THE STATE OF SOUTH CAROLINA
In The Supreme Court

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

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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Unpublished Opinion No. 2010-UP-232 (S.C. Ct.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.

BRIEF OF PETITIONERS

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2. Did the Court of Appeals err in failing to address the ALC's plain meaning analysis and in overturning a factual stipulation regarding the operational nature of a telephone company, as well as 62 other stipulations, even though DOR never requested such relief and the Revenue Procedures Act directs the parties to "do their best" to enter into stipulations?

3. Did the Court of Appeals err in failing to affirm certain alternative findings of the ALC, including a finding that the Alltel Entities should not be held responsible for a substantial understatement penalty, even though the Department failed to properly preserve or challenge those findings on appeal?

Statement of the Case

1. Initial procedural history.

The impetus for the matter below arose in 2004 when the Department of Revenue ("DOR") initiated an audit of Alltel Communications, Inc., Alltel Mobile Communications of the Carolinas, Inc., New York Newco Subsidiary, Inc., Telespectrum, Inc., 360 Communications Co. of SC No. 1, and 360 Communications Co. of SC No. 2 (collectively, the "Alltel Entities"). [App. at 128, Jt. Stip. ¶29.] The Alltel Entities are engaged in the business of providing wireless communications as radio common carriers, [App. at 131, Jt. Stip. ¶44,] and, therefore, are not telephone utilities providing telephone services as defined for regulatory purposes. *See* S.C. Code Ann. § 58-11-10 (f) (1976); [*see also* App. at 468, Unpublished Op. No. 2010-UP-232, p.10 n.6.] The services provided by the Alltel Entities are not, and never have been, regulated by the Public Service Commission of South Carolina ("PSC"). [App. at 131, Jt. Stips. ¶¶45, 47.]

At the conclusion of the audit, DOR determined that the Alltel Entities are a "telephone company" within the ambit of section 12-20-100[1] and, consequently, assessed a total deficiency against the Alltel Entities of $4,709,671, [App. at 003, ALC

[1] Under South Carolina law, a license tax is imposed on incorporated entities for the privilege of doing business in this state. S.C. Code Ann. § 12-20-20 (2000). Generally, a corporation must calculate and report its corporate license tax pursuant to section 12-20-50. However, section 12-20-100 imposes an increased license tax on certain enumerated public service companies, including a "telephone company." S.C. Code Ann. § 12-20-100 (A)(1) & (2). There is no dispute that section 12-20-100 applies in this case only if the Alltel Entities are a "telephone company." S.C. Code Ann. § 12-20-100 (A). Neither section 12-20-100 nor any other provision of Title 12 defines the term "telephone company," and there are no South Carolina cases interpreting or defining that term. [*See* App. at 131, Jt. Stip. ¶43;] *see also* discussion *infra* p.17.

Order, April 22, 2008, ("Order") p.2; Op. p.4.] consisting of $2,859,354 in unpaid license taxes, $808,382 in substantial understatement penalties, and $1,041,935 in interest. [App. at 128-130, Jt. Stips. ¶¶32-36.] S.C. Code Ann. § 12-20-100. Previously, the Alltel Entities paid corporate license taxes calculated pursuant to S. C. Code Ann. § 12-20-50 (2000 & Supp. 2009). [App. at 124-30, Jt. Stips. ¶¶6, 8, 12, 15, 17, 21, 30-31, 38.] DOR assessed this deficiency even though it:

- had never engaged in such an audit before [App. at 124, Jt. Stip. ¶1];
- was unable to identify any similarly situated taxpayer which was paying corporate license tax pursuant to section 12-20-100 [*id.*];
- had promulgated no regulation or even a revenue ruling interpreting section 12-20-100 as applying to a provider of wireless telecommunications services; and
- through its statutory predecessor, previously had issued a decision determining that a corporation providing communications services was only obligated to pay corporate license tax under section 12-20-100 if it was regulated by the PSC. *In re: ABC Telephone Co.*, S.C. Tax Comm'n Dec'n No. 91-41, 1991 WL 531801, *4 n.6 (Aug. 12, 1991).

The Alltel Entities timely protested the proposed deficiency. [App. at 130, Jt. Stip. ¶37.]

2. The decision of the ALC.

After DOR issued its final determination on May 30, 2007, denying these protests, [App. at 130, Jt. Stip. ¶38,] the Alltel Entities timely filed requests for a contested case hearing with the Administrative Law Court ("ALC"). [App. at 130, Jt. Stip. ¶39.] By orders dated July 17, 2007, the ALC required the parties to submit pleadings in accordance with Rule 18, of the Rules of Procedure for the Administrative Law Court (RPALC). [App. at 138-76, Alltel Entities' Petitions, (August 17, 2007); App. at 177-229, DOR Answers (September 4, 2007).] The ALC consolidated these six cases by Order of Consolidation and Scheduling dated

November 14, 2007. [App. at 4, Order, p.3.] The parties thereafter entered into 63 separate joint stipulations (not including subparts) of both fact and law [App. at 122-137, Jt. Stips. ¶¶1-63,] as they were encouraged to do by S.C. Code Ann. § 12-60-3320. Thereafter, the parties filed cross-motions for summary judgment with supporting memoranda on February 1, 2008, and memoranda in opposition to the other party's motion for summary judgment on or before February 11, 2008. [App. at 25-73 & 74-121; *see also* App. at 3, Order, p.4.]

A hearing was conducted before the Honorable Marvin F. Kittrell, Chief Administrative Law Judge, on February 19, 2008. [App. at 3, Order, p.4.] The ALC took the matter under advisement at the conclusion of the hearing and thereafter granted the Alltel Entities' motion for summary judgment and denied DOR's motion for summary judgment by written order dated April 22, 2008. [App. at 002-024, Order, pp.1-23] The ALC ruled that, under the plain meaning of section 12-20-100, none of the Alltel Entities constituted a "telephone company" because they were providers of "wireless communications via radio, not communications via telephone." [App. at 017, Order, p.16.] The ALC alternatively ruled that, if the meaning of the language of the statute was not plain in this regard, any ambiguity must be resolved in favor of the Alltel Entities as a matter of law. [App. at 022-023, Order, pp.21-22.] The ALC also ruled in the alternative that, had it been necessary to reach other issues raised by the parties, including the contention of the Alltel Entities that they had substantial authority for their interpretation of section 12-20-100 which relieved them from any obligation to pay a penalty on a substantial underpayment of the corporate license tax, the ALC would have found in favor of the Alltel Entities. [App. at 023,

Order, p.22.] In its Order, the ALC made findings of fact based upon the parties' stipulations. [App. at 005-014, Order, pp.4-13.]

DOR did not move the ALC to alter or amend its judgment under Rule 59(e), of the South Carolina Rules of Civil Procedure (SCRCP), to assert that it should be relieved of its stipulations; that summary judgment was not an appropriate procedural vehicle to resolve the revenue dispute between the parties; that additional facts were required to be found to determine the controversy; or that the ALC had misinterpreted any of the parties' joint stipulations. Instead, DOR instituted an appeal to the Court of Appeals by filing and serving its notice of appeal on May 19, 2008.

3. Unpublished Opinion of the Court of Appeals.

The Court of Appeals heard argument in DOR's appeal on February 9, 2010. In its arguments to the Court of Appeals, DOR did not assert that use of the summary judgment procedure was not appropriate below; that a genuine issue of material fact existed; that it should be relieved from any of the parties' joint stipulations below; that the parties' Joint Stipulation 50 was a stipulation to the meaning of section 12-20-100; or that a single stipulation could be read in isolation.

Nevertheless, on April 7, 2010, the Court of Appeals issued Unpublished Opinion No. 2010-UP-232 ("Unpublished Opinion" or "Opinion"), reversing the ALC Order based on grounds not asserted by DOR. Specifically, the Court of Appeals reversed and remanded the case to the ALC "for further proceedings as to the applicability of section 12-20-100 to [the Alltel Entities]" and for further rulings on certain alternative issues addressed in the ALC Order, including the propriety of DOR's assessment of penalties against the Alltel Entities. [App. at 463-464, Op.,

pp.5-6.] The Court of Appeals recognized that the "question of what the legislature intended for the term 'telephone company' to mean for purposes of section 12-20-100 is a question of law. [App. at 466, Op., p.8.] But the Court of Appeals nevertheless held that the ALC erred in granting summary judgment to the Alltel Entities because the case presented "an important question of novel impression" and, thus, "additional development of the facts is necessary to clarify the application of section 12-20-100 as to [Petitioners]." [App. at 467-468, Op., pp.9-10 (citing *Brockbank v. Best Capital Corp.*, 341 S.C. 372, 534 S.E.2d 688 (2000)).] The Court of Appeals then remanded the case to the ALC "for further proceedings as to the applicability of section 12-20-100 to [the Alltel Entities]." [App. at 469, Op., p.11.] The Unpublished Opinion did not, however, address the ALC's alternative ruling that, if the plain meaning of section 12-20-100 did not include any of the Alltel Entities as a "telephone company" within the ambit of the statute, then any ambiguity in the statute had to be construed in favor of the Alltel Entities and that they were entitled to summary judgment as a matter of law on that basis as well.

On April 22, 2010, the Alltel Entities filed a petition for rehearing and petition for rehearing with suggestion of rehearing *en banc*, both of which were denied by orders of the Court of Appeals filed June 7, 2010.

4. Petition to this Court

On August 5, 2010, the Alltel Entities timely submitted their petition and the appendix and on October 7, 2010, DOR filed and served its return to the petition. The Alltel Entities filed and served their reply on November 16, 2010. This Court issued its order granting the petition of the Alltel Entities on December 15, 2011, and

directing the parties to file additional briefs and the petitioners to file additional copies of the Appendix in accordance with Rule 242(i), of the South Carolina Appellate Court Rules (SCACR).

Summary of Arguments

Even accepting the analysis employed in the Unpublished Opinion, the Alltel Entities are nonetheless entitled to have the relief granted by the ALC reinstated as a matter of law because the Unpublished Opinion concluded that "the construction of Section 12-20-100 as applied to wireless communications providers is an important question of novel impression" and that the application of the statute to the Alltel Entities was not "absolutely clear as a matter of law." [App. at 467-468, Op., pp.9-10.] Under long-standing precedent of this Court, the applicability of a tax statute must be construed against the state in cases of doubt. The Unpublished Opinion ignores this precedent.

The Unpublished Opinion also fails to address the arguments of the parties regarding the primary basis for the ALC's ruling, i.e., that a provider of "wireless communications via radio" is not a "telephone company" under the plain meaning of section 12-20-100. The Unpublished Opinion also improperly relieves DOR of stipulations entered into in good faith in pursuance of a legislative directive applicable to revenue disputes, misstates the nature and effect of these stipulations, and fails to apply the law to the facts established by these stipulations.

Finally, the Unpublished Opinion reverses certain alternative findings by the ALC, including one relieving the Alltel Entities from liability for substantial underpayment penalties even though DOR did not preserve its challenge to that issue and, thus, as a matter of law entitled the Alltel Entities to at least that relief. In view of

the foregoing, and as further discussed below, the Unpublished Opinion of the Court of Appeals should be reversed and the decision of the ALC affirmed *in toto* or at least to the extent that the ALC granted the Alltel Entities alternative relief.

Arguments

I. This Court should reverse the decision of the Court of Appeals because it held that the application of section 12-20-100 to the Alltel Entities is not "absolutely clear as a matter of law," yet failed to apply the long-recognized principle that tax statutes must be construed against the State in cases of doubt.

The Court of Appeals held that the application of section 12-20-100[2] to the Alltel Entities is "not absolutely clear as a matter of law," [App. at 467-468, Op., pp.9-10,] yet failed to apply the long-recognized principle that, "[i]n the enforcement of tax statutes, the taxpayer should receive the benefit in cases of doubt."[3] *S.C. Nat'l Bank v. S.C. Tax Comm'n*, 297 S.C. 279, 281, 376 S.E.2d 512, 513 (1989) (citing

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[2] In pertinent part, the statute provides as follows:

> (A) In the place of the license fee imposed by Section 12-20-50, every express company, street railway company, navigation company, waterworks company, power company, electric cooperative, light company, gas company, telegraph and **telephone company** shall file an annual report with the department and pay a license fee as follows:
>
> (2)(a) three dollars for each thousand dollars, or fraction of a thousand dollars, of gross receipts derived from services rendered from **regulated business** within this State (emphasis added).

§ 12-20-100. The dispute in the instant case is simply whether the Alltel Entities are telephone companies, which have regulated business, and are therefore subject to a license tax under section 12-20-100.

[3] As explained more fully in Part II, the Alltel Entities maintain that a radio common carrier providing wireless telecommunications service is not a "telephone company" under the plain meaning of section 12-20-100 for the reasons set forth in the ALC's order. However, for the reasons discussed in this brief, the result that should have been reached even under the analysis employed by the Court of Appeals in the Unpublished Opinion is no different than the result required by giving the statute its plain meaning.

Cooper River Bridge, Inc. v. South Carolina Tax Comm'n, 182 S.C. 72, 188 S.E. 508 (1936). The Court of Appeals' holding that the statute's application to the Alltel Entities is "not absolutely clear" is the same as holding that, as a matter of law, there is doubt as to whether the statute applies to those entities. Viewed in this light, the aforementioned doubt standard was implicated as a matter of law, yet the Court of Appeals failed to take the simple, but required, step of applying that standard.

This failure is even more problematic in this case due to the existence of all of the typical predicate factors requiring application of this long-recognized doubt standard. Specifically, the Court of Appeals recognized that the "question of what the legislature intended for the term 'telephone company' to mean for the purposes of section 12-20-100 is a **question of law**." [App. at 466, Op., p.8 (emphasis added).][4] The Court of Appeals also recognized that there is a difference in the treatment of radio common carriers versus telephone companies for regulatory purposes, [App. at 468, Op., p.10] and that the issue raised in this case has been treated differently by different jurisdictions. [App. at 468-469, Op., pp.10-11.] The Court of Appeals also referenced the sales and use tax provisions of Title 12 of the Code of Laws of South Carolina, [App. at 468, Op., p.10, n.7,] an approach that in and of itself indicates that section 12-20-100 is ambiguous and subject to doubt as to its application to the Alltel Entities.

[4] The Court of Appeals applied the standard of review applicable to orders granting summary judgment, and this Court recently applied this same standard of review in addressing an appeal of a revenue dispute decided by the ALC on cross-motions for summary judgment. *See Media General Communications, Inc, & Media General Broad. of South Carolina, Holdings, Inc. v. S.C. Dep't of Rev.*, 388 S.C. 138, 694 S.E.2d 525 (2010)

But despite the indicators of ambiguity regarding a question of law and the ALC's analysis of the statute's ambiguity, [App. at 019-023, Order, pp.18-22,] the Court of Appeals simply reversed the decision below and remanded for further fact finding without ever mentioning or discussing the ALC's alternative finding that the statute's application to the Alltel Entities is subject to doubt and, thus, is ambiguous and triggers application of the doubt standard set out in *S.C. Nat'l Bank v. S.C. Tax Comm'n, supra*.[5] In short, the Court of Appeals had all the pieces necessary to solve the puzzle of an ambiguous tax statute, but simply failed to assemble them.[6]

The Court of Appeals also failed to consider—even though it was argued in the Alltel Entities' brief—that the only existing agency precedent on point concluded that a "telephone company" under the statute is a company regulated by the PSC because "[a]ll the corporations taxed under [the predecessor version of section 12-20-100] are in the nature of public service corporations [and, as] such, they provide for a necessitate [sic] of the public and in turn are regulated by the state in some manner." *In re: ABC Telephone Co.*, S.C. Tax Comm'n Dec'n No. 91-41, 1991 WL 531801, *4

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[5] This Court has held that the Court of Appeals must address and give a reason for its adjudication of each issue "fairly arising upon the record." *In re Mem. Decisions by Ct. Apps.*, 322 S.C. 53, 471 S.E.2d 456 (1993). The Court of Appeals apparently considered that its characterization of the issue as novel excused it from analyzing the ALC's accompanying ambiguity analysis. However, this Court recently addressed a novel issue pertaining to a tax statute that was decided through full stipulations and cross-motions for summary judgment—just like this case. *Media General,* 388 S.C. at 149-50, 694 S.E.2d at 530-31 (discussing existing agency precedent); *see also* discussion *infra* pp.17-18.

[6] As noted below, *see* discussion *infra* Part II, the Court of Appeals remanded for further fact finding without identifying any specific factual inquiry necessary beyond stating that, "[f]or instance, further inquiry into the nature of the services provided by Respondents is essential." [App. at 466-67, Op., pp.8-9.]

n.6 (Aug. 12, 1991).[7] The parties also stipulated that the Alltel Entities are not regulated by the state. [App. at 131, Jt. Stip. ¶47 ("The State of South Carolina has never regulated the retail sale of wireless voice and data communications services via radio to the public for compensation by the Alltel Entities.").] In light of this stipulation, DOR's failure to follow its own agency determinations constituted an arbitrary departure from its established precedent. *See 330 Concord Street Neighborhood Ass'n v. Campsen*, 309 S.C. 514, 517, 424 S.E.2d 538, 540 (Ct. App. 1992). Because the Alltel Entities presented this argument to the ALC, [App. at 248-50, Tr. p.23, l.10-p.25, l.5,] requiring DOR to adhere to this precedent is an additional sustaining ground upon which the Court of Appeals should have affirmed the ALC and an additional basis by which this Court may reverse the Unpublished Opinion. *See I'On, LLC v. Town of Mt. Pleasant*, 338 S.C 406, 419, 526 S.E.2d 716, 723 (2000).

DOR also has not promulgated any regulation contrary to *In re: ABC Telephone Co.*, or any regulation at all regarding the definition of "telephone company" as found in section 12-20-100.[8] This is a significant omission in light of this

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[7] The Alltel Entities submit that this determination supports the ALC's plain meaning conclusion, which examined the term "telephone company" in view of the language and design of the statute as a whole, without employing a subtle or forced construction to limit or expand its scope. *See e.g., Fox v. Moultrie,* 379 S.C. 609, 614, 666 S.E.2d 915, 917-918 (2008).

[8] The existence of this precedent and the absence of any such regulation precluded the DOR from making an argument to the ALC or Court of Appeals that its new interpretation was entitled to deference. *Cf. Media General*, 388 S.C. at 149-50, 694 S.E.2d at 530-31 (discussing existing agency precedent and deference accorded to "an agency's long-standing interpretation of a statute" [citing *Etiwan Ferilizer Co. v. S.C. Tax Commission,* 217 S.C. 354, 359, 60 S.E.2d 682, 684 (1950) (holding that where "construction of [a] statute has been uniform for many years in administrative practice, and has been acquiesced in by the General Assembly for a long period of

Court's recent decisions focusing on whether the authority or views asserted by DOR, if not within the express terms of the statute, are set forth in or supported by a duly promulgated regulation. *See Sonoco Products Co. v. S.C. Dep't of Rev.*, 378 S.C. 385, 393, 662 S.E.2d 599, 603 (2008) (noting that DOR regulations set forth a preference for a broad construction of the statute at issue); *Ventures South Carolina, LLC v. S.C. Dep't of Rev.*, 378 S.C. 5, 10, 661 S.E.2d 339, 341 (2008) (holding that DOR exceeded its power to collect information regarding gross proceeds from gambling cruise operations because it had not promulgated any regulations to that effect). As stated above, the Court of Appeals erred in failing to consider this alternate sustaining ground and supporting authority.

The Court of Appeals also failed to consider the ample analysis by the ALC of the legislative history of section 12-20-100 in connection with its ambiguity ruling. *See Town of Forest Acres v. Seigler*, 224 S.C. 166, 173, 77 S.E.2d 900, 903 (1953) (cited at [App. at 20-21, Order, pp.19-20;]) *see also Berkeley County School Dist. v. South Carolina Dep't of Rev.*, 383 S.C. 334, 679 S.E.2d 913 (2009) (considering

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time, such construction should not be overruled without cogent reasons"]). Arguably, the legislature has been aware of the decision of DOR's statutory predecessor, *In re: ABC Telephone Co.*, since it was issued in 1991. *Cf. Lexington Law Firm v. S.C. Dep't of Consumer Affairs*, 382 S.C. 580, 587, 677 S.E.2d 591, 594 (2009) ("There is a presumption that the Legislature has knowledge of previous legislation as well as of judicial decisions construing that legislation when later statutes are enacted concerning related subjects.") (internal citation omitted). 1995 S.C. Acts No. 76, which repealed former S.C. Code Ann. § 12-19-100 and S.C. Code Ann. § 12-19-110 and enacted section 12-20-100 in their place, provided the legislature with an opportunity to reject the *In re: ABC Telephone Co.* decision which determined that only an entity regulated by the PSC is a "telephone company" subject to a greater corporate license tax—an opportunity of which the General Assembly did not avail itself. Accordingly, just as DOR is entitled to deference to its longstanding administrative interpretation of a statute under *Etiwan, supra*, taxpayers should be permitted to rely on such an interpretation under *330 Concord Street Neighborhood Association, supra.*

legislative history in interpreting statute) (plurality opinion). The predecessor of section 12-20-100 was enacted in 1904. 1904 Statutes at Large of South Carolina, No. 269, § 9.[9] Because the predecessor statute also did not define "telephone company," the ALC considered other statutes existing in 1904. *See Sonoco Products*, 378 S.C. at 392, 662 S.E.2d at 602 (determining meaning of the term "contiguous" by referencing other statutes and stating that "*when the Legislature promulgated [the statute]* it was aware of the uses of the term 'contiguous' in other statutory schemes") (emphasis added). All of the pertinent statutes existing in 1904 contemplated that a "telephone company" employs a line to transmit communications. *See* 1904 Statutes at Large of South Carolina, No. 281, § 1 (granting Railroad Commission authority to "fix and regulate the rates or tolls to be charged by the owners or operators of all such telephone lines, stations or exchanges, for the transmission of intelligence for hire"); 1899 Statutes at Large of South Carolina, No. 40, §§ 1-2 (granting every telephone company the right to "operate its line" in public rights of way and the right of eminent domain). The ALC fully considered this legislative history in an effort to ascertain the meaning of the statute, but that analysis is ignored in the Unpublished Opinion.

The ALC also correctly determined that its finding that the Alltel Entities are outside the scope of section 12-20-100 was "entirely consistent and dictated by" *Cooper River Bridge, Inc. v. South Carolina Tax Comm'n*, 182 S.C. 72, 188 S.E. 508 (1936). [App. at 22, Order, p.21.] In *Cooper River*, the Tax Commission contended that a bridge and toll company fell within a statutory provision imposing an income

[9] *See also* William J. Quirk & Fred A. Walters, *A Constitutional and Statutory History of the Telephone Business in South Carolina*, 51 S.C. L. Rev. 290, 375 (2000) (noting 1904 enactment of a gross receipts tax on telephones).

tax on public utility and public service corporations. *Cooper River*, 188 S.E. at 508-09. The statutory provision at issue there imposed a specific type of income tax on enumerated public service corporations, including "every corporation engaged in the ... telephone ... business ... or other form of public service." *Id.* at 510. The Tax Commission admitted that the bridge company was not an enumerated corporation, but contended that the words "other form of public service" were "broad enough to include the [bridge company] as a public utility or public service corporation." *Id.*

This Court concluded that bridge companies and tollgate companies did not fall within the statutory language, in part because the General Assembly had not included them as part of the enumerated companies. *Cooper River* at 511. Importantly, as part of its analysis, this Court also considered whether bridge and tollgate companies were subject to the jurisdiction of the Railroad Commission, which was the predecessor to the PSC. *Id.* Thus, this Court held in *Cooper River* 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.* The ALC's reliance on *Cooper River* was appropriate because that case reflects that entities of a different nature than the entities specifically enumerated under the statute do not fall within the statute.

In sum, the Court of Appeals should have affirmed the ALC because it recognized that the application of the statute to the Alltel Entities is subject to doubt—i.e., it is "not absolutely clear as a matter of law"—but failed to apply the principle that tax statutes should be construed against the State in cases of doubt. *See* Rule

220(c), SCACR (appellate court may affirm upon any ground in the record). This Court has encouraged the efficiency of affirming on any ground found in the record, both historically and recently. *See I'On, LLC*, 338 S.C at 421, 526 S.E.2d at 723 (holding that an "affirmance promotes judicial economy and finality in private and public affairs, which are important public policies"); *see also Jones v. Lott,* 387 S.C. 339, 347, 692 S.E.2d 900, 904 (2010) (noting authority of appellate court to rely on additional sustaining grounds to affirm the lower court's judgment). If allowed to stand, the Court of Appeals' decision will create uncertainty in the application of tax statutes by undermining the application of the rule for construing doubtful tax statutes against the government. Given that the Court of Appeals' Unpublished Opinion—and the record—contain the pieces of the puzzle showing that the statute should be construed against the State as a matter of law, this Court should reverse the Court of Appeals.

II. This Court should reverse the Court of Appeals based upon its failure to address the ALC's plain meaning analysis and its overturning a factual stipulation regarding the operational nature of a telephone company, as well as 62 other stipulations, even though DOR never requested such relief and the Revenue Procedures Act directs the parties to "do their best" to enter into stipulations.

Although the ALC primarily determined that the Alltel Entities do not fall within the plain meaning of section 12-20-100, [App. at 014-019, Order, pp.13-18,] the Court of Appeals never directly analyzed or discussed that ruling. *See, e.g., PalmettoNet, Inc. v. South Carolina Tax Comm'n*, 318 S.C. 102, 109, 456 S.E.2d 385, 389 (1995) (applying plain meaning rule to taxation statute). Instead, the Court of Appeals determined that the ALC's Order should be reversed and remanded even though DOR never requested that relief. The basis of the Court of Appeals' reversal

was not a critique of the ALC's analysis—although statutory interpretation is a question of law—but its apparent objection to one of 63 separate stipulations, namely that a telephone company "transmit[s] intelligence over a vast network of wires located in public rights of way and in easements over private property." [App. at 132, Jt. Stip. ¶50 ("Joint Stipulation 50"); *see* App. at 465-466, Op., pp.7-8.] The Court of Appeals found that this was a stipulation of **law** not binding on the Court and (paradoxically) concluded that "additional development of the **facts** is necessary to clarify the application of section 12-20-100 as to [the Alltel Entities],"[10] even though the only illustration it gave was that, "[f]or instance, further inquiry into the nature of the services provided by Respondents is essential." [App. at 466-67, Op., pp.8-9 (emphasis added).] This line of analysis was improper and should be reversed for a number of reasons.

First, and foremost, DOR never requested to be relieved from its stipulation before the ALC, either before or after the ALC's decision, and never argued that the summary judgment procedure was inappropriate in this case or that additional fact-finding was needed. Nor could it have done so legitimately, in view of the fact that both DOR and the Alltel Entities filed cross-motions for summary judgment, which, if nothing else, constitutes an acknowledgement that summary judgment is appropriate because no other facts need be considered beyond those already in the

[10] The Unpublished Opinion criticizes the ALC's reference to Joint Stipulation ¶50 in a footnote in its order discussing the nature of the stipulation. [App. at 015-016, Order, pp.14-15.] However, in the footnote in question, the ALC noted DOR's argument that the term "telephone company" includes entities beyond the traditional wireline companies, but rejected that contention "[a]s explained below." In other words, the ALC went beyond Joint Stipulation 50 to render a decision, a process further reflected by the twenty three pages of the ALC's Order.

record. *Harrison Western Corp. v. Gulf Oil Co.*, 662 F.2d 690, 692 (10th Cir. 1981) ("[C]ross motions for summary judgments do authorize the court to assume that there is no evidence which needs to be considered other than that which has been filed by the parties."). Because DOR did not raise any of these issues before the ALC or otherwise ask that court for relief from any stipulation, the Court of Appeals should have held that DOR was bound by all of the stipulations. *See Home Medical Systems, Inc. v. South Carolina Dep't of Revenue*, 382 S.C. at 562, 677 S.E.2d at 586 ("Although a Rule 59(e) motion may effectively seek a reconsideration of issues and arguments, this type of motion is often **required** for issue preservation purposes.") (emphasis in original); *Brown*, 348 S.C. at 519, 560 S.E.2d at 417; *Porter v. South Carolina Public Svc. Comm'n*, 333 S.C. 12, 31, 507 S.E.2d 328, 338 (1998) ("When a party has not asked the court to relieve it from the terms of a stipulation, that party remains bound by the stipulation.").[11]

Compounding its error of granting DOR relief that it did not seek at either the trial or appellate level, the Court of Appeals proceeded to graft its own views onto Joint Stipulation 50, over and above those assigned and applied to it by the parties below and by the ALC, then used those views as grounds for reversing the ALC's Order. DOR's agreement to Joint Stipulation 50 reflects its consistent acknowledgement that "cellular and landline services operate on patently different technologies." [App. at 363, Final Br. Appellant., p.10.] DOR candidly and repeatedly stipulated that the Alltel Entities' communications system does not use wires and is

[11] In fact, DOR did not even request that the Court of Appeals relieve it from its stipulations below, magnifying the error in the result reached in the Unpublished Opinion in this regard.

based on very different, radio technology. [*E.g.*, App. at 124, 131, Jt. Stips. ¶¶2, 3, 44.] DOR took the same position in its memoranda filed before the ALC, expressly acknowledging "the regulatory and technological differences (*see* Joint Stipulations, [¶¶] 2-4 & 43-52 of the Petitioners) ...." [App. at 078, Resp. Pets' Mot. Summ. J., p.5.] Counsel for DOR also acknowledged in the hearing before the ALC that "it is true there is a significant technological difference between wireless and what's known as wire line telecommunications." [App. at 253, Tr., p.31, ll.12-14.]

In short, the issue in this case was never the factual nature of the Alltel Entities' services, but whether those services constituted the Alltel Entities a "telephone company" under section 12-20-100. The limiting language of section A of the statute reflects the significance of this analysis and, as DOR's predecessor determined in its decision *In re: ABC Telephone Co.,* that language reflects that a telephone company is an entity of the type that is regulated by the PSC and that generates receipts as part of that regulated business. *Cf. Duke Power Co. v. South Carolina Tax Comm'n*, 292 S.C. 64, 66, 354 S.E.2d 902, 903 (1987) (holding that, prior to amendment to present language, the "circuit court erred in construing the statute so as to limit the imposition of the license fee tax to only receipts from customer charges in Duke's regulated business" and that the "fact that the statute was subsequently amended is of no comfort to Duke"). Importantly, the legislature has recognized that, for regulatory purposes, the services provided by the Alltel Entities are not those of a telephone company. *See* S.C. Code Ann. § 58-11-10 (f) (1977).

Joint Stipulation 50 is a factual stipulation as to the operational nature of a traditional telephone company, a factual inquiry of significance to the question of

whether the statute applies to the Alltel Entities. The Court of Appeals erroneously concludes that Joint Stipulation 50 is a stipulation of law to which it is not bound and assigns meanings to the stipulations not employed or suggested by the parties. *See Porter*, 333 S.C. at 30, 507 S.E.2d at 337 ("Because the court construes it like a contract, a stipulation that is unambiguous and explicit must be construed *according to the terms the parties have used*, as those terms are understood in their plain, ordinary, and popular sense.") (emphasis added); *see also Buice v. WMA Securities, Inc.*, 380 S.C. 149, 157, 668 S.E.2d 430, 434 (Ct. App. 2008). In reversing the decision of the ALC based solely on the conclusion that Joint Stipulation 50 was a stipulation of law, the Unpublished Opinion allows the cart to drive the horse.

Also, by remanding for "additional development of the facts," the Court of Appeals compounds the error by relieving DOR not only from Joint Stipulation 50, but also from all of the 63 joint stipulations—some with multiple subparts—entered into by the parties. This was unnecessary because, as DOR noted before the ALC, there are numerous stipulations concerning the nature of the services provided by the Alltel Entities and the differences between these services and telephone services. [*See* App. at 078, Resp. Pets' Mot. Summ. J., p.5 (citing Jt. Stips. ¶¶2-4 & 43-52 and noting "regulatory and technological differences" of the Alltel Entities).] Moreover, the Court of Appeals' decision undermines the legislative policy set out in the South Carolina Revenue Procedures Act that, "[i]n order to increase the efficiency and reduce the costs of contested cases, parties to a contested case hearing, in good faith, shall do their best to stipulate the facts and issues upon which they can agree." S.C. Code Ann. § 12-60-3320. The parties did that in this case, but the Court of Appeals gave DOR a

second bite at the apple. Although the opinion below is unpublished, it is inescapable that the Court of Appeals has created a significant disincentive for parties in revenue disputes—particularly taxpayers—to stipulate facts and issues. This disincentive undermines the clear legislative direction of section 12-60-3320 and will increase the number of and necessity for fact-finding bench trials in the ALC, which in turn will increase the demand for scarce administrative resources.

Moreover, this action by the Court of Appeals is entirely inconsistent with this Court's recent decisions. In *Media General*, this Court affirmed a decision of the ALC finding a South Carolina statute allowed "three multistate corporations ... to use the combined entity method in apportioning their income and determining their South Carolina corporate income tax liability." 388 S.C. at 140, 694 S.E.2d at 526. As in this case, the parties in *Media General* agreed to certain stipulations; among these was a stipulation that the standard apportionment formula applied in this state "does not fairly represent [the taxpayers'] business activities in South Carolina, thus resulting in a statutory distortion of petitioners' activities within South Carolina." *Media General*, 388 S.C. at 143, 694 S.E.2d at 527.

The instant case has similar characteristics to *Media General*, yet the Court of Appeals reversed and remanded for further fact finding rather than construing the statute as a matter of law.[12] The parties fully stipulated the facts and stipulated

[12] Even though *Media General,* involves a first-time interpretation of a statutory term ("taxpayer"), this Court considered the grant of summary judgment based upon the parties' stipulations. 388 S.C. at 140-41, 694 S.E.2d at 526. By contrast, the Unpublished Opinion relies heavily upon the fact that the phrase "telephone company" in section 12-20-100 had not been previously interpreted by an appellate court, thus creating a "novel issue" compelling reversal of the grant of summary judgment by the ALC.

pertinent legal issues pertaining to the case. The parties also filed cross-motions for summary judgment. The ALC granted summary judgment against DOR based on the plain meaning of section 12-20-100. Yet, the Court of Appeals, rather than evaluating the plain meaning of the statutory language or, alternatively, whether that language is ambiguous, instead invalidated all of the joint stipulations and remanded the case for further fact finding. Notwithstanding the Court of Appeals' erroneous determination that Stipulation 50 is a stipulation of law, *Media General* reflects that parties in a revenue dispute may properly stipulate the application of law to fact. The Court of Appeals' erroneous analysis was wholly inconsistent with this Court's very recent precedent and the Unpublished Opinion should therefore be reversed.

In sum, the Court of Appeals erred in *sua sponte* addressing an argument neither made nor preserved by DOR; concluding that the parties jointly stipulated to a question of law regarding the meaning of the phrase "telephone company" in section 12-20-100; and determining the ALC had relied too heavily on that joint stipulation. [App. 465-467, Op., pp.7-9.] If the Alltel Entities had thought Joint Stipulation 50 was a stipulation of law concerning section 12-20-100, they would not have submitted the pages and pages of argument in support of their motion for summary judgment or their response to DOR's motion for summary judgment. As explained above, DOR did not think Joint Stipulation 50 was a stipulation to the meaning of the statute. [*See also* App. p. 363, Final Br. Appellant., p.10 (arguing that Joint Stipulation 50 concerned Title 58 of the South Carolina Code of Laws).] And if the ALC had found Joint Stipulation 50 to be a stipulation of law on the meaning of section 12-20-100, it simply would have decided the case on that basis instead of discussing all of the issues

raised by the case and the nature of the Alltel Entities in a 23-page order. The Court of Appeals' analysis was erroneous, and this Court should therefore reverse.

III. This Court should reverse the Court of Appeals' decision because the opinion fails to affirm certain alternative findings of the ALC, including a finding that the Alltel Entities should not be held responsible for a substantial understatement penalty, even though the Department failed to properly preserve or challenge those findings on appeal.

In Part II of the Unpublished Opinion, the Court of Appeals held that certain alternative findings made by the ALC "were not sufficiently detailed to enable proper review." [App. at 470, Op., p.12.] For the reasons discussed below, the holding of the Court of Appeals in this regard should be reversed.

A. Because DOR did not properly preserve, raise, or present any argument to the Court of Appeals regarding certain alternative findings made by the ALC, this Court should reverse the Court of Appeals' decision with respect to the alternative issues and affirm the findings of the ALC.

Among the ALC's alternative rulings that the Court of Appeals failed to review was a determination that the Alltel Entities should not be subjected to a substantial understatement penalty[13] for the same reasons articulated in the ALC's analysis of the plain meaning and ambiguity issues. The ALC also determined that the Alltel Entities were not engaged in a regulated business for purposes of section 12-20-100 and that partnership income and assets should not be included in the license fee calculation.

The ALC's determinations with respect to these alternative findings should have been affirmed if for no other reason than DOR failed to present a challenge regarding the nature and adequacy of those findings to the ALC and thereby preserve that issue for appeal. *See, e.g., Home Medical Systems*, 382 S.C. at 562, 677 S.E.2d at

[13] *See* discussion *infra* Part III.B.

586 (stating issues not raised to and ruled upon by the ALC are unpreserved for appellate review); *Brown v. South Carolina Dep't Health & Envtl. Control*, 348 S.C. 507, 519, 560 S.E.2d 410, 417 (2002) (holding that "issues not raised to and ruled on by the ALJ are not preserved for appellate consideration"). Moreover, DOR's statement of the issue was impermissibly vague,[14] and its argument consisted of short, conclusory statements that did not address the substance of its position and, thus, should have been disregarded.[15] Therefore, the Court of Appeals' decision should be reversed based on these failures alone.

B. The ALC correctly determined that the Alltel Entities had "substantial authority" for their treatment of the corporate license fee on the original license tax returns.

Even if the substance of DOR's argument is considered, the ALC correctly determined in the alternative that DOR's imposition of a substantial understatement penalty should be reversed for the same reasons that the ALC had determined that the Alltel Entities are not subject to section 12-20-100. [*See* App. at 23, Order, p.22 n.9.] By way of background, S.C. Code Ann. § 12-54-155 (2000) imposed, during the license tax years at issue, a penalty of 25% on any underpayment of tax attributable to a "substantial understatement," which is defined as an understatement exceeding 10%

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[14] DOR's actual statement of the issue was as follows: "Did the ALC fail to give proper consideration to other issues raised under its jurisdiction?" [App. at 354, Final Br. Appellant, p.1.] As such, the issue was stated only in broad and general terms and should have been disregarded. *See* Rule 208(b)(1)(B), SCACR; *see also* JEAN HOEFER TOAL ET. AL., APPELLATE PRACTICE IN SOUTH CAROLINA, p.210 (2nd ed. 2002) (describing as "overly vague" an issue stated as "Did the circuit court err in granting summary judgment?").

[15] [App. at 385, Final Br. Appellant, p.32 (stating that the ALC failed to give "due consideration" to certain regulated business and partnership issues);] *see Fields v. Melrose Ltd. P'ship*, 312 S.C. 102, 106 & n.3, 439 S.E.2d 283, 285 & n.3 (Ct. App. 1993). ("[A]n issue is deemed abandoned on appeal and, therefore, not presented for review, if it is argued in a short, conclusory statement without supporting authority.").

of the tax required to be shown on the return for the taxable period, or $5,000. § 12-54-155(a),(b) (2000).[16] However, the understatement must be reduced by any amount attributable to "the tax treatment of any item by the taxpayer if there is or was substantial authority for such treatment." *Id.* § 12-54-155 (b)(2)(B).

The parties stipulated that Treasury Regulation § 1.6662-4(d) governs the determination of what is substantial authority for purposes of South Carolina law. [App. at 133, Jt. Stip. ¶60.]; 26 C.F.R. § 1.6662-4(d). "The substantial authority standard is an objective standard involving an analysis of the law and application of the law to relevant facts." *Id.* Although it requires more than a reasonable basis, "the substantial authority standard is less stringent than the more likely than not standard (the standard that is met when there is a greater than 50-percent likelihood of the position being upheld)." *Id.* Thus, "[t]here is substantial authority for the tax treatment of an item only if the weight of the authorities supporting the treatment is substantial in relation to the weight of the authorities supporting contrary treatment." 26 C.F.R. § 1.6662-4(d)(3)(i). Substantial authority is an objective standard and "a taxpayer may have substantial authority for a position that is supported only by a well-reasoned construction of the applicable statutory provision." 26 C.F.R. § 1.6662-4 (d)(3)(i)-(ii).[17]

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[16] Section 12-54-155 was amended in 2006. *See* 2006 S.C. Acts. No. 386, § 27.A. Because the license tax years at issue ended prior to the date the statute was amended, the prior version—which was enacted in 1988 and which is found in the bound volume of the Code of Laws of South Carolina published in 2000—is applicable in this case. *Id.* § 27.B ("This section takes effect upon approval by the Governor and applies for tax periods beginning after December 31, 2006.").

[17] This argument was raised by the Alltel Entities below, [App. at 272-75, Tr. p.82, 1.23-p.85, 1.15], and is an additional sustaining ground upon which this Court

Viewed in this light, the ALC correctly determined that the Alltel Entities had substantial authority for calculating and paying their corporate license tax under the provisions of section 12-20-50 and not section 12-20-100 "for the reasons set forth above in this Order." [App. at 23, Order, p.22 n.9.] That is, the ALC determined that even if it had concluded that the Alltel Entities were subject to section 12-20-100, the analysis employed to determine that they were not in and of itself constituted substantial authority to the contrary for purposes of determining whether the substantial understatement penalty should have been imposed.[18] There is substantial evidence to support the ALC's analysis regarding substantial authority to support the taxpayers' treatment of section 12-20-100 as being inapplicable to them and, for this reason, the ALC's holding must be affirmed and the Court of Appeals' decision reversed.

C. The Alltel Entities are not engaged in a regulated business for purposes of Section 12-20-100.

Even if the substance of the regulated business issue is considered, there was more than sufficient evidence upon which to affirm the ALC's ruling that the Alltel

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may reverse the Unpublished Opinion and affirm the decision of the ALC. *See I'On*, 338 S.C at 419, 526 S.E.2d at 723.

[18] Also, this Court's *Cooper River* decision—discussed above—objectively leads to the conclusion that the Alltel Entities are not a telephone company, especially in light of the stipulated fact that the retail sale of wireless voice and data by the Alltel Entities is not and never has been regulated by the State of South Carolina or the PSC. [App. at 124, 131, Jt. Stips. ¶¶4, 45, 47.] When this decision is considered in light of the remainder of the ALC's analysis, it is at least inescapable that substantial authority supports the position taken by the Alltel Entities on their license fee returns. *See* 26 C.F.R. § 1.6662-4(d)(2). Similarly, when DOR's long-standing interpretation of the predecessor to section 12-20-100 in *ABC Telephone Company, supra,*—an interpretation that has not been changed by the legislature for more than two decades—is taken into account, the Alltel Entities' position that they are not "telephone company[ies]" within the ambit of the statute is quite clearly based upon substantial authority. *Cf. Etiwan Fertilizer, supra.*

Entities are not engaged in regulated business under section 12-20-100 (A)(2). There are the ample stipulations, binding upon DOR, which provide substantial evidence in this regard. [*See* App. at 124, 131, Jt. Stips. ¶¶, 4, 44, 45.] Also, by reference to the *Bell Atlantic Mobile* decision, [App. at 23, Order, p.22 n.7], the ALC reflected its determination that the Alltel Entities do not have regulated business within the ambit of section 12-20-100 (A)(2) because they are not regulated as is a telephone company. *See Bell Atl. Mobile*, ATB 2007-121, at 155. The ALC further supported this determination by reference to its analysis of the term "telephone company" earlier in its order. [App. at 23, Order, p.22 n.7.] In other words, the Alltel Entities are not engaged in a regulated business because, as discussed above, they are not regulated by the PSC. Combining these with previous agency views on the matter, *see* discussion *supra* pp.9—10 (discussing *In re: ABC Telephone Co.,*) from which DOR cannot arbitrarily depart,[19] the ALC correctly concluded that section 12-20-100 is inapplicable here because the evidence or record showed that taxpayers in this case are not regulated by the State of South Carolina and, thus, do not conduct regulated business in this state. Therefore, the ALC's ruling in this regard should have been affirmed by the Court of Appeals under section 1-23-610(C).

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[19] *See 330 Concord Street*, 309 S.C. at 517, 424 S.E.2d at 540. This argument also is an additional sustaining ground upon which this Court may reverse the Unpublished Opinion and affirm the decision of the ALC. *See I'On,* 338 S.C at 419, 526 S.E.2d at 723. Even if DOR could ignore its previous position in this matter, a determination on appeal that the Alltel Entities are telephone companies subject to section 12-20-100 would not completely resolve the case in favor of DOR inasmuch as the statute requires calculating the amount of "gross receipts derived from services rendered from **regulated** business within this State" by the Alltel Entities during the years in question. *See* § 12-20-100 (A)(2)(a) (emphasis added); *cf. Duke Power Co. v. South Carolina Tax Comm'n*, 292 S.C. 64, 354 S.E.2d 902 (1987).

D. The ALC properly determined that DOR erroneously included partnership receipts and assets in its license fee calculation.

As the ALC determined, the corporate license tax applies to corporations, not partnerships. [App. at 23, Order, p.22 n.8.] This conclusion is fully supported by substantial evidence, not the least of which is DOR's stipulation that "Sections 12-20-50 and 12-20-100 impose a license fee on companies and corporations but not on partnerships or individuals." [App. at 132, Jt. Stip. ¶54;] *see also* § 12-20-20 (2000) ("Except for those *corporations* described in Section 12-20-110, every domestic *corporation*, every foreign *corporation* qualified to do business in this State, and any other *corporation* required by Section 12-6-4910 to file income tax returns shall file an annual report with the department.") (emphasis added); § 12-20-100 (A) ("In the place of the license fee imposed by Section 12-20-50, [a license fee is imposed on] every express *company*, street railway *company*, navigation *company*, waterworks *company*, power *company*, electric cooperative, light *company*, gas *company*, telegraph *company*, and telephone *company*.") (emphasis added).[20] Thus, the ALC recognized that partnerships are legal entities separate and distinct from the corporation owning a share of the partnership. *Lane v. Krein*, 297 S.C. 133, 134, 375 S.E.2d 351, 352 (Ct. App. 1988) ("A partnership is an entity which is separate and distinct from the persons who compose it."). This determination therefore is supported by substantial evidence and must be affirmed.

[20] It bears repeating at this point that, although the application of this license tax scheme to corporations is not subject to doubt, any doubt with respect to its applicability to partnerships must be construed in favor of the taxpayer in light of the statutory language. *See Cooper River*, 188 S.E. at 508-09.

The ALC's conclusion is further supported by the finding that "there is no provision for flow-through taxation of partnerships under the statutory license fee provisions" and its citation to S.C. Code Ann. § 12-6-600 (2000). [*See* App. at 23, Order, p.22 n.8.] Section 12-6-600 requires partners to report their share of partnership income for income tax purposes on their individual tax return by stating that a partnership is not subject to income taxation and that, instead, "[e]ach partner shall include its share of South Carolina partnership income on the partner's respective income tax return." *Id.* In other words, the ALC recognized that the General Assembly knows how to adopt the aggregate theory and direct flow-through taxation of partnerships when it so chooses, but it has not done so in the context of *corporate* license taxes. *See* § 12-20-20 (referring to corporations). In short, there is more than adequate authority and substantial evidence to support the ALC's ruling in favor of the Alltel Entities on this issue and the Court of Appeals failure to affirm that decision under section 1-23-610(C) should be reversed.[21]

[21] As the ALC noted, the parties stipulated that there were certain computational errors in the DOR Final Determination and that the applicable penalties and interest must be recalculated if the license tax amounts are modified to correct these errors. [*See* App. at 24, Order, p.23.] The ALC found it unnecessary to remand the case to DOR for this recalculation because it rejected DOR's Final Determination "in its entirety." *Id.* But, should this Court affirm the Court of Appeals with respect to this issue, a remand to DOR would then be appropriate for the limited purpose of allowing the recalculation of such amounts.

Conclusion

For the foregoing reasons, the Court of Appeals' Unpublished Opinion should be reversed and the decision of the ALC below affirmed. Alternatively, should this Court not reverse the Unpublished Opinion *in toto*, the Court should at least reverse the Court of Appeals on the alternative grounds discussed above pertaining to the substantial underpayment, regulated business, and taxation of partnership entities.

Respectfully submitted,

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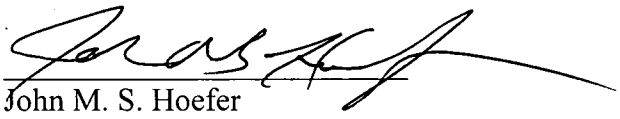
January 17, 2012

Conclusion

For the foregoing reasons, the Court of Appeals' Unpublished Opinion should be reversed and the decision of the ALC below affirmed. Alternatively, should this Court not reverse the Unpublished Opinion *in toto*, the Court should at least reverse the Court of Appeals on the alternative grounds discussed above pertaining to the substantial underpayment, regulated business, and taxation of partnership entities.

Respectfully submitted,



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THE STATE OF SOUTH CAROLINA
In The Supreme Court

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

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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.

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 **Brief of Petitioners** 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 17th day of January 2012.