THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. Supreme Court

APPEAL FROM THE ADMINISTRATIVE LAW COURT
The Honorable Marvin F. Kittrell, Chief Administrative Law Judge

On Certiorari to the Court of Appeals of South Carolina
Unpublished Opinion No. 2010-UP-232 (S.C. Ct. App. Filed April 7, 2010)

Case Nos .07-ALJ-07-0299-CC; 07-ALJ-07-0300-CC;
07-ALJ-07-0301-CC; 07-ALJ-07-0302-CC;
07-ALJ-07-0303-CC; 07-ALJ-07-0304-CC.

Alltel Communications, Inc.; Alltel Mobile
Communications of the Carolinas, Inc.;
New York Newco Subsidiary; Telespectrum, Inc.;
360 Communications Co. of SC No. 1; and
360 Communications Co. of SC No. 2, ... Petitioners,

v.

South Carolina Department of Revenue, ...Respondent.

REPLY BRIEF

John M.S. Hoefer
Tracey C. Green
WILLOUGHBY & HOEFER, P.A.
Post Office Box 8416
Columbia, South Carolina
29202-8416
803-252-3300
Attorneys for Petitioners

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Argument

I. The Order of the Administrative Law Court did not hinge upon only one of 63 stipulations taken in isolation, but in part upon the significant technological differences between radio and telephone communications identified by the ALC based upon the stipulations taken as a whole and the admissions of the parties.

In reviewing the Court of Appeals' decision in this case, the Alltel Entities submit that it is important that the real issue be kept in mind: whether radio common carriers like the Alltel Entities that provide wireless radio communications to the public nevertheless are a "telephone company" and, thus, subject to the increased corporate license fee imposed on public service corporations by South Carolina Code section 12-20-100.[1] The Administrative Law Court ("ALC") determined that section 12-20-100 does not apply to the Alltel Entities in a decision based in part upon the 63 stipulations filed by the parties and in part upon the candid acknowledgment by the Department of Revenue ("DOR") that the wireless radio technology used by the Alltel Entities is "patently different" than the wired telephone technology used by landline telephone companies. [App. p.016, Order p.15 ("Order").] This basic issue was lost in Opinion No. 2010-UP-232 ("Unpublished Opinion") because the Court of Appeals did not address the Order actually issued by the ALC and instead granted affirmative relief to DOR that it did not seek at the ALC or in the Court of Appeals, based on issues that DOR did not present to the ALC.

In its brief, DOR continues to argue in favor of the Unpublished Opinion based on the erroneous assertion that the ALC decided this case solely on the basis of a single stipulation by the parties: Stipulation 50. [*See* App. p.10, Jt. Stip. ¶50.] That argument is

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[1] [*See* Br. Pet. p.1 n.1.]

based on the incorrect conclusion of the Unpublished Opinion that only one of 63 stipulations influenced the decision of the ALC. Both the Court of Appeals and DOR have misapprehended the use of that stipulation in the Order. A review of the actual language of the Order shows that the Unpublished Opinion reversed the decision below based on an erroneous and incomplete reading of the Order and of the record.

The ALC determined that the Alltel Entities are not a "telephone company" for purposes of section 12-20-100. In rendering this decision, the ALC considered that the Alltel Entities do not transmit communications using wires. [App. p.024, Order, p.23.] The ALC found that a "telephone company"—or, using DOR's parlance, "traditional telephone providers" or "traditional land line carrier[s,]"[2]—transmits communications through wires using a completely different technology than that employed by a radio common carrier like the Alltel Entities. [*See* App. pp.015-016, Order, pp.14-15.] The ALC also determined that, unlike telephone, electric, and other public utilities, the Alltel Entities never have been regulated by the South Carolina Public Service Commission (PSC); do not have condemnation authority; and do not install their facilities in public rights-of-way. [App. pp.016-017, Order, pp.15-16.] The ALC thus concluded that a radio common carrier is different than a "telephone company," both as one exists today and as one existed when the predecessor of section 12-20-100 first was enacted in 1904. [App. p.020, Order, p.19.][3] The ALC alternatively concluded that, based on these differences, the statute is at the least ambiguous as applied to the Alltel Entities and, thus, must be

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[2] [*See, e.g.*, App. p.238, DOR Determination, p.6.]

[3] Whether it is called a history of legislation or a legislative history, [Br. Resp. p.9,] a review of the statute is appropriate to determine the meaning of the term "telephone company" as used in section 12-20-100 based on the technology in use when the statute was adopted.

construed against DOR. [App. p.022, Order, p.21.] In short, the ALC rendered a decision based on the statute itself and also on a full consideration of the differences between companies using wireless radio technology compared to those using wireline telephone technology.

Although the Order is that straightforward, the Unpublished Opinion erroneously concluded that it is based on nothing more than Stipulation 50. [App. p.466, Op., p.8 ("[W]e do not believe that it was the Department's intent to, in essence, forfeit its entire case by stipulation.").] Stipulation 50 says that "telephones and telephone companies transmit intelligence over a vast network of wires located in public rights of way and in easements over private properties." [App. p.132, Jt. Stip. ¶50.] From the very beginning of this case, DOR acknowledged that "[t]here are, in fact, technological differences" between a "'cellular carrier' and a traditional land line carrier," but opined that "*this is a distinction without a difference*" because "South Carolina has chosen to treat [these entities] identically for corporate license taxation purposes." [App. p.238, DOR Determination, p.6 (emphasis added).] DOR maintains that position now. [Br. Resp. p.12 ("[B]oth parties were, and remain, in agreement that '**cellular and landline services operate on patently different technologies**.'") (emphasis in original).] Stipulation 50 was a factor in the ALC's analysis, but it did not by itself drive that conclusion.

It therefore is unremarkable that DOR agreed to Stipulation 50 as part of its acknowledgement of the technological differences "between a 'cellular' carrier and a traditional land line carrier." [App. p.238, DOR Determination, p.6.] DOR in fact stipulated to the following in addition to Stipulation 50:

- The Alltel Entities are in the business of providing wireless voice and data communications service via radio to the public for compensation in the State of South Carolina.
- The Alltel Entities are not and never have been required to obtain any license, certification, or other permit from the State of South Carolina to engage in their wireless communications business.
- The Alltel Entities are radio common carriers operating pursuant to radio station licenses issued by the Federal Communications Commission ("FCC").
- States are preempted from regulating radio common carriers unless a petition is filed with the FCC, and South Carolina has not filed any such petition.
- The Alltel Entities do not have facilities located in public rights-of-way.
- The Alltel Entities use radio communications towers or facilities owned or leased by the entity or licensed to the entity.

[App. pp.124, 131-132, Jt. Stips. ¶¶2-4, 45-49, 51-52.] Stipulation 50 simply is a manifestation of both parties' view that the technologies at issue are vastly different.

Stipulation 50 therefore is not an isolated stipulation intended to forfeit DOR's entire case, but instead is one of a series of negotiated stipulations that is consistent with DOR's position prior to the issuance of the Order that, although there are technological differences between a "'cellular carrier' and a traditional land line carrier," these differences are "a distinction without a difference." In short, DOR's historical position was that differences exist between these types of entities, but do not matter for purposes of section 12-20-100. The Alltel Entities agreed that differences exist, but contended that they do make a difference as they undercut DOR's efforts to apply section 12-20-100 in this case. Thus, the parties stipulated to the facts and agreed to a procedure by which they filed cross-motions for summary judgment. [App. p.3, Order, p.2.] The Unpublished Opinion ignored this history, considered isolated parts of the record, and then reversed the grant of summary judgment based on Stipulation 50, thereby undermining the

stipulations process and allowing DOR to change its litigation position after its initial position was unsuccessful—even though DOR never requested any such relief.

DOR now argues that Stipulation 50 merely recognized the limitations of the PSC's regulating authority under Title 58 of the South Carolina Code and, thus, that the ALC misconstrued the stipulation in its Order. [Br. Resp. p.13.] But DOR never presented any argument to the ALC that the stipulation had been misconstrued. [*See, e.g.*, Br. Pet. pp.16-17.] Moreover, Stipulation 50 does not expressly reference Title 58[4] and, more to the point, does not use the term "telephone utility" as found in Title 58. In interpreting the stipulations,[5] the only reasonable conclusion is that Stipulation 50 was not so limited but reflects DOR's position regarding the differences between telephone companies versus radio common carriers. [*See* App. pp.131-132, Jt. Stips. ¶¶45-53.] The Court of Appeals erred in rejecting the Alltel Entities' argument that these differences are a substantive distinction. [*Cf.*, *e.g.*, App. p.238, DOR Determination p.6 ("[T]his is a distinction without a difference.").]

The record shows that as part of their contention that radio common carriers differ substantially from telephone companies, the Alltel Entities have consistently used Stipulation 50 in support of its arguments that they are not a telephone company:

> The Alltel Entities are not a telephone company. A telephone company transmits "intelligence over a vast network of wires." Jt. Stip. ¶ 50. The target of DOR's attention in this case is, in contrast, a company providing "wireless voice and data communications service via radio to the public for compensation." Jt. Stips. ¶¶ 2, 3 (emphasis added).

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[4] [*Cf.* App. p.131, Jt. Stip. ¶44.]

[5] [*See* Br. Pet. pp.18-19,]

[App. p.052, Alltel Entities' Mem. in Supp., Mot. Sum. J., p.3 (Feb. 1, 2008) ("Alltel MSJ").[6]] In contending otherwise, DOR ignores this and other statements by counsel for the Alltel Entities:

> We believe that the phrase telephone company is ... commonly and ordinarily understood to mean the company that comes to your home, your place of business, whatever other premises you may have, and installs a *land line telephone. It does not include the item I'm holding in my hand, a wireless communication device, which, as stipulated in this case, operates using radio frequencies not wires and lines.*

[App. pp.239-240, Tr. 14:23-15:7 (Feb. 19, 2008) (emphasis added).] Counsel for the Alltel Entities then states that, "[i]n addition, we would point out ... that under ... South Carolina law, a distinction is made between a telephone company or telephone utility and a radio common carrier providing wireless communication services." [App. p.240, Tr. 15:7-12.] In other words, arguments by the Alltel Entities about Title 58 were in addition to arguments about the substantial differences between entities providing communications with wireless radio technology versus those using wired telephone technology. Just as DOR consistently has acknowledged the technological differences between wireless radio and wired telephone communications, the Alltel Entities consistently have said that section 12-20-100 does not apply in part because they do not use a wire-based telephone system.

DOR now inconsistently says summary judgment was not appropriate, contending that "the uncertainty of whether the taxpayers are a telephone company within the statute, justifies remanding for further factual inquiry." [Br. Resp. p.5.] This statement

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[6] [*See also* App.p.053, Alltel MSJ p.4; App.p.058, Alltel MSJ p.9; App.p.059, Alltel MSJ p.10.] A review of the record, as well as DOR's own brief, [*see* Br. Resp. p.15, n.30 & accompanying text,] shows that these citations involve more than mere references to Title 58.

acknowledges the statute's ambiguity as applied to the Alltel Entities. DOR then states that although "each [of the parties] argued that there were no issues of fact, by the fact that both presented two views of the facts and law, there were inherent material issues of fact and law." [Br. Resp. p.13.] DOR cannot have it both ways: having previously moved for summary judgment, the agency cannot now argue otherwise. *See Hayne Fed. Credit Union v. Bailey*, 327 S.C. 242, 251, 489 S.E.2d 472, 477 (1997) ("Judicial estoppel precludes a party from adopting a position in conflict with one earlier taken in the same or related litigation."); [*see also* Br. Pet. pp.16-17.] This is another example of the problem with DOR changing its position without having presented that new position to the ALC. *See Home Med. Sys., Inc. v. S. Carolina Dept. of Revenue*, 382 S.C. 556, 562, 677 S.E.2d 582, 586 (2009).

In sum, the Order was based on all of the joint stipulations filed by the parties, as well as DOR's consistent acknowledgement of the technological differences between wireless radio and wireline telephone communications. The relief directed by the Unpublished Opinion would result in a significant expenditure of resources to develop a factual record substantially the same as that stipulated by the parties. The Unpublished Opinion should have affirmed the ALC and its failure to do so, coupled with the basis upon which the Order, warrants affirming the ALC.

II. An objective analysis of the facts actually stipulated in this case in light of the precedent advanced by the parties, the Order of the ALC, and the analysis of the Unpublished Opinion leads inescapably to the conclusion that section 12-20-100 is at the very least ambiguous as applied to the Alltel Entities.

Although the Alltel Entities continue to maintain that they do not fall within the plain meaning of section 12-20-100, [*see* Br. Pet. Arg. II,] a position that was disregarded by the Court of Appeals, the "not absolutely clear as a matter of law" holding of the Unpublished Opinion mandates a conclusion that the statute is at the very least ambiguous.[7] "In the enforcement of tax statutes, the taxpayer should receive the benefit in cases of doubt." *S. Carolina Nat'l Bank v. S. Carolina Tax Comm'n*, 297 S.C. 279, 281, 376 S.E.2d 512, 513 (1989) (citing *Cooper River Bridge, Inc. v. South Carolina Tax Comm'n*, 182 S.C. 72, 188 S.E. 508 (1936)). It follows from the holding that section 12-20-100 is "not absolutely clear as a matter of law" that application of section 12-20-100 is, in fact, subject to doubt. Contrary to DOR's erroneous arguments, if the application of the taxing statute is subject to doubt, then the decisions of this Court require that the "taxpayer ... receive the benefit in cases of doubt."[8]

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[7] DOR is incorrect, [*see* Br. Resp. p.21,] that determining a statute to be ambiguous requires a supporting finding of fact. *Town of Summerville v. City of N. Charleston,* 378 S.C. 107, 109, 662 S.E.2d 40, 41 (2008) (statutory interpretation is a question of law); *see also Humanoids Group v. Rogan,* 375 F.3d 301, 306 (4th Cir. 2004) ("Of course, determining whether a regulation or statute is ambiguous presents a legal question, which we determine *de novo*.").

[8] DOR also argues for using the standard for granting summary judgment as applied in *Brockbank v. Best Capital Corp.*, 341 S.C. 372, 534 S.E.2d 688 (2000), and in the Unpublished Opinion to this case. [Br. Resp. p.5.] However, the doubt standard of *South Carolina National Bank* and *Cooper River* that is applied in cases involving ambiguous tax statutes requires a different conclusion in this case, especially in light of the available record. That is, if there is doubt about whether the taxing statute applies in a case—especially in the face of agreed-upon stipulations—the question must be resolved in favor of the taxpayer and not remanded for yet more findings of fact. The Unpublished Opinion erroneously reaches a different result.

As the language of the *South Carolina National Bank* decision establishes, this Court applied the "cases of doubt" standard to cases involving the application of tax statutes to taxpayers in its *Cooper River* decision. *See Cooper River*, 182 S.C. 72, 188 S.E. at 509 ("In construing the statutes under which the tax has been assessed, our Supreme Court has pointed out in numerous cases that the taxpayer must receive the benefits in cases of doubt in the enforcement of tax statutes."). And although *Cooper River* contains an additional phrasing about "any substantial doubt being resolved in [the taxpayer's] favor," *id.* at 509-10, the holding of *Cooper River* and the standard applied in the more recent *South Carolina National Bank* case reflect that the question that a court must address is whether it is doubtful that the taxing statute encompasses the taxpayer. In other words, given the holding of *South Carolina National Bank*, the *Cooper River* language regarding "substantial doubt" is in the nature of a statement that immaterial questions do not rise to the required level of doubt and not a recognition of different standards. DOR's efforts to argue that there are two different standards and that the Alltel Entities fail to meet one of them is not based on a complete or accurate assessment of this Court's decisions.

Viewed in this light, applying *Cooper River* to this case—which the ALC did in rendering its alternative decision finding the statute ambiguous[9]—shows that the applicable doubt standard is met in this case. This Court in *Cooper River* held that bridge

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[9] DOR is incorrect, [*see* Br. Resp. pp.21-23,] that the ALC may not base its decision on alternative grounds. *See, e.g., Anderson v. Short*, 323 S.C. 522, 525, 476 S.E.2d 475, 477 (1996) (affirming trial court ruling based on two separate grounds when party did not appeal all grounds). Moreover, for the reasons explained in the text and in the Alltel Entities' initial brief, the ALC's alternative ruling was correct, especially in light of the determination in the Unpublished Opinion that the application of section 12-20-100 is "not absolutely clear as a matter of law."

companies and tollgate companies did not fall within a statutory provision imposing an income tax on other public utility and public service corporations. This Court based that decision in part on the fact that the General Assembly had not included these corporations as part of the enumerated companies, and it reached that decision ***even though the statute contained the words "other form of public service."*** *Id.* at 511. In other words, *Cooper River* holds that an income tax statute analogous to section 12-20-100 but with much broader language did not include a different type of entity than the companies enumerated therein because the language was "ambiguous or ... reasonably susceptible of an interpretation that would exclude the person called on to pay the tax." *Id.* If the application of section 12-20-100 to the Alltel Entities is "not absolutely clear as a matter of law" as the Court of Appeals held in the Unpublished Opinion,[10] then the statute in this case necessarily is "reasonably susceptible of an interpretation that would exclude the person called on to pay the tax," *see Cooper River*, 182 S.C. 72, 188 S.E. at 509, and its attempted application to the Alltel Entities is subject to doubt. In this vein, it is important to note that this Court held that "[t]he question [of whether unenumerated entities were included in the general language] is one of doubt and ambiguity" in view of the fact that the taxpayer was of a very different nature than the other entities enumerated under the statute. *See id.* at 510-11. Applying that same standard requires affording the Alltel Entities "the benefits ... in the enforcement" of section 12-20-100 because the Court of Appeals held that the application of the statute was not clear and because the record demonstrates that companies using wireless radio technology are very different in nature

[10] A holding that the Alltel Entities assert necessarily involves substantial doubt by virtue of the fact that the Court of Appeals determined that the application of the statute to the Alltel Entities was so unclear that it could not render a decision in this matter based upon the language of the statute alone.

from those using wired telephone technology. Consequently, the doubt and ambiguity present in this case and recognized by the Court of Appeals is more than enough to compel the conclusion that the Alltel Entities are not subject to section 12-20-100.

DOR also distorts *In re: ABC Telephone Co.*, S. Carolina Tax Comm'n Dec'n No. 91-41, 1991 WL 531801 (Aug. 12, 1991), arguing that this decision does not assist the Alltel Entities because it was "fact specific." [Br. Resp. p.8.] But Decision 91-41 is agency precedent analyzing application of the specific statute at issue here to determine the amount of license taxes a telephone company was required to pay.[11] In this decision, DOR's predecessor, the Tax Commission, recognized that "[a]ll the corporations taxed under §12-19-110 (1977) [a predecessor to §12-20-100] are in the nature of public service corporations. As such, they provide for a necessitate [*sic*] of the public and in turn are regulated by the state in some manner." *Id.* *4 n.6. Decision 91-41 further states that, "in the taxpayer's case, such regulation would be by the Public Service Commission since that is the regulating agency for telephone companies." *Id.* *4. And contrary to DOR's suggestion, Decision 91-41 is quite broad and not at all "fact specific," a conclusion reflected in the following language from that decision:

> As to the businesses here in question, the only one that is regulated in some manner by the Public Service Commission is the taxpayer's billing and collecting service. See S.C. Code Ann. § 58-9-230 (1990). Therefore, except for this one service, we agree with the taxpayer that the receipts from these businesses should be excluded from § 12-19-110.

Id. Based on this agency precedent, section 12-20-100 does not include radio common carriers because they are not telephone companies or utilities subject to Public Service

[11] DOR's characterization of the decision as involving the "failure to pay income taxes" is incorrect. [Br. Resp. p.8.]

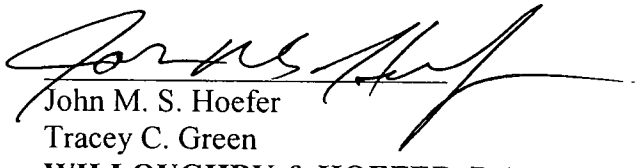
Commission regulation (as is established by §§ 58-11-10(f) and 58-11-100(B)), they do not provide public necessities, and they are not regulated by the state. DOR cannot arbitrarily depart from that precedent by labeling it "fact specific." [*See* Br. Pet. pp.11-12, 27.]

In sum, the record as well as the precedent of this Court and the agency itself dictates a conclusion[12] that the statute is at the least ambiguous as applied to the Alltel Entities. The failure of the Unpublished Opinion to apply the long-recognized ambiguity standard warrants a reversal of the Court of Appeals.

Conclusion

For the reasons explained above, this Court should reverse the Unpublished Opinion and hold that South Carolina Code section 12-20-100 does not apply to the Alltel Entities.

Respectfully submitted,



John M. S. Hoefer
Tracey C. Green
WILLOUGHBY & HOEFER, P.A.
Post Office Box 8416
Columbia, South Carolina 29202-8416
803-252-3300

Attorneys for Petitioners

Columbia, South Carolina
April 25, 2012

[12] The Alltel Entities opening brief adequately addresses the remaining issues addressed in DOR's brief, including but not limited to the arguments set forth in Part IV of that brief. [*See* Br. Pet. Arg. III.]

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PROOF OF SERVICE

This is to certify that I, an employee of the law offices of Willoughby & Hoefer, P.A., have caused to be served this day one (1) copy of the **Reply Brief** by placing same in the care and custody of the United States Postal Service with first class postage affixed thereto and addressed as follows:

Harry A. Hancock, Esquire
South Carolina Department of Revenue
Post Office Box 12265
Columbia, South Carolina 29211

Lindsey Gilbert

This 25th day of April 2012.