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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM
THE PUBLIC SERVICE COMMISSION OF SOUTH CAROLINA

Delton W. Powers, Jr., Chair

PSC Docket No. 2023-361-E
Appellate Case No. 2024-001447

Clyde Kennedy, Appellant,

v.

Dominion Energy South Carolina, Inc., Respondent.

MOTION TO DISMISS UNTIMELY APPEAL

Pursuant to Rules 203(b)(6), 203(d)(3), and 240 of the South Carolina Appellate Court Rules, Respondent Dominion Energy South Carolina, Inc. (“Company”) moves to dismiss the above-captioned appeal. As more fully set forth below, the appeal must be dismissed because Appellant Clyde Kennedy (“Kennedy”) failed to timely perfect his appeal. Thus, this Court lacks jurisdiction over Kennedy’s appeal.

Procedural History Establishing Untimely Filing of Notice of Appeal

The Public Service Commission of South Carolina (“Commission”) denied the customer complaint filed by Kennedy by Order No. 2024-393 dated June 12, 2024. *See*

Order No. 2024-393, attached as Exhibit 1 to Kennedy’s Notice of Appeal. The Commission electronically served the “notice of entry of the order” on Kennedy by Notice of Electronic Filing (“NEF”) titled “SCPSC eService Notification” that same day. *See* S.C. Code Reg. § 103-852(A) (expressly allowing service of Commission orders to be effectuated by “electronic service”). Kennedy consented to electronic service of the Commission order under S.C. Code Reg. § 103-852(B). Moreover, service was effective upon electronic service of the order on Kennedy. *See* S.C. Code Reg. § 103-852(B) (stating that “service is effective upon the email or electronic service being sent”). Thus, electronic service of the Order by NEF started the clock for filing of any petition for rehearing. *See also* S.C. Reg. § 103-817.1(E)(3) (establishing that “[t]he NEF constitutes proof of service under Rule 5(b), SCRCF, Title 58 of the South Carolina Code and Chapter 103 of the South Carolina Code of Regulations”).

In dockets before the Commission involving electric service, Section 58-27-2150 of the South Carolina Code of Laws controls petitions for rehearing in electric dockets. *See* S.C. Reg. § 103-854(B). Section 58-27-2150 requires¹ any petition for rehearing to be made “within ten days after *service of notice of the entry of the order* or decision . . .” (emphasis added). Kennedy, therefore, was statutorily required to file any petition for rehearing no later than June 22, 2024. Kennedy missed this deadline.

Kennedy did not file and serve his petition for rehearing with the Commission

¹ Furthermore, the Commission’s order plainly informed Kennedy that the petition for rehearing had to be made “within ten (10) days after service of the notice of the entry of this order.” *See* Notice of Appeal, Ex. 1, Order No. 2024-393 at p. 17.

until June 28, 2024. *See* Order Denying Petition for Rehearing dated July 30, 2024, No. 2024-537 at p. 3, attached as Exhibit 1 to Kennedy’s Notice of Appeal. The petition was untimely. As a result, the Commission correctly found that Kennedy’s “Petition for Rehearing dated June 28, 2024, is untimely” *See* Order Denying Petition for Rehearing dated July 30, 2024, No. 2024-537 at p. 6.

Standard for Dismissal

Rule 203, SCACR, governs timeliness of appeals from the Commission. The rule requires service of a notice of appeal “within thirty (30) days after receipt of the decision.” Rule 203(b)(6), SCACR. The party must also file the notice of appeal “with the clerk of the appellate court within the time required to serve the notice of appeal under Rule 203(b)(6).” Rule 203(d)(2), SCACR. However, “[i]f a *timely* petition for rehearing is filed with the administrative tribunal, the time to appeal for all parties shall be stayed and shall run from receipt of the decision granting or denying that motion.” Rule 203(b)(6), SCACR (emphasis added). Should the party fail to timely file a petition for rehearing, that failure “converts the order into a final judgment, and the aggrieved party’s only recourse is to file a notice of intent to appeal.” *See, e.g., Overland, Inc. v. Nance*, 423 S.C. 253, 257, 815 S.E.2d 431, 433 (2018)

“The requirement of service of the notice of appeal is jurisdictional, *i.e.*, if a party misses the deadline, the appellate court lacks jurisdiction to consider the appeal and has no authority or discretion to ‘rescue’ the delinquent party by extending or ignoring the deadline for service of the notice.” *Elam v. S.C. Dept. of Transp.*, 361 S.C. 9, 14-15, 602 S.E.2d 772, 775 (2004).

Kennedy's Notice of Appeal is Untimely

The Commission issued the order challenged in Kennedy's notice of appeal on June 12, 2024. Kennedy was statutorily required to file any petition for rehearing no later than June 22, 2024. Kennedy missed that deadline and did not file a petition for rehearing with the Commission until June 28, 2024. Therefore, under Rule 203, SCACR, the untimely petition for rehearing did not stay Kennedy's deadline for filing and service of his notice of appeal.

As a result, the appellate rules required Kennedy to file and serve his notice of appeal within 30 days from service of the Commission's June 12th order. That 30-day deadline expired on July 12, 2024, without Kennedy filing or serving a notice of appeal. Instead, Kennedy filed and served the notice of appeal on August 29, 2024. Thus, Kennedy missed the deadline to perfect the appeal by 48 days. The appeal is untimely, and this Court must dismiss the appeal. Rule 203(d)(3), SCACR ("If the notice of appeal is not timely filed or the filing fee is not paid in full, the appeal *shall be dismissed . . .*") (emphasis added).

Respectfully submitted,

/s/ Michael J. Anzelmo
Michael J. Anzelmo
SC Bar No. 72933
McGuireWoods LLP
1301 Gervais Street, Suite 1310
Columbia, South Carolina 29201
Phone: (803) 251-2313
Email: manzelmo@mcguirewoods.com

K. Chad Burgess, Esquire
SC Bar No. 69456
Dominion Energy Services, Inc.
Mail Code OSC 1A
220 Operation Way
Cayce, South Carolina 29033
Phone: (803) 217-8141
Email: chad.burgess@dominionenergy.com

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PROOF OF SERVICE

I certify that Respondent's Motion to Dismiss Untimely Appeal was served on the following counsel of record for Appellant Clyde Kennedy, the Office of Regulatory Staff and the Public Service Commission of South Carolina on September 10, 2024, via electronic mail under Paragraph (d)(1) of the Order Re: Methods of Electronic Filing and Service Under Rule 262 of the South Carolina Appellate Court Rules (As Amended April 24, 2024), Appellate Case No. 2020-000447.

Kathleen M. McDaniel
Burnette Shutt McDaniel
Counsel for Clyde Kennedy
kmcDaniel@burnetteshutt.law

Joshua E. Austin, Esquire
Benjamin P. Mustian, Esquire
Counsel for the Office of Regulatory Staff
jaustin@ors.sc.gov
bmustian@ors.sc.gov

September 10, 2024

/s/ Michael J. Anzelmo

Michael J. Anzelmo

SC Bar No. 72933

McGuireWoods LLP

1301 Gervais Street, Suite 1310

Columbia, South Carolina 29201

Phone: (803) 251-2313

Email: manzelmo@mcguirewoods.com



McGuireWoods LLP
1301 Gervais Street
Suite 1310
Columbia, SC 29201
Phone: 803.251.2300
Fax: 803.251.2315
www.mcguirewoods.com

Michael J. Anzelmo
Direct: 803.251.2300
manzelmo@mcguirewoods.com
Fax: 803.251.2315

September 10, 2024

VIA EMAIL ONLY

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201
ctappfilings@sccourts.org

**RE: Clyde Kennedy v. Dominion Energy South Carolina, Inc.
Appellate Case No. 2024-001447**

Dear Ms. Kitchings:

Pursuant to Rule 262(a)(3), SCACR, Respondent Dominion Energy South Carolina, Inc. files its (1) Motion to Dismiss Untimely Appeal in the above referenced appeal and (2) Proof of Service. See also Supreme Court of South Carolina's Order titled "Re: Methods of Electronic Filing and Service (As Amended April 24, 2024), Appellate Case No. 2020-000447." The \$50.00 filing fee will be delivered to the Court of Appeals within five days of this filing. *Id.* Counsel of record will be served by electronic mail pursuant to Rule 262(c)(3), SCACR.

Respectfully submitted,

/s/Michael J. Anzelmo

Michael J. Anzelmo
Counsel for Dominion Energy South Carolina, Inc.

cc: Kathleen M. McDaniel, Esquire (via electronic mail)
Joshua E. Austin, Esquire (via electronic mail)
Benjamin P. Mustian, Esquire (via electronic mail)