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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

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Appellate Case No. 2020-000983
Trial Court Case No. 17-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 Department of Revenue, Farmers Telephone Cooperative, Inc., FTC Communications, LLC, and FTC Diversified Services, LLC, ... Respondents.

Of Which, Farmers Telephone Cooperative, Inc., FTC Communications, LLC and FTC Diversified Services, LLC, are the Respondents-Appellants

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APPELLANTS-RESPONDENTS' RESPONSE TO *AMICI CURIAE* BRIEF OF HORRY TELEPHONE COOPERATIVE, INC.; PALMETTO RURAL TELEPHONE COOPERATIVE, INC.; SANDHILL TELEPHONE COOPERATIVE, INC.; AND WEST CAROLINA RURAL TELEPHONE COOPERATIVE, INC.

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INTRODUCTION

Appellants-Respondents ("Taxing Entities") offer this Response in opposition to the *Amici Curiae* Brief submitted by Horry Telephone Cooperative, Inc.; Palmetto Rural Telephone Cooperative, Inc.; Piedmont Rural Telephone Cooperative, Inc.; Sandhill Telephone Cooperative, Inc.; and West Carolina Rural Telephone Cooperative, Inc. (collectively, the "Cooperatives") in support of Respondents/Appellants ("Taxpayers").

The primary flaw with the Cooperatives' arguments is that the Cooperatives attempt to expand the meaning of "rural telephone service" as used in section 12-37-220(B)(10) (the "Exemption") to include *all* telecommunications services provided through modern-day broadband and wireless networks. To do so, the Cooperatives point out the different ways the General Assembly has sought to incentivize and subsidize efforts to increase all broadband and wireless telecommunications services (e.g., internet access and wireless cellular services) in rural areas throughout South Carolina. However, "rural telephone service" and broadband and wireless telecommunications services are not the same. As the term "telecommunications services" implies, many more services than just "rural telephone service" are necessarily included. And, although it is true that the General Assembly has enacted other, different statutory and regulatory schemes in an effort to increase broadband and wireless telecommunications services in rural areas of South Carolina, these enactments have all taken place well after the Exemption was enacted and are separate and apart from the Exemption afforded in section 12-37-220(B)(10). If anything, the Cooperatives' arguments prove the opposite point: the General Assembly chose to incentivize and subsidize the provision of broadband and wireless telecommunications services to rural South Carolinians through means other than a property tax exemption.

The Cooperatives, like Taxpayers, also incorrectly assert that Taxing Entities' argue that the meaning of "rural telephone service" "must be limited to the technology that existed at the time

the statute was enacted." (Cooperative's Br. 8). As stated in Taxing Entities' other briefs, at no point have Taxing Entities made this argument.[1] The Cooperatives put forth this false narrative in hopes that this Court will expand the General Assembly's 1978 meaning of "rural telephone service" to include all telecommunications services that now exist today. This is a bridge too far. Although older statutes can accommodate new technologies—as the Exemption does in this case for the transition from copper wires to fiberoptic cable—the Cooperatives are not proposing that the Exemption accommodate new technology that provides the same service. Rather, the Cooperatives are asking this Court to expand the Exemption's application to new technology that provides an entirely new set of services not contemplated by the General Assembly in 1978. The Cooperatives' proposed interpretation is not supported by the statutory text, the legislative history, or the commonly understood meaning of the statutory terms at issue in this case.

Finally, the Cooperatives seek summarily to dismiss the principle that in every tax exemption statute there exists an implicit *de minimis* threshold use requirement. The Cooperatives do so by pointing out all of the other statutes in Title 12 of the South Carolina Code that contain a modifier to the word "used." However, the Cooperative's arguments fail to show why the lack of any modifier in section 12-37-220(B)(10) has any effect on the *de minimis* threshold use requirement. The principle that a *de minimis* use of property for an exempt purpose is not sufficient to render that property eligible for the relevant tax exemption exists in every tax exemption statute

[1] In an attempt to distort Taxing Entities' actual interpretation of section 12-37-220(B)(10), the Cooperatives, like Taxpayers, argue that Taxing Entities' interpretation results in a conclusion that telephone service can only be provided through technology that existed in 1978. (*See* Cooperatives' Br. 7). However, Taxing Entities' have only ever argued that if the term "rural telephone service" is given its plain and ordinary meaning as understood by the General Assembly at the time the Exemption was enacted, then the meaning of "rural telephone service" must be restricted to the provision of voice communication through an unbroken physical connection. This can occur through copper wire, which existed in 1978, or through the fiber optic cables that are still replacing copper wires to this day.

unless the statute indicates expressly to the contrary. The Exemption does not indicate to the contrary. Therefore, a *de minimis* use of property to provide "rural telephone service" is not sufficient to render the property eligible for the Exemption.

ARGUMENTS

I. "Rural Telephone Service" Does Not Include All Broadband and Wireless Telecommunications Services.

The Exemption's plain language is clear: only the property that is used in providing "rural telephone service" is exempt from property taxation. S.C. Code Ann. § 12-37-220(B)(10). This term was used by the General Assembly when the Exemption was enacted in 1978. At that time, voice communication through an unbroken physical connection was the only available method for people to communicate through a telephone. It was not until 1983 that other telecommunications services—whether it be internet access or wireless cellular services—were first made available to the public. (Tr. 246:25–247:1; R. 1759–60).

The Cooperatives are asking this Court to define "rural telephone service," as used by the General Assembly in 1978, to include all modern-day broadband and wireless telecommunications services, such as the internet and the full range of wireless cellular services presently offered by the Cooperatives and Taxpayers. However, the terms "telecommunications services" and "broadband service" were both defined by the General Assembly in a separate Title of the South Carolina Code well after the Exemption was enacted. There is no indication whatsoever that the General Assembly intended to apply these subsequently enacted definitions to the Exemption's meaning of "rural telephone service."

In 1996,[2] the General Assembly defined "telecommunications services" to mean "the services for the transmission of **voice and data communications** to the public for hire, including those nonwireline services provided in competition to landline services." S.C. Code Ann. § 58-9-10(15) (emphasis added). Then, in 2003,[3] the General Assembly defined "broadband service" to mean "a service that is used to **deliver video or to provide access to the Internet** or content and services similar to that accessible through the Internet." *Id.* § 58-9-10(17) (emphasis added). These subsequently enacted statutes show that "rural telephone service" and "broadband service" are completely different services, and that "telecommunications services" include far more services than just "rural telephone service."

Furthermore, the fact that the General Assembly added these terms to a separate Title of the South Carolina Code, approximately 18 and 25 years *after* the Exemption was enacted, shows two things: (1) the General Assembly is capable of enacting and amending statutes in response to technological advancements; and (2) the General Assembly chose to respond to technological advancements in the telecommunications industry through a separate statutory scheme. If the General Assembly intended for the Exemption to apply to all property used in providing "telecommunications services" and/or "broadband service," then it could have amended section 12-37-220(B)(10) expressly to state so, or it could have cross-referenced section 12-37-220(B)(10) when it amended section 58-9-10 to include additional definitions. However, the General Assembly did not do either, and the Exemption remains entirely unchanged since 1978.

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[2] *See* 1996 Act No. 354, § 1 (eff. May 29, 1996) (stating "[a]n act to amend section 58-9-10 . . . **so as to add provisions defining . . . 'telecommunications services'**. . .") (capitalization removed from original) (bold emphasis added).

[3] *See* 2003 Act No. 6, § 1 (eff. Mar. 12, 2003) (stating "[a]n act to amend section 58-9-10 . . . **so as to provide a definition for 'broadband service'** . . .) (capitalization removed from original) (bold emphasis added).

In support of the Cooperatives' argument that "rural telephone service" should be defined by this Court to include both "telecommunications services" and "broadband service," the Cooperatives assert two incorrect arguments: (1) in 1978, "telephone service" was understood to be provided through means other than an unbroken physical connection; and (2) restricting the application of "rural telephone service" to voice communication through an unbroken physical connection would undermine the State's policy on promoting broadband and wireless telecommunications services. As explained below, neither of these conclusions is correct.

A. When the Exemption was Enacted in 1978, "Rural Telephone Service" Meant Voice Communication that was Provided through an Unbroken Physical Connection.

The Cooperatives argue that "telephone service" in the 1970s was not understood to mean voice communication through an unbroken physical connection. To do so, they provide a definition from the 1971 edition of the *Compact Edition of the Oxford English Dictionary*. However, the Record shows that, in the 1970s, "telephone service" was only capable of being provided through an unbroken physical connection, and was understood in the industry, specifically, to mean "voice traffic over a pair of copper wires." (Tr. 259:17–21 & 388:15–23; R. 1172 & 1901).

In addition, the plain and ordinary meaning of "telephone service" in the 1970s was also understood to mean voice communication through an unbroken physical connection. *See Telephone*, WEBSTER'S NEW COLLEGIATE DICTIONARY (1973) (defining "telephone" as "an instrument for reproducing sounds at a distance; **specifically: one in which sound is converted into electrical impulses by wire**") (emphasis added)[4]; *Telephone*, THE OXFORD ENGLISH DICTIONARY (2d) (1989) (defining "telephone" as "[a]n apparatus for reproducing sound, especially that of a voice, at a great distance, by means of electricity; consisting, like the electric

[4] This definition remained the same throughout subsequent editions. *See Telephone*, WEBSTER'S NEW COLLEGIATE DICTIONARY (1975), (1979), and (1980).

telegraph, **of transmitting and receiving instruments connected by line or wire which conveys the electric current**").

As shown by these definitions, "telephone service" in 1978 was limited to (1) voice communications (2) that occurred through an unbroken physical connection. The Cooperatives are unable to show that the General Assembly intended the definitions of "telecommunications services" or "broadband service" located in another Title of the South Carolina Code to apply to "rural telephone service" as used in the Exemption. Therefore, "rural telephone service" must be given its plain, ordinary meaning that would have been understood in 1978: voice communication that occurs through an unbroken physical connection.

B. Taxing Entities' Interpretation of "Rural Telephone Service" Has No Effect on the State's Policy of Promoting Broadband and Wireless Telecommunications Services.

The Cooperatives also argue that adopting Taxing Entities' interpretation of "rural telephone service" would undermine the State's policy of promoting broadband and wireless telecommunications services. "Rural telephone service" and modern-day broadband and wireless telecommunications services are not the same. The General Assembly's chosen definitions for "telecommunications services" and "broadband service" show this explicitly. *See* S.C. Code Ann. § 58-9-10(15) & (17). Thus, interpreting "rural telephone service" to include only voice communication through an unbroken physical connection will have no effect on the State's policy of promoting broadband and wireless telecommunications services in rural areas of South Carolina.

On the other hand, the Cooperatives are asking this Court to expand the Exemption's meaning so that it now covers all property used to provide modern-day broadband and wireless telecommunications services. The reason the Cooperatives put forth this overly broad definition of "rural telephone service" is simple: their modern-day networks are being built primarily to

provide broadband and wireless telecommunications services—not landline telephone service. But, no matter how desperately the Cooperatives and Taxpayers wish to expand the meaning of "rural telephone service" to include all broadband and wireless telecommunications services, the fact remains that the Exemption was originally intended for the specific purpose of defraying the cost of telephone poles and wires so that telephone companies and rural telephone cooperatives could afford to provide rural South Carolinians with landline telephone service.

Landline telephone service is being replaced more and more by other forms of telecommunications, such as internet services and wireless cellular services. While increasing access to *all* broadband and wireless telecommunications services is a laudable policy goal, the Exemption was not intended for the property used to provide the full suite of modern-day services the Cooperatives and Taxpayers now provide. This is made clear by the General Assembly's subsequent enactments to incentivize and subsidize the provision of broadband and wireless telecommunications services through means other than a property tax exemption and the General Assembly's decision not to amend the Exemption to include the property that provides these services.

Specifically, the General Assembly has chosen to incentivize and subsidize electric cooperatives to provide broadband service in rural areas of South Carolina. S.C. Code Ann. § 58-9-3000(B)(3) ("With this chapter, the General Assembly intends to authorize **electric cooperatives** to (a) invest in or deploy broadband facilities and (b) provide broadband service in this State.") (emphasis added). And, as made clear by the Cooperative's own brief, the General Assembly makes continued efforts to subsidize the provision of broadband service in rural areas and "has committed tens of millions of dollars to expanding broadband to rural areas of the State." (*See* Cooperatives' Br. 9–10 (citing S.C. Code Ann. § 58-9-3000(B)(1); 2020 S.C. Acts No. 142, § 10; & Rural Broadband Grant Program, S.C. Office of Regulatory Staff)). Moreover, the South

Carolina Public Service Commission has mechanisms in place to encourage local telephone companies to implement new technologies so that they main remain competitive with other providers. *See S.C. Cable Television Ass'n v. Public Serv. Comm'n of S.C.*, 313 S.C. 48, 52, 537 S.E.2d 38, 40 (citing S.C. Code Ann. § 58-9-330) ("The policy expressed by the [Public Service Commission] in adopting the [Earnings Sharing Plan] is a desire to provide an incentive for [local telephone companies] to adopt new technologies in order to remain competitive and to allow them to share in profits generated by these improvements.").

In its Final Order, the ALC also noted some of the incentives afforded to Taxpayers through both federal and South Carolina statutory schemes, separate and apart from Title 12 of the South Carolina Code. With respect to Farmers and FTCC, specifically, the ALC stated that as incumbent local exchange carriers, Farmers and FTCC are afforded "certain protections from competition" pursuant to sections 58-9-10, *et seq.* (Order 16; R. 22). And, as part of the establishment of the Universal Service Fund, "[b]oth Farmers and FTCC are carriers of last resort that receive USF funds from [sic] to assist them provisioning service in high-cost areas. FTCC was the first provider to receive high cost support through the Federal USF and the [South Carolina Public Service Commission] for **wireless telephone service**." (Order 18; R. 24) (emphasis added).

Put more plainly, the General Assembly has chosen to incentivize technological advancements in the telecommunications industry through other statutory schemes. *See* S.C. Code Ann. §§ 58-9-10, *et seq.* Therefore, Taxing Entities' interpretation does not and cannot undermine the State's policy of promoting broadband and wireless telecommunications services because this interpretation has no impact whatsoever on any of the other South Carolina statutes and regulations that incentivize and subsidize the provision of broadband and wireless telecommunications services.

On the other hand, the Cooperatives and Taxpayers seek to expand the Exemption's application to include property that is used to provide broadband and wireless telecommunications services by suggesting that other South Carolina statutes—which were all enacted well after the Exemption, are in a separate Title of the South Carolina Code, and are governed by completely different South Carolina administrative agencies—are relevant to determining the General Assembly's intended meaning of "rural telephone service." However, these subsequently enacted statutes are in no way relevant. Using these statutes to determine the Exemption's meaning is an improper method of statutory interpretation. *See Food Marketing Institute v. Argus Leader Media*, 139 S.Ct. 2356, 2365–66 (2019) (stating that the legislature's use of language in subsequently enacted statutes "tells us nothing about [the legislature's] understanding of the language it enacted" in an earlier period); *Union Carbide Corp. v. Richards*, 721 F.3d 307, 316 (4th Cir. 2013) ("As the Supreme Court has observed, 'post-enactment legislative history (a contradiction in terms) is not a legitimate tool of statutory interpretation.'" (quoting *Bruesewitz v. Wyeth LLC*, 562 U.S. 223, 242 (2011)).

If the General Assembly intended to expand the original scope and meaning of "rural telephone service" to include all "telecommunications services" or "broadband service," then it could have done so by amending section 12-37-220(B)(10) or by explicitly referencing section 12-37-220(B)(10) in a subsequent statutory enactment, but the General Assembly did not. Rather, the Exemption remains unchanged since 1978. Therefore, the meaning of "rural telephone service" must be limited to what the General Assembly intended in 1978. The Record, along with all common definitions existing in or around 1978, show that the meaning of "rural telephone service" must be limited to voice communication through an unbroken physical connection.

II. A *De Minimis* Use of Property to Provide "Rural Telephone Service" is Not Sufficient to Render the Property Eligible for the Exemption.

The Cooperatives further argue that a *de minimis* threshold use requirement does not exist in the Exemption because section 12-37-220(B)(10) does not contain a modifier on the level of use required such as "exclusively," "primarily," or "solely." Thus, the Cooperatives maintain that *any* level of use of property to provide "rural telephone service" is sufficient to qualify for the Exemption. However, the Cooperatives' argument misses the point entirely: it is the absence of an explicit use requirement in section 12-37-220(B)(10) that triggers the principle that a *de minimis* use of property to provide "rural telephone service" is not sufficient to render that property eligible for the Exemption. As expressed by the United States Supreme Court, the *de minimis* principle "is part of the established background of legal principles against which all enactments are adopted, and which all enactments (absent contrary indication) are deemed to accept." *See Wisconsin Dep't of Rev. v. William Wrigley, Jr., Co.*, 505 U.S. 214, 231 (1992).[5]

Taxing Entities are not arguing that Taxpayers' and the Cooperatives' property must be used exclusively, solely, or even primarily for the provision of "rural telephone service." Rather, the level at which Taxpayers' use their property to provide "rural telephone service" is *de minimis*, and Taxpayers' property is, therefore, not used at a sufficient level to receive the Exemption. The Record shows that a mere 0.45% of Taxpayers' property was used to provide voice services in 2018. (Trial Ex. 134; R. 3861). The Record also shows that the amount of Taxpayers' property used to provide voice services has declined each year since at least 2010. (Trial Ex. 134; R. 3861; *see also* Order 67; R. 73). Not even Taxpayers' tax attorney believes this level of use constitutes a bonafide use of property for purposes of the Exemption. (Tr. 684:6–16; R. 2197) (Taxpayers' tax

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[5] (citing *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 618 (1992); *Hudson v. McMillan*, 503 U.S. 1, 8–9 (1992); *Ingraham v. Wright*, 430 U.S. 651, 674 (1977); *Abbott Labs. v. Portland Retail Druggists Ass'n, Inc.*, 425 U.S. 1, 18 (1976); *Indus. Ass'n of San Francisco v. United States*, 268 U.S. 64, 84 (1925)).

attorney testifying at the hearing that only 1% of property being used for an exempt purpose would *not* constitute a bonafide use).

In the only reported South Carolina case addressing a tax exemption statute that did not contain an explicit threshold use requirement, the Court held that "only a minimum use" for an exempt purpose would not be sufficient to qualify for the exemption. *Hercules Contractors & Eng'rs, Inc. v. S.C. Tax Comm'n*, 280 S.C. 426, 439, 313 S.E.2d 300, 308 (Ct. App. 1984). In other words, a *de minimis* use of property for an exempt purpose was not sufficient to qualify for the relevant tax exemption. Yet, the Cooperative's simply state that the Court cannot make the same conclusion in this case because other provisions in Title 12 contain a modifier to the word "used." This argument is entirely illogical—as noted above, it is exactly because section 12-37-220(B)(10) does not contain an explicit threshold use requirement that the *de minimis* principle applies. *See, e.g., Wisconsin Dep't of Rev.*, 505 U.S. at 231 (stating that all statutes "absent contrary indication" are deemed to accept the *de minimis* principle).

Additionally, the Cooperative's argue that even if the *Hercules* Court read a *de minimis* requirement into section 12-35-550(17) (1976), the Court cannot do so in this case because "the General Assembly already imposed degree-of-use requirements in various exemptions" in section 12-37-220. (Cooperatives' Br. 6). This argument completely ignores the fact that the relevant statute in *Hercules*, section 12-35-550 (1976), involved another sales tax exemption that contained a specific level of "use" required to receive the exemption. The statutory provision immediately following the specific provision at issue in *Hercules* exempted from sales tax "[t]he gross proceeds of the sale of fuel for use **exclusively** in the curing of agricultural products." S.C. Code Ann. § 12-35-550(18) (1976) (emphasis added). Therefore, applying a *de minimis* use threshold to section 12-37-220(B)(10) is no different—in fact, it is completely consistent with—the *Hercules* Court's application of the *de minimis* use threshold to section 12-35-550(17) (1976).

Moreover, the Cooperatives argue that if property is capable of making rural telephone service "*available*," that property should be eligible for the exemption, no matter how the property is actually used. [6] This argument imposes words into the statute that simply are not there. There is nothing in the text of section 12-37-220(B)(10) stating property that simply makes telephone service *available* is exempt from taxation. Rather, the Exemption is available for the property that is "**used** in providing rural telephone service." S.C. Code Ann. § 12-37-220(B)(10) (emphasis added). Therefore, even if a rural telephone cooperative's property makes "rural telephone service" available, it remains necessary to determine if, and to what extent, that property is actually used to provide "rural telephone service." If that property is only used in a *de minimis* amount to provide "rural telephone service," then it cannot be eligible for the Exemption.

Finally, the Cooperatives argue that even if an implicit *de minimis* threshold use requirement exists within section 12-37-220(B), "the Administrative Law Court properly rejected the Taxing Entities' argument that rural telephone networks are used only to a de minimis extent to provide telephone service." (Cooperatives' Br. 6). This statement is incorrect. Instead, the ALC explicitly held that "the relative use of Taxpayer's network for voice telephone service is declining and is becoming more and more **de minimis**." (Am. Order 67; R. 73) (emphasis in original). And, "the evidence shows Taxpayers' interconnected network is **only incidentally used in providing voice services**." (Am. Order 67; R. 73).

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[6] This argument is similar in nature to Taxpayers' argument that the relative use of property to provide rural service does not matter because that property is used to provide *access* to rural telephone service. (*See* Taxpayers' Resp. Br. 27). The Cooperatives' argument is wrong for the same reason. It imposes words into section 12-37-220(B)(10) that the General Assembly did not use when enacting the Exemption. This "method" of interpretation is contrary to well-settled rules of statutory interpretation. *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.").

In this case, as in *Hercules*, it would be unreasonable to conclude that the General Assembly intended only a *de minimis* use of a rural telephone cooperative's property to provide "rural telephone service" be sufficient to render that property eligible for a tax exemption. *See Hercules*, 280 S.C. at 439, 313 S.E.2d at 308. The Record shows that Taxpayers' use their property to provide "rural telephone service" in only a *de minimis* amount and is becoming "more and more *de minimis*" each year. Therefore, the level at which Taxpayers' use their property to provide "rural telephone service" is not sufficient to qualify for the Exemption.

CONCLUSION

For these reasons, the Cooperatives' arguments must be rejected. The Exemption's meaning of "rural telephone service" must be limited to voice communication provided through an unbroken physical connection as was intended by the General Assembly in 1978. And, any property that is not used in more than a *de minimis* amount to provide "rural telephone service" as compared to that property's overall use to provide other broadband and wireless telecommunications services, is not be eligible for the Exemption.

Respectfully submitted,

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