The State of South Carolina
In The Court of Appeals

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

Appellate Case No. 2020-000983
Civil Action No. 2017-ALJ-17-0237-CC

Clarendon County, Florence County, Lee County, Sumter County, Williamsburg County, Williamsburg County School District, Clarendon School District Two, Florence School District One, Florence School District Three, Sumter County School District, Clarendon County Hospital District, Lee County School District, and Clarendon School District One,. .....Appellants/Respondents,

v.

South Carolina Dept. of Revenue, Farmers Telephone Cooperative, Inc., FTC Communications, LLC and FTC Diversified Services, LLC,.....Respondents,

of whom

Farmers Telephone Cooperative, Inc., FTC Communications, LLC and FTC, Diversified Services, LLC, are.....Respondents/Appellants.

INITIAL RESPONSE BRIEF OF RESPONDENTS/APPELLANTS FARMERS TELEPHONE COOPERATIVE, INC., FTC COMMUNICATIONS, LLC, AND FTC DIVERSIFIED SERVICES, LLC

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INTRODUCTION

Thirteen counties and political subdivisions (collectively the "Taxing Entities") brought this action seeking to reopen and undo a settlement of property tax liability (the "Settlement Agreement") entered between the South Carolina Department of Revenue (the "Department") and three rural telephone service providers: Farmers Telephone Cooperative, Inc. ("Farmers Co-op"), and its two wholly owned subsidiaries, FTC Communications, LLC ("FTCC"), and FTC Diversified Services, LLC ("Diversified") (collectively the "Farmers Entities"). In the Settlement Agreement, the Department granted a property tax exemption to FTCC for tax years 2010 to 2016, and to Diversified (formed in 2012) for tax years 2013 to 2016. Farmers Co-op was a party to the Settlement Agreement because of its interest in the property of its wholly owned subsidiaries (FTCC and Diversified). The Administrative Law Court ("ALC") reopened the settlement and issued a lengthy ruling that was problematic for a number of reasons, though not the ones the Taxing Entities dispute on appeal. As summarized briefly here and explained more fully below, the Taxing Entities' arguments on appeal are meritless.

First, the Taxing Entities argue that *none* of FTCC's or Diversified's assets used to provide rural telephone service is eligible for *any* amount of exemption under the Rural Telephone Services Exemption (the "Exemption"). The argument is astonishing (and problematic) for multiple reasons, any one of which is enough to bring it down. For one, it would require this Court to formulate and insert new requirements into the statutory text—an exercise that is contrary to the judicial role and well-settled rules of statutory interpretation. In addition, the argument would require this Court to adopt an outlandish interpretation of the statutory term "telephone services" to include only 1970s era equipment. Such an interpretation lacks any basis in the law, and a similar argument has been described by the United States Supreme Court as "bordering on the frivolous." Further, the holding sought by the Taxing Entities would render the Exemption largely meaningless, a historic relic no longer applicable to most telephone providers' property in use today.

Second, the Taxing Entities argue the ALC's ruling that FTCC and Diversified were eligible for an exemption in 2014–2016 constitutes an "illegal" and "retroactive" refund. The argument is wrong, again for multiple reasons. Contrary to the Taxing Entities' argument, the relevant statutory language is clear that a taxpayer may apply for the Exemption up to three years after its original tax returns were due. The Taxing Entities' argument to the contrary rests on a *different* deadline for a *different* action and pretends as if *that* deadline should supersede, preempt, or nullify the three-year deadline for applications. In addition, the Taxing Entities' argument lacks any support in case law because it is based on significant misapprehensions of the facts and holding of *TNS Mills*, a case that predated the enactment of the three-year application deadline.

Third, the Taxing Entities argue that FTCC and Diversified should be punished for the Department's apparently long-standing inability to meet the June 1st deadline to notify counties of its exemption decisions. Yet again, the Taxing Entities' argument rests on a fundamental misunderstanding of *TNS Mills*, which did not deny an exemption based on *the Department's* failure to meet the June 1st deadline, but on the *taxpayer's* failure to meet an application deadline—a failure not present here. In addition, the Taxing Entities' admission that historically the Department has *never* been able to meet the June 1st deadline, coupled with the Taxing Entities' failure to ever complain of this practice, undercuts their argument that compliance with the deadline is of critical import. If the counties have for years quietly accepted the noncompliance, they cannot now pivot to argue taxpayers should be penalized for the Department's inability to meet the deadline. Further, such a ruling would lead to an absurd result, disrupting and conflicting with the statutory scheme by effectively negating various statutory rights and deadlines that, by definition or necessity, do not allow the Department to make final decisions by June 1st each year.

Fourth, the Taxing Entities argue Farmers Co-op's own property (as opposed to FTCC's and Diversified's property) should be stripped of the Exemption. As the ALC properly noted, however, the Taxing Entities did not raise that claim or request such relief from the ALC—a fact they admit in their recitation of the procedural history and by which they are bound. Further, the mere fact that

Farmers Co-op is a party to this suit due to its interest in FTCC's and Diversified's property does not mean Farmers Co-op consented to jurisdiction over *other* claims relating to *other* property.

Fifth, and finally, the Taxing Entities argue they have standing in this proceeding under Code section 12-4-535, which sets out a sequence of events that can lead to a county having standing to challenge a Department Determination. Their argument, however, completely ignores the fact that the first step in that statute—a step that must be taken by the Department before the sequence of events leading to standing can occur—was never taken here.

COUNTER-STATEMENT OF THE ISSUES ON APPEAL[1]

1. **FTCC's and Diversified's eligibility.** Did the ALC correctly conclude that FTCC and Diversified own property that is "used in providing rural telephone service" and is, therefore, eligible for property tax exemption pursuant to the Rural Telephone Service Exemption?

2. **FTCC's and Diversified's applications.** Did the ALC correctly conclude that Code sections 12-4-720(A)(1) and (C) permit a taxpayer to apply for a property tax exemption up to three years after the taxpayer's original return was filed?

3. **The Department's notification deadline.** Did the ALC correctly conclude that the statutory deadline for the Department to notify counties of its exemption decisions—even assuming the statute says what the Taxing Entities claim—is merely aspirational, particularly where there was evidence that the Department has never been able to meet this deadline, and thus FTCC and Diversified should not be penalized for the Department's alleged failure?

4. **Farmers Co-op's Exemption.** Did the ALC correctly conclude that the Taxing Entities did not appeal Farmers Co-op's tax returns and that Farmers Co-op's property was not at issue in this matter, particularly when the Taxing Entities did not challenge Farmers Co-op's exemption in their request for a contested case hearing or their Prehearing Statement—a failure the Taxing Entities concede in their Statement of Facts?

5. **Taxing Entities' alternative standing.** Did the ALC correctly conclude Code section 12-4-535 cannot provide the Taxing Entities with standing in the instant proceeding because

[1] The Farmers Entities have themselves appealed from the ALC's Amended Final Order and have challenged various of its rulings. *See* Farmers Entities' Brief. This Counter-Statement of the Issues does not waive the issues raised in the Farmers Entities' own appeal (*see id*. at 2), nor does it imply or assume the ALC had jurisdiction over this proceeding (*see id.* at 13–29), could reopen a statutorily-authorized settlement (*see id*. at 29–34), or engaged in proper statutory interpretation and application as challenged in the Farmers Entities' Brief (*see id*. at 34–50).

that statute applies only in a different context, namely when the Department initiates an administrative proceeding to ensure an errant county official's compliance with state law.

COUNTER-STATEMENT OF THE CASE AND FACTS

The Farmers Entities have already set out a thorough recitation of the relevant factual and procedural history, which, for the sake of the reader, is incorporated herein by reference rather than by repetition. *See* Farmers Entities' Brief at 3–11. This Counter-Statement is, therefore, limited to five points: one to correct a recurring and relevant misapprehension in the Taxing Entities' Brief as to when the Exemption statute was enacted; another to note a significant concession in their Statement of Facts regarding the claims they have (and have not) pled; a third to emphasize the Taxing Entities' tacit admission of the absence of any facts justifying the ALC's reopening of a statutorily authorized settlement; a fourth to contest their begging of the question regarding what constitutes a Department Determination, the basis upon which they claim the ALC has jurisdiction of this case; and a fifth to point out concessions made by their expert as to his calculations and his subsequent corrections thereto.

First, the Taxing Entities repeatedly, but incorrectly, state the Rural Telephone Services Exemption "was enacted in 1978." *See, e.g.*, TE's Brief at 2, 15, 25–26; *see also id*. at 5, 14–15, and 27–29. It was not. Rather, the Exemption was enacted in 1957. *See* 1957 S.C. Acts 177, § 1; S.C. Code Ann. § 65-1522(46)–(47) (1960 Supp.). And while it was recodified in 1976 (as Code sections 12-37-220(40)–(41)) and was amended and recodified again in 1978 (in its present location and form), the amendment did not alter the underlying intent or objective of the Exemption, namely to incentivize and facilitate the provisioning of telephone service in rural areas of South Carolina.[2]

[2] The 1978 amendment altered the mechanics but not the purpose, objective, or effect, of the Exemption by narrowing its scope from (i) "all property of every kind owned by rural telephone cooperatives" and "all rural party telephone lines and instruments" of telephone companies to

The Taxing Entities' misapprehension regarding the date of the Exemption's original enactment is notable in light of the emphasis they put on that date as supposedly controlling the Exemption's interpretation and application. *See, e.g.*, TE's Brief at 2, 14–15 and 25–28 (arguing the Exemption applies only to technology and equipment available in 1978). That argument is wrong at a fundamental level, *see* Part I(B)(1), *infra*, and its absurdity is even more evident when the Exemption's *actual* enactment date more than two decades earlier is used. If the Taxing Entities' argument were correct and the Exemption applied only to technology available at the time of its enactment (1957), the Exemption would be a largely meaningless historic relic because the technology is continually evolving, and the Exemption would exempt only rotary phones, analog wires, and mechanical line switching—1950s technology that was already outdated by 1978 and is no longer used today. *See* Tr. at 266:7 to 272:4 (R. ___ to ___) (describing the evolution of telephone technology in the mid-20th century); Howard A. Shelanski, *Competition and Deployment of New Technology in U.S. Telecommunications*, 2000 U. CHI. L. FORUM 85, 99 (2000) (noting that dual-tone multi-frequency "touch tone" dialing was introduced in 1963 and had largely replaced rotary phones and pulse dial systems by 1976).

Second, the Taxing Entities concede that the proceeding giving rise to this appeal challenged *only* the property tax exemption granted to FTCC and Diversified and did *not* challenge or involve the exemption granted to their parent company Farmers Co-op. *See* TE's Brief at 14 ("On July 10, 2017, Clarendon County filed a request for contested case hearing challenging property tax exemptions granted by the Department *to FTCC and Diversified*.") (emphasis added). This concession is supported by the pleadings giving rise to the action, which seek review *only* of

(ii) property of rural telephone cooperatives and telephone companies "used in providing rural telephone service." *Compare* S.C. Code Ann. § 12-37-220(B)(10) (1978) *with* S.C. Code Ann. §§ 12-37-220(40)–(41) (1976) and § 65-1522(46)–(47) (1960 Supp.).

the property tax exemption granted to FTCC and Diversified. *See, e.g.*, Clarendon Cnty. Request for Contested Case Hr'g (R. ___); Mots. to Intervene (R. ___, ___, ___, ___, ___, ___, ___, and ___); Lee Cnty. Suppl. to Request for Contested Case Hr'g (R. ___); Consolidated Suppl. to Request for Contested Case Hr'g (R. ___).

This concession in the Taxing Entities' Statement of the Facts (as well as the Record evidence) stands in stark contrast to and rebuts the Taxing Entities' subsequent and erroneous argument that Farmer Co-op's exemption is also at issue in this appeal because (they argue) the Taxing Entities challenged Farmers Co-op's property tax exemption in their proceeding before the ALC. *See* TE's Brief at 51–55. Having admitted they did not do so, *see id.* at 14, the Taxing Entities cannot reverse course and immediately argue the opposite.

Third, the Taxing Entities tacitly concede there was no basis for the ALC to reopen the statutorily authorized settlement between the Department and the Taxing Entities involving FTCC's and Diversified's property. Under South Carolina law, the Department is expressly authorized to compromise disputes with taxpayers and to enter into binding, written agreements with taxpayers regarding a tax liability. *See* S.C. Code Ann. § 12-4-320(3) and (4). Such agreements, if approved by the Director, are final and conclusive and "may not be reopened by administrative or judicial action or otherwise, except in cases of fraud, malfeasance, or misrepresentation." *Id.* at § 12-4-320(4). In the instant proceeding, there was never any allegation much less proof of fraud, malfeasance, or misrepresentation that would justify the ALC's reopening and undoing of the settlement (*see* Farmers Entities' Brief at 29–34), and the Taxing Entities' have not identified any, effectively conceding the point. *See* TE's Brief at 1–19.

Fourth, the Taxing Entities' explanation of the statutory background includes a sweeping, conclusory, and incorrect assertion that any decision by the Department on an application for

property tax exemption is a "department determination" that can give rise to ALC review. *See id*. at 23 ("DOR's exemption determination is a department determination that triggers statutory appeal rights."). Not so. As explained at length in the Farmers Entities' brief, the term "department determination" is a defined term that arises only in particular contexts specifically identified in the Code and which do *not* include every exemption decision the Department makes. *See* Farmers Entities' Brief at 16–19. The Taxing Entities' assertion otherwise is simply incorrect.

Fifth, the Taxing Entities include and rely upon a chart of calculations of the bandwidth used by voice services for FTCC and Diversified. *See* Taxing Entities' Brief at 34. However, they neglect to mention that at trial, their expert agreed there were some flaws in his analysis that impacted his calculations, and he revised these numbers. *See* Tr. at 991:10 to 1001:23 (R. ____ to ____) and Trial Ex. 190 (R. ___). The original chart and Taxing Entities' arguments to this Court peg the use of bandwidth for voice for the tax years at issue between 0.45% and 4.75%. However, he revised these calculations to between 1.79% and 19.12% for the tax years at issue. *Id. See also* Am. Final Order at 67 (R. __).

ARGUMENT

I. The Farmers Entities were (and are) eligible for the Exemption.

The Taxing Entities argue at length that the ALC erred by concluding FTCC and Diversified were eligible for the Exemption. *See* TE's Brief at 24–36. Their argument asks this Court (1) to adopt an astonishingly cramped definition of "rural telephone service," (2) to formulate and insert into the plain language of S.C. Code Ann. § 12-37-220(B)(10) a new, undefined, and imaginary line of demarcation- a "*de minimis"* standard- dividing rural telephone equipment into eligible and ineligible categories, and (3) to hold FTCC's and Diversified's property that is used for the exempt purpose nonetheless is not exempt because the percentage of use (based on the

Taxing Entities' cramped definition and a "bandwidth" usage measurement that has no basis in the statute) falls short of that imaginary line. *See id*. at 32–36. The Taxing Entities provide no South Carolina authority indicating that such a threshold exists;[3] they do not explain why one *should* exist; and they do not acknowledge the ALC rejected their request, much less explain how or why the ALC erred. *See id.*

Fortunately, the Court need not grapple with the complex details and dubious prerequisites necessary to manufacture and impose a "more than *de minimis* use" standard into the Exemption *because there is no basis to discover or create such a requirement*. Stated differently, the Taxing Entities' Arguments I(A)(1) to (5) are not even relevant unless the Court first decides to grant the Taxing Entities' unsupported plea in Argument I(A)(6) and insert a *de minimis* threshold into the Exemption—an endeavor this Court should not undertake. Accordingly, rather than providing a sequential response to the arguments in the Taxing Entities' Brief, the Famers Entities will begin

[3] The only South Carolina case the Taxing Entities cite in support of their argument is *Hercules Contractors & Engineers, Inc. v. S.C. Tax Comm'n*, 280 S.C. 426, 313 S.E.2d 300 (Ct. App. 1984). As discussed more fully below, *see* Part I(A)(1), *infra*, *Hercules* does not support a "more than *de minimis* use" requirement.

In *Hercules*, the Court held a taxpayer was fully entitled (*i.e*., 100%) to an exemption even though only 35% of the volume processed by the relevant equipment related to the exempt purpose. The Taxing Entities ask this Court to extrapolate from *Hercules'* holding a rule that property must be used at least 35% (as measured by their proposed metric) for the exempt purpose (as narrowly defined by the Taxing Entities) to qualify for an exemption. The *Hercules* Court never held thusly, and neither should this Court.

Further, *Hercules* actually *rebuts* the Taxing Entities' alternative argument regarding a cost-based metric. The Taxing Entities argue primarily that bandwidth is the appropriate measure of the use of FTCC's and Diversified's property, *see* TE's Brief at 32–33, but, alternatively, they argue that if cost is the proper metric, then FTCC and Diversified are entitled only to a 40–50% exemption (rather than 75% as the ALC ruled), which reflects the amount of network equipment used to provide voice telephone services, *see id*. at 38–40. If *Hercules* is any guide, however, that percentage of use entitles the taxpayer to the exemption in full. Accordingly, the Taxing Entities' entire argument about eligibility collapses if the Court concludes the ALC correctly rejected the Taxing Entities' argument that bandwidth is the appropriate measure of use.

where the Taxing Entities' argument ends, namely the erroneous conclusion that the Exemption does or should contain a *de minimis* use threshold.

A. The Exemption does not and should not impose an implicit *de minimis* use threshold—a proposed requirement that lacks any basis in the statute or case law.

The Rural Telephone Service Exemption is silent as to the degree to which property must be used to provide rural telephone service to qualify for the exemption. *See* S.C. Code Ann. § 12-37-220(B)(10) and Farmers Entities' Brief at 34–39. In the absence of any express statutory requirement, the exemption is categorical and applies to any property that is "used"—*e.g.*, used *at all*—to provide rural telephone service. *See id.* The Taxing Entities, however, argue that what the statute *really* means is that property is exempt only if it is so employed in more than a *de minimis* way. *See* TE's Brief at 24–36. In support of this argument, the Taxing Entities cite several cases from other jurisdictions as well as one South Carolina decision: *Hercules Contractors & Engineers, Inc. v. S.C. Tax Comm'n*, 280 S.C. 426, 313 S.E.2d 300 (Ct. App. 1984). Only two of the cases they cite—*Hercules* and the Wisconsin Supreme Court's opinion in *Village of Lannon*—even *remotely* relate to the issues in this appeal. Both are distinguishable from the instant facts, and neither of them support the rule the Taxing Entities seek to impose. Both are discussed in turn below. The other out-of-jurisdiction cases cited by the Taxing Entities are irrelevant from a factual and analytical standpoint as explained more fully below.

1. *This Court's ruling in* Hercules *did not impose an implicit "substantial use" requirement, but, rather, indicates that the Farmers Entities' equipment—like the equipment in* Hercules*—is entitled to tax exemption.*

The sole South Carolina case the Taxing Entities cite in support of their argument is this Court's decision in *Hercules Contractors & Engineers, Inc. v. S.C. Tax Comm'n*, 280 S.C. 426, 313 S.E.2d 300 (Ct. App. 1984). The *Hercules* opinion, however, does not lead to the conclusion the Taxing Entities reach.

In *Hercules*, this Court interpreted a sales tax exemption that applied to "machines used in . . . manufacturing of tangible personal property." *Hercules*, 280 S.C. at 429, 313 S.E.2d at 303. More specifically, the question in *Hercules* was whether a machine used 35% for an exempt purpose—manufacturing—and 65% for a non-exempt purpose qualified for a sales tax exemption for machines used in manufacturing.[4] *Id.* at 439–40, 313 S.E.2d at 308–09. The Court noted the absence of any qualifying words (*e.g.*, "exclusively used" or "primarily used") in the exemption statute, *id.* at 439, 313 S.E.2d at 308, and acknowledged the tension that can exist between "the rule of strict construction against a tax exemption" and the fact "that such a rule 'does not impinge upon the all-prevailing rule that a statute is to be construed in accordance with its real intent and meaning, and not so strictly as to defeat the legislative purpose.'" *Id.* at 435, 313 S.E.2d at 306 (quoting *State v. Taylor*, 80 So.2d 618 (Ala. 1954)). Ultimately, the Court held the facility was eligible for the exemption. *Id.* at 440, 313 S.E.2d at 309.

The Taxing Entities incorrectly characterize *Hercules* as holding that "the exemption applies *so long as* the machines are 'substantially' used in manufacturing." *See* TE's Brief at 34 (emphasis added). But the *Hercules* Court did not hold that substantial use was a requirement or prerequisite for the exemption. Rather, the Court held as follows:

> The Burlington facility . . . *is substantially used in the manufacture* of tangible personal property for sale, *and this was a purpose for which it was built.* We therefore hold that the materials used in its construction are exempt from sales or use taxes.

[4] The "machine" was a waste treatment facility. The Court first determined the waste treatment facilities involved in *Hercules* qualified as "machines" and, when used to treat waste of manufacturing plants, were machines "used in manufacturing" for purposes of the exemption. Two of three facilities at issue treated only waste of manufacturing plants, and were thus shoo-ins for the exemption. As for the third facility, however, only 35% of the waste it treated came from a manufacturing plant, while the other 65% did not.

280 S.C. at 440, 313 S.E.2d at 309 (emphasis added). A number of inferences can be drawn from the holding—for example, the Court considered 35% use to be substantial use and also considered it to be sufficient to qualify as a machine used in manufacturing. Likewise, "a purpose" for which the facility was built appears to have influenced the holding as much as the actual use of the property. However, *the Court never said that substantial use was required to meet the exemption*, nor did it define substantial use. And, particularly relevant to the case at hand, the *Hercules* Court expressly recognized the importance of avoiding requirements and tests that place "an imaginary demarcation line between [exempt and non-exempt property] which could only result in confusion and uncertainty." *Id.* at 440, 313 S.E.2d at 308 (quoting *Morley v. Brown & Root Inc.*, 239 S.W.2d 1012 (Ark. 1951)). Finally, but notably, this Court did *not* hold the property was only *partially* exempt in light of its partial use for exempt purposes (*e.g.*, 35% exempt to correlate with the 35% volume of exempt work it performed). Rather, the dual-use property was 100% exempt. *Id.*

To be clear, even if the *Hercules* Court *had* required "substantial use" to meet the sales tax exemption (and, as noted above, it did not), that holding would not be dispositive in the instant appeal. This case is both legally and factually distinguishable from *Hercules* in numerous ways. For example, the current dispute involves a property tax exemption that applies year after year, while *Hercules* involved a one-time sales tax exemption. Accordingly, the calculation and degree of cumulative use needed to qualify for the relevant exemptions—assuming there is such a requirement—would differ. Further, the statutory language used in the exemptions is not the same, nor is the underlying legislative intent.[5]

[5] The parties agree the Rural Telephone Service Exemption was intended (1) to make the provision of telephone service financially viable in areas of the State that otherwise would be cost prohibitive, and (2) to provide telephone access and availability to, at a minimum, rural South Carolinians (and the Farmers Entities assert that it is not limited just to South Carolina citizens but to all persons in rural areas whether residents or to those visiting or passing through rural areas),

An additional, and important, factual distinction is that FTCC's and Diversified's dual-use property is being used 100% of the time for the exempt purpose of providing rural telephone service, whether the customers are using the telephone network or not, because access and availability to a telephone network are key values of the service (mandated by the FCC's "Five Nines of Reliability" requirement) and are, in fact, a significant legislative purpose behind the Exemption. Am. Final Order at 18-19, 24-25; *see also* Tr. at 547:14 to 549:4 (R.___ to ___); *id*. at 765:8–22 (R.___); *id.* at 766:14–25 (R.___). In contrast, the "machine" in *Hercules*—a waste processing facility—was not being used for its exempt purpose when it was sitting idle (not processing waste) or when it was processing the large majority of the waste it did process.

The one point of similarity between the facts presented in the instant appeal and those presented in *Hercules* indicates FTCC's and Diversified's property *is* eligible for the Exemption. Specifically, just like the purpose of the property in *Hercules* was relevant and undisputed, so too it is undisputed here that the Farmers Entities' rural telephone network was built to provide rural telephone service. Am. Final Order at 18; *see also* Tr. at 537:4–8 (R.___); *id.* at 453:17–25 (R.___). The Taxing Entities do not even attempt to explain why the ALC's reasons for distinguishing *Hercules* are flawed. Instead, they incorrectly characterize *Hercules* as containing a "substantial use" requirement, while simultaneously ignoring *Hercules'* holding that eligibility for the

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even if that service is used only rarely or is used less frequently than other bundled services. The sales tax exemption in *Hercules*, in contrast, was motivated by different purposes, and neither of the purposes underlying the Exemption would be furthered by the imposition of the requirement the Taxing Entities purport to discern in *Hercules.*

The ALC recognized this case is distinguishable from *Hercules* because of the access component of S.C. Code Ann. § 12-37-220(B)(10), whose purpose includes the *ability* to use or access telephone service—a purpose not present in any analogous form in the exemption at issue in *Hercules*. *See* Am. Final Order at 67 n.49 (R. ___).

exemption is based, at least in part, on the exempt *purpose* the object serves—a factor that counsels in favor of exemption both in *Hercules* and here.

In sum, *Hercules* is in some ways factually and analytically distinguishable; did not impose the rule the Taxing Entities claim it did; and, if anything, indicates FTCC's and Diversified's property at issue is eligible for 100% exemption in light of its purpose and function and in light of the legislative purpose underlying the Exemption. *Hercules* does not support the creation and imposition of the requirement proposed by the Taxing Entities.

2. The Wisconsin Supreme Court's ruling in Village of Lannon *stands only for the proposition that a taxpayer may not exploit an exemption through a "sham" use—a scenario that has not been (and could not be) alleged here.*

The Taxing Entities' reliance on the Wisconsin Supreme Court's holding in *Village of Lannon v. Wood-Land Contractors, Inc.*, 672 N.W.2d 275 (Wis. 2003) proves no more useful to them than did *Hercules*. The taxpayer in *Village of Lannon* was a corporation primarily engaged in the business of clearing land. 672 N.W.2d at 276. The taxpayer also processed and sold some "forest products" (*e.g.*, wood chips and firewood) generated by its land-clearing, which accounted for about 10% of its yearly revenue. *Id.* at 276–77. As a result, the taxpayer claimed all of its property (including items such as office materials, computers, etc.) was exempt from property tax pursuant to Wis. Stat. § 70.111(20), which exempts "[a]ll equipment used to cut trees, to transport trees in logging areas[,] or to clear land of trees for the commercial use of forest products." *Id.* at 277. The trial court ruled the taxpayer was not eligible for the exemption because in its view the taxpayer's "primary purpose" was land-clearing and not harvesting of forest products. *Id.*

The Court of Appeals agreed based on its belief that the legislature did not intend for the exemption to apply to businesses outside of the logging industry. *Id.* The Wisconsin Supreme Court, however, disagreed. It reviewed the plain and unqualified language of the exemption, which

stood in contrast to other statutory property tax exemptions with qualifying language surrounding those exemptions, leading the Court to conclude that the legislature's failure to use similar qualifying language in the exemption at issue meant that it did not intend to limit it. *Id.* at 279. It then remanded the case with instructions for the trial court to analyze the equipment's use, and if used for the exempt purpose, then it would be exempt. *Id.* at 281–82.

Notably, the Wisconsin Supreme Court acknowledged the tension that can exist between a facially broad tax exemption statute and the general rule that tax exemptions are strictly construed. It noted, for example, that tax exemption statutes requiring "exclusive use" of property are construed using a "strict but reasonable" standard that allows taxpayers to claim the exemption despite incidental non-exempt uses of property. *Id.* at 282. The Court opined the standard should also be used in the converse situation, namely when interpreting broad property tax exemptions that require only "use" of the property so as to prevent pretextual or sham uses intended to exploit the exemption:

> The personal property exemption at issue is subject to the same "strict but reasonable" construction. *Without such a construction, we believe that the exemption would invite subterfuge or sham in claims involving de minimis use.* Accordingly, we recognize the corollary to the above principle here: *de minimis* uses of the property are not sufficient to invoke this exemption.
>
> We are mindful that our holding today may appear to run contrary to the legislative directive that exemptions "shall be strictly construed . . . with a presumption that the property in question is taxable . . . ." Wis. Stat. § 70.109. *However, we are impelled to our conclusion by the language of the statute. We believe that if the legislature intended to limit Wis. Stat. § 70.111(20) to the logging industry, it would have explicitly said so, as it has done in several of the other subsections. Indeed, if the legislature still wishes to narrow the exemption, it can amend it at any time by adding a few words* to identify a specific business model or, if it so chooses, a "primary purpose."

Id. (emphasis added) (internal citations omitted).

The analysis by Wisconsin's highest court makes sense—even very narrow exemptions requiring "exclusive" use permit incidental, non-exempt uses without imperiling the intended application of the exemption.[6] Likewise, a corollary of the same principle is that a broad exemption requiring only that property be "used" for a specific purpose should not be construed so broadly that a taxpayer may claim the exemption based solely on *de minimis* use undertaken *solely as a sham or pretext to exploit the exemption*.

In sum, *Village of Lannon* does not support the imposition of a blanket "more than *de minimis* use" standard proposed by the Taxing Entities. Rather, it stands merely for the proposition that a taxpayer may not "game the system" by engaging in occasional exempt activity when such activity is undertaken as a sham solely for the purpose of claiming an exemption to which the taxpayer would not be entitled in the normal course of its business. And while such a rule might make sense as a safeguard to prevent taxpayers from acting in bad faith to exploit an exemption, that rule is utterly inapplicable in the instant proceeding, as there has not been (nor could there be) any allegation that FTCC's or Diversified's provision of rural telephone service is merely a sham or was undertaken merely as a pretext to claim the Exemption.

3. The other cases cited by the Taxing Entities are irrelevant to the question of whether the Exemption does or should contain a de minimis *use threshold.*

The Taxing Entities argue this Court should create and impose a requirement of more-than-

[6] The same principle has been recognized by the Supreme Court of South Carolina and this Court. *See, e.g., Charleston Cty. Aviation Auth. v. Wasson*, 277 S.C. 480, 487, 289 S.E.2d 416, 420 (1982) (addressing property tax exemption in S.C. Code Ann. § 12-37-220(A)(1) for state-owned property "used exclusively for public purposes" and explaining that "it is therefore the opinion of this court that property may be used exclusively for a public purpose notwithstanding an incidental private use of the property."); *see also Hock RH, LLC v. S.C. Dep't of Revenue*, 423 S.C. 208, 218, 813 S.E.2d 540, 545 (Ct. App. 2018) (citing *Charleston Cty. Aviation Auth.*, 277 S.C. at 487, 289 S.E.2d at 420 ("When the use of property is for a public purpose, an incidental private use or benefit will not negate or alter the public purpose use of the property.")).

de-minimis-use because other jurisdictions have supposedly done so. *See* TE's Brief at 35–36 (arguing that "the prevailing rule in other jurisdictions is 'in the absence of an exclusivity requirement, it is the primary, as distinguished from an incidental, use of the property that determines the question whether it is exempt from taxation.'") (quoting 84 C.J.S. Taxation § 278 and citing several non-South Carolina cases).

The cases the Taxing Entities cite (as well as those cited by the C.J.S. section on which the Taxing Entities rely), however, are distinguishable from and irrelevant to the instant appeal. Two, for example, involved exemptions that applied to property "used ***exclusively***" for the exempt purpose. *See People v. Haring*, 8 N.Y.2d 350, 170 N.E.2d 677 (N.Y. 1960) (analyzing a statute exempting property "used exclusively for carrying out" a religious organization's purpose, and concluding the taxpayer's sale of excess produce grown at its farm did not disqualify it from receiving the exemption); *Grundy Cty. Agr. Dist. Fair, Inc. v. Dep't of Revenue of State of Ill*., 806 N.E.2d 695 (Ill. Ct. App. 2004) (analyzing a statute exempting "property used exclusively by societies for agricultural or horticultural purposes, and not used with a view to profit" and remanding the case due to the trial court's improper application of exclusive use test).

Another involved an exemption based on the property's ***primary purpose***, not its use. *Town of Jay v. Androscoggin Energy, LLC*, 822 A.2d 1114 (Maine 2003) (analyzing a statute exempting property "placed in operation primarily for the purpose of" reducing air pollution, and, not surprisingly, applying a "primary purpose" analysis). Yet another did not involve a tax exemption at all. *See MacDonough-Webster Lodge No. 26 v. Wells*, 834 A.2d 25 (Vt. 2003) (analyzing the "charitable use" exemption to the doctrine of adverse possession).

A fifth involved the question of whether a taxpayer's building was a "manufacturing" facility for purposes of an exemption. *Aero Air Inc. v. Department of Revenue*, 8 Or. Tax. 461,

1980 WL 2042 (Oregon Tax Court 1980). The *Aero* court concluded the taxpayer was not entitled to the exemption because, in the court's view, none of the taxpayer's activities constituted manufacturing. The court also noted that only a small percentage of the facility's floor space was used for assembly and fabrication. *See id*. at 464 (noting the court was reticent "to exempt the total facility from taxation because approximately two percent of the facility's square footage is used for ostensible manufacturing"). In the instant appeal, the Taxing Entities seize upon this "two percent" reference as support for the usage threshold they seek to impose on the Exemption. But the issue in *Aero* is fundamentally different from the issue here. In *Aero*, the taxpayer argued that *all* of its property should be exempt because a small fraction of that property was (ostensibly) engaged in an exempt activity. The court disagreed, ruling the exemption should not be "extended" from some exempt property to other non-exempt property. *Id*. at 464. Here, in contrast, FTCC and Diversified have not argued (and the ALC did not rule) that *all* of their property (including property not used for the exempt purpose) should be exempt merely because *some* of their property is used for an exempt purpose. Rather, FTCC and Diversified sought the exemption only for the equipment used to provide rural telephone service (even if that equipment also provides other non-telephone services simultaneously).

A sixth case involved a charitable-organization exemption that turned not on the question of *how* property was used but by *whom* it was used. *Marist Bros. of New Hampshire v. Town of Effingham*, 195 A.3d 90 (N.H. 2018). In *Marist Brothers*, a Roman Catholic religious Order had claimed a property tax exemption for a camp facility owned and operated by the Order, but which they occasionally rented to third-parties for use as a camp during the offseason. The question before the court was whether the property was eligible for an exemption that applied to charitable organizations' property that was "owned, used and occupied *by them directly* for the purposes for

which they are established." *Id.* at 95 (citing N.H. Rev. Stat. Ann. § 72.23(V)). The court concluded the camp property still qualified for the exemption because the offseason rentals were insubstantial and incidental. *Id*. at 102–03. The instant appeal does not involve similar statutory language and raises no such concerns about *who* is using the property.

Others (as well as *Haring*, *Grundy*, and *Marist Brothers*, *supra*) are distinct from the instant appeal because they involved a different question. Specifically, they analyzed not whether a property's *de minimis* use for an exempt purpose made the property eligible for an exemption, but, rather, whether *de minimis* use for a *non*-exempt purpose was enough to *dis*qualify the property. Stated differently, these cases involved the *opposite* question as the one presented here, *e.g.*, they considered whether incidental *non*-exempt use *dis*qualifies property from an exemption. Accordingly, they do not support the rule the Taxing Entities purport to discern from them.

B. Even if the Exemption contained an implicit *de minimis* use requirement, the Farmers Entities satisfy that requirement when "use" is properly interpreted and applied.

Even assuming *arguendo* that the Exemption contains an implicit *de minimis* use requirement or even a requirement that property must be used substantially for an exempt purpose, such a use requirement—properly interpreted and applied—is satisfied by FTCC's and Diversified's property. The Taxing Entities' arguments to the contrary rest on an absurd definition of "telephone service" that borders on frivolity and would render the Exemption a dead letter and would require the Court to select a measuring stick (bandwidth) that was cherry-picked by the Taxing Entities despite its numerous deficiencies, and which was properly rejected by the ALC.

1. *The Taxing Entities' proposed interpretation of "telephone service" rests on a gross distortion of the principles of statutory construction.*

In a purported effort to interpret the Rural Telephone Service Exemption, the Taxing Entities propose an astonishing interpretation of the statute's term "telephone service," namely

that the telephone service contemplated and exempted by the statute includes *only* the technology available and in use in 1978 (when the Exemption was supposedly enacted),[7] *i.e.*, voice-only landlines. *See* TE's Brief at 25–31.[8] The argument rests on a flawed version of the principle that a statute should be interpreted according to its original public meaning. The Taxing Entities, however, contort that principle beyond recognition, arguing not that a statute's *meaning* is fixed at the time of its enactment (which is a well-settled and unobjectionable maxim), but, rather, that a statute's *application* is bound by and limited to the technology and materials in use at the time of its enactment. Such an interpretation finds no support in the law and would lead to an absurd result.

The absurdity of the Taxing Entities' argument is plain. In the Taxing Entities' view, for example, the First Amendment would protect only printed newspapers; the Second Amendment would protect only muskets; and the Fourth Amendment would protect only literal papers. That, of course, is not how courts interpret texts, and the Taxing Entities' argument has been roundly and repeatedly rejected by the courts. Indeed, the Supreme Court has noted that the argument borders on frivolity. *See District of Columbia v. Heller*, 554 U.S. 570, 582 (2008) ("Some have made the argument, bordering on the frivolous, that only those arms in existence in the 18th century are protected by the Second Amendment. We do not interpret constitutional rights that way. Just as the First Amendment protects modern forms of communications [] and the Fourth Amendment applies to modern forms of search [], the Second Amendment extends, *prima facie*, to all instruments that constitute bearable arms, even those that were not in existence at the time of the

[7] As noted in the Counter-Statement of the Case and Facts, *supra*, the Exemption was, in fact, initially enacted in 1957, and was recodified and amended in 1978.

[8] The Taxing Entities' argument on this point recycles language copied—sometimes nearly verbatim—from the ALC's Amended Final Order. *Compare* TE's Brief at 26–27 *with* Am. Final Order at 59 (R. ___). They do so selectively, however, omitting the portions of the Order that explain the shortcomings of the Taxing Entities' purported "original meaning" argument. *See* Am. Final Order at 60–61 (R. ___).

founding.") (citations omitted); *see also City of Columbia v. Tatum*, 174 S.C. 366, 386, 174 S.E. 541, 548–49 (1934) (affirming lower court's ruling noting that legal texts should be interpreted in a way that accommodates "the benefit of improved appliances and instrumentalities").

Indeed, even Justice Scalia—perhaps the most vocal champion and foremost judicial proponent of originalism—recognized that a proper statutory interpretation is bound only by the original *meaning* of the text, not by the original expected *applications*, and that the original meaning can and does encompass new and changing technologies and circumstances. *See, e.g.*, *Heller*, 554 U.S. at 581–83; *Kyllo v. United States*, 533 U.S. 27 (2001) (holding the use of a thermal imaging device to monitor the radiation of heat from a person's home was a "search" within the meaning of the Fourth Amendment); *see also* Lee J. Strang, *Originalism and the "Challenge of Change"*: *Abduced-Principle Originalism and Other Mechanisms by Which Originalism Sufficiently Accommodates Changed Social Conditions*, 60 HASTINGS L.J. 927 (2009) (noting that fidelity to a text's original meaning can still accommodate its application to new technologies and circumstances).

Further, the absurdity of the Taxing Entities' proposed interpretation is revealed by the sweeping and dire consequences it would have if adopted by this Court. If, as the Taxing Entities claim, the Exemption applies only to telephone technology in use in 1978—namely "'voice traffic over a pair of copper wires,'" *see* TE's Brief at 26—such an application would nearly gut the Exemption and effectively strip the property tax exemption from rural providers in the State, thereby depriving rural citizens of essential infrastructure that is needed to provide them with service comparable to those available to non-rural citizens. As technology has advanced in the four decades since 1978, voice-only copper wires have largely been replaced with fiber optic cables; mechanical switching has given way to electronic or digital switching; and many other

technologies have evolved including the use of sonic technology, voice over internet protocol technology, and changes in router technology.[9] (The foregoing are all technological changes affecting landline service; the industry has been further changed with the growth and evolution of cellular or wireless technology.) These changes, among others, mean that if the Exemption were applied as the Taxing Entities interpret it, it would be rendered largely meaningless. Such an interpretation is not permitted. *See, e.g.*, *Lightner v. Hampton Hall Club, Inc*., 419 S.C. 357, 364, 798 S.E.2d 555, 558 (2017) (noting an interpretation that renders words "in a statute meaningless . . . violates our rules of statutory interpretation") (citation omitted); *In re Decker*, 322 S.C. 215, 219, 471 S.E.2d 462, 463 (1995) ("A statute should be so construed that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous.") (citation omitted).[10]

In sum, the Taxing Entities' entire argument regarding FTCC's and Diversified's eligibility for the Exemption rests on the shaky foundation of a statutory interpretation that is itself absurd,

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[9] *See* Tr. at 392:1–12 (R. ___); *id.* at 393:3 to 395:9 (R. ___ to ___); *id*. at 272:16 to 274:10 (R. ___ to ___); *id.* at 275:13 to 276:13 (R. ___ to ___). *See also* Am. Final Order at 12–14 (R. ___) (summarizing technological changes in telephone industry since 1978).

[10] In arguing the Exemption applies only to technology that existed in 1978, the Taxing Entities repeatedly argue that the interpretation proposed by the Farmers Entities and adopted by the ALC would sweep "Netflix and deer trail camera service" within the definition of telephone service. *See* TE's Brief at 26, 28 (incorrectly stating that "Taxpayers' expert even went so far as to include internet service, email, streaming video services like Netflix, and deer trail camera service within his definition of 'telephone service.'"). This argument mischaracterizes both the context and the actual testimony of the Farmers Entities' expert, Mr. Wyatt, with respect to his discussion about "telephone service." Mr. Wyatt was not testifying about whether the Exemption was intended to cover internet services, email, Netflix and deer cameras. More importantly, he ultimately concluded that *none of these items are included in his definition of telephone service*. Mr. Wyatt testified that he would argue certain elements of the internet are more akin to telephone services—*e.g.*, deaf people using a video application on their smart phone to communicate with each other using sign language—but he agreed the internet in general is not telephone service, *see* Tr. at 834:15 to 835:11 (R. ___ to ___); he categorically refused to agree that email is telephone service, *id*. at 835:12–25 (R. ___ to ___); and he ultimately characterized the ability to stream Netflix and deer cameras on a smart phone as being video delivery over a cell phone, *not* "telephone service," *id*. at 836:1 to 838:1 (R. ___ to ___). Finally, FTCC and Diversified are not seeking the Exemption for any assets that are solely used to provide such non-telephone services.

is contrary to the law, and would lead to an absurd result. When that foundation is removed (as it must be for the reasons explained above), the entire argument collapses.

2. The Taxing Entities' argument that wireless telephone service is not "telephone service" rests on the same faulty principles of statutory construction.

The Taxing Entities expand on their ill-fated "original meaning" argument by arguing specifically that wireless telephone service is not "telephone service." *See* TE's Brief at 28–31. The argument rests on the same baseless interpretive principles discussed and refuted above. *See* Part I(B)(1), *supra*. When the interpretive principle of "original meaning" is rightly understood, it is irrelevant whether the precursors of modern cellular technology existed or were contemplated in 1978. *Contra* TE's Brief at 28–29. Even assuming the General Assembly did not foresee the technological evolution of wireless telephone service, the statute's meaning can—and, indeed, must—accommodate new and changing technologies. *Heller*, 554 U.S. at 582; *City of Columbia*, 174 S.C. at 386, 174 S.E. at 548–49; *see also* Am. Final Order at 63 (R. ___) (correctly recognizing that statutes can be read to accommodate new technology, and that wireless telephone service constitutes "telephone service" as conceived by the General Assembly because, like traditional landline telephone service, it connects rural South Carolinians by voice over the public switch telephone network).

The Taxing Entities' other arguments about wireless service fare no better. They argue, for example, that the Exemption was intended to promote rural infrastructure development, and that such an incentive is not needed for the development of wireless service. *See* TE's Brief at 29–30. Policy arguments of that sort should be directed to the legislature, not the courts, and the ALC correctly rejected it, concluding the intent of the General Assembly was to promote the advancement of telephone service in rural areas throughout South Carolina and that because wireless telephone service has become a substitute for landline telephone service, wireless telephone

service fulfills the same purpose as landline telephone service. *See* Am. Final Order at 60–61.

Even assuming these policy arguments were appropriate in a judicial proceeding (and they are not), they are misleading and, at bottom, incorrect. The Taxing Entities argue that "many, if not all, major wireless cellular companies provide wireless coverage . . . *within Taxpayers' geographic service area*" and that "[c]ompetition among wireless cellular providers is extensive throughout the *same* area serviced by Taxpayers." TE's Brief at 30 (emphasis added). But those assertions or implications are simply not true. The ALC correctly concluded that "*none* of the listed competitors cover all the areas that Farmers Entities cover," and that the "Farmers Entities service some areas that remain *un-serviced by any other carrier*." Am. Final Order at 62 (R. ___) (emphasis added); *see also* Tr. at 554:7 to 556:2 (R. ___ to ___).

The Taxing Entities' argument that market competition is an adequate substitute for the Exemption likewise fails. First, even assuming *arguendo* that the logic of the argument was sound, the rise of market competition cannot repeal or impliedly preempt an enactment of the General Assembly. Second, the evidence and persuasive precedent indicate that market competition is not a suitable replacement for the Exemption as evidenced by the fact that the State *continues* to recognize the need to aid FTCC in achieving the goal of universal and affordable access to telephone service in rural areas. *See* Am. Final Order at 62–63 (R. ___) (noting the State's decision to distribute universal service funds ("USF") to FTCC, a wireless provider, to help achieve the Legislature's goal of providing rural telephone service).

In addition, the Taxing Entities argue, without any support, that "the purpose of developing a rural landline telephone network was to provide a *physical* connection of communication between an isolated user and the rest of the developed world." TE's Brief at 30 (emphasis added). But the ALC correctly concluded that wireless telephone service, just like a landline, fulfills the

General Assembly's actual purpose, namely providing telephone service in rural areas of South Carolina. *See* Am. Final Order at 62 (R. ___). Further, the ALC correctly recognized that this finding is consistent with the testimony of both parties' engineering experts who agreed that wireless service is telephone service and that whether something is "telephone service" depends solely on the type of service that is being provided and not on the technology that is used to provide it. *See id*.; *see also id.* at 61 (R. ___) (relying on expert testimony that wireless service is a substitute for landline service); *id.* (noting the South Carolina Public Service Commission had awarded USF status to FTCC, a wireless provider, because the provision of wireless service fulfills the Legislature's goal of providing rural telephone service) (citing Op. S.C. Atty Gen., 2017 WL 6629071, at *4 (Dec. 20, 2017)).

Likewise, the Taxing Entities' final argument—that wireless service should not be exempt because out-of-state drivers passing through rural areas might occasionally use FTCC's network—falls flat. *See* TE's Brief at 30–31. The fact that someone passing through rural South Carolina makes temporary use of the wireless service that is also used and always available to residents of rural South Carolina does not somehow strip that service of its benefit to rural South Carolinians as intended by the General Assembly[11]—especially when the Taxing Entities failed adequately to support that argument below. *See* Am. Final Order at 63 (R. ___) (noting that although "people from out of state who drive on our State's highways use Farmers Entities' towers as they pass through the area, the extent of that use was not quantified and that fact does not eliminate the need or the purpose for providing rural telephone service in this area").

[11] In any event, there is no evidence—and no reason to believe—that the General Assembly intended the rural telephone system to benefit only rural residents and not also to benefit tourism, commerce, and other sectors in rural South Carolina that rely on out-of-state visitors or drivers passing through rural areas of the State.

In sum, the Taxing Entities' attempt to exclude wireless service from the Exemption lacks any basis in well-settled rules of statutory interpretation, is unsupported by the evidence, and lacks any policy justifications (even assuming such arguments were appropriately before the courts) that merit upending the Exemption.

3. The Farmers Entities sought the Exemption solely for property used in providing rural telephone services.

The Taxing Entities argue that FTCC's and Diversified's property must be analyzed as a single, consolidated network. *See* TE's Brief at 31–32. Specifically, according to the Taxing Entities, FTCC and Diversified are "incapable" of differentiating between their property that is and is not used to provide rural telephone service. *See id*. at 31. The intended thrust of the Taxing Entities' argument is not immediately apparent, but the Farmers Entities respond briefly to it to note it rests on premises already rebutted and is otherwise incorrect, misleading, or irrelevant.

First, there has been (and still is) no need for FTCC or Diversified to categorize their property in the way the Taxing Entities describe. The supposedly missing taxonomy of property is a delineation based on the cramped, contorted, and incorrect definition the Taxing Entities have concocted. *See id*. at n.9. That definition, however, lacks any basis in the Exemption's language, precedent, principles of statutory interpretation, or policy, *see* Parts I(A) and I(B)(1)–(2), *supra*, and thus FTCC's and Diversified's supposed failure to divide up their property according to that definition is irrelevant to the analysis and application of the Exemption.

Second, FTCC and Diversified did, in fact, differentiate between their property that was used to provide rural telephone services (including property also used for additional services) and property not used for an exempt purpose. They did so as part of the Settlement Agreement entered into with the Department (which was an exhibit in this proceeding) and thereafter in their annually filed returns (which were likewise exhibits in this proceeding). *See* Trial Exs. 11, 16, 29, 37, 42,

47, 50, 52, 54, 58, 63, 68, 71, 73, 75, 91 (R. __, __, __, __, __, __, __, __, __, __, __, __, __, __, __, __, __). Further, Diversified segregated its internet service provider equipment and the head end for IPTV as non-exempt and did *not* claim the Exemption for them because they are not used in providing rural telephone service. *See* Tr. at 573:8–14 (R. ___). FTCC has applied for the tax exemption only for assets used in providing rural telephone services, including, but not limited to, wireless towers (including monopole structures, lattice structures, and guidewire structures throughout the wireless network), radios and antennas connected to the towers, and banks that house various electronic elements used in bringing the wireless signal to a mobile telephone switching office. *Id*. at 568:6 to 571:20 (R. ___ to ___); *id.* at 805:24 to 807:1 (R. ___ to ___).

Third, it is not clear what findings or conclusions of the ALC, if any, the Taxing Entities are challenging. Accordingly, they have not met their burden of demonstrating how the ALC erred in reaching whatever findings or conclusions the Taxing Entities may be challenging, and this "argument" should be disregarded.

4. *Even assuming property's relative use was relevant, the "bandwidth" metric proposed by the Taxing Entities is not well-suited for the task and misrepresents the extent to which the Farmers Entities' property provides rural telephone service.*

Even assuming that the extent to which dual-use property is used to provide rural telephone services is relevant to determine the extent of its exemption (an assumption the Farmers Entities dispute, *see* note 1, *supra*, and the Farmers Entities' Brief at 34–39), this Court should reject the Taxing Entities' argument that "use" must be measured using bandwidth. *See* TE's Brief at 32–34. The Taxing Entities provide no discussion of what the ALC ruled, much less how or why that ruling erred. Rather, and somewhat confusingly, they simply provide an out-of-context block quotation from the Amended Final Order that incorrectly implies the ALC agreed with and adopted bandwidth as the appropriate metric of use, *see id*. at 33, but fail to explain that in the very next

paragraph of the Order the ALC *rejected* the notion that bandwidth is the appropriate method for measuring use under the Exemption, *see* Am. Final Order at 67–68.

The Taxing Entities' appellate arguments for using bandwidth as the measuring rod of "use" fail for the same reason the ALC rejected them below. *First*, the ALC correctly recognized and emphasized the fact that *the ability* to use or access telephone service is an inherent and critical component to consider when quantifying and measuring "use" under the Exemption:

> [B]andwidth does not adequately capture the use of the network under the statute . . . [because] the intention of the exemption is to encourage the development of rural telephone service to supply the ability to connect to the public switch network and access emergency services 99.999% of the time. In other words, *access is an important component of use in this scenario* that does not necessarily correlate with traditional measure of use such as minutes of use or bandwidth.

Am. Final Order at 67 (R. ___) (emphasis added). Accordingly, even assuming *arguendo* that the Exemption contains an unstated *de minimis* use threshold, FTCC and Diversified still qualify for the Exemption because the property at issue is *always*—*i.e.*, 100% of the time—being used to provide *access* to rural telephone service. *See also id*. at 24–25 (R. ___) (noting that "the majority of Taxpayers' assets are still being used to provide *the ability to access* rural telephone service when needed," even if many of Taxpayers' customers only use their phones for emergency services).

Second, as the ALC correctly recognized, bandwidth is an inappropriate measurement because it fails to take account of the fact that the vast majority of FTCC's and Diversified's property would be necessary even if the *only* service provided was voice calls:

> [B]andwidth does not capture the fact that no matter how *de minimis* the use of Taxpayer's network is for telephone service, a majority of the network infrastructure is physically needed to provide voice telephone service even if the infrastructure is also used for non-exempt data services.

Id. at 67–68 (R. ___); *see also id*. at 25 (R. ___) (concluding based on the testimony of the Taxing Entities' expert, Mr. Moss, "that if the Farmers Entities were to build a landline-only telephone network, that network would be similar to the current Farmers Entities' network"); *id*. at 24–25 (R. ___) (recognizing that using bandwidth to calculate use "fail[s] to take into account the fact that the bulk of the Farmer Entities' equipment and property would still be needed to provide voice telephone service even if data services, such as TV and Internet, were eliminated"). Accordingly, even assuming the truth of the Taxing Entities' calculations about the small percentage of *bandwidth* occupied by voice calls, that metric obscures the fact that the great majority of FTCC's and Diversified's property is used to provide the ability to make telephone calls. Adopting a bandwidth metric to measure use will have the same effect as creating a "*de minimis*" requirement in the statute—the Exemption would be rendered meaningless. Such an interpretation should not be permitted.

In sum, the ALC provided multiple, sound reasons that were supported by ample evidence to support its conclusion that using bandwidth to quantify "use" under the Exemption simply does not work or make sense in light of the purpose of the Exemption. The Taxing Entities have not even attempted to explain to this Court why the ALC erred when it rejected their argument that bandwidth is a proper method—much less "the only" appropriate method—to measure use. Accordingly, the Court should deny the Taxing Entities' request to hold that "use" should be measured based on bandwidth.[12]

[12] Further, while the Farmers Entities disagree that *any* measurement and evaluation of relative use is needed or permissible, *see* Farmers Entities' Brief at 34–39, if this Court were to disagree and remand with instructions for reevaluation, a better metric for evaluation would be minutes-of-use ("MOU"). Engineers use MOU measurements to design, plan, and maintain a telecommunications network, and Farmers' CEO and engineering expert both testified that MOU is the most important measure for a voice telephone network, particularly because voice traffic is mandated to take

C. The Farmers Entities proved their eligibility for the exemption by demonstrating that 100% of their parent company's property was exempt in 1973.

The Taxing Entities argue the Exemption should be denied in its *entirety* because FTCC and Diversified allegedly failed to prove what proportion of Farmers Co-op's property was exempt in 1973. *See* TE's Brief at 37–38. Their argument has no merit.

First, the premise of the Taxing Entities' argument is incorrect. Proving the exact portion of a taxpayer's property that was exempt in 1973 is not an "essential element" that, if not proven, renders property added after 1973 entirely ineligible for the Exemption.[13] Rather, as discussed below, and as the ALC correctly recognized, the proportion of property that was exempt in 1973 is merely a cap with respect to the amount of later added property that can qualify as exempt.

Regardless, the Taxing Entities' argument is also incorrect because the Farmers Entities *did*, in fact, establish the percentage of Farmers Co-op's property that was exempt in 1973. In 1973, all of Farmers Co-op's property—as in 100% of it—was exempt from property taxation because the language of the Exemption in effect at that time exempted "All property of every kind owned by rural telephone cooperatives[.]" *See* note 2, *supra*, and accompanying text. The testimony both of

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priority over all data traffic. Tr. at 1033:14–20 (R. ___); *id*. at 579:8 to 584:13 (R. ___ to ___); *id*. at 548:21 to 549:17 (R. ____ to ___); *id.* at 756:1 to 757:10 (R. ___ to ___); *id*. at 745:13 to 755:3 (R. ___ to ___). When measuring voice traffic by MOU, the numbers are staggering and show that 90–99% of the traffic on FTCC's wireless network for the years in question was voice traffic. *Id*. at 780:15–25 (R. ___) and Trial. Ex. 151 (R. ___). *See also* Farmers Entities' Proposed Order at 57–58 (R. ___). Similarly, voice traffic on the Farmers Entities' landline network is estimated to be approximately 99.6% of the traffic in MOU on an annual basis. Tr. at 581:11 to 583:22 and 1038:11 to 1040:22 (R. ___ to ___ and ___ to ___) (Farmers' CEO testifying it appeared that approximately 0.3% of the total time use of the landline network per year consists of data traffic based on the MOU reports generated over a 10-week period in 2019 and using Taxing Entities expert's figures regarding data traversing the network (which appeared to be overstated)); *see also* Trial Ex. 179 at 10 (R. ___) (ISUP Trunk Group Totals Report showing 118,347,033 MOU generated by Farmers Co-op and Diversified over a 10-week period in 2019 and 617,094,915 MOU on an annual basis).

[13]Indeed, the Taxing Entities' 82-page proposed order to the ALC does not even argue this is a prerequisite at all, much less an "essential element." *See generally* TE's Proposed Order (R. ___).

Farmers Co-op's CEO and the Department's witness confirmed that Farmers Co-op's property has always been exempt. *See* Tr. at 601:11–25 (R. ___) (Farmers' CEO's testimony that Farmers Co-Op's property "has been 100 percent tax exempt since its inception in 1951"); *id*. at 123:15–25 (R. ___); *see also* Am. Final Order at 26 ("Farmers, Taxpayers' parent company, has claimed the Rural Telephone Service Exemption since its inception. Moreover, Farmers has always claimed 100% of its assets as exempt.").[14]

Subsequently, the Exemption was amended and now provides in pertinent part that "Any property . . . added after December 31, 1973, shall likewise be exempt from property taxation in the proportion that the exempt property . . . was to the total property of such company or cooperative as of December 31, 1973, in that tax district." S.C. Code Ann. § 12-37-220(B)(10). The Department interprets, and has always applied, this language to mean that newly acquired property (*e.g.*, property acquired after 1973) that qualifies for the exemption for a particular taxpayer cannot exceed the percentage of the taxpayer's property that qualified for the exemption in 1973. *See* Ingram Dep. at 21:11 to 22:10 (R. ___ to ___). This interpretation is consistent with the statutory language, and the Taxing Entities do not appear to dispute this aspect of the statute.

[14] Although the ALC correctly ruled that the 1973 language in the Exemption statute did not bar FTCC and Diversified from qualifying for the exemption (*see* Am. Order at 68–69 (R. ___)), its reasoning, onto which the Taxing Entities have latched, is unclear and creates some confusion. In particular, the ALC stated that the record contained no evidence regarding "the specific nature of Farmers' property that was exempted as of December 31, 1973" (*see id.* at 68 (R. ___)), which the Taxing Entities now allege is fatal to the Exemption claim. *See* TE's Brief at 37–38. However, while the current Exemption statute requires property to be used to provide rural telephone service and thus would require a taxpayer to identify the proportion of property so used, the version of the statute in effect in 1973 had no such requirement and instead exempted *all* property owned by a rural telephone cooperative whether used to provide rural telephone service or not. *See* n.2 *supra*; *see also* S.C. Code Ann. § 65-1522(46) (1960 Supp.) ("The following property shall be exempt from taxation, to wit: . . . (46) *Rural telephone cooperatives* – All property of every kind owned by rural telephone cooperatives[.]"). Thus, in 1973, Farmers Co-op was not required to establish the specific nature of its property to determine the proportion that was exempt versus the portion that was non-exempt—because it was *all* exempt.

Because for tax purposes, the assets of FTCC and Diversified are treated as if they are assets of Farmers Co-op, the assets of FTCC and Diversified are treated the same and can qualify for the exemption. *CFRE, LLC v. Greenville Cty. Assessor*, 395 S.C. 67, 716 S.E.2d 877 (2011). However, the percentage of FTCC and Diversified's property that is exempt cannot exceed the percentage of Farmers Co-op's property that was exempt in 1973. *See* S.C. Code Ann. § 12-37-220(B)(10).

Accordingly, the cap on FTCC's and Diversified's exempt property is 100%, meaning the assets of FTCC and Diversified used in providing rural telephone services can qualify for up to a 100% exemption from property taxes. This does not mean that 100% of FTCC's and Diversified's property is exempt from taxation; only that *up to* 100% of their assets can be exempt *if those assets are being used in providing rural telephone service*. Stated differently, all of FTCC's and Diversified's assets used to provide rural telephone services can qualify for the Exemption.

Thus, the proper analysis in this case is simply to determine which of FTCC's and Diversified's assets are used in providing rural telephone services—in which case they are entitled to the Exemption in full—and which assets are not used in providing rural telephone services and thus are not entitled to the Exemption. The Record shows this was done in the process of reaching the Settlement Agreement, when all non-telephone service assets were removed from the applications for Exemption; it was established again at trial; and it was recognized by the ALC. *See* Trial Ex. 91 (Settlement Agreement) at p. 6, § 2.1 (R. ___); Am Final Order at 64–65 (R. ___). The Court should reject the Taxing Entities' argument that FTCC and Diversified are ineligible for the Exemption.

D. The Taxing Entities' argument for a 40–50% exemption lacks textual and evidentiary support.

The Taxing Entities argue in the alternative that even if the ALC's cost-method of evaluating relative use was correct, the ALC nevertheless erred in concluding that FTCC's and

Diversified's qualifying property was eligible for 75% exemption. *See* TE's Brief at 38–40.[15] In the Taxing Entities' view, the ALC's alleged error was awarding *too high* of an exemption.[16] Specifically, they argue that a partial exemption based on cost is appropriate only if it falls within the range provided by *their* expert because (in their view) "only one witness presented any definite testimony regarding the cost of building a voice-only network: Mr. Joe Moss." TE's Brief at 38–39. The Taxing Entities' argument should be rejected for any of the reasons below.[17]

First, the Court should not rely on Mr. Moss's testimony because it is speculative. *See, e.g.*, *Watson v. Ford Motor Co*., 389 S.C. 434, 699 S.E.2d 169 (2010) (acknowledging that expert testimony must be supported by adequate facts, data, or opinion); *see also Cooper v. Smith & Nephew, Inc*., 259 F.3d 194, 200 (4th Cir. 2001) ("A reliable expert opinion must be based on scientific, technical, or other specialized knowledge and not on belief or speculation.") (internal quotations and citation omitted). For starters, if the Court were to accept as true the Taxing Entities'

[15] The Taxing Entities characterize the ALC's ruling ineptly, arguing the ALC "conclude[ed] that 75% of FTCC's and Diversified's property was eligible for the Exemption." TE's Brief at 38. The ALC did not, however, rule that 75% of FTCC's and Diversified's total property was exempt. Rather, the ALC ruled that all of FTCC's and Diversified's property used to provide rural telephone services (*e.g.*, a subset of their total property) was entitled to a 75% exemption. *See* Am. Final Order at 99 (R. ___) ("[T]he Court finds the assets qualifying for the exemption are determined by the unit valuation method based on cost with 75% of the overall assets being exempt.").

[16] The Farmers Entities agree this ruling was in error, though for a different reason, namely that the qualifying property should have been *entirely* exempt because the Exemption's unqualified, categorial language says simply that property used to provide rural telephone shall be exempt, with no indication the Legislature contemplated or authorized partial exemptions for qualifying property. *See* Farmers Entities' Brief at 34–39.

[17] As an initial matter, the Farmers Entities disagree fundamentally with the cost-method calculation for the reasons explained in their Brief and because reliance on such an analysis was inappropriate when no party requested the court render a decision on that basis. *See* Farmers Entities' Brief at 34–39; *see also United States v. Sineneng-Smith,* 140 S. Ct. 1575, 1579 (2020) (holding that courts are assigned "the role of neutral arbiter of matters the parties present" and should "rely on parties to frame the issues for decision").

argument that the exemption must be within the range Mr. Moss provided, the Court would first need to decide *which of his ranges* sets the boundaries of the allowable exemption. That is because Mr. Moss first testified that a voice-only network could be constructed for 50% to 60% cheaper than the current network, and minutes later testified that the incremental cost to build a telecommunications network (which could provide the additional "non-telephone" services the Farmers Entities provide) on top of a voice-only network would be approximately 30% to 40% in additional costs. *Compare* Tr. at 984:25 to 985:17 (R. ___ to ___) *with* Tr. 1028:12 to 1029:8 (R. ___ to ___). Those numbers simply don't add up,[18] and they provide no sound basis for the ALC or for this Court to reach any supportable conclusion.

Second, even assuming the Court could correctly guess whether it should rely on the first range Mr. Moss provided or the second one, his testimony lacked any specificity regarding any supposed cost-savings that could be realized if FTCC's and Diversified's network was voice-only. Indeed, Mr. Moss's testimony indicates he was speculating. For example, while he suggested that some costs could be saved if a carrier provided only voice services because some equipment would require less capacity than currently required to operate, *see* Tr. 979:22 to 981:7 (R. ___ to ___), he conceded he had not pulled *any* pricing information or otherwise researched the actual cost-savings, if any, that could be realized from making this change, *see id.* at 1020:24 to 1021:11 (R. ___ to ___). The only concrete example he gave was that a landline provider could replace its

[18] For example, assume the current network cost $100 to construct. According to Mr. Moss, two things are true. First, it could have been constructed as a voice-only network for 50% to 60% cheaper, *i.e.*, for around $45. Second, a voice-only network (*e.g.*, the $45 network in this example) could be upfitted to a full telecommunications network for an additional 30–40% (*e.g.*, approximately $16), for a total cost of around $61. Both of these things cannot be true. If Mr. Moss were correct, no providers would build a telecommunications network. Rather, they would build a voice-only network, then upgrade its capabilities and (*voila*!) end up with a full service network at a fraction of the cost.

10-gigabit card with a 1-gigabit card, *id.* at 983:13–18 (R. ___), but Farmers' CEO refuted this, testifying that two 1-gigabit cards would be needed, and that two 1-gigabit cards would cost *more* than one 10-gigabit card. *Id.* at 1035:24 to 1036:16 (R. ___ to ___) (testifying that two 1-gigabit cards would cost $228,000 while one 10-gigabit card would cost $150,000).

Further, the emphasis the Taxing Entities now place on Mr. Moss's testimony is belied by his caveats, hesitancy, and admissions that his testimony was, at bottom, merely guesswork. The first cost estimate range he provided was in response to a question from the ALC, and Mr. Moss admitted he "hadn't done any research, but just off the top of [his] head" he guessed it might be 50% to 60% cheaper to build a voice-only network, which he again qualified as "a very rough estimate." Tr. at 985:3–17 (R. ___). Shortly thereafter, when providing the second range, Mr. Moss similarly said he was giving "really rough numbers," that "it's really hard to quantify that because there's so many moving parts," and that he was "reluctant" to even answer the question. *Id.* at 1028:12 to 1029:8 (R. ___ to ___).

Mr. Moss's inability to answer these questions is in some ways not surprising as nothing in the plain language of the Exemption or in any other South Carolina law would suggest to him or to anyone that the cost of constructing a voice-only network (as compared to FTCC's and Diversified's current network) was relevant in this case or that a partial exemption was contemplated by the Exemption. The Legislature could have chosen to include language allowing a partial exemption for dual-use assets that would be measured by cost (as it did in the pollution control statute found at S.C. Code Ann. § 12-37-220(A)(8)),[19] but it chose not to do so in the

[19] *See* S.C. Code Ann. § 12-37-220(A)(8) (providing that for assets used for both production and pollution control, the value eligible for exemption is "the difference in the cost between this equipment and equipment of similar production capacity or capability without the ability to control pollution").

Exemption. Instead the Exemption statute simply provides an exemption for all assets "used in providing rural telephone service." S.C. Code Ann. § 12-37-220(B)(10). Finally, as discussed previously, this Court in *Hercules* considered 35% use for the exempt purpose to be substantial and to warrant entitlement to the exemption in full, as in 100%. *See* Part I(A)(1) and note 3, *supra*. Thus, even if one accepted the Taxing Entities' 40-50% cost figure, that would be more than sufficient to justify a full exemption. Accordingly, FTCC's and Diversified's assets at issue should have been completely exempt. *See Hodges v. Rainey*, 341 S.C 79, 85, 533 S.E.2d 578, 581 (2000) ("What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will."); *State v. Leopard*, 349 S.C. 467, 471, 563 S.E.2d 342, 344 (Ct. App. 2002) ("[A] court cannot rewrite the statute and inject matters into it which are not in the legislature's language."); *see also* Farmers Entities' Brief at 34–39.

II. The Farmers Entities properly and timely applied for and claimed the Exemption for tax years 2014, 2015, and 2016 (among others).

The Taxing Entities argue the ALC erred by ruling FTCC and Diversified were entitled to a property tax refund for tax years 2014, 2015, and 2016 when (according to the ALC and the Taxing Entities), FTCC and Diversified did not apply for the exemption until 2017 when they filed amended tax returns. *See* TE's Brief at 40–46. Although the thrust of their argument is not entirely plain, it seems the Taxing Entities are arguing (1) taxpayers are required by Code § 12-4-720(C) to request the Exemption each year on their *original* property tax returns, (2) the Exemption cannot subsequently be requested on an *amended* property tax return, (3) FTCC and Diversified did not request the Exemption on their original, annual tax returns for 2014, 2015, and 2016, *ergo* (4) the ALC's ruling that FTCC and Diversified were entitled to the exemption for those years was

"illegal" and "retroactive." As explained more fully below, the Taxing Entities' argument is wrong.[20]

A. The Code plainly permits a taxpayer to apply for an exemption by submitting an amended tax return or a separate request up to three years after its original tax return.

The Taxing Entities' argument on this issue comes down to the alleged tension between two subsections of the same statute: Code section 12-4-720(A)(1) and (C). The former requires taxpayers to "file an *application* for exemption with the department within the period provided by Section 12-54-85(F)," which, for Taxpayers, is up to three years after the April 30th due date for their annual property tax returns. *See* S.C. Code Ann. § 12-4-720(A)(1); *id*. § 12-54-85(F). The latter subsection instructs taxpayers who file annual property tax returns (which includes FTCC and Diversified) to "*claim* any exemption on the return each year the property is exempt." *Id*. § 12-4-720(C).

The ostensible tension, then, is between one subsection that allows a taxpayer to make an "application" for exemption up to three years after returns are filed, and another subsection that instructs the taxpayer to "claim" the exemption each year on its return. That supposed tension, however, arises from the Taxing Entities' rhetorical sleight-of-hand. Specifically, they conflate the two concepts and act as if they were the same, incorrectly asserting that subsection 12-4-720(C) contains an "annual Exemption *application* requirement." *See* TE's Brief at 41 (emphasis added). That assertion is incorrect. The ALC extensively discussed the distinction between applying for and claiming the Exemption. *See* Am. Final Order at 72–77 (R. ___). The Taxing Entities' failure

[20] The Farmers Entities agree the ALC erred, though for different reasons, in its analysis of their requests for the Exemption. Specifically, as explained in the Farmers Entities primary brief, the ALC erred by erroneously concluding FTCC and Diversified had not applied for and/or claimed the Exemption in all of the tax years at issue. *See* Farmers Entities' Brief at 39–49.

to acknowledge that distinction, much less to grapple with the ALC's ruling and explain the alleged error therein, is a sufficient basis to reject their argument on this issue.

Once the Taxing Entities' creative license with the statutory text is understood, it is apparent that the supposed tension between the "conflicting" requirements can be harmonized. Indeed, there is no need for the Taxing Entities to speculate as to what the Legislature "must have intended" when it amended the statute in 1995 because, as the ALC explained, the legislative history tells us what the Legislature intended. In 1991, Section 12-4-720 required that a taxpayer "file an application for exemption between January first and April fifteenth of the first year for which the exemption is claimed." 1991 S.C. Laws Act 50, § 2. Then, in 1995, the Legislature amended section 12-4-720 in part to "extend the time for filing exemption applications." 1995 S.C. Laws Act 125. The 1995 version removed the language requiring the application for exemption to be filed by April fifteenth and added the current versions of subsections (A)(1) and (C). *See id.*; *see also* Am. Final Order at 75 (R. ___). The ALC correctly found that "it is clear the General Assembly meant for taxpayers to apply for an exemption up to three years after their original tax return was filed," and the ALC thus correctly harmonized any perceived conflict within § 12-4-720. *See* Am. Final Order at 75–77 (R. ___).[21] In short, and as explained by the ALC, subsection (A)(1) allows taxpayers to *apply* for the Exemption within three years of April 30th, and subsection (C) merely instructs taxpayers to *claim* (as opposed to apply for) the Exemption in subsequent years when they file their annual property tax returns. *See id.* at 76–77 (R. ___).[22]

[21] Further, the ALC correctly noted that § 12-4-720(C) does not say exemptions must be claimed on the original return, which indicates it can be claimed in other ways. *Id.*

[22] Despite the ALC's proper acknowledgement that taxpayers need not apply for exemptions in their tax returns but may use other methods, the ALC incorrectly stated that under the facts of this case, the only method used by FTCC and Diversified to apply for the exemptions that qualified as an application was their amended returns filed in 2017; however, as explained in the Farmers

Applications for exemption, as the *TNS Mills* court held and as all parties and the ALC agreed, can be made via tax returns or other methods. *See TNS Mills v. S.C. Dept. of Rev.*, 331 S.C. 611, 618, 503 S.E.2d 471, 475 (1998)(holding that taxpayers may apply for exemptions on their tax returns or "may apply for exemptions separately."). *See also* Am. Final Order at 77 n.64 (R. ___); TE's Brief at 4 (noting that a taxpayer can apply for a property tax exemption on its annual tax returns or via a separate application). Here, FTCC and Diversified applied for the exemption within the three year deadline for all tax years at issue via letters submitted to the Department requesting the exemption and/or via the filing of amended returns. *See* Trial Exs. 11, 15–16, 20, 22, 24, 28–29, 33, 37, 42, 47, 50, 58, 63, 68, 71, 79–81, and 86 (R. __, __–__, __, __, __, __–__, __, __, __, __, __, __, __, __, __, __, __–__ and __). The Department, which is statutorily charged with making exemption determinations (*see* S.C. Code Ann. § 12-4-710), interpreted the letters and/or amended returns as proper applications and accepted them as timely-made. *See* Ingram Dep. at 82:6–14 (R. ___) (Department's witness testifying that FTCC and Diversified "went the route of a property tax appeal to make us aware that they were making an application for exemption for certain types of property"); *id.* at 45:1–22 (R. ___) (Department's witness testifying that FTCC and Diversified "file[d] for an exemption timely for the years they were requesting the exemption"); Brewer Dep. at 25:4–13 (R. ___) (Department's witness testifying that FTCC's and Diversified's claims for refund and requests for the exemption were timely filed); Tr. at 672:4–12 (R. ___) (Jeffrey Allen testifying that the Department never questioned whether FTCC's and Diversified's applications were timely-made). The Department's construction and application of the statute should not be overturned absent cogent reasons. *See Duke Energy Corp. v. S.C. Dep't of Revenue*,

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Entities' Brief, this is erroneous as their many letters requesting the exemption clearly qualify as applications and the Department so found. *See* Farmers Entities' Brief at § V.

415 S.C. 351, 355, 782 S.E.2d 590, 592 (2016).

Relatedly, the ALC correctly rejected the Taxing Entities' argument that § 12-4-720(C) supersedes or is an exception to the general rule in § 12-4-720(A)(1). The Taxing Entities' interpretation improperly discriminates between significant and insignificant taxpayers (as their interpretation would only allow small businesses, which are not required to file annually, to have the benefit of the three-year time period to file an application), and, more importantly, has no basis in the language of the statute and is completely contrary to the General Assembly's clear intention to *extend* the time to apply for exemptions when it revised § 12-4-720 in 1995. *See* Am. Final Order at 77 n.63 (R. ___). The Legislature created exceptions to the general rule in § 12-4-720(A)(1), but those exceptions are, unsurprisingly, found in § 12-4-720(A)(2) and (3), both of which, like (A)(1), refer to "applications," whereas § 12-4-720(C) merely instructs annual filers to "claim" exemptions each year. Indeed, the exceptions found within subsection (A) illustrate the error of the Taxing Entities' view. The exception in subsection (A)(2), for example, reduces the three-year lookback in (A)(1) to one year for pollution control property, while the exception in (A)(3) provides that thirteen different exemptions do not require an application at all. No other taxpayers are specifically addressed as having a different time period to apply for an exemption. The Legislature clearly knew how to create exceptions to the general rule, as it did so plainly in subsections (A)(2) and (A)(3). Having created those clear and express exceptions, the General Assembly would not proceed in subsequent portions of the statute to create another exception using different and ambiguous terminology, particularly when the statute was amended for the stated purpose of extending the time to apply for property tax exemptions.

In addition, section 12-4-720(C)'s requirement that taxpayers *claim* exemptions on their annual tax returns has no three-year deadline as the application statute does. *See* S.C. Code Ann.

§ 12-4-720(C); *see also* Farmers Entities' Brief at § V. The ALC correctly ruled that this subsection cannot be used to undo a taxpayer's right to request an exemption under subsection (A) up to three years following the filing of its original returns. *See* Am. Final Order at 74–75 (R. ___). But, in any event, both FTCC and Diversified initially claimed the exemption for all of their property, just as Farmers Co-op had always done, by listing all of their property on their original annual tax returns. *See* Tr. at 497:24 to 498:20 (R. ___ to ___) (Farmers Co-op's CFO testifying he initially listed all FTCC and Diversified property as exempt). *See also id*. at 198:9 to 199:13 (R. ___ to ___) (Department's testimony that FTCC and Diversified continued to file their returns listing all of their assets, and that the Department understood that FTCC and Diversified were requesting the exemption). After discussions with the Department, FTCC and Diversified agreed that some of their property was not exempt and, as part of the settlement, they filed amended returns in 2017 to separately identify exempt and non-exempt property). *See id*. at 483:3–22 (R. ___-___); *id*. at 497:24 to 498:20 (R. ___ to ___); Trial Exs. 11, 16, 29, 37, 42, 47, 50, 58, 63, 68, and 71 (R. __, __, __, __, __, __, __, __, __, __, __, and __). Thereafter, FTCC and Diversified filed original tax returns for tax years 2017 and 2018 similarly identifying their exempt and non-exempt property. Trial Exs. 52, 54 73, and 75 (R. __, __, __, and __). Thus, FTCC (from 2010 to 2016) and Diversified (from 2013 to 2016) listed all of their property as exempt on their returns each year and then filed amended returns in 2017 for those tax years to segregate what the parties had agreed were non-exempt assets, followed by original tax returns for tax years 2017 and 2018 respectively, which also segregated out exempt versus non-exempt assets, thus satisfying any requirement under section 12-4-720(C) that they claim the exemption on their annual tax returns.

Finally, the Taxing Entities argue that interpreting the Legislature's 1995 amendments to § 12-4-720 as allowing taxpayers to apply for property tax exemptions after June 1st of that tax year

has somehow repealed the June 1st deadline by implication.[23] *See* TE's Brief at 45. However, this Court need not grapple with this issue because it has already affirmed that § 12-4-720(A)(1) allows taxpayers to apply for exemptions after June 1st, a point which is also confirmed by the plain-meaning interpretation of § 12-4-720(A)(1) (providing taxpayers three years to apply for the Exemption under § 12-54-85(F)). *See Hock RH, LLC v. S.C. Dep't of Revenue*, 423 S.C. 208, 211–12, 813 S.E.2d 540, 542 (Ct. App. 2018). In *Hock RH*, the taxpayer moved onto leased property in November 2012 and applied for the exemption in § 12-37-220(A)(2) in November 2013 (for the 2013 property tax year). The Department denied the request in January 2014 because the taxpayer did not own the property, and the taxpayer paid the 2013 property tax in February 2014. In October 2014 (after the General Assembly clarified that leased property could qualify for the exemption), the taxpayer filed for a refund of the 2013 property tax, which this Court held was permissible. *Id.* at 218–20, 813 S.E.2d at 545–46. Thus, the taxpayer leased the property for the entirety of 2013; applied for the exemption well after June 1, 2013; and successfully filed a refund request in October 2014 for tax year 2013.

In sum, the ALC correctly rejected Taxing Entities' argument that FTCC and Diversified forfeited the right to the Exemption unless claimed by April 30th each year on their original tax returns. Instead, taxpayers can request the Exemption in multiple ways—including on original returns, amended returns, and via separate applications as recognized by the South Carolina Supreme Court in *TNS Mills*—provided it is done within three years of April 30th for the year in question. In addition, FTCC and Diversified properly claimed the exemption on their tax returns each year either via their original or amended returns.

[23] The "June 1st deadline" is found in S.C. Code Ann. § 12-4-710, which requires the Department to advise counties of their exemption determinations by June 1st. This requirement, and its relevance, if any, to this proceeding are discussed in more detail below.

B. The Court's holding in *TNS Mills* is plainly distinguishable from the instant proceeding and does not deprive the Farmers Entities of the Exemption in the tax years at issue.

The Taxing Entities' reliance on *TNS Mills* is grossly misplaced, and their representation of the facts and holding of *TNS Mills* contains significant misapprehensions. *See* TE's Brief at 43–44. Critically, the Taxing Entities fail to mention that the court's analysis and holding in *TNS Mills* were based on, and driven by, old law which predated the enactment in 1995 of the three-year application period previously discussed. In 1992, the taxpayer in *TNS Mills* filed amended tax returns for tax years 1986 through 1991, and the amended returns requested the property tax exemption applicable to pollution control equipment.[24] *See TNS Mills*, 331 S.C. at 615–16, 503 S.E.2d at 473–74. The *prior* version of § 12-4-720 governed the case and thus a taxpayer seeking the pollution control exemption "was required to file an application before the sixteenth day of the fourth month after the close of the accounting period regularly employed by the taxpayer for income tax purposes" to receive the benefits of the exemption. *Id.* at 618, 503 S.E.2d at 475. The court in *TNS Mills* thus denied the exemption *not* because the taxpayer applied on amended returns, but because the taxpayer clearly did not apply in time because the then-existing deadline in § 12-4-720 had passed years before. *Id.* at 618–19, 503 S.E.2d at 475.

As explained above, the Legislature amended § 12-4-720 in 1995 to extend the time to apply for exemptions to three years. Thus, the taxpayer in *TNS Mills* was required to file an application for exemption by April 15th of a particular tax year to receive the pollution control exemption for that year, whereas the law now allows taxpayers generally to file an application for exemption up to three years *after* they file their original returns. Here, unlike in *TNS Mills*, FTCC and Diversified applied *before* the current three-year deadline to apply had passed.

[24] The exemption is found in S.C. Code Ann. § 12-37-220(A)(8).

The Taxing Entities' argument misconstrues and quotes bits and pieces of *TNS Mills* that are irrelevant to this case, and they ignore that the law has since changed to allow most taxpayers three years to claim an exemption. *TNS Mills* involved different law and different facts, and it provides no support for the Taxing Entities' argument here.

III. The ALC correctly concluded that the Farmers Entities should not be punished for the Department's historic inability to meet the statutory deadline to render exemption decisions.

The Taxing Entities argue the Exemption cannot be granted to FTCC and Diversified because the Department failed to meet a deadline in Code section 12-4-710 (which requires the Department meet an impossible deadline to advise counties of its exemption decisions by June 1). *See* TE's Brief at 46–51. In other words, the Taxing Entities argue that taxpayers can timely apply for and be entitled to property tax exemptions, yet still be denied the exemptions whenever the *Department* fails to fulfill *its* duty under § 12-4-710.

The Taxing Entities again misinterpret the significance of *TNS Mills* as it relates to this case. The court in *TNS Mills* did not hold that the Department cannot grant exemptions if *the Department* fails to meet the June 1st deadline in § 12-4-710; rather, it merely held the Department cannot grant an exemption to a *taxpayer* who failed to meet the *taxpayer's* deadline to apply set forth in § 12-4-720.[25] As noted above, the taxpayer in *TNS Mills* had applied for the exemption *years* after the then-existing deadline had passed. Because the taxpayer had clearly missed the deadline, it argued that § 12-4-730 allowed the Department to nonetheless grant a "retroactive"

[25] Indeed, not only does *TNS Mills* not support the Taxing Entities' argument; it actually rebuts it. If the Taxing Entities' argument were correct, the *TNS Mills* Court would have resolved the appeal with a quick and simple ruling on *that* basis—*i.e.*, that the Department's exemption determination came after June 1 of the tax years at issue and thus the exemption was impermissible—rather than undertaking the lengthy and more complex analysis it used to resolve the appeal.

exemption because there was no deadline in *that* statute.[26] *See* 331 S.C. at 620–21, 503 S.E.2d at 476. The Court disagreed, holding that "nothing in this section [§ 12-4-730] modifies section 12-4-720(A)(2)'s mandatory deadline for *applying* for an exemption," and noting that "if 12-4-730 is interpreted as allowing retroactive exemptions, the mandatory deadlines set by the General Assembly are rendered meaningless." *Id.* at 620, 503 S.E.2d at 476 (emphasis added). Stated differently, the *TNS Mills* Court held that the Department could not waive the then-existing statutory deadline for taxpayers to apply for an exemption. The Court *then* proceeded to point out (as quoted at length, and out of context, in the Taxing Entities' Brief at pages 47 and 48) that interpreting § 12-4-730 as allowing the Department to grant exemptions when taxpayers failed to timely apply for exemptions would *also* conflict with the June 1st deadline set forth in § 12-4-710. *Id.* at 620–21, 503 S.E.2d at 476. The analysis and holding on this issue in *TNS Mills* was unremarkable and made sense in that case, but it is neither analogous nor controlling to the issue in this appeal.

Here, in contrast to *TNS Mills*, the Farmers Entities are not arguing that § 12-4-730 allows the Department to grant an untimely-sought exemption because FTCC and Diversified, unlike the taxpayer in *TNS Mills*, *did not miss the current three-year deadline* in § 12-4-720(A)(1). This is precisely why the ALC correctly distinguished *TNS Mills*. *See* Am. Final Order at 98 n.80 (R. ___). Even assuming the June 1st deadline in § 12-4-710 is partially or even primarily for the benefit of the counties, *that*—as the ALC correctly noted—is not the question. *Id*. at 97 (R. ___). Instead, the

[26] S.C. Code Ann. § 12-4-730 states: "The department, upon receipt of an application and upon proper investigation, may declare the real and personal property of a property owner qualifying for an exemption from ad valorem taxation identified in this chapter as exempt and shall certify the exemption to the auditor's office in the county in which the property is located. Upon certification by the department, the auditor shall void any tax notice applicable to the property."

question is what happens if the Department is unable to comply with the June 1st deadline, which the Department's witness testified was impossible to meet?[27] Should the taxpayer be penalized for the Department's inability to meet an impossible deadline, particularly when, as the Taxing Entities admit, the Department historically has never been able to meet that deadline and the Taxing Entities have never complained of that practice? *See* TE's Brief at 50 and n.17 (noting "DOR's routine failure to even attempt to comply" and that "[a]t no point has DOR ever even attempted to comply with section 12-4-710's June 1st deadline"); *see also* Brewer Dep. at 80:6–10 (R. ____) (Department witness testifying that no county had ever raised the June 1st deadline to him).

The ALC correctly concluded that the Department's failure to meet this deadline does not bar the Department from granting exemptions. *See* Am. Final Order at 97–98 (R. ___ to ___). The ALC emphasized that neither § 12-4-710 nor any other statute addresses what happens if the Department fails to meet this deadline. *Id*. at 97 (R. ___). This is a critical point: where a statute is silent as to the penalty for not meeting a statutory deadline, the Court should not create one where the Legislature chose not to act. *See, e.g.*, *Johnston v. S.C. Dep't of Labor, Licensing, & Regulation*, 365 S.C. 293, 298, 617 S.E.2d 363, 365 (2005) (stating that where a licensing board failed to comply with a mandatory statutory deadline, the court would "not assume the Legislature intended the Board to lose its power to act for failing to comply with the statutory time limit," particularly where the Legislature had not provided how the time limit was to be enforced and the statute contained "no language regarding the consequences" of missing the deadline). This

[27] *See* Tr. at 178:19 to 180:12 (R. __ to __) and Ingram Dep. at 92:14 to 96:16 (R. ___to ___) (Department witness testifying that the Department was unable to meet the June 1st deadline and usually tried to notify the counties of exemption decisions by mid-August).

statutory interpretation also complies with due process and fundamental fairness concerns as taxpayers have no control over whether the Department complies with this deadline.

Further, the Taxing Entities' admission of the Department's historical inability to meet the deadline and their apparent acquiescence to this practice pulls the rug out from under their argument that compliance with the deadline is a vital and critical step on which the statutory scheme and the counties' operations depend. *See* TE's Brief at 47–48. If, as they claim (and the Department admits), the Department has never been able to comply with this deadline, and if, as seems clear, the counties have never relied upon this deadline nor objected to that practice, they cannot now argue the taxpayers should be penalized for this practice.

Moreover, the Taxing Entities' argument that they received no notice of FTCC's and Diversified's exemption claims are contradicted by the facts of this case. Specifically, the Taxing Entities argue they were "kept in the dark for nearly five years" in an attempt to have this Court believe they had neither notice nor opportunity to make budget adjustments to prepare for a later determination that FTCC and Diversified were entitled to a refund. *See id.* at 51. That is simply incorrect. As the ALC found, beginning in 2012, the counties received actual notice on a yearly basis of the nature and basis of FTCC and Diversified's protests and appeals via notices provided by the Department to the county auditors. *See* Am. Final Order at 34 (R. ___). The counties chose not to take any action based on this information, *see id.*, yet now ask this Court not only to add a penalty where none exists in the statute, but also to penalize the *taxpayers* due to the Department's inability to meet its deadline, when they have acquiesced to such practice for decades. Such a request has no legal merit and also is against the equities in the case.

Further, despite the Taxing Entities' repeated claim that *their* interpretation of the June 1st deadline for the Department to render exemption decisions aligns best with the overall legislative

scheme and plan, that simply is not the case. To the contrary, their proposed application of the June 1st deadline would *disrupt* and *conflict with* the statutory scheme by effectively negating the express, statutory three-year window to apply for exemptions, the statutory right for taxpayers to appeal denials of exemptions, and other statutory rights that, by definition or necessity, prevent the Department from making a final determination by June 1st of a given tax year.

In sum, the ALC correctly concluded the Department's (understandable) failure to comply with the June 1st deadline in § 12-4-710 does not deprive the Department of its power to act or its authority to grant the Exemption, nor should a taxpayer who properly applied for the Exemption be penalized by the Department's failure and lose its right to claim the Exemption. The Taxing Entities' arguments to the contrary provide no basis to reverse on this issue.

IV. The issue of Farmers Co-op's eligibility for the Exemption was not before the ALC and is not preserved for appellate review.

The Taxing Entities argue that the ALC's conclusions regarding FTCC's and Diversified's eligibility for the exemption should also apply to Farmers Co-op's property. *See* TE's Brief at 51–55. As explained more fully below, the argument is unpreserved and, even if it were preserved, is wrong in several ways, any one of which is sufficient to reject it. The issue of Farmers Co-op's eligibility for the exemption was not before the ALC as demonstrated by the following procedural history—drawn almost entirely from the Taxing Entities' own Statement of Facts—which clearly and explicitly shows (1) that the Taxing Entities consistently and repeatedly challenged *only* FTCC's and Diversified's eligibility in this proceeding; and (2) that the issue of Farmers Co-op's eligibility for the Exemption was not before the ALC and, therefore, is not before this Court. The Taxing Entities admit as follows:

- "On January 7, 2017, DOR, FTCC, and Diversified entered into [the Settlement Agreement] wherein DOR granted *FTCC and Diversified* the Exemption for tax years 2010 through 2016." *See* TE's Brief at 10 (emphasis added).[28]

- In a memorandum dated July 6, 2017, the Department informed the Counties that *FTCC and Diversified* will now be subject to the Exemption and provided the Counties with Supplemental Certifications *for FTCC and Diversified* for tax years 2010 through 2016. TE's Brief at 12–13.

- "On July 10, 2017, Clarendon County filed a request for contested case hearing challenging property tax exemptions granted by the Department *to FTCC and Diversified*." *Id.* at 14 (emphasis added).

- On July 17 and 26, 2017, "the other Taxing Entities intervened" and challenged the Department's Supplemental Certifications granting the Exemption *to FTCC and Diversified*. *Id.* at 14.

- "On August 16, 2017, DOR certified the final assessments *to FTCC and Diversified* for tax year 2017. . . . [and] Taxing Entities [on September 25, 2017] filed additional supplements challenging [the 2017 certifications] which granted *FTCC and Diversified* the Exemption." *Id.* at 13 (emphasis added).

- "On September 10, 2018, Taxing Entities filed additional supplements challenging DOR's Certifications for tax year 2018, which also granted *FTCC and Diversified* the Exemption." *Id.* at 14 (emphasis added).

- On September 12, 2019—after the May 2019 hearing in this matter but before the ALC's February 24, 2020, Order ("Initial Order")—the Taxing Entities in a separate, subsequent proceeding filed a request for a contested case hearing as to the 2019 tax year and *again* challenged only the Exemption as to the property of *FTCC and Diversified*. *See* Request for Contested Case Hr'g dated September 12, 2019 (R. ___).

- Finally, in a separate and subsequent proceeding brought *after* this appeal was underway, the Taxing Entities on September 10, 2020 filed a request for a contested case hearing as to the 2020 tax year and, for the first time, actually challenged the Exemption as to the property of FTCC, Diversified, *and* Farmers Co-op. *See* Request for Contested Case Hr'g dated September 10, 2020 (R. ___) (challenging exemption as to the property of FTCC, Diversified, *and* Farmers Co-op and attaching certifications for all three entities).

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[28] As noted by the Taxing Entities, Diversified did not exist until 2012 and thus the Exemption was granted to Diversified for tax years 2013 forward. *Id.* at 10 n.2 Also, as discussed above, Farmers Co-op as the parent company of FTCC and Diversified was also a party to the Settlement Agreement because of its interest in the property owned by FTCC and Diversified. *See* Introduction, *supra*.

In addition to the Taxing Entities explicit and repeated statements *in their own Brief* that the proceeding giving rise to this appeal challenged *only* the exemptions granted to FTCC and Diversified, the Taxing Entities' proposed order to the ALC, the ALC's Initial Order, the Taxing Entities' Motion to Reconsider, and the ALC's Amended Final Order all likewise demonstrate that Farmers Co-op's eligibility for the Exemption was never before the ALC. For example:

- In their September 20, 2019, proposed order to the ALC, the Taxing Entities confirmed (yet again) that they challenged only the Exemption as to FTCC and Diversified and for tax years 2010 through 2018. *See* Proposed Order at 2 (R. ___) ("The Taxing Entities challenge the South Carolina Department of Revenue's ('Department') decision to grant certain ad valorem property tax exemptions *to FTCC Communications, LLC* ('FTCC') *and FTC Diversified Services, LLC* ('Diversified,' and collectively with FTCC, the 'Taxpayers') under S.C. Code Ann. § 12-37-220(B)(10) (the 'Rural Telephone Service Exemption') for tax years 2010 through 2018.").

- The ALC's February 24, 2020, Initial Order adopts virtually verbatim the Taxing Entities' description discussed in the preceding bullet point. *See* Initial Order at 1 (R. ___). In addition, though obvious and known to all parties, the ALC correctly noted that while Farmers Co-op was a party to the Settlement Agreement, its "tax returns were not appealed nor [were] those tax returns at issue in this case." *Id.* at 8 n.5 (R. ___). Naturally, and as expected, the 85-page Initial Order thoroughly addresses the issues actually before the ALC, namely, FTCC's and Diversified's entitlement to the Exemption for tax years 2010 through 2018. *See generally* Initial Order (R. ___).

- In their March 5, 2020, Motion to Reconsider, the Taxing Entities *for the first time requested* that the ALC take its conclusions with respect to *FTCC and Diversified's* entitlement to the Exemption and *apply* those conclusions to *Farmer's Co-op*. *See* Taxing Entities' Mot. To Reconsider (filed March 5, 2020) at 6–8 (R.___). The Taxing Entities do not allege or argue that the ALC erred; they do not argue the ALC failed to rule on an issue they had previously raised (because they had not); they do not challenge the ALC's explicit statement that Farmers Co-op's tax returns were not appealed or at issue in this case; and they do not ask the ALC to reconsider *anything*. *Id.* Instead, they simply "*request* that the [ALC] enter an express finding that Farmers [Co-op] is not entitled to receive the Rural Telephone Exemption for any of the years at issue in this case." *Id.* at 8 (R. ___) (emphasis added).

- In the ALC's June 10, 2020 Amended Final Order, the ALC did not grant the Taxing Entities' baseless and untimely plea. Instead, it again correctly noted that Farmers Co-op's "tax returns were not appealed nor [were] those tax returns at issue in this case," *see* Am. Final Order at 10 n.5 (R. ___), and again addressed the issues actually before the ALC, namely, FTCC's and Diversified's entitlement to the Exemption for tax years 2010 through 2018. *See generally* Am. Final Order (R. ___).

On appeal, the Taxing Entities renew their baseless, improper, and untimely plea and argue the ALC's conclusions regarding FTCC's and Diversified's eligibility for the Exemption should also apply to Farmers Co-op's property. *See* TE's Brief at 51–55. As explained more fully below, the argument was not timely raised to the ALC; is not preserved; and would require this Court to disregard the applicable Standard of Review and, instead, make new findings and rulings on issues never raised to or ruled upon by the lower court.

A. The eligibility of Farmers Co-op's *own* property (as opposed to the property of its subsidiaries FTCC and Diversified) for the Exemption was not timely raised to the ALC.

The issue of Farmers Co-op's eligibility for the exemption was not before the ALC and, therefore, is not before this Court. The Taxing Entities' attempt to raise the argument anew ignores the consistent, repeated, and express Record evidence to the contrary and the explicit statements in their own Brief and, instead, falsely assert that they "appealed DOR's determination that Farmers is entitled to the exemption." TE's Brief at 52. This is simply untrue. Indeed, to read the Taxing Entities' Brief is to rebut their argument, for they admit that they challenged *only* the "property tax exemptions granted by the Department ***to FTCC and Diversified***." *See id.* at 14 (emphasis added). That statement is correct and is binding on the Taxing Entities, who may not flip positions and disavow it in the very same brief by later claiming they challenged Farmers Co-op's eligibility. *See* Rule 208(b)(1)(c), SCACR (stating that any matters stated or alleged in appellant's statement of the case shall be binding on appellant).

The Taxing Entities argue they "appealed" the issue of Farmers Co-op's eligibility to the ALC by raising the topic in their Prehearing Statement, which (they claim) "stated plainly" that they were challenging the exemption granted to Farmers Co-op. *See* TE's Brief at 52 (quoting the Taxing Entities' Prehr'g Stmnt. at 2). A closer look at their Prehearing Statement, however, places

the cherry-picked excerpt they quote back into its context, and confirms that *only* FTCC and Diversified's assets (which, in a manner of speaking, were ultimately owned by Farmers Co-op) were at issue before the ALC, and, conversely, *that Farmers Co-op's property was* ***not*** *before the ALC*. The relevant portion of the Taxing Entities' Prehearing Statement says:

> Taxing Entities challenge the property tax exemption granted by the South Carolina Department of Revenue (the "Department") to Farmers Telephone Cooperative, Inc., FTC Communications LLC, and FTC Diversified Services, LLC ("Taxpayers") for tax years 2010 through 2017.[1] . . .
>
> Following execution of the Settlement Agreement, the Department issued assessment certifications ("Assessment Certifications") to each of the respective county auditors for Taxing Entities instructing the auditors to comply with the Department's determination of what property is exempt and what property is not exempt.[2]
>
> [1] *Tax years 2010 through 2015 are addressed in the Settlement Agreement . . . . Tax years 2016 and 2017 are addressed by the Assessment Certifications,* more particularly described in footnote #2, below.
>
> [2] *See* Memorandum dated July 6, 2017 to County Auditors from Taylor Ingram (relating to tax years 2010 through 2016), previously provided to this Court, in part, as Exhibit A to Consolidated Supplement to Request for Contested Case Hearings . . . ; Memorandum dated August 24, 2017 to County Auditors from Taylor Ingram (relating to tax year 2017), previously provided to this Court as Exhibit A to Consolidated Supplement to Request for Contested Case Hearing . . . .

Taxing Entities' Prehr'g Stmnt. at 2 (R. ___) (italics added) (original underlining omitted). Stated more simply, the Prehearing Statement confirms that the Taxing Entities were challenging *only* the exemption of property that was "addressed in the Settlement Agreement" and "addressed by the Assessment Certifications" that were listed and provided to the ALC. *See id.* at 2 nn.1–2 (R. ____).

None of those documents dealt with Farmers Co-op's own property. The Settlement Agreement, to which Farmers Co-op was a party due to its ownership of FTCC and Diversified,

addressed ***only*** *whether FTCC's and Diversified's property was entitled to the exemption* for tax years 2010 to 2015. *See* Trial Ex. 91, Settlement Agreement (R. ___). Similarly, the Assessment Certifications described in the Prehearing Statement and attached to the Taxing Entities' Requests for Contested Case Hearing relate ***only*** *to FTCC's and Diversified's property* determined to be exempt. *See* Trial Exs. 124–128, 130 (R. ___, ___). Accordingly, neither in their requests for a contested case hearing nor in their Prehearing Statement did the Taxing Entities challenge Farmers Co-op's exemption eligibility for its own (non-FTCC and non-Diversified) property. [29]

B. The issue of Farmers Co-op's eligibility to the Exemption is not preserved for appellate review.

The issue of Farmers Co-op's eligibility for the Exemption was not timely raised to and ruled upon by the ALC and is, therefore, not preserved for appellate review. As noted above, the Taxing Entities did not plead any claims against Farmers Co-op. *See* Part IV, *supra*. Accordingly, the ALC could not have ruled (and did not rule) on the Co-op's eligibility for the Exemption. *See Shirley v. Bishop*, 431 S.C. 412, 424–25, 848 S.E.2d 325, 331–32 (Ct. App. 2020) ("Generally, claims or defenses not presented in the pleadings will not be considered on appeal." (quoting *Fraternal Order of Police v. S.C. Dep't of Revenue*, 352 S.C. 420, 435, 574 S.E.2d 717, 725 (2002)); *see also Gainey v. Gainey*, 279 S.C. 68, 70, 301 S.E.2d 763, 764 (1983) ("[A] party may not receive relief which was not requested in the pleadings."). The ALC understood this and

[29] Also noteworthy is that under the Taxing Entities' jurisdictional theory that they may challenge an exemption determination by filing a request for contested case hearing within 30 days of the Department issuing a certification to a taxpayer (a theory the Farmers Entities dispute, *see* Farmers Entities' Brief at § I), their deadlines for challenging tax years 2010–2016 as to the Co-op would have been long passed when they filed the instant request for contested case hearing in July of 2017. And, as they never challenged any certifications granting the Exemption to Farmers Co-op until 2020 when they challenged certifications for tax year 2020 by filing a new case (*see* Request for Contested Case Hr'g dated September 10, 2020 (R. ___)), the eligibility of Farmers Co-op's property for tax years 2010-2018 (the only tax years at issue in this case) was obviously not an issue before the ALC.

properly ruled only on the eligibility of the two entities before it. *See* Am. Final Order at 99 (R. ___).

Further, as noted above, the first time the Taxing Entities raised the issue of Farmers Co-op's eligibility for the Exemption was in their Motion to Reconsider filed after the ALC had ruled. *See* Part IV, *supra*. "[I]t is axiomatic that an issue cannot be raised for the first time on appeal, but must have been *raised to and ruled upon* by the trial judge to be preserved for appellate review." *Miller v. Dillon*, 432 S.C. 197, 206–07, 851 S.E.2d 462, 467 (Ct. App. 2020) (emphasis added). And, while post-trial motions are required to preserve issues that were *previously raised* but not ruled upon, *see, e.g., I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 421–22, 526 S.E.2d 716, 724–25 (2000), a post-trial motion *cannot* be used to raise an issue for the first time. *See, e.g., Johnson v. Sonoco Prod. Co.*, 381 S.C. 172, 177, 672 S.E.2d 567, 570 (2009) ("An issue may not be raised for the first time in a motion to reconsider."); *Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.*, 368 S.C. 342, 372–73, 628 S.E.2d 902, 919 (Ct. App. 2006); *see also Ellie, Inc. v. Miccichi*, 358 S.C. 78, 102–03, 594 S.E.2d 485, 498 (Ct. App. 2004) ("Without an initial ruling by the trial court, a reviewing court simply would not be able to evaluate whether the trial court committed error." (citation omitted)).

Here, the Taxing Entities never raised the issue of Farmers Co-op's eligibility for the Exemption, and the ALC did not rule upon the issue as it was not before it. The Taxing Entities request in their Motion to Reconsider was too little, too late.

Ironically, after submitting to the ALC a proposed order limiting the issues to whether or not *FTCC and Diversified* qualified for the Exemption for tax years 2010 through 2018, *see* Taxing Entities Proposed Order at 2 (R. ___), the Taxing Entities now argue to this Court "that the ALC erred *by not holding* that Farmers *is ineligible* for the Exemption," *see* TE's Brief at 51 (emphasis

added), an argument they are forced to make in the negative because they *cannot* argue the ALC erred in concluding that Farmers Co-op *is* eligible for the Exemption because no such ruling exists as the issue was never before the ALC. The Taxing Entities are thus asking this Court to "reverse" a ruling that does not exist on an issue was not before the ALC (*see* Am. Order at 10 n.5 (R. ___)), and, accordingly, is not before this Court.

C. Farmers Co-op's participation in the suit as the parent company of FTCC and Diversified does not concede jurisdiction over property owned solely by Farmers Co-op itself.

The Taxing Entities argue that even if they never challenged the eligibility of Farmers Co-op's property, consideration of that topic is nevertheless warranted because "Farmers has never disputed the ALC's jurisdiction over Farmers." *See* TE's Brief at 52. As an initial matter, this is an incorrect representation of Farmers' positions, which included moving to dismiss the proceeding before the ALC for lack of jurisdiction (namely lack of standing by the Taxing Entities), *see* Mot. to Dismiss (R. ___), as well as arguing at length to this Court that the ALC lacked jurisdiction over the proceeding. *See* Farmers Entities' Brief at 13–29.

But even if Farmers Co-op had not challenged the ALC's jurisdiction, that does not mean that the ALC therefore had jurisdiction over the Co-op for claims never pled or asserted. Farmers Co-op's participation in this proceeding, and the reason the ALC likely included it as a party at the outset, is because of its interest in the property at issue, which is owned by its wholly-owned LLC subsidiaries and the fact that it was a party to the Settlement Agreement, which the Taxing Entities were challenging. But the fact that Farmers Co-op is an interested party in regard to *that* property and the Settlement Agreement does not mean that Farmers Co-op thereby consented to jurisdiction over *other* property and *other* claims that were never pled and were not at issue in the settlement.

Further, the ALC lacked jurisdiction over Farmers Co-op's property under the Taxing Entities' own theory of how the ALC supposedly attains such jurisdiction.[30] Specifically, the Taxing Entities have asserted that the ALC has jurisdiction over the claims against FTCC and Diversified based on the Taxing Entities' appeal of the certifications that followed the Settlement Agreement and the yearly certifications issued thereafter. *See* TE's Brief at 52–54. However, as previously stated, the Taxing Entities never filed a request for contested case hearing with attached certifications as to *Farmers Co-op* for any assessments granting the exemption as they did for FTCC and Diversified. *See* Part IV, *supra*. They first followed the procedure they claim is correct in 2020 when, in a separate proceeding brought after this appeal was underway, they specifically challenged the exemption as to Farmers Co-op and attached certifications related thereto. *See* Request for Contested Case Hr'g dated September 10, 2020 (R. ___). Thus, under the Taxing Entities' own jurisdictional argument (which, again, the Farmers Entities dispute), the ALC lacked jurisdiction over claims against Farmers Co-op as to the tax years at issue in this proceeding.

D. *CFRE, LLC* provides no support for the Taxing Entities' argument that this Court should rule on Farmers Co-op's assets when the Taxing Entities never appealed any decision by the Department on those assets.

The Taxing Entities argue the holding in *CFRE, LLC* requires a court to rule upon *all* of a corporation's assets even if the plaintiff has only alleged claims against the assets of a single-member LLC owned by that corporation. *See* TE's Brief at 54–55. This is absurd. Neither *CFRE, LLC* nor any other case supports this argument. Rather, *CFRE, LLC* stands for the entirely different and unremarkable proposition that the assets of a single-member LLC that is a disregarded entity

[30] The Farmers Entities continue to contend that the ALC does not have jurisdiction over any claims against any of the Farmers Entities for any tax years because no Department Determinations were issued by the Department. *See* Farmers Entities' Brief at § I.

for tax purposes are treated for tax purposes as if they are the assets of the LLC's owner. *See CFRE, LLC v. Greenville Cty. Assessor*, 395 S.C. 67, 716 S.E.2d 877 (2011).

The Taxing Entities' argument is not only unsupported by case law, it would lead to an absurd result. Imagine, for example, a corporation with hundreds of properties in the upstate of South Carolina and which also owns an LLC with one piece of property in Myrtle Beach. Taxing Entities are arguing that a lawsuit challenging the eligibility of the LLC's single piece of property for a property tax exemption—a lawsuit with no claims against the corporation or claims challenging the eligibility of its properties in the Upstate—somehow enables the court to simply take its conclusion with respect to the property in Myrtle Beach and "apply it" to all of the properties in the Upstate because the LLC is disregarded for tax purposes. This makes no sense, and the fact that the various properties may be similar does not make it any less absurd.

Jurisdictional defects are not cured because the claims a plaintiff failed to plead are similar to the claims it actually pled, and claims against an LLC's property does not somehow transform into claims against all property owned by the LLC's owner. A party must have properly pled all of its claims to place those claims before the Court. *See* Part IV, *supra*. As previously discussed, the Taxing Entities failed to do so. *Id.*

E. The ALC did not make all necessary findings of fact relating to Farmers Co-op's own property's eligibility for the Exemption.

The Taxing Entities also argue the ALC made all of the fact findings necessary to determine whether Farmers Co-op's assets are eligible for the exemption. *See* TE's Brief at 52. As explained more fully below, that statement is not true. (And even if it was, that does not on its own authorize the ALC (much less this Court) to rule on an issue that was not timely raised and is entirely absent from the pleadings.)

The discovery in this case and the evidence presented at trial pertaining to Farmers Co-op related solely to the eligibility of *FTCC and Diversified's assets* for the Exemption for tax years 2010 to 2018. Specifically, the following issues were addressed in discovery, at trial, and in the ALC's findings:

- That Farmers Co-op is a party to the Settlement Agreement that was being challenged (*see e.g.* Trial Ex. 91, Settlement Agreement (R. ___);
- That FTCC and Diversified, which are both disregarded entities for income tax purposes, are Farmers Co-op's wholly owned subsidiaries, and thus FTCC and Diversified could qualify for the exemption through the Co-op under *CFRE, LLC v. Greenville Cty. Assessor*, 395 S.C. 67, 716 S.E.2d 877 (2011) (*see, e.g.* Tr. 496:22 to 497:6 and 666:11 to 667:2 (R. ___to __ and ___ to __));
- Technical testimony related to how FTCC's and Diversified's networks operate (both are interconnected to some extent with the Co-op's network) (*see e.g.* Tr. 542:15 to 543:25 and 573:24 to 574:18 (R. ___ to __ and __ to __));
- Evidence regarding usage of the landline network (which included both the Co-op and Diversified) based on MOU (*see e.g.* Trial Ex. 179, ISUP Report (R. ___));
- Historical testimony, including how the Co-op has filed its tax returns and applied for the exemption in the past and that FTCC and Diversified filed their returns and applied for the exemption in the same manner (*see e.g.* Tr. at 472:20 to 473:24 and 476:20 to 480:8 (R. ___ to __ and __ to __)).

As the ALC correctly pointed out, "Farmers, FTCC and Diversified all share a common telephone network infrastructure, ***but each entity also separately owns a number of different assets.***" Am. Final Order at 2 (R. ___) (emphasis added). The bulk, if not all, of the evidence presented as to these different and specific assets pertained to property of FTCC and Diversified because those were the only assets at issue.[31] Even if the ALC made some factual rulings that could arguably pertain to a claim against Farmers Co-op (such as that FTCC and Diversified both

[31] *See generally* Tr. at 565:11 to 573:7 (R. ___to ___) (testimony describing specific assets of FTCC and Diversified and using demonstrative evidence including pictures of some of these assets and a sample of fiber optic cable).

use portions of Farmers Co-op's core network, *see* TE's Brief at 53), that does not mean all necessary fact findings were made (and they clearly were not), as there is no evidence in the Record regarding the specific property of Farmers Co-op that comprises that core network or that otherwise belongs to Farmers Co-op and is used in providing rural telephone service. Nor does the fact that some fact findings could pertain to Farmers Co-op cure the Taxing Entities' failure to plead any claims against it. Finally, nothing about the fact findings suggests, as the Taxing Entities claim, that "none of Farmers [Co-op's] property should be exempt" or that they should be only "partially exempt." *See* TE's Brief at 54. As previously explained, so long as the assets are used for the exempt purpose, they qualify for the exemption. *See supra* Part I.

In sum, the ALC correctly found that Farmers Co-op's property was not before it (*see* Am. Final Order at 10 n.5 (R. ___)), and it is, likewise, not before this Court.

V. The Taxing Entities lacked standing in this proceeding on any basis, including under Code section 12-4-535.

The Taxing Entities argue they have standing not only on the basis the ALC found, but also under S.C. Code Ann. § 12-4-535. *See* TE's Brief at 55–58.[32] They (and the ALC) are incorrect in their general belief that they have standing at all. *See* Farmers Entities' Mot. to Dismiss (R. ___); *see also* Farmers Entities' Brief at 13–29 (explaining the ALC's lack of jurisdiction over this proceeding). As explained more fully below, they are likewise incorrect in their more specific belief that they have standing pursuant to Code section 12-4-535, an argument the ALC correctly rejected. *See* Am. Final Order at 39–40 n.30 (R. ___).

[32] The Taxing Entities presumably raise this argument as a backup (and a tacit admission) in case this Court reverses—as it should—the ALC's erroneous analysis and ruling on standing and jurisdiction under two other statutes, namely Code sections 12-60-2130 and -2150(H). *See generally* TE's Brief at 55–58.

The Taxing Entities argue at length that they have complied with the statutory requirements of §§ 12-4-535(B) and (C). But the problem for the Taxing Entities—as the ALC explained—is that those subsections are not at play unless and until the Department first initiates the administrative process under § 12-4-535(A) by issuing a Department Determination—a threshold event that never occurred here.

On appeal, the Taxing Entities not only fail to explain how the ALC erred, they ignore the ALC's analysis completely and fail even to mention § 12-4-535(A). Instead, the Taxing Entities attempt to leapfrog over § 12-4-535(A) and state that "[t]he only issue remaining is whether Taxing Entities complied with the timing requirements of section 12-4-535 for each tax year in dispute." *See* TE's Brief at 56. The Taxing Entities' decision to ignore section 12-4-535(A) and the ALC's analysis appears to be strategic, presumably because—as explained below—the ALC's analysis on this point is correct and cannot be rebutted.

Section 12-4-535(A) states: "The department may issue a department determination *directing the appropriate county official to comply* with all applicable state law relating to the valuation, assessment, or taxation of property." (Emphasis added.) The ALC correctly ruled that "Subsection (A), when read in conjunction with the rest of the statute, clearly establishes the Department initiates the administrative process under this statute to ensure county officials comply with the applicable laws." Am. Final Order at 39–40, n.30 (citing *S.C. State Ports Auth. v. Jasper Cty.*, 368 S.C. 388, 398, 629 S.E.2d 624, 629 (2006)). Thus, section 12-4-535 as a whole is an enforcement statute establishing a regulatory process that commences with the Department's issuance of a Department Determination pursuant to § 12-4-535(A), which may be warranted when a county official refuses or fails to comply with applicable law. *Id.* Here, the ALC correctly found that section 12-4-535 was never triggered because the Taxing Entities "filed a contested case based

on the Department's directive in the Supplemental Certifications, thereby circumventing the need for such a confrontation" envisioned and addressed by § 12-4-535. *Id*.

In sum, the ALC properly concluded that § 12-4-535 does not give the Taxing Entities standing in this case, and the argument to the contrary of the Taxing Entities, who have not even attempted to explain how the ALC erred, should be rejected.

CONCLUSION

For the foregoing reasons as well as those set forth in their primary brief, Farmers Co-op, FTCC and Diversified respectfully request this Court reject the Taxing Entities' arguments and reverse the ALC's Amended Final Order for only the reasons set forth in the Farmers Entities' Brief.

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February 12, 2021
Charleston, South Carolina

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SC Court of Appeals

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. 17-ALJ-17-0237-CC

Appellate Case No. 2020-000983

Clarendon County, Florence County, Lee County, Sumter County, Williamsburg County, Williamsburg County School District, Clarendon School District Two, Florence School District One, Florence School District Three, Sumter County School District, Clarendon County Hospital District, Lee County School District, and Clarendon School District One..... Appellants/Respondents,

v.

Farmers Telephone Cooperative, Inc., FTC Communications, LLC, and FTC Diversified Services, LLC, ... Respondents/Appellants,

and

South Carolina Department of Revenue ..... Respondent.

PROOF OF SERVICE

I hereby certify that I have served via electronic mail a copy of the foregoing Initial Response Brief and Counter Designation of Matter to Be Included in the Record on Appeal of Respondents/Appellants Farmers Telephone Cooperative, Inc., FTC Communications, LLC, and FTC Diversified Services, LLC on parties' counsel of record at the following AIS information addresses:

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A copy of the e-mail serving this document is attached hereto.

Bryson M. Geer

February 12, 2021

From: Bryson Geer
Sent: Friday, February 12, 2021 7:09 PM
To: Walter H. Cartin (waltcartin@parkerpoe.com); 'Michael Kozlarek'; Madison Felder; Dawson, Jr., Katon E.; Jason Luther; Jana E. Shealy
Cc: John Von Lehe; Gene DuRant; Miles Coleman; Quillen, Colleen C.; Amber Hogan; Lydia Spry
Subject: Clarendon County et al. v. SCDOR and Farmers et al. (Appellate Case No. 2020-000983)
Attachments: 2021.02.12 F-L Farmers Initial Response Brief and Counter-Designation of Matter.pdf; 2021.02.12 Farmers Entities' Counter-Designation of Matter to be Included in Record of Appeal.pdf; 2021.02.12 Proof of Service - Farmers Initial Response Brief and Counter-Designation.pdf; 2021.2.12 -- Clarendon Cnty. v. SCDOR et al. -- Initial Response Brief of Farmers Entities.pdf

All- Please see attached letter regarding the filing of Farmers' Initial Response Brief and Counter-Designation of Matter to be Included in the Record on Appeal in the above matter and a copy both filings, which were electronically filed today. We have also attached a proof of service (minus a copy of this email), which we will file shortly.

Please don't hesitate to call or email me with any questions or concerns.

Thanks,

Bryson

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February 12, 2021

VIA E-FILING
The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1220 Senate Street
PO Box 11629
Columbia, SC 29211

RE: Clarendon County, et al. v. South Carolina Department of Revenue, Farmers Telephone Cooperative, Inc., FTC Communications, LLC, and FTC Diversified Services, LLC
ALC Case No.: 17-ALJ-17-0237-CC
Appellate Case No.: 2020-000983
Our File No.: 029623/09019

Dear Ms. Kitchings:

Enclosed for electronic filing in the above matter, please find Respondents/Appellants Farmers Telephone Cooperative, Inc., FTC Communications, LLC and FTC Diversified Services, LLC's Initial Response Brief, Counter Designation of Matter to be Included in the Record on Appeal and Proof of Service.

By copy of this letter to all counsel, we are hereby serving them with a copy of each of the above documents. We ask that, at your convenience, you return a copy of the attached documents to us bearing the Court's file stamp.

Thank you for your assistance, and please do not hesitate to contact us should the Court require any additional information.

With kind regards,

Bryson M. Geer

BMG:ls
Enclosures
cc: Walter H. Cartin, Esq.
Katon E. Dawson, Jr., Esq.
Madison Felder, Esq.
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