

RECEIVED

Nov 01 2021

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

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 Department 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 are..... Respondents/Appellants.

**JOINT MOTION FOR CERTIFICATION TO
THE SOUTH CAROLINA SUPREME COURT**

Pursuant to Rule 204(b), SCACR, the parties move jointly to certify and transfer this appeal to the Supreme Court without awaiting the Court of Appeals’ consideration and ruling. This case raises multiple issues of significant public interest—both to the parties and to numerous similarly situated political subdivisions and taxpayers—including the scope of the Department of Revenue’s (“SCDOR” or the “Department”) statutory authority to settle disputes with taxpayers; whether and

when political subdivisions can challenge such settlements; the extent of the Administrative Law Court’s (“ALC”) jurisdiction to review agency decisions; the interpretation and application of the Rural Telephone Service Exemption; the permissibility of certain SCDOR procedures and practices; the bounds of local governments’ taxing authority; and the ALC’s application (or misapplication) of the doctrine of agency deference.

Further, in the absence of this Court’s expedited review pursuant to Rule 204(b), the parties, including more than a dozen political subdivisions and three rural telephone providers, bear the risk that, as the amounts in controversy continue to accumulate with each passing year, the eventual losing parties—whomever they may be—may struggle to comply promptly and fully with their payment or reimbursement obligations or may face challenges making such payments while still maintaining their planned level of expenses and provision of services or otherwise complying with their budgets.

Accordingly, and as explained more fully below, the parties jointly and respectfully ask this Court to certify and transfer the appeal for this Court’s direct review.

FACTUAL AND PROCEDURAL BACKGROUND¹

Farmers Telephone Cooperative, Inc. (“Farmers Co-op”) is a telephone cooperative incorporated in 1952 to provide rural telephone service in South Carolina. Like other telephone providers of that era, Farmers Co-op initially offered only voice telephone service through analog technology and copper wires. As technology and consumer demand evolved, Farmers Co-op expanded its offerings over the years to provide telecommunications and broadband services. All of Farmers Co-op’s property has always been exempted from property taxation by SCDOR

¹ For the readers’ efficiency, this section has been pared down to the essential facts necessary to provide context for the Court’s consideration of this Motion. The parties’ briefs filed with the Court of Appeals set out the factual background and procedural history in much greater detail.

pursuant to the Rural Telephone Service Exemption, S.C. Code Ann. § 12-37-220(B)(10) (the “Exemption”), which exempts property used to provide “rural telephone service.” The Exemption does not define “rural telephone service.”

FTC Communications, LLC (“FTCC”) was organized as a single-member LLC of Farmers Co-op in 2009 to provide wireless telephone services. Three years later, FTC Diversified Services, LLC (“Diversified”) was organized as a single-member LLC of Farmers Co-op to provide landline telephone service as well as internet, internet protocol television, and security services to regions within Farmers Co-op’s general service area where Farmers Co-op cannot (per FCC regulations) itself provide service.

During the first three years of its existence, FTCC filed property tax returns and did not seek or receive any exemption pursuant to the Rural Telephone Service Exemption. In 2012, however, following this Court’s ruling in *CFRE, LLC v. Greenville County Assessor*, 395 S.C. 67, 716 S.E.2d 877 (2011), FTCC applied for the Exemption for tax year 2012 and protested SCDOR’s proposed assessment because it did not exempt FTCC’s property. In response, SCDOR issued a revised assessment for 80% of the originally assessed amount and sent a memorandum to the county auditors for the Taxing Entities advising that FTCC had protested the assessment and a copy of the revised assessment. The counties then issued an 80% property tax bill, which FTCC paid. FTCC subsequently wrote to SCDOR to request the property tax exemption for FTCC’s property used to provide rural telephone services for tax years 2010 and 2011 and requested a refund for those years.

Diversified, which was not created until 2012, followed a similar practice. Diversified and FTCC both filed tax returns in 2013, 2014, and 2015 that SCDOR treated as applications for exemption. Diversified and FTCC also protested SCDOR’s proposed assessments because the assessments did not exempt their properties from property tax pursuant to S.C. Code Ann. § 12-

37-220(B)(10). In each of those years, SCDOR responded by issuing revised assessments for 80% of the originally assessed amounts and provided a copy of the revised assessments to Diversified and FTCC. In each of those years, the Department also sent a memorandum to the respective auditor for each affected county advising the county auditors that Diversified and FTCC had protested the assessments and a copy of the revised assessments. In each year, the counties issued tax bills for 80% of the originally assessed amount, and FTCC and Diversified paid these taxes.

From the time of FTCC's first letter to the Department in the summer of 2012 until the end of 2016, FTCC and Diversified engaged in extensive discussions and negotiations with SCDOR over whether FTCC and Diversified qualified for the Exemption. On January 8, 2017, SCDOR entered into a settlement with FTCC, Diversified, and Farmers Co-op (collectively, the "Farmers Entities"). In the Settlement Agreement, the Department granted FTCC and Diversified the Exemption for tax years 2010 through 2016; the Department and the Farmers Entities agreed that property used to provide FTCC's wireless cellular service and Diversified's landline telephone service qualified for the Exemption; and they agreed that property used only to provide other services (such as internet access and services, digital TV and alarm services) was not exempt. Further, SCDOR and the Farmers Entities agreed that FTCC and Diversified would file amended property tax returns for every applicable tax year to allow the Department to calculate and issue certified revised assessments to the applicable counties. The Settlement Agreement contemplated that upon receipt of the certified final assessments, each county would calculate a revised property tax amount for each tax year. The net effect was to exempt several million dollars' worth of property used in providing landline and wireless telephone services and to require the Taxing Entities either to issue refunds to FTCC and Diversified or to credit those amounts toward the taxes due over the next three years (or whatever other period of time was agreed upon by the Farmers Entities and the Taxing Entities). The Taxing Entities were not parties to the Settlement

Agreement, and they were not consulted about its terms during the negotiation process or prior to its execution.

On July 10, 2017, Clarendon County commenced this proceeding by filing a request for a contested case hearing before the ALC challenging the terms of the Settlement Agreement. Twelve other political subdivisions intervened in the case. The Farmers Entities moved to dismiss the proceeding for lack of jurisdiction, and the Taxing Entities moved for partial summary judgment. The ALC denied both motions. After discovery, SCDOR filed a Motion for Partial Summary Judgment, arguing it had entered a binding settlement agreement with the Farmers Entities and that under Section 12-4-320 of the South Carolina Code, the settlement was enforceable and could not be reopened. The ALC granted the motion in part, finding that the settlement agreement was binding between the parties to the agreement but declining to rule on the effect of that settlement as to the Taxing Entities.

The ALC conducted a contested case hearing in this matter in May of 2019 before the Honorable Ralph K. Anderson, III. Judge Anderson issued a Final Order and, subsequently, issued an Amended Final Order finding that FTCC and Diversified provide “rural telephone service” (among other services) and that the landline and wireless assets used to provide rural telephone service (among other services) qualify for the Exemption. The ALC devised its own method to determine the relative use of those assets and concluded that Diversified’s landline assets and FTCC’s wireless assets were entitled to a 75% exemption. The ALC further found that FTCC timely applied for and was entitled to receive the Exemption for tax years 2014–2018, but not 2010–2013, and that Diversified had not properly applied for and, therefore, was not entitled to

receive the Exemption for any of the tax years at issue except 2018. All parties appealed.² The parties filed their final briefs with the Court of Appeals on June 3, 2021.

ARGUMENTS FOR CERTIFICATION

Rule 204(b), SCACR, states that “[c]ertification is normally appropriate where the case involves an issue of significant public interest or a legal principle of major importance.” This appeal presents both in abundance. The resolution of the issues in this case will have far-reaching practical effects on South Carolina’s counties and rural telephone cooperatives, including those not party to this suit, and on the Department’s authority to settle disputes with taxpayers in a variety of contexts. Further, the legal questions raised in this appeal—including the ALC’s subject matter jurisdiction over settlement agreements between the Department and taxpayers, the doctrine of agency deference, and how statutory texts should be interpreted and applied in the context of technological evolution—involve legal principles of broad relevance and major importance about which the Court’s guidance is needed.

First, the jurisdictional and procedural issues on appeal implicate important legal principles affecting SCDOR’s operations and interactions with taxpayers, the way in which SCDOR can resolve disputes with taxpayers, and what role, if any, counties in South Carolina have in reviewing and challenging such settlements. The Taxing Entities assert that the Department’s resolution of eight years’ worth of tax protests via a settlement agreement between the Department and the Farmers Entities regarding the Exemption’s application, without the Taxing Entities being made a party to that agreement or otherwise consenting to its terms when the agreement affects property

² Although the Department initially appealed the ALC’s Amended Final Order, on November 10, 2020, the Department filed a motion to withdraw its appeal, which was granted by the Court of Appeals.

tax revenues belonging to the Taxing Entities, violates the South Carolina Revenue Procedures Act (the “SCRPA”) and is inconsistent with the legislative taxation scheme.

On the other hand, the Department and the Farmers Entities assert that under the SCRPA, the Department’s settlement agreement with a taxpayer is final, conclusive, and not subject to judicial review, except in very limited circumstances such as fraud or malfeasance. The Department and the Farmers Entities also assert that no “department determination,” which statutorily triggers appeal rights for counties, is issued when the Department resolves a matter with a taxpayer via settlement agreement, meaning the ALC lacked jurisdiction to hear the contested case giving rise to this appeal. On the other hand, the Taxing Entities assert that the Department’s and the Farmers Entities’ stance on this issue is contrary to the plain language of the SCRPA, and that a “department determination” is issued when the Department renders its final decision on an issue. The Taxing Entities also assert that a settlement agreement between the Department and a taxpayer is not final and conclusive, and is subject to judicial review, in situations where local governments that are impacted by the terms of the settlement agreement are not parties to the agreement. How this issue is decided will have an impact on the Department and on all taxpayers and counties in South Carolina.

Second, this appeal presents issues of significant public interest by virtue of the identity of the parties and the financial impact of the dispute. FTCC and Diversified own substantial property in the affected counties. If the Taxing Entities are correct that a portion of this property is not exempt, then the Taxing Entities would be owed substantial monies in underpayments of property taxes on this property. In addition, the Taxing Entities would receive property tax revenues from that property going forward. On the other hand, if FTCC and Diversified are correct, and their property at issue in this case is exempt, then the tax refunds they are owed by the Taxing Entities are substantial and growing.

The amounts at issue in this appeal relate to tax years 2010 to 2018, and the Taxing Entities have filed additional cases regarding subsequent tax years. The amounts will continue to accrue as FTCC and Diversified pay property taxes pursuant to the formula devised by the ALC in the Amended Final Order being challenged on appeal, which are currently being paid under protest at 80% per S.C. Code Ann. § 12-60-2140. If the Farmers Entities are successful on appeal, then the Taxing Entities will face great difficulties in making refunds given that the moneys paid in taxes over the years have been spent, and this will impact their budgets going forward. Moreover, the Farmers Entities are very concerned that the Taxing Entities will be unable to refund any monies found due to them. On the other hand, if the Taxing Entities are successful on appeal, then FTCC and Diversified will have to come up with substantial and growing sums, which will impact their budgets and financial health. The bottom line is that regardless of which parties ultimately prevail on appeal, substantial sums owed to or from the counties and school districts or to or from the Farmers' Entities are only getting larger with the passage of time as additional tax years, as well as interest, will be added, and, thus, a ruling in this appeal will have a significant public impact and is an issue of public interest.

Third, the public impact of the issues presented in this appeal is not limited to the parties and their constituents. The Exemption applies to all rural telephone cooperatives and rural telephone companies that own property used to provide "rural telephone service" within the meaning of the Exemption. Five other rural telephone cooperatives in addition to the Farmers Entities could be impacted by some of the rulings in this case. For example, if the Farmers Entities prevail on the issue of whether property used to provide wireless cellular service is exempt from taxation, then these other rural telephone cooperatives could be entitled to the Exemption for their property, if any, that is used to provide wireless cellular service. Because these issues involve

widespread ramifications for many taxpayers, counties, and their constituents, the appeal raises issues of significant public interest.

Fourth, the legal issues raised in this appeal involve principles of major importance. A central issue to the appeal, for example, is how courts should interpret and apply decades-old statutory language in contemporary and technologically evolved contexts. In this appeal, that question involves an Exemption originally enacted in 1957 and most recently amended and recodified in 1976, and asks, among other things, whether the “telephone services” contemplated by the General Assembly decades ago include the cell phones of today. But the interpretive principles that answer that question have far broader resonance beyond the specific fact pattern of this case.

Fifth, the appeal also raises an important question regarding the legal test to determine when courts should defer to an agency’s interpretation of a statute. Specifically, the ALC ruled that an agency’s interpretation of a statute is “worthy of deference” only if the agency’s interpretation is a “long-standing” one. The Farmers Entities contend that the Supreme Court and Court of Appeals have never articulated the test in these terms and that the question of whether judicial deference is owed only to “long standing” agency interpretations is a matter of significant and potentially dispositive importance in this case and many others.

CONCLUSION

For the reasons outlined above, the parties respectfully request that the Court certify and transfer this case to the South Carolina Supreme Court.

WE SO MOVE AND CONSENT:

PARKER POE ADAMS & BERNSTEIN LLP

By: Walter H. Cartin by BMS
Walter H. Cartin, SC Bar #78405 *w/permission*
Katon E. Dawson, SC Bar #101167
PARKER POE ADAMS & BERSTEIN LLP
1221 Main Street, Suite 1100 (29201)
Post Office Box 1500
Columbia, South Carolina 29202
(803) 255-8000 / (803) 255-8017 (fax)
waltcartin@parkerpoe.com
katondawson@parkerpoe.com

and

Madison Felder, SC Bar # 100606
PARKER POE ADAMS & BERSTEIN LLP
110 East Court Street, Suite 200
Greenville, South Carolina 29601
(864) 577-6362 / (864) 242-9888 (fax)
madisonfelder@parkerpoe.com

and

Michael E. Kozlarek, SC Bar #69330
KOZLAREK LAW LLC
Post Office Box 565
Greenville, South Carolina 29601
(864) 527-5941
michael@kozlareklaw.com
Attorneys for Appellants-Respondents

November 1, 2021

WE SO MOVE AND CONSENT:

NELSON MULLINS RILEY &
SCARBOROUGH LLP

By: Bryson M. Geer
Bryson M. Geer, SC Bar #13606
E-Mail: bryson.geer@nelsonmullins.com
John C. von Lehe, Jr., SC Bar #5719
E-Mail: john.vonlehe@nelsonmullins.com
151 Meeting Street / Sixth Floor
Post Office Box 1806 (29402-1806)
Charleston, SC 29401-2239
(843) 853-5200

and

Miles E. Coleman, SC Bar #78264
E-Mail: miles.coleman@nelsonmullins.com
2 W. Washington St. / Fourth Floor
Post Office Box 10084 (29603-0084)
Greenville, SC 29601
(864) 250-2300

and

William E. DuRant, Jr., SC Bar #1808
Attorney at Law
E-Mail: gdurant@legaloff.net
1170 Old West Liberty St., Suite 1
Sumter, SC 29150
(803) 774-5323

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

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

RECEIVED

Nov 01 2021

SC Court of Appeals

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 Joint Motion for Certification to the South Carolina Supreme Court on parties' counsel of record at the following AIS information addresses:

Counsel Served:

Walter H. Cartin
Katon E. Dawson, Jr.
Parker Poe Adams & Bernstein, LLP
Post Office Box 1500
1221 Main Street, Suite 1100
Columbia, SC 29202
waltcartin@parkerpoe.com
katondawson@parkerpoe.com

Madison Felder
Parker Poe Adams & Bernstein, LLP

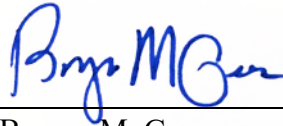
110 East Court Street, Suite 200
Greenville, SC 29601
madisonfelder@parkerpoe.com

Michael E. Kozlarek
Kozlarek Law LLC
Post Office Box 565
Greenville, SC 29602-0565
michael@kozlareklaw.com

Counsel for Appellants/Respondents

Jason P. Luther
South Carolina Department of Revenue
P.O. Box 12265
Columbia, SC 29211-9979
jason.luther@dor.sc.gov

Counsel for Respondent



Bryson M. Geer

November 1, 2021

Bryson M. Geer
(Admitted in NC & SC)
T 843.534.4306
bryson.geer@nelsonmullins.com

151 Meeting Street | Sixth Floor
Charleston, SC 29401-2239
T 843.853.5200 F 843.722.8700
nelsonmullins.com

November 1, 2021

Via Electronic Mail and U.S. Mail

The Honorable Patricia A. Howard
Clerk of Court
The South Carolina Supreme Court
PO Box 11330
Columbia, SC 29211
supctfilings@sccourts.org

RECEIVED
Nov 01 2021
SC Court of Appeals

RE: Clarendon County, et al. v. South Carolina Department of Revenue, et al.
Appellate Case No.: 2020-000983
Our File No.: 029623/09019

Dear Ms. Howard:

Enclosed for electronic filing please find a Joint Motion for Certification to the South Carolina Supreme Court in the above-referenced matter. Also enclosed via mail only is a check in the amount of \$50.00 to cover the filing fee.

By copy of this correspondence, we are hereby serving a copy of the same on all counsel of record as well as the South Carolina Court of Appeals.

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: *(all via E-mail w/ enclosure)*
The Honorable Jenny Abbott Kitchings
Walter H. Cartin, Esq.
Katon E. Dawson, Jr., Esq.
Madison Felder, Esq.
Michael E. Kozlarek, Esq.
Jason P. Luther, Esq.
William E. Durant, Jr., Esq.