taken out of the---

6 **Court Reporter:** Can you repeat that? I couldn't hear

7 you.

8 **Mr. Potts:** I'm sorry.

9 **Court Reporter:** I'm sorry. I couldn't hear you.

10 **Mr. Potts:** I said that means they have to be taken out

11 of the treasury. I'll try to speak more distinctly, if not

12 speak at all.

13 **The Court:** Well, if you need any help from the back

14 row, I think you can call on your surrogate back there.

15 **Mr. Potts:** Thank you, Your Honor.

16 **The Court:** Mr. Doerring.

17 **Mr. Doerring:** Thank you, Your Honor. May it please the

18 Court? The issue presented in these motions of the parties

19 is whether the Court should stay or dismiss these

20 proceedings. The Court issues here are jurisdictional and

21 the statute of limitations and the interplay between those

22 two, between the Administrative Law Court and this Court.

23 I.P.'s position is set forth in its motion filed with

24 the Court, and it's further supported by its complaint with a

25 copy of the Administrative Law Court's attached to the Court

1 for reference and copies of additional case submissions we
2 provided to the Court last week. The case involves the
3 interpretation of the State Tax Credit Statute, 12-6-3620,
4 and also and importantly the precertification role and duties
5 of the State Energy Office which our General Assembly has
6 inserted into this tax credit statute by amendment a few
7 years ago.
8 The State Energy Office was never always in this tax
9 credit statute and indeed was never in Title 12. These are
10 tax credit statutes, normally interpreted and administered by
11 our State Department of Revenue. Our General Assembly has
12 added the State Energy Office in a handful of these tax
13 credit statutes, Your Honor, in various roles, one of which
14 is a pre-filing certification role, untested, unknown. There
15 are no opinions. There are no rules. There are no
16 regulations, and indeed by statute, Your Honor, the State
17 Energy Office is a unit of the Budget and Control Board with,
18 by statute, no regulatory power. It can't even issue its own
19 rules and regulations.
20 The statute itself provides corporations with an income
21 of franchise tax credit for the installation of biomass
22 energy production equipment. The tax credit statute at
23 issue, Your Honor, has many unique features. Particularly,
24 it pertains to this pre-filing certification process that
25 really does not exist at all in our hundreds of other tax

1 credit statutes.

2 The tax credit statute provides that an applicant by
3 December 31st must go back and look at all of its potential
4 equipment that may qualify for this biomass energy production
5 equipment, and then the applicant has less -- less -- well, a
6 month by January 31st to go back and look at all of its data
7 for the year to ascertain what may and what may not qualify
8 for this credit and to file an application for certification
9 with our State Energy Office.

10 The State Energy Office then, Your Honor, has even a
11 limited amount of time by March 1st, 28 days, to make a
12 determination concerning that application. To make matters
13 more compacted, the corporation has until March 15th, two
14 weeks later, to file its income tax return utilizing the
15 certifications of our State Energy Office.

16 Your Honor, the whole process is less than 75 days, from
17 start - literally January 1st - to finish, March 15th, when
18 the corporation is going to claim these credits. And our
19 General Assembly envisions an expedited and -- and review
20 process where you go through this application process.
21 There's a limited review. There's a limited certification
22 process. It goes to the taxpayer. The taxpayer claims it on
23 the return. Needless to say, that didn't happen here.

24 Contrary to what Mr. Potts indicated earlier, there was
25 much discussion between the parties before the first

1 application was filed throughout 2010, throughout the filing
2 of the initial application on January 1st, 2011. There was
3 much discussion, document exchange, between International
4 Paper and the State Energy Office. It's an untested statute.
5 International Paper was seeking for guidance.
6 In fact, there were e-mails; there were letters. There
7 was documents going back and forth. Indeed, Your Honor,
8 International Paper invited the State Energy Office and its
9 representatives and a representative from the Department of
10 Revenue to come to its facility, which it did before the
11 filing of the tax credit application, for an inspection of
12 its facilities, for review of its asset listings. It opened
13 it up and offered its books and records and asked: Please
14 tell us what you want.
15 This is not something like Mr. Potts indicated where
16 just something was dumped on them. And indeed once
17 international -- once the State Energy Office denied the
18 certification application on March 20th, which, as Mr. Potts
19 correctly indicated, in the Administrative Law Court
20 proceedings where they file -- State Energy Office filed
21 initial motions to dismiss saying our March 1st letters were
22 not department determinations, Administrative Law Court; you
23 don't have jurisdiction.
24 The Administration Law Court, Judge Anderson, said: No,
25 you're wrong. Those are department determinations, and I do

1 have jurisdiction. You can amend them. You can add
2 additional information. This is after months and months of
3 discovery, by the way. But we'll let this case -- we'll let
4 these cases proceed forward. And they did for a year later,
5 through discovery, documents, thousands of pages of
6 information.
7 What Mr. Potts also didn't mention is State Energy
8 provided thousands of pages the other way. This isn't just
9 International Paper. This is the State Energy Office
10 providing thousands---
11 **The Court:** For what?
12 **Mr. Doerring:** ---and thousands of pages.
13 **The Court:** For what?
14 **Mr. Doerring:** In discovery concerning all of -- all of
15 the information, the documents they reviewed, similar
16 applications that were filed in the State Energy Office. We
17 weren't the only ones. And the policies - except they were -
18 procedures, e-mails, just a litany of documents that were
19 provided concerning how they looked at applications, what
20 they did, their processes, other applications, their
21 determination of processes, the documents they reviewed...
22 This wasn't just International Paper. Now---
23 **The Court:** This statute has been in effect since, it
24 looks to me like, 2008. Why was there in 2011 such confusion
25 about how to proceed under this statute?

1 **Mr. Doerring:** I can -- I will let the State Energy
2 Office answer that, Your Honor, but really the first -- I
3 think the first year---
4 **The Court:** Is this your first application?
5 **Mr. Doerring:** Yes, Your Honor, and indeed for most -- I
6 think there might have been one small application, Your
7 Honor, according to the discovery received that might have
8 been filed before. It's a relatively small one. The
9 majority -- there might have been one filed in 2009, Your
10 Honor. The majority of all of them first came in this first
11 year in 2010, and that was the first year they reviewed it.
12 And International Paper's applications for 2010 and 2011
13 involved equipment installed at their Georgetown and Eastover
14 facilities. The Georgetown facility, the one where they
15 specifically inspected, together with the Department of
16 Revenue, for -- and the equipment was $40 million. I mean,
17 there are large, large paper facilities, and it's an
18 extensive amount of information.
19 The application process doesn't envision that you go and
20 submit boxes and boxes and boxes of information. None of the
21 other applicants did, by the way. It's designed with regard
22 to an application and a limited certification. There's over
23 20 pages for each, 30, with a detail description of what they
24 did and how they did it and copies of information, copies of
25 letters, copies of asset information. It was a thorough

1 application, and it's, in fact, in many instances more
2 detailed than others.
3 The State Energy Office denied both applications, and
4 indeed in the first one, in the 2010 application, Your Honor,
5 they seem to deny it in part, grant some of it, and ask for
6 additional information. The quandary with an untested
7 statute like this is: What do we do? If that actually is a
8 determination, a department determination - which the
9 Administrative Law Court did find initially - we only have
10 30 days to file a contested case proceeding. If it's, in
11 fact, as the Administrative Law Court initially found in the
12 case, you've got 30 days or you're out of court. You can't
13 come here if it's a contested case proceeding.
14 So this forced International Paper into that -- into the
15 Administrative Law Court. Interestingly and procedurally,
16 the Administrative Law Court, Your Honor, is unlike here
17 where we file -- I apologize if I'm speaking with something
18 that you already know. Unlike complaints and answers filed
19 in this court, you initiate a contested case hearing simply
20 by requesting the Administrative Law Court. The
21 Administrative Law Court assigns a judge to it.
22 Then they request pre-hearing statements, and the
23 pre-hearing statements are really where the parties'
24 positions are articulated. The State Energy Office or court
25 had jurisdiction throughout in all its pre-hearing

1 statements.

2 **Court Reporter:** I'm sorry. Could you -- I didn't---

3 **Mr. Doerring:** The State Energy Office in its pre-

4 hearing statements said the Administrative Law Court had

5 jurisdiction from the beginning, from the beginning, citing

6 various statutes, and then for a year and a half proceeded

7 through contentious litigation, discovery, depositions,

8 motions. A year and a half later it files a motion saying

9 you don't have subject jurisdiction over -- you don't have

10 subject matter jurisdiction over it.

11 The Administrative Law Court granted their motion, and

12 again a copy of that order is attached, Your Honor, to our

13 complaint, and the Administrative Law Court indicated it

14 presently doesn't have subject matter jurisdiction over the

15 State Energy Office sitting in a contested case proceeding,

16 but it may have what it referred to as appellate

17 jurisdiction. If a claim were to be filed with the State

18 Energy Office because it perceived the State Energy Office

19 denied International Paper due process and that if

20 International Paper were to go to the State Energy Office and

21 make an administrative request for a due process type hearing

22 with an impartial adjudicator also, International Paper could

23 do that.

24 Interestingly though, the Court dismissed it for lack of

25 jurisdiction and then in its order remanded it, remanded it,

1 to the State Energy Office. At that point International
2 Paper is faced with a quandary. It says the Administrative
3 Law Court doesn't have jurisdiction, so it filed an appeal
4 with the Court of Appeals from that order. It then
5 immediately -- and this is all laid out in our complaint by
6 the way, Your Honor, date by date, item by item. It filed an
7 administrative claim for a hearing with the State Energy
8 Office. The Court of Appeal -- the appeal is pending. The
9 claim with the State Energy Office has not been acted on, and
10 it's pending.
11 If the Court of Appeals or indeed the Supreme Court
12 determines that the Administrative Law Court was right,
13 correct, and it doesn't have jurisdiction over the state --
14 over International or over the State Energy Office, they may
15 very well determine that it doesn't have appellate
16 jurisdiction either, may determine that this is just not the
17 correct forum, the Administrative Law Court.
18 Now, we would find that curious for a variety of
19 reasons, but, if so, there is this court as another
20 alternative or maybe it is the forum where these disputes
21 need to go forward. As Your Honor knows, before 1995 --
22 1994, before the formation of our State Administrative Law
23 Court, it was this court, our court here in Richland County,
24 which heard tax disputes with our departmental then tax
25 commission. I had many cases in front of this court, in the

1 early nineties in particular, state income tax disputes or a
2 tax commission hearing before the Administrative Law Court
3 came into being. But this may very well be the forum if the
4 Court of Appeals or indeed Supreme Court determines that it
5 does not have jurisdiction over the State Energy Office.
6 Now, tax claims for credit under this statute are likely
7 subject to a statute of limitations. They can't hang around
8 forever. The general statute of limitations on most tax
9 assessments - credits, refunds - is three years. It's set
10 forth under Title 12. It's in 12-54-85(a) and in 12-60-470.
11 Those are the general statutes of limitation under Title 12
12 applicable to assessments and refund. That's always been the
13 three years.
14 The problem is that deals with the assessment of tax and
15 the credit or refund of tax, not to a certification procedure
16 by some other state agency before you get to the filing of a
17 return which is what this is. It's a pre-filing
18 certification procedure where they haven't certified it.
19 So there are other statutes, general statutes of
20 limitations, in our state, and there are also common law
21 general periods of tolling of limitation in our state
22 developed through our courts: Two years, three years, other
23 periods. We don't know what that time period is and---
24 **The Court:** I find that a little bit problematic. I
25 mean, the exceptions to the three-year statute of limitations

1 are generally statutory, and I know -- I mean, I know of no
2 reason why it would not be a three-year statute of
3 limitations, and I don't know that I can make a decision
4 based on the -- what you consider as the uncertainty of the
5 statute of limitations. It's just -- to me it's there.
6 **Mr. Doerring:** Well, it---
7 **The Court:** I mean, unless you can point me to something
8 that says it's not three years.
9 **Mr. Doerring:** We can, Your Honor, and if you would
10 provide us with that opportunity, we can provide you with a
11 supplement that simply goes through the---
12 **The Court:** I mean, it's not a -- it's not a statute of
13 repose issue.
14 **Mr. Doerring:** Well, no. It's a statute of limitations
15 issue. And in certain instances refunds are two years.
16 **The Court:** Well, so is suing doctors.
17 **Mr. Doerring:** Exactly. And this---
18 **The Court:** That's why I say, it's specifically laid out
19 in some sort of statutory provision that lessens the statute
20 of limitations for certain reasons.
21 **Mr. Doerring:** And we can---
22 **The Court:** But none that exceed it. None exceed the
23 three-year statute of limitations that I'm aware of unless
24 you go back as old as I am and some of us in the room are
25 that -- we used to love the old six-year statute of

1 limitations.

2 **Mr. Doerring:** And it still exists.

3 **The Court:** Well, it may.

4 **Mr. Doerring:** In the income tax purposes it does. The

5 -- but we can cite you I know to various - a number of them -

6 two-year statutes that may be applicable, too. And then the

7 other issue is: When does it run? Does it -- there are any

8 multiple dates. Does it run from December 31st, the time the

9 accrual of the credit claim could arise? January 1st, the

10 beginning of the period for filing the credit application?

11 January 31st, the time when the credit application is last

12 due under the statute? March 1st, the time that the State

13 Energy Office has to issue its determination or actual dates

14 in between?

15 **The Court:** Well, haven't you -- I mean, you've made

16 your application. You've made it. You've filed. So, I

17 mean, I---

18 **Mr. Doerring:** We have actual dates, Your Honor.

19 **The Court:** So...

20 **Mr. Doerring:** But we don't know when that statute might

21 apply depending on those dates and---

22 **The Court:** It seems to me that the statute would only

23 apply if you don't file timely.

24 **Mr. Doerring:** Correct.

25 **The Court:** If you file timely, there's no statute issue

1 I would think.

2 **Mr. Doerring:** Correct. And even if it's three years,

3 Your Honor, we're between two and three years right now.

4 **The Court:** But you've already filed.

5 **Mr. Doerring:** I understand, but if you dismiss it, if

6 you dismiss it here, then we're out of court, and the

7 Administrative Law Court, the Court of Appeals, can affirm

8 dismissal and determine that it doesn't have jurisdiction.

9 That's the prejudice. If you dismiss it here and the Court

10 of Appeals holds the dismissal of the A.L.C. action and also

11 - and it may - determine that there's no administrative due

12 process right to do with the State Energy Office as we filed:

13 Out of court in the A.L.C., out of court in the State Energy

14 Office, and you've just dismissed us.

15 Now, we don't know how long these proceedings in the

16 Court of Appeals are going to take, and dismissal here I find

17 interesting. The issue that the State Energy Office raises

18 in this motion under 12(b)(6) and 12(b)(8) is dismiss it,

19 Your Honor, because there's an identity of parties and

20 there's an identity of issues. Of course there are. It's

21 the identical parties and the identical issues.

22 What they miss in their argument is the jurisdictional

23 issues, and those are the issues -- by the way, interestingly

24 enough, we couldn't find any case in South Carolina, not one,

25 and really we had to scour the cases -- case decisions of

1 other states. We did find those two decisions in Idaho which
2 do stand for the proposition where -- in multiple forums and
3 jurisdiction is an issue potentially, and there may be claims
4 bars out there that stay is the appropriate remedy.
5 The interesting thing I also find is that in the State
6 Energy Office's memorandum on Page 9, they cite a United
7 States Supreme Court decision, Michigan National Corporation,
8 in support of its motion. Quoting Michigan National, quote,
9 Dismissal rather than stay has been approved where there is
10 assurance that no party is prejudiced.
11 That's our United States Supreme Court - assurance - and
12 if this case gets dismissed and the A.L.C. affirms and the
13 Court of Appeals affirms the dismissal is over there and that
14 State Energy doesn't have -- that there's no
15 administrative jurisdiction over State Energy, International
16 Paper will not have a forum, the forum to have their
17 certification reviewed which is at the heart of it, Your
18 Honor, and that's all we're asking is a forum---
19 **The Court:** I thought there had not been a
20 certification.
21 **Mr. Doerring:** Pardon?
22 **The Court:** I thought there had not been a certificate.
23 **Mr. Doerring:** Correct. Their act with respect to the
24 certification process or their denial of the certification,
25 Your Honor, reviewed.

1 **The Court:** March 1st letter.

2 **Mr. Doerring:** Correct, in each year, '10 and '11,
3 correct, two years. And if -- and the prejudice to the State
4 Energy Office is none, and the prejudice, potential
5 prejudice, to International Paper is great. Staying the
6 matter if -- and also by dismissal, we're going to incur
7 additional time for the appeals, legal fees, going to the
8 Court of Appeals.

9 A remedy is to stay the case, put it aside. Let the
10 Court of Appeals make its determination, and that would be in
11 the interest of justice, the interest of fairness, would keep
12 the parties on a level playing field while the Court of
13 Appeals goes through its jurisdictional analysis. And, Your
14 Honor, we may be back here but not without a dismissed case,
15 not without the specter of the statute of limitations bar
16 alone. Thank you.

17 **The Court:** What about Mr. Willard's suggestion that the
18 matter not be dismissed and that the stay not be granted and
19 the case proceed in this court?

20 **Mr. Doerring:** I understand the suggestion, Your Honor,
21 and, in fact, State Energy has been vigorously trying to get
22 to this Court for some time. We find it interesting now that
23 they're seeking to dismiss it. The -- going forward and
24 spending time on the trial of this case -- it's going to be
25 an extensive trial. It will be weeks with expert witnesses

1 and additional discovery. We've got, I think between the
2 parties at last count, something like 7 or 8,000 pages of
3 documents.
4 **The Court:** Are those all disputed issues, disputed
5 claims?
6 **Mr. Doerring:** The---
7 **The Court:** To me it shouldn't be that difficult.
8 **Mr. Doerring:** Well, there are mixed issues of law and
9 fact. It's -- State Energy has raised a variety of claims in
10 its pre-hearing statements and otherwise through discovery
11 about whether the -- the statute has very specific
12 prerequisites, and they've raised any number of legal
13 arguments against why this piece of equipment shouldn't
14 qualify, that piece of equipment shouldn't qualify, that you
15 can't view what international process is doing as a whole out
16 there with this equipment. You have to take each single
17 piece of equipment and installation---
18 **The Court:** I don't want to get in too deeply into the
19 case, but isn't this new equipment?
20 **Mr. Doerring:** It is---
21 **The Court:** It qualifies as biomass or are you trying to
22 identify older equipment which you're now wanting to get a
23 tax credit for?
24 **Mr. Doerring:** Oh, no. All of it's new equipment. It's
25 new equipment but must be placed in service. Indeed, one of

1 the particular things is a $10 million new and complete
2 evaporator system in its Eastover facility. I mean, it's
3 brand-new silver. It's -- it's one of the most major
4 upgrades that International Paper has done. I mean, it's
5 substantial.
6 The other -- the most compelling issue in response to
7 your question, Your Honor, is we don't want to go through a
8 whole trial process here only to have the Court of Appeals
9 then say you don't have jurisdiction which is---
10 **The Court:** I find that somewhat---
11 **Mr. Doerring:** It could be a possibility. The Court of
12 Appeals -- while we're robustly litigating the case in front
13 of you, Your Honor, the Court of Appeals in which this is
14 pending and perhaps eventually the Supreme Court from the
15 Court of Appeals may say---
16 **The Court:** The circuit court has no jurisdiction?
17 **Mr. Doerring:** And it was the Administrative Law Court
18 that had it. We don't know. That's the difference between
19 the normal 12(b)(6), 12(b)(8) issue here is this is a
20 completely untested statute. I mean, no -- it's a case of
21 first impression, and we don't know apart -- if this was a
22 normal tax statute, we'd be with the Department of Revenue.
23 We'd be with the Administrative Law Court. We'd be under the
24 Revenue Procedures Act. We would not be here.
25 And by the way, the -- that was an argument made in

1 front of the Administrative Law Court to not dismiss the
2 case, that the State Energy Office was acting on behalf of
3 the Department of Revenue in its certification process and
4 the -- Judge Anderson didn't like that argument. The Court
5 of Appeals might. In fact, the Court of Appeals may say:
6 Yeah, I think you have contested case jurisdiction; I think
7 you're acting on behalf in this certification rule for the
8 Department of Revenue in a pre-filing capacity and I think
9 you're under the Revenue Procedures Act and go forward with
10 the contested cases.
11 **The Court:** All right.
12 **Mr. Doerring:** Thank you.
13 **The Court:** Mr. Willard?
14 **Mr. Willard:** Your Honor, just briefly I'll address some
15 of the 12(b)(8) issues, and Mr. Potts will address some of
16 the other issues. Your Honor, this is exactly why we have
17 Rule 12(b)(8). You heard the reluctance, Judge. If we try
18 it in this case, it may be -- there may be a decision in the
19 A.L.C. if it gets remanded back. The fact that the A.L.C.
20 found that they had appellate jurisdiction -- that the A.L.C.
21 had appellate jurisdiction and that I.P. blew it, that
22 doesn't -- they say they don't have a remedy. They had a
23 remedy, and they didn't properly follow the rules. That's
24 what the A.L.C.---
25 **The Court:** What should they have done?

1 **Mr. Willard:** That doesn't create prejudice. They
2 should have filed as the A.L.C. found. They should have
3 filed it as an A.L.C. appeal---
4 **The Court:** From what?
5 **Mr. Willard:** ---under the appellate rules of the A.L.C.
6 **The Court:** From what?
7 **Mr. Willard:** From the Energy Office. That's what
8 they---
9 **The Court:** Specifically from what? You mean from
10 the---
11 **Mr. Willard:** From what the A.L.C. had already ruled was
12 the final decision.
13 **The Court:** He's talking about when...
14 **Mr. Potts:** Okay. Let me back up just one second, Your
15 Honor. May I do that to answer your question? The March 1st
16 letter that went out they claimed for months and months and
17 months was a final decision by the Energy Office, and
18 contrary to what he suggested to you, between March 1st and
19 March 25th, the day they filed with the law court, the
20 Administrative Law Court, not one word to the Energy Office,
21 not one letter, not one phone call.
22 He didn't seek anybody's advice as to what he should do.
23 He got this letter dated March 1st. It comes in. He reads
24 it. He doesn't pick up the phone and call Energy. He
25 doesn't call anybody. So he waits 25 days, and then he -

1 saying I'm going to call this a final decision - picks the
2 Court, namely the Administrative Law Court is the Court he
3 picked, and he files in the Administrative Law Court. He has
4 a choice of two things he can do at that point in time: He
5 can file with the Administrative Law Court saying I want a
6 contested case hearing---
7 **The Court:** All right.
8 **Mr. Potts:** ---or he can file in the Administrative Law
9 Court saying I wish to appeal this final decision which he
10 contends is a final decision and which the Court actually,
11 based on his argument, said was a final decision. That was
12 his choice. The problem was he blew it. He did it wrong.
13 Judge Anderson, in his three-page order or four-page
14 order, whatever it is, explains why he did it wrong. Now he
15 wants to come back and say, okay, we may have muffed it, but
16 I want a second bite at the apple. Please don't let that
17 happen to me. That's fine and dandy, but that's not what the
18 law says.
19 You've got Judge Anderson sitting over there in a well-
20 reasoned - not that I wholly agree with it, but it doesn't
21 matter - in a well-reasoned, well-thought-out order, is
22 telling you exactly where the jurisdictional boundaries are
23 and he has said: My court has jurisdiction. Now---
24 **The Court:** To do what?
25 **Mr. Potts:** Of this case. The administrative -- he is

1 saying this case, this appeal, from the State Energy Office,
2 jurisdiction resides with the Administrative Law Court.
3 **The Court:** That is the appeal.
4 **Mr. Potts:** The appeal of what they contend is a final
5 decision.
6 **The Court:** Okay.
7 **Mr. Potts:** And that's been their position all along.
8 We had a final decision. While I'm here - I'm going to let
9 Bo finish - but there has been a lot of sliding in the
10 arguments you've heard. By sliding I mean things like, oh,
11 when he -- when the State Energy Office submitted its status
12 to the Administrative Law Court, they didn't contest
13 jurisdiction. Well, the fact of the matter is I even
14 personally called Mr. Doerring at that time and told him I
15 was going to have to reserve that and it is reserved. I just
16 didn't bring the file with me. I didn't know this was going
17 to come up because this is all supposed to be on essentially
18 one document, the pleadings, the plaintiff's complaint, and
19 the plaintiff has stood in front of you and said: Same case,
20 same issues before you. And he has not even given you a
21 basis to find prejudice. He said we don't know what it is.
22 What does he expect? He's going to have an epiphany
23 between now and 15 more days that he didn't have from
24 January 30th when he filed this case for the five months to
25 today, that all of a sudden he's going to do what he should

1 have done a long time ago which is find prejudice, if there
2 was one, and present to it this Court. He has not done that.
3 He is sitting back there saying: We'll present this to you;
4 we'll present this to you.
5 He's got to prove to you there's prejudice to him and
6 none to us; it's his burden. And we have come to you and
7 said: There is real prejudice to us. You've got a bill over
8 in the legislature saying that office may not exist tomorrow
9 or not quite tomorrow but a few months from now.
10 There is prejudice to the State; there is serious
11 prejudice. We've already had a witness that they want, in
12 fact, up in Washington, D.C., who has left. The
13 administrator has already picked up four more jobs on top of
14 the State Energy Office and she may -- you know, who knows
15 how long she's going to be there? And she was the
16 decisionmaker in the case.
17 They haven't presented you with anything except we
18 screwed it up. We screwed the pooch, and they don't want to
19 admit it. They're looking for a second bite at the apple and
20 a second shot at this case. The case is on appeal. Four
21 months and they still haven't filed their brief.
22 The decision was December 17th. They filed an appeal,
23 and their first extension is in January and we're still
24 waiting to see their brief, these people who were so
25 concerned and so interested in getting this thing resolved,

1 but they come to you and want you, in effect, to insult the
2 judge across -- or at least turn around to an administrative
3 law judge and say, no, I'm going to take jurisdiction of
4 this, even though you say you have it, because that's what it
5 amounts to because he very clearly said the A.L.C. has
6 jurisdiction. Excuse me. Mr. Willard.
7 **Mr. Willard:** No more, Your Honor. I think Mr. Potts...
8 **The Court:** Anything further?
9 **Mr. Doerring:** Briefly, Your Honor. Again, to reiterate
10 and to expand, the Administrative Law Court is a court of
11 limited jurisdiction, as Judge Anderson notes in his order.
12 If there is a -- something is determined to be an agency
13 determination, he can't extend it. The agency can't extend
14 it. No one can extend the 30-day period for filing a
15 contested case proceeding. It's fixed. If you file on the
16 31st day, you're out.
17 So the issue of contacting Mr. Potts to discuss the case
18 is a red herring. International Paper has to make its own
19 decision - correct - about where to file. The issue of
20 appellate jurisdiction which was raised a year and a half
21 later through the motion to dismiss is another avenue that
22 the Administrative Law Court indicates it may have
23 jurisdiction over the case.
24 The problem with that is they don't have -- the State
25 Energy Office is a limited unit of the Budget and Control

1 Board. It doesn't have any of these procedures in place. In
2 fact, we've now filed one, a claim with them, and they still
3 don't have any procedures or policies or anything in place to
4 give us this hearing that Judge Anderson indicated in his
5 dismissal may be an appropriate remedy.
6 Now, the Court of Appeals may come back and say, no,
7 that's not even an appropriate remedy. In the certification
8 under Title 12 under the Revenue Procedures Act dealing with
9 credits, it's our State Department of Revenue, and that's a
10 listed agency and you're in front of the Administrative Law
11 Court. In matters dealing with certification, it's our
12 general courts of jurisdiction. They are the only ones that
13 have jurisdiction to determine it.
14 And, by the way, they take great pains of saying this is
15 a declaratory judgment and that a declaratory judgment -- and
16 it's one -- it's our second cause of action. Our first cause
17 of action is to have a hearing on the certification process
18 and to have the Court determine what the amount of credit
19 should be certified.
20 **The Court:** Okay.
21 **Mr. Doerring:** Thank you, Your Honor.
22 **The Court:** Anything further?
23 **Mr. Potts:** Your Honor, sorry. What is the name we give
24 to that first -- is that a mandamus? Is that what they're
25 asking for? Because I have yet to hear them say what it is.

1 I'm asking for a mandamus out of this court. Is that -- I'd
2 like to know that, and they've just indicated to the Court
3 that that's what they're asking you to order, something like
4 that.
5 **The Court:** All right, counsel. Obviously I need to
6 read Judge Anderson's order and your briefs. I did read your
7 briefs. I had not taken the time to read Judge Anderson's
8 order, and let me just request that you send me a proposed
9 order within ten days.
10 **Mr. Doerring:** Your Honor, would you like International
11 Paper to address your statute of limitations issue separately
12 or in a proposed order?
13 **The Court:** Well, no, I would think in the proposed
14 order -- you raised it as an issue.
15 **Mr. Doerring:** Yes, Your Honor.
16 **Mr. Willard:** Your Honor, I would just -- I believe both
17 parties had submitted proposed orders already.
18 **The Court:** Well, that's true, you have, but... All
19 right. Well, let's do this. You have submitted proposed
20 orders. Why don't you just review them in light of today's
21 discussion and let me know if you want to make any changes?
22 **Mr. Doerring:** Thank you, Your Honor.
23 **The Court:** Within ten days.
24 **Mr. Doerring:** Thank you, Your Honor.
25 **The Court:** You're right. I have -- I have -- I have

1 both the orders. All right. Thank you very much, counsel.
2 Interesting discussion.
3 (Whereupon, the proceedings were concluded. There were
4 no exhibits introduced.)
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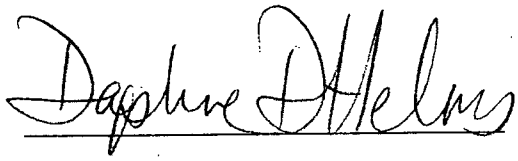
I, the undersigned Daphne D. Helms, official court reporter for the Fifth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the circuit court for Richland County, South Carolina, on the 16th of May, 2013.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

September 27, 2013



Daphne D. Helms, court reporter

Rath, Jennifer

From: Tracey D. Smith [tds@montgomerywillard.com]
Sent: Wednesday, July 10, 2013 4:16 PM
To: 'gcooperj@sccourts.org'; 'gcooperLC@sccourts.org'
Cc: Theodore D. Willard; Doerring, Erik; Rath, Jennifer
Subject: International Paper v. State Energy Office 2013-CP-40-0572
Attachments: Def. Proposed Order.docx

Dear Judge Cooper,

Attached is a copy of South Carolina State Energy Office's proposed order with regard to the motion hearing which is scheduled to be heard before you on Monday, July 15, 2013 at 11:00 a.m. Opposing counsel is copied on this e-mail.

Sincerely,

Tracey D. Smith

Tracey D. Smith, Paralegal to Theodore D. Willard, Jr.
Montgomery Willard, LLC
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STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	)))	IN THE COURT OF COMMON PLEAS FOR THE FIFTH JUDICIAL CIRCUIT
International Paper Company, Inc., Plaintiff, v. South Carolina State Energy Office, Defendant.	)))))))))	Civil Action No.: 2013-CP-40-0572 **ORDER DENYING PLAINTIFF'S MOTION TO RECONSIDER, ALTER OR AMEND**

This matter is before the Court upon motion of Plaintiff International Paper Company, Inc. ("IP") pursuant to SCRCP 52 and 59 for an order reconsidering, altering or amending this Court's order dated May 23, 2013 granting Defendant South Carolina State Energy Office's ("SEO") Motion to Dismiss pursuant to SCRCP 12(b)(6) and 12(b)(8) and denying Plaintiff's Motion to Stay. At a hearing on July 15, 2013 attended by counsel for the parties, this Court heard oral argument on Plaintiff's motion. For the reasons stated below, and based on the pleadings, arguments of counsel and the parties' written submissions, this Court finds that Plaintiff's Motion to Reconsider, Alter or Amend should be denied.

I. BACKGROUND

Plaintiff brings this action alleging it is entitled to a declaration that certain of its 2010 and 2011 expenditures qualify for the Biomass Resource Credit pursuant to S.C. Code Ann. § 12-6-3620 and that SEO is required to certify that such costs qualify for the Biomass Resource Credit. (Complaint ¶¶ 44-49). As can be seen by the allegations of Plaintiff's Complaint, Plaintiff initially submitted these identical issues to the Administrative Law Court ("ALC"). (Complaint ¶¶ 18-21, 26-29). The Complaint further alleges that by an order dated December 19, 2012 (the

"Order"), the ALC granted the State Energy Office's motion to dismiss. (Complaint ¶ 34). The Order, which was attached to and incorporated into the Complaint as Exhibit A, found that while the ALC did not have jurisdiction over the case as a contested case, the ALC would have had appellate jurisdiction over the case pursuant to S.C. Code Ann. §1-23-600(D) (2011). However, because Plaintiff failed to file the action as an appeal, the ALC found that it had no appellate jurisdiction. (Order at 8).

Unhappy with the result in the ALC, on January 17, 2013, Plaintiff appealed the ALC's Order to the South Carolina Court of Appeals. (Complaint ¶ 37). The ALC case is now on appeal at the S. C. Court of Appeals, and possibly the S.C. Supreme Court.[1] After appealing, Plaintiff filed this action. Defendant subsequently filed a Motion to Dismiss pursuant to SCRCP 12(b)(6) and 12(b)(8) and Plaintiff moved to stay the case. By order dated May 23, 2013, this Court granted Defendant's Motion to Dismiss pursuant to SCRCP 12(b)(6) and 12(b)(8) and denied Plaintiff's Motion to Stay.

II. DISCUSSION

A. Dismissal was Approrpiate; A Stay Is Not.

As shown by the allegations of the Complaint, and as conceded by Plaintiff during the first oral argument, the action pending before this Court is the same action Plaintiff filed in the ALC. The ALC case is now on appeal at the S. C. Court of Appeals, and possibly the S.C. Supreme Court, which appellate courts now have exclusive jurisdiction. See, generally, Metts v. Mims, 384 S.C. 491, 682 S.E.2d 813 (2009) (the service of a notice of appeal gives the appellate court exclusive jurisdiction over the appeal and the matters necessarily included as a part thereof).

[1] On May 21, 2013, Plaintiff filed a motion to certify the appeal to the S.C. Supreme Court pursuant to SCACR 204(b).

In order for this Court to issue a stay, it must first determine that it has jurisdiction to do so. If this Court lacks jurisdiction, it has no power to issue a stay and must dismiss the action. Univ. of S. Ala. v. Am. Tobacco Co., 168 F.3d 405 (11th Cir. 1999) (holding a court must first have jurisdiction over a case before it issues a stay); Rodriquez v. U.S. Dept. of Justice, 2007 U.S. dist. Lexis 33501 (D.N.H. 2007) (where the U.S. Magistrate found "[b]ecause this court lacks jurisdiction over this matter, I cannot issue a stay.").

Before the complaint was filed, the ALC and the Court of Appeals had already exercised jurisdiction over this matter, making their jurisdiction exclusive. Tucker v. Tucker, 264 S.C. 172, 213 S.E.2d 588 (1975) (holding even though the circuit court and probate court had concurrent jurisdiction, where the administration of an estate was first initiated in probate court, the probate court had exclusive jurisdiction over a subsequent action to remove a co-executor which was brought in circuit court and the circuit court case should have sustained the demurrer); MacDonald v. McDonald, 276 S.C. 573, 281 S.E.2d 109 (1981) (dismissing circuit court case seeking an equitable lien where a case was already brought in family court between the same parties concerning their interests in the marital residence). These cases rely on the Principle of Priority, which the South Carolina Supreme Court adopted in Tucker. The "Principle of Priority" is defined as follows:

> As a rule the exercise of concurrent jurisdiction is controlled by the principle of priority. According to this principle the court of concurrent jurisdiction that first exercises it thereby acquires exclusive jurisdiction to further proceed in the case. In other words, once a court of concurrent jurisdiction has begun to exercise its jurisdiction over a case its authority to deal with the action is, subject to appellate review, exclusive until it is completely disposed of, and no other court of concurrent jurisdiction may interfere with the proceedings thus pending. . . .
>
> "In several opinions 'comity' has been indicated as a motive of the courts to abide by the priority principle, but it appears that it is a legal duty of a court to abide by it, and that the rationale of the rule is to reduce the possibility of the conflicting exercise of concurrent jurisdiction, especially to reduce the undesirable possibility that a case involving the same subject matter and the same parties be

> simultaneously proceeded upon in more than one court. Several cases have pointed out that the applicability of the priority rule does not depend on whether one of the two courts of concurrent jurisdiction is superior in rank to the other such court. . . ."

Tucker, 213 S.E.2d at 590. The ALC and the Court of Appeals first exercised jurisdiction over this same case. Applying the Principle of Priority, they have exclusive jurisdiction over this action. Because another court is currently exercising jurisdiction, the motion to stay proceedings was properly denied, and the motion to dismiss properly granted.[2]

Even if the Principle of Priority did not apply, the Court finds that attempting to assert jurisdiction over this case in order to issue a stay—rather than dismissing the case—would be inappropriate, would lead to additional uncertainty, and would result in this Court interfering with the jurisdiction of the S.C. Court of Appeals and possibly the S.C. Supreme Court. For these reasons, the Court finds dismissal more appropriate than a stay of proceedings and therefore denies Plaintiff's motion to reconsider. See, generally, Spartanburg v. Belk's Dep't Store, 199 S.C. 458, 20 S.E.2d 157 (1942) (granting a motion for stay of proceedings rests entirely within the discretion of the trial judge).[3]

B. Plaintiff Is Not Prejudiced By Denial of the Stay and Dismissal.

As was previously found, under the "Principle of Priority," this Court should not exercise jurisdiction to stay this action because the ALC and the Court of Appeals first exercised jurisdiction over this same case and have exclusive jurisdiction over this action. Even if this

---

[2] For clarity, this Order does not address whether or not this Court has subject matter jurisdiction. Likewise, this Order does not address whether or not the ALC was correct in concluding it would have had appellate jurisdiction had IP filed an appeal. The very potential for conflicting orders from different courts illustrates the need for this Court not to exercise authority over this case.

[3] Additionally, granting a stay when another court is exercising jurisdiction would be inconsistent with the purposes behind the S.C. Declaratory Judgment Act, S.C. Code Ann. § 15-53-70 (2012) which states that a court may refuse to render a declaratory judgment when the judgment would not terminate the uncertainty or controversy giving rise to the process.

Court does have the authority to issue a stay, the Court finds that Plaintiff will suffer no prejudice as a result of a dismissal.

As previously found in the May 23, 2013 order, if Plaintiff prevails on its appeal of the ALC Order, the case will be remanded back to the ALC as either a contested case or an ALC appeal. Therefore, Plaintiff will have its remedy through the administrative and judicial process and will suffer no prejudice by the dismissal of this action, which seeks the identical relief Plaintiff sought before the ALC.

If Plaintiff loses on its appeal from the ALC, the matter may be forever ended with prejudice because Plaintiff failed to perfect its appeal at the ALC level.

The prejudice that Plaintiff has alleged will result from the application of an unidentified statute of limitations are alleviated by Plaintiff's ability to appeal the May 23, 2013 order and this order, thereby preventing the statute of limitations from running while the ALC decision is decided on appeal. Accordingly, because Plaintiff would suffer no prejudice under any of the above scenarios, the Court finds that dismissal was appropriate.

The Court points out that, despite being given multiple opportunities to do so, Plaintiff has failed to point this Court to any particular statute of limitations that would cause Plaintiff to be prejudiced by a dismissal. In its proposed orders, Plaintiff makes the statement that possible statutes of limitations "vary from one year to more than ten years." As the party opposing the motion, Plaintiff has the burden of proving prejudice. See Foggie v. CSX Transp., Inc., 315 S.C. 17, 431 S.E.2d 587 (1993). Plaintiff did not meet its burden by merely referring the Court to a range of possible limitations from one year to ten years and asking the Court to speculate as to which statute of limitations applies. For instance, if a one-year statute of limitations applies, Plaintiff will suffer no prejudice in that the one-year statute of limitations already had expired

before Plaintiff initiated the present action. Likewise, if a ten-year statute applies, Plaintiff will suffer no prejudice in that the Court of Appeals or Supreme Court would certainly have decided the ALC appeal in that time. Plaintiff's prejudice argument is simply based on speculation.

C. Plaintiff's Argument That The ALC's Order Was Not a Dismissal Is Irrelevant.

In its motion, Plaintiff argues that the Court misinterpreted the ALC's order, that the ALC did not dismiss the case outright, but merely remanded the case back to Defendant for a hearing and final determination. Plaintiff's argument fails in that: (1) Plaintiff never made this argument prior to entry of judgment for Defendant and therefore this argument cannot be the basis of a reconsideration, and (2) whether or not the ALC's order was an "outright" dismissal or a remand with instructions is irrelevant as to whether or not this Court properly dismissed this case.

Prior to this Court's May 23, 2013 order dismissing Plaintiff's case, Plaintiff has not argued that the ALC's order was merely a remand and not an outright dismissal.[4] "A party cannot use Rule 59(e) to present to the court an issue the party could have raised prior to judgment, but did not." C.A.H. v. L.H., 315 S.C. 389, 392, 434 S.E.2d 268, 270 (1993) (citing Hickman v. Hickman, 301 S.C. 455, 392 S.E.2d 481 (Ct. App. 1990)). Because Plaintiff has not raised this issue prior to entry of judgment in favor of Defendant, Plaintiff cannot now raise this argument for the first time.

Additionally, whether or not the ALC's order was an "outright" dismissal or a remand

[4] Plaintiff's Complaint does not make this distinction. (Complaint ¶ 34.) On its face, the ALC's order states, "[f]or the reasons set forth below, the State Energy Office's Motion To Dismiss is granted." (ALC Order at 3). "Consequently, since IP filed a request for a contested case with this Court, this Court has no subject matter jurisdiction to hear this case and must therefore dismiss it." (ALC Order at 4). While the ALC's order does include the word "remand," it is unaccompanied by any instructions. Whatever was intended, an interpretation of the ALC's order on this point is unnecessary to rule on the motions pending; therefore, this Court makes no determination regarding the intent or meaning of the ALC's use of the word "remand."

with instructions is irrelevant as to whether this Court properly dismissed this case. Under either scenario, this Court properly dismissed the case under the Principle of Priority, as explained above.

Even assuming arguendo that Plantiff is correct—that the ALC remanded the case back to the Defendant for a hearing and a final determination from which the Plaintiff could then appeal, dismissal would still be proper. Where a matter on appeal is remanded by the court to a state agency, the appeal remains pending in the court while the court waits for the agency's compliance with the order of remand. BoBo v. Marshane Corp., 302 S.C. 86, 394 S.E. 2d 2 (Ct. App. 1990). If the matter is still pending before the ALC, it would be even less appropriate for this Court to interject itself as it would now be interfering with both the appellate and the administrative process.

D. Plaintiff's Attempt To Resurrect a Failed Administrative Appeal is Improper.

This Court's May 23, 2013 order properly found that Plaintiff engaged in procedural fencing in order to resurrect a failed administrative appeal. Contrary to Plaintiff's argument, the allegations of Plaintiff's own complaint indicated a pattern of procedural fencing and forum shopping in an attempt to circumvent the administrative process offered by the Energy Office.

On January 31, 2011, Plaintiff filed an application for the Biomass Resource Credit with Defendant for its expenditures in the calendar year 2010. (Complaint ¶ 18). On March 1, 2011, the Defendant wrote to Plaintiff a letter advising IP that certain of the projects would probably qualify for the credit while, others would probably not, but more information was needed. (Complaint ¶ 19). However, instead of providing any of the information requested and without contacting or speaking with anyone at the State Energy Office, on March 25, 2011, Plaintiff filed with the ALC requesting a contested case hearing. (Complaint ¶ 21). On January

20, 2012, Plaintiff filed an application for the Biomass Resource Credit with Defendant for its expenditures in calendar year 2011. (Complaint ¶ 26). On March 1, 2012, the Energy Office notified the Plaintiff indicating that it would not certify the same. (Complaint ¶ 27). On March 2, 2012, Plaintiff filed a contested case hearing with the ALC based on the 2011 costs. (Complaint ¶ 29). On March 14, 2012, Defendant issued an amended response to Plaintiff's 2010 application. (Complaint ¶ 30). Then, both actions were consolidated before the ALC on May 1, 2012. (Complaint ¶ 32).

On December 19, 2012, the ALC issued its order granting SEO's motion to dismiss both cases, holding that the ALC did not have jurisdiction over the case as a contested case, and advising that the ALC would have had appellate jurisdiction over the case had Plaintiff properly appealed. However, because Plaintiff failed to file the action as an appeal, the ALC found that it had no appellate jurisdiction either. (Complaint ¶ 34).

The ALC's order stated:

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

(ALC Order at 8).

On January 17, 2013, Plaintiff appealed the ALC order to the Court of Appeals.

(Complaint ¶ 37). Plaintiff initiated this current action on January 30, 2013.

As can be seen above, Plaintiff's own allegations reflect that Plaintiff declined the process afforded by the Energy Office, voluntarily initiated this action before the ALC, and then voluntarily chose to bring the action only as a contested case, not an administrative appeal— thus failing to adhere to the ALC's rules of procedure for filing an appeal. Plaintiff then sought to convert its request for a contested case to an appeal which the ALC refused to let happen.

Plaintiff now seeks to have this Court resurrect Plaintiff's failed appeal to the ALC and do what the ALC did not allow. All the issues arising out of the ALC case are now before the Court of Appeals (perhaps soon the Supreme Court). Accordingly, it is a matter for those courts to decide, not this Court. Therefore, this Court declines to interfere and finds that Defendant's motion to dismiss was properly granted.

Not until after the ALC dismissed its action, and Plaintiff had appealed that dismissal to the Court of Appeals, did Plaintiff initiate this action—over one year and ten months after Plaintiff filed its initial ALC contested case. If Plaintiff was genuinely concerned about jurisdictional ambiguity or any potential statute of limitations' bar, as Plaintiff has argued, Plaintiff would have initiated the current action simultaneously with the ALC action. Instead, Plaintiff chose to ride it out before the ALC for a year and ten months—until after the ALC dismissed the case. Plaintiff's filing of this current action is an attempt to engage in procedural fencing and forum shopping in order to obtain a second bite at the apple for a process that it initiated. Therefore, the Court finds that the case was properly dismissed.

III. CONCLUSION

For the foregoing reasons, Plaintiff's Motion to Reconsider, Alter or Amend is denied.

IT IS SO ORDERED:

_____
G. THOMAS COOPER, JR.
PRESIDING JUDGE

July ____, 2013
Columbia, South Carolina

The Supreme Court of South Carolina

International Paper Company, Appellant,

v.

South Carolina State Energy Office, Respondent.

Appellate Case No. 2013-001066

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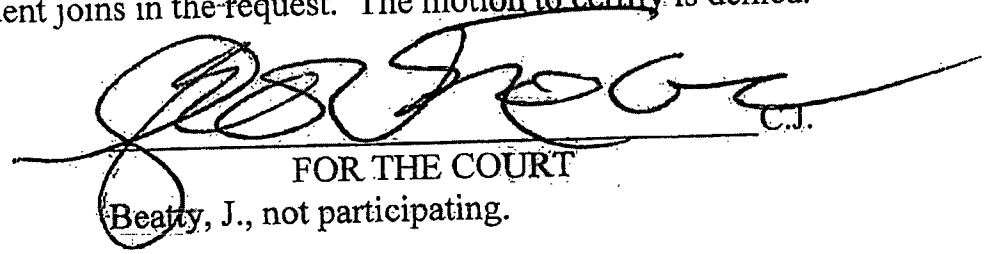
ORDER

Appellant moves to certify this appeal from the Court of Appeals pursuant to Rule 204(b), SCACR. Respondent joins in the request. The motion to certify is denied.



C.J.

FOR THE COURT

Beatty, J., not participating.

Columbia, South Carolina

July 12, 2013

cc:
Robert L. Widener
Erik P. Doerring
Keith C. McCook
Frank S. Potts
The Honorable Jenny Kitchings

The South Carolina Court of Appeals

International Paper Company, Inc., Appellant,

v.

South Carolina State Energy Office, Respondent.

Appellate Case No. 2013-001607

RECEIVED
SEP 23 2013
McNAIR LAW FIRM, P.A.

ORDER

Appellant has filed a motion to consolidate this appeal with Appellate Case No. 2013-000114. Respondent opposes the motion. After careful consideration, the motion is granted. Appellant shall serve and file its initial brief and designation of matter within thirty days of receiving all transcripts.

FOR THE COURT

Columbia, South Carolina

cc:
Robert L. Widener
Erik P. Doerring
Keith C. McCook
Frank S. Potts

FILED
9/20/13 AT

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

Case No. 12-ALJ-30-0086-CC

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

v.

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

NOTICE OF APPEAL

International Paper Company, Inc., appeals the decision of the Honorable Ralph King Anderson, III, dated December 19, 2012. Appellant received a copy of this decision on December 19, 2012.

January 17, 2013

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. Supreme Court

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

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

v.

South Carolina State Energy Office, ... Respondent.

MOTION TO CERTIFY APPEAL TO SUPREME COURT

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

BACKGROUND

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

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

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

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

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

ARGUMENT

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

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

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

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

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

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

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

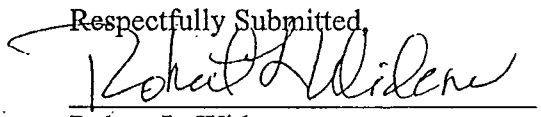
CONCLUSION

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

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

May 21, 2013

Respectfully Submitted,



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THE STATE OF SOUTH CAROLINA
In The Supreme Court

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JUL 25 2013
SC Court of Appeals

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

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

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

v.

South Carolina State Energy Office, ... Respondent.

MOTION TO CONSOLIDATE AND TO HOLD APPELLATE TIMELINES IN ABEYANCE

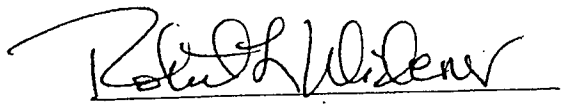
The above-captioned appeal from the Administrative Law Court (ALC) involves the same parties and same issues as a recently filed appeal from the Circuit Court (copy attached). Appellant moves to consolidate the two appeals pursuant to Rule 214, SCACR, which permits consolidation "where the same question is involved in two or more appeals in different cases." A motion to consolidate has also been filed in the Circuit Court appeal at the same time as the filing of the present motion.

Taken together, the two appeals present the overriding question of whether the Circuit Court or the ALC has subject matter jurisdiction to review the determinations of the South Carolina State Energy Office (SEO) on certification of a tax credit granted by S.C. Code Ann. § 12-6-3620. Consolidating these appeals will result in a single Record on Appeal and a single set of appellate briefs that: (1) more concisely present the issues than would separate appeals that are

consolidated after briefing; and (2) as a result, conserves the time and resources of this Court and the parties.

Accordingly, Appellant requests that the appellate timelines in this case be held in abeyance, that consolidation be granted, and that Appellant's initial brief and designation in the consolidated appeal be ordered due thirty (30) days after receiving the hearing transcripts in the Circuit Court Appeal.[1] If consolidation is not granted, Appellant respectfully requests fifteen (15) days from the date of receipt of the order denying consolidation to serve and file its initial brief and designation in the present appeal.[2]

Respectfully Submitted,



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July 25, 2013
Columbia, SC

[1] The relevant hearing transcripts (May 16, 2013 and July 15, 2013) were ordered on July 18, 2013. Appellant has received the July 15, 2013 hearing transcript.

[2] Appellant's initial brief and designation in the present appeal was due July 22, 2013. In anticipation of receiving the Circuit Court's order, Appellant moved to hold the appellate deadlines in abeyance pending receipt of the Circuit Court's order so that Appellant could appeal that order and move to consolidate the appeal from the Circuit Court with this appeal from the ALC. That abeyance motion is currently pending before this Court.

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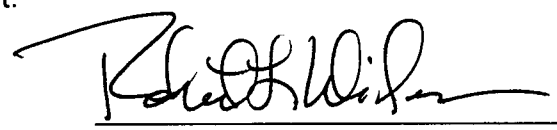
SC Court of Appeals

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Record on Appeal contains all material proposed to be included by any of the parties and not any other material. I also certify that this Record is in compliance with the August 13, 2007 order of the South Carolina Supreme Court.



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August 25, 2014

THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

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

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

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

v.

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

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

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

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

v.

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

CERTIFICATE OF SERVICE

The undersigned, Gary Lewis, being duly worn, says that he served the Record on Appeal, in the above captioned appeal, by hand delivering true and correct copies of Volumes I & II, to counsel for the Respondent at the address shown below, on August 25, 2014:

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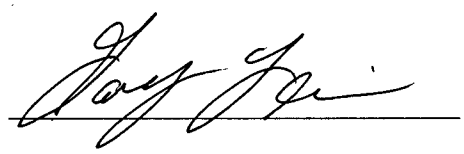
SC Court of Appeals

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