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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Honorable S. Phillip Lenski, Administrative Law Judge

RECEIVED
SEP 12 2017
SC Court of Appeals

Appellate Case No. 2017-001260

(Case No. 2012-ALJ-17-0031-CC)

South Carolina Department of Revenue..... Appellant/Respondent,

v.

Duke Energy Corporation..... Respondent/Petitioner.

MOTION TO DISMISS

Pursuant to South Carolina Appellate Court Rule 240, Respondent Duke Energy Corporation ("Duke"), through its undersigned counsel, respectfully moves this Court to dismiss Appellant South Carolina Department of Revenue's ("Appellant") Notice of Appeal. For the reasons stated in the attached Memorandum of Law, dismissal is required for insufficiency of service of process because Appellant failed to properly serve its Notice of Appeal on Duke within the period required by SCACR 203(b)(6).

DATED this 6th day of September 2017.

Respectfully Submitted

Marsha A. Ward

Marsha A. Ward, Esq.
Eric S. Tresh, Esq. (*Pro Hac Vice application pending*)
Maria M. Todorova, Esq. (*Pro Hac Vice application pending*)
Eversheds Sutherland (US) LLP
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Attorneys for Duke Energy Corporation

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MEMORANDUM OF LAW IN SUPPORT OF RESPONDENT DUKE ENERGY CORPORATION'S MOTION TO DISMISS FOR INSUFFICIENCY OF SERVICE OF PROCESS

Respondent Duke Energy Corporation ("Duke" or "Respondent"), through its undersigned counsel, submits this memorandum of law in support of its contemporaneously filed motion to dismiss this action for insufficiency of service of process.

INTRODUCTION

In this case, the South Carolina Department of Revenue ("Appellant" or "Department") appeals the administrative law court's April 28, 2017 Order Granting Duke's Motion for Summary Judgment ("Order"). The South Carolina Appellate Court Rules ("SCACR") govern appeals from administrative tribunals to the Court of Appeals. S.C. Code Ann. § 1-23-380(1). The Department did not comply with the SCACR governing service of process. Therefore, the Department's appeal should be dismissed for insufficiency of service of process.

To perfect an appeal from the administrative law court to the Court of Appeals, the SCACR require an appellant to serve its notice of appeal on the agency involved, the administrative law court, and all parties of record within thirty days of receipt of the decision. SCACR 203(b)(6) and (d)(2) ("Rule 203"). "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." *USAA Property & Cas. Ins. Co. v. Clegg*, 377 S.C. 643 (S.C. 2008) (*quoting Elam v. S.C. Dep't of Transp.*, 361 S.C. 9 (S.C. 2004)); Rule 203(d)(3). Here, Appellant did not serve the notice of appeal on Duke within thirty days of Appellant's receipt of the administrative law court's decision. Appellant therefore failed to comply with the service requirements of Rule 203(b)(6) and (d)(2), and the appeal should be dismissed.

BACKGROUND

Duke filed a Request for Contested Case Hearing ("Contested Case Hearing Request") related to its South Carolina sales and use tax liability on nuclear canisters with the administrative law court on January 30, 2012. A copy of the Contested Case Hearing Request is attached hereto as Exhibit A. The Contested Case Hearing Request was submitted by Duke's attorneys, Marsha A. Ward, Esq.[1] and Eric S. Tresh, Esq.[2] The Contested Case Hearing Request stated that Duke was not representing itself, and that it was represented by attorneys Ms. Ward and Mr. Tresh. Duke also provided the mailing address of its attorneys, which was 999 Peachtree Street NE, Atlanta, Georgia, 30309-3996. Ms. Ward was a South Carolina attorney at

[1] At the time of this filing Ms. Ward was a counsel with Sutherland, Asbill & Brennan LLP. Ms. Ward is now Of Counsel with Eversheds Sutherland (US) LLP, previously Sutherland Asbill & Brennan LLP.
[2] At the time the Contested Case Request was filed, Mr. Tresh's *Pro Hac Vice* admission before the administrative law court was pending.

the time the Contested Case Hearing Request was filed. Subsequently, Mr. Eric Tresh was admitted *Pro Hac Vice* before the administrative law court on February 16, 2012. A copy of the order admitting Mr. Tresh *Pro Hac Vice* is attached as Exhibit B. Zachary T. Atkins, Esq. of Sutherland, Asbill & Brennan LLP was subsequently admitted *Pro Hac Vice* before the administrative law court on August 16, 2012. A copy of the order admitting Mr. Atkins *Pro Hac Vice* is attached as Exhibit C. After the admission of Mr. Atkins, all pleadings filed by Duke were signed by Ms. Ward, Mr. Tresh, or Mr. Atkins, and all three attorneys were identified as counsel for Duke throughout the proceedings at the administrative law court.

The administrative law court issued its Order finding in favor of Duke Energy on the merits on April 28, 2017. On that same day, Edye Ulmer Moran, Esq., the Judicial Law Clerk to the Honorable S. Phillip Lenski, e-mailed the Order to Messrs. Zachary Atkins, Sean Ryan, and Milton Kimpson. Mr. Kimpson is counsel for the Appellant, and filed the Appellant's notice of appeal. Sean Ryan is also counsel for the Appellant. A copy of the April 28, 2017 e-mail transmitting the administrative law court's Order to all of the parties is attached hereto as Exhibit D.

In Appellant's proof of service of its notice of appeal, Appellant states that it provided service to Duke by mailing a copy of the notice to three individuals: Burnet R. Maybank, III, Esq., Eric S. Tresh, Esq., and Jeffrey A. Friedman, Esq. on May 30, 2017. A copy of Appellant's proof of service and its notice of appeal is attached as Exhibit E. However, Mr. Tresh was not provided service of the notice of appeal on May 30, 2017 and Mr. Tresh did not receive a mailing of the notice of appeal. Instead, on June 6, 2017, Mr. Tresh received a copy of the Department's appeal for a different taxpayer for a case in which Mr. Tresh had no

involvement or knowledge. The appeal that Mr. Tresh received on June 6, 2017 is attached as Exhibit F. This appeal involves a taxpayer named Richard Beltram.

It appears that the Department placed the incorrect notice of appeal in the mail to Mr. Tresh. This mistake was acknowledged to Mr. Tresh in a subsequent email exchange on June 6, 2017 with the Department's counsel, Milton Kimpson. See Exhibit G, Mr. Tresh's email exchange with Mr. Kimpson.[3] Mr. Tresh finally received an e-mail with a copy of the notice of appeal on June, 7 2017. See Exhibit H, Email to Mr. Tresh with the notice of appeal attached.

Neither Mr. Maybank nor Mr. Friedman was counsel for Duke at the administrative law court. Mr. Friedman also did not receive a copy of the notice of appeal. Exhibit E states that the Notice of Appeal was sent to Mr. Friedman at 1275 Pennsylvania Avenue, NW, Washington, DC 20004. However, Mr. Friedman's business address was – and continues to be - 700 6th St NW, Washington, DC 20001. Thus, it appears that Mr. Friedman did not receive the Notice of Appeal because it was sent to the incorrect address. In any event, Mr. Friedman's receipt of the notice is irrelevant as he was not representing Duke in this matter. Mr. Maybank did receive the Notice of Appeal and in response sent a letter to Ms. Jenny Kitchings, Clerk for the South Carolina Court of Appeals, stating that Mr. Maybank did not currently and had never represented Appellee in this matter. Mr. Maybank's letter to Ms. Kitchings is attached as Exhibit I.

Finally, Appellant's proof of service does not state that service was made upon either Ms. Ward or Mr. Atkins and neither received a copy of the Notice of Appeal.

AUTHORITY AND ARGUMENT

Proceedings for review at the Court of Appeals "are instituted by serving and filing notice of appeal as provided in the South Carolina Appellate Court Rules within thirty days after the

[3] Even after Appellee's counsel advised Appellant's counsel that it had not received a mailing of the Notice of Appeal, Appellant's counsel failed to subsequently serve Respondent's counsel a notice of its its motion for an extension of time. Appellant *still* has not served a copy of the motion on Duke.

final decision of the agency[.]" S.C. Code Ann. § 1-23-380(1). "Copies of the notice of appeal must be served upon the agency and all parties of record." *Id.* The Appellate Court Rules elaborate that appeals from administrative law courts must be served on the agency, the administrative law court, and "all parties of record" within thirty days of "receipt of the decision." SCACR 203(b)(6). "If the notice of appeal is not timely filed or the filing fee is not paid in full, the appeal shall be dismissed, and shall not be reinstated except as provided by Rule 260." SCACR 203(d)(3).

The filing and service requirements of Rule 203(b) are jurisdictional. *USAA Property & Cas. Ins. Co.*, 377 S.C. at 651. When an appellant fails to serve a notice of appeal on a respondent as prescribed under Rule 203(b) - within thirty days after receiving written notice of the entry of a final order or judgment - a court lacks subject matter jurisdiction over the appeal and the appeal must be dismissed. *Id.* (*citing Canal Ins. Co. v. Caldwell*, 338 S.C. 1 (Ct. App. 1999). The fact that the notice of appeal may have been timely filed with the court of appeals is a separate and distinct inquiry from whether the notice of appeal was timely served on "all parties of record." *Id.*

Whenever a party is required to make service upon another party represented by an attorney, the "service shall be made upon the attorney unless service upon the party himself is ordered by the court." South Carolina Rules of Civil Procedure, Rule 5(b)(1). Where an attorney of record has filed an appearance, until that attorney is discharged in the manner provided by law, the attorney represents the party, service of papers upon the attorney is service upon the party and, as to adverse parties, the authority of the attorney of record continues unabated. *See Culbertson v. Clemens*, 322 S.C. 20 (S.C. 1999) (*citing Hess v. Tyszko*, 362 N.Y.2d 287, 289 (1974)). Therefore, in order to properly serve Duke under Rule 203(b)(6),

Appellant was required to serve the notice of appeal on Duke's attorneys of record, which were Mr. Tresh, Mr. Atkins, and Ms. Ward, within thirty days of Appellant's receipt of the administrative law court's decision.

In this case, Appellant received the Order by electronic mail on April 28, 2017. Because thirty days from April 28, 2017, would have been a Sunday, and the following Monday was a Federal holiday, May 30 was the thirtieth day from April 28 for purposes of filing an appeal in this Court. *See* South Carolina Rules of Civil Procedure, Rule 6(a) (stating that the last day of the period so computed is to be included unless it is a Sunday or Federal holiday, in which event the period runs until the end of the next day which is neither a Sunday nor such holiday).

Appellant filed its notice of appeal and proof of service with this Court on May 30, 2017. However, Appellant failed to serve its notice of appeal on Duke within thirty days of receiving the administrative law court's final decision because that notice was not served on Mr. Tresh, Mr. Atkins, or Ms. Ward. Instead, Mr. Tresh received a mailing of a notice of Appellants's appeal for a different taxpayer, for a case in which Mr. Tresh had no involvement or knowledge. See Exhibit F. Indeed, the first time Mr. Tresh was provided the notice of appeal filed in this case was June 7, 2017, when Appellant e-mailed the notice to Mr. Tresh. *See* Exhibit H. The notice of appeal was never served on Ms. Ward or Mr. Atkins as neither Ms. Ward or Mr. Atkins was mentioned on the certificate of service.

Since Appellant did not satisfy the requirements of Rule 203(b)(6) for appealing the Order, Duke respectfully requests that the Court grant its motion and dismiss this action.

CONCLUSION

For the foregoing reasons, Duke respectfully requests that the Court enter an order granting its Motion and dismissing this action pursuant to Rule 203(d)(3).

DATED this 6th day of September, 2017.

Respectfully Submitted

Marsha A. Ward

Marsha A. Ward, Esq.
Eric S. Tresh, Esq. (*Pro Hac Vice application pending*)
Maria M. Todorova, Esq. (*Pro Hac Vice application pending*)
Eversheds Sutherland (US) LLP
999 Peachtree Street NE, Suite 2300
Atlanta, Georgia 30309
Tel. No. (404) 853-8000
Fax No. (404) 853-8806

Attorneys for Duke Energy Corporation

CERTIFICATE OF SERVICE

I certify that I have this day served a copy of the foregoing *Memorandum* by United States mail, postage prepaid, addressed as follows:

Sean G. Ryan
Jason Luther
Counsel for Litigation
South Carolina Department of Revenue
P.O. Box 12265
Columbia, SC 29211-9979

This 6Th day of September, 2017.

Chris Beaudro

Exhibit-A

South Carolina Administrative Law Court (SC ALC)
Request for Contested Case Hearing FORM

Last Name:	First:	Middle:	☐ Mr. ☐ Mrs. ☐ Miss ☐ Ms.	Docket No. (To Be Completed by ALC)
Duke Energy Corporation				

Mailing Address:	City:	State and Zip:
PO Box 1321 / Mail Code: DEC41A	Charlotte	NC 28201-1321

Home Number:	Work Number:	Cell Number:	*E-Mail Address:
	(980) 373-5223		Cooper.Monroe@duke-energy.com

*By providing your e-email address, you consent to receive court orders and notices via electronic transmission

REPRESENTATION

Are you representing yourself? ☐ Yes ■ No — If No, please complete the following:

Are you represented by an Attorney? ■ Yes ☐ No	Are you represented by a CPA? ☐ Yes ☐ No
Name of Attorney: Marsha A. Ward; Eric S. Tresh (pro hac vice pending)	Name of CPA:
Mailing Address: Sutherland Asbill & Brennan LLP 999 Peachtree Street NE	Mailing Address:
City, State and Zip: Atlanta, Georgia 30309-3996	City, State and Zip:
Work Number, Cell Number and E-mail Address: (404) 853-8039; marsha.ward@sutherland.com (404) 853-8579; eric.tresh@sutherland.com	Work Number, Cell Number and E-mail Address:

CASE INFORMATION

Name of the Agency that issued the decision: (Example – Dept. of Revenue, Dept. of Insurance, DHEC) South Carolina Department of Revenue

In order to have your case processed, **you must attach the agency decision.** Is it attached?: ■ Yes ☐ No	If no, please explain:
Date the decision was issued: January 6, 2012	Date the decision was received: January 6, 2012

Please provide a brief statement regarding why the hearing is being requested and the relief sought:

Please see Brief Statement of the Case & Relief Sought attached hereto.

Payment via ■ Check ☐ Money Order ☐ Cash for $ submitted today to the Administrative Law Court via (applicable **filing fee pursuant to** ALC Rule 71) is being ■ U.S. Postal Service ☐ Hand-delivery

Marsha A Ward — X *Your Signature or Signature of Attorney/CPA*

1/30/2012 — *Date*

CERTIFICATE OF SERVICE (MUST BE COMPLETED)

Your Name: Marsha A. Ward	Date: 1/30/2012	City: Atlanta	State: GA

I hereby certify that on the date and place listed above, I served a copy of the foregoing Request for Contested Case Hearing **on all other parties** to this matter by depositing the same in the United States Mail, postage paid, and addressed as follows (use the reverse side for any additional names):

Name and/or Agency	Address	City, State and Zip
Clerk's Office South Carolina Administrative Law Court	1205 Pendleton St., Suite 224	Columbia, SC 29201
Benjamin John Tripp, Esq. South Carolina Department of Revenue Office of General Counsel for Litigation	301 Gervais Street, PO Box 12265	Columbia, SC 29211
Name and/or Agency	Address	City, State and Zip

Marsha A Ward — X *Your Signature or Signature of Attorney/CPA*

1/30/2012 — *Date*

State of South Carolina
Department of Revenue
Office of General Counsel for Litigation
301 Gervais Street, P.O. Box 12265, Columbia, South Carolina 29211
Telephone (803) 898-5130 FAX (803) 898-5147

January 6, 2012

Burnet R. Maybank, III
Nexsen Pruet
PO Drawer 2426
Columbia, SC 29202

Re Department Determination
Duke Energy Corporation

Dear Mr. Maybank:

Enclosed is the South Carolina Department of Revenue's Determination in the above-referenced matter. If you disagree with the Determination, you may request a contested case hearing before an Administrative Law Judge. If you choose to pursue such remedy, you must do so within thirty (30) days of the date of this letter. If you fail to respond within this time limitation, you will lose your right to appeal the Department Determination and your protest will be ended. Should you desire a contested case hearing, you must complete the enclosed request form and mail it, along with a $500.00 filing fee, to the Administrative Law Court at the address stated on the form's instruction sheet.

The Administrative Law Court rules require that you also send me a copy of your request. My address is as follows: PO Box 12265, Columbia, SC 29211.

Sincerely,

OFFICE OF GENERAL COUNSEL FOR LITIGATION

Benjamin John Tripp
Counsel for Litigation

BJT:lbc

Enclosures

DEPARTMENT DETERMINATION

Taxpayer:

Duke Energy Corporation
422 South Church Street
Charlotte, NC 28202

Period Involved:

Use Tax for April of 2002 to December of 2004

Amount in Dispute:

Tax:	$1,018,436.60
Penalty:[1]	204,245.94
Interest:[2]	466,110.11
Total:	$1,688,792.65

Matter in Dispute:

Are spent fuel canister and cask systems, used to store radioactive fuel after use in a nuclear reactor, exempt from use tax under S.C. Code Ann. § 12-36-2120(17) (Supp. 2010), which exempts machines used in manufacturing and their parts and attachments that are necessary to control pollution?

Determination:

The spent fuel systems are not exempt from use tax under § 12-36-2120(17) because they are neither necessary and integral to the production of electricity nor are they parts or attachments to a machine used in manufacturing.

---

[1]The Department has assessed a penalty for a substantial understatement of tax under S.C. Code. Ann. § 12-54-155 (Supp. 2010). Because South Carolina law does not halt the accrual of the penalty charges during a tax protest, the charges will continue to accrue as dictated by statute until the matter is resolved.

[2]A charge for accrued interest applies. See S.C. Code Ann. § 12-54-25 (Supp. 2010). This amount is based on interest accrued through January 5, 2012. Because South Carolina law does not halt the accrual of interest during a tax protest, interest will continue to accrue until the matter is resolved.

Relevant Facts:

1. The taxpayer operates five nuclear reactors at two sites in the state, one in York County and the other in Oconee County. The reactors convert energy from the fission of uranium into electricity. In its natural state, only about 1% of uranium's total weight has the proper composition to produce electricity through fission. After mining, uranium must be "enriched" to raise the level of fissile uranium to 4%. Natural uranium emits only slight levels of radiation, which is virtually harmless to humans. However, the uranium is toxic, so protective containers and wraps are used during transportation to prevent direct contact.

2. The nuclear power plants receive fresh, enriched uranium in units known as fuel assemblies. The reactors process upwards of 150 fuel assemblies at a time. Inside the reactor, the uranium is combined with a "moderator," such as water, which causes the fissile uranium to break down. The fission releases energy used to produce electricity, heightened amounts of radioactivity, and chemical byproducts. After the level of fissile uranium in the fuel assemblies drops back down to around 1%, the uranium is "spent," and the fuel assemblies must be removed from the reactor. Though the spent fuel is removed, the fission byproducts themselves continue to break down further in a chain reaction, and the fuel assemblies continue to release energy and heightened radiation. This chain reaction continues for decades; only after about forty years will the level of radiation emitted by the spent fuel diminish to the level emitted by uranium in its natural state.

3. Every eighteen months, during a scheduled outage for each reactor, all fuel assemblies are removed from the reactor and tested. During a given outage, typically two-thirds to three-fourths of the assemblies are placed back into the reactor. To protect against the heat and radiation emitted by spent fuel assemblies, they must be moved from the reactor through canals and into pools of borated water, which acts as a shield against the radiation and heat. Typically, the spent fuel assemblies stay in the pools for ten years before settling enough for further handling.

4. After settling, some spent fuel assemblies are sent to storage facilities in a different location. This process involves spent fuel storage systems composed of metal canisters and concrete casks. Large metal canisters are used to remove the spent fuel from the pools. The canisters are twelve to fourteen feet high, ten to twelve feet in diameter, and can store two dozen spent fuel assemblies. A crane mechanism installed at the pool lowers a canister into the water, and once submerged, the canister is loaded with spent fuel assemblies and the borated water. Next, the crane lifts the canister until its top lip breaches the surface, at which point a lid is welded on. The canisters are then transported to a remote area of the manufacturing facility and installed in large, concrete storage casks, which are part of a facility known as an independent spent fuel storage installation. The

spent fuel is intended to ultimately be deposited in a permanent repository, such as one at one time in development at Yucca Mountain, Nevada.

5. In early 2006, the South Carolina Department of Revenue (Department) began a total audit of the taxpayer at its request. The Department's audit spanned a number of years, including the period of April of 2002 to December of 2004. The audit revealed that during this period, the taxpayer purchased from out-of-state vendors a number of canister-and-cask spent fuel storage systems. The total cost was $19,764,879.66: $3,019,267.00 for systems in York County, and $16,745,612.66 for Oconee County. The taxpayer had not paid use tax on the systems.

6. The disputed assessable use tax on the purchases totals $1,018,436.60. The taxpayer has already paid $167,398.11 of the tax but claims it did so in error. The Department issued a proposed assessment dated September 28, 2009, assessing the additional $851,038.49, as well as a substantial understatement penalty of $204,245.94.

7. By letter dated December 23, 2009, the taxpayer protested the assessment. The taxpayer delivered a supplemental protest dated August 25, 2010, arguing that the purchases of the spent fuel storage systems are exempt from sales and use tax under § 12-36-2120(17) and 27 S.C. Code Ann. Regs. 117-302.5 and 302.6 (Supp. 2010), which apply to machines used in manufacturing.

Analysis:

Under § 12-36-2120(17), spent fuel canister and cask systems are not exempt from use tax because they are not necessary and integral to the production of electricity and because they are not a part of or an attachment to machines used in producing electricity. Section 12-36-2120(17) exempts from use tax purchases of the following machines:

> machines used in manufacturing, processing, recycling, compounding, mining, or quarrying tangible personal property for sale. "Machines" include the parts of machines, attachments, and replacements used, or manufactured for use, on or in the operation of the machines and which (a) are necessary to the operation of the machines and are customarily so used, or (b) are necessary to comply with the order of an agency of the United States or of this State for the prevention or abatement of pollution of air, water, or noise that is caused or threatened by any machine used as provided in this section.

"The language of a tax exemption statute must be given its plain, ordinary meaning and must be strictly construed against the claimed exemption." Thayer v. S.C. Tax Comm'n, 307 S.C. 6, 413 S.E.2d 810 (1992). The taxpayer bears the burden of bringing himself squarely within the statute authorizing the exemption. M. Lowenstein & Sons, Inc. v. S.C. Tax Comm'n, 277 S.C. 561, 290 S.E.2d 812 (1982); cf. SCANA Corp. and Subsidiaries v. S.C. Dep't of Revenue, 384 S.C. 388, 683 S.E.2d 468 (2009) (Beatty, J., dissenting) ("[I]n cases involving a tax deduction, any ambiguity is strictly resolved against the taxpayer.").

In Hercules Contractors and Engineers v. South Carolina Tax Commission, 280 S.C. 426, 313 S.E.2d 300 (Ct. App. 1984), the Court of Appeals held that a machine must be necessary and integral to the manufacturing process to come within the sales tax exemption. Id. at 432, 313 S.E.2d at 304. In Springs Industries, Inc. v. S.C. Dep't of Revenue, 99-ALJ-17-0153-CC, the Administrative Law Court held that racks for holding yarn after it had undergone a certain level of processing were not an essential or integral part of the manufacturing process and therefore were not exempt. The court stated the racks were not used to manufacture the yarn, nor were they attachments to machines used to manufacture the yarn. Rather, the racks were used for storage. In Anonymous Taxpayer v. S.C. Dep't of Revenue, 02-ALJ-17-0350-CC, the Administrative Law Court also held that racks used to hold fibers manufactured by the taxpayer were used for storage and not essential or integral to the manufacturing process. One set of "intermediate" racks was used to hold fibers after they were extruded and spun onto spools before quality inspection. Another set of racks was used to store fibers after mechanical processing for curing, which was required to produce a completed, marketable product. Although the taxpayer argued storage on the intermediate racks involved some level of curing as well, the court stated the intermediate racks were not used to manufacture the product, nor were they attachments to machines used to manufacture the product. Similarly, the final curing racks were not exempt because they were used for storage, not manufacturing, and therefore they were not integral to manufacturing.

Consistent with these cases, the Department stated in S.C. Rev. Rul. #04-7 that although the machinery exemption does not require exempt machines to be used in the production line directly, it does require exempt machines to be necessary and integral to manufacturing. The Department explained that necessary and integral means that a machine is essential to the manufacturing process and is used in an ongoing and continuous basis during manufacturing. Id. (citing Hercules, 280 S.C. 426, 313 S.E.2d 300; Springs Industries, Inc. v. S.C. Dep't of Revenue, 99-ALJ-17-0153-CC; Anonymous Taxpayer v. S.C. Dep't of Revenue, 02-ALJ-17-0350-CC); see also Regulation 117-302.5(B)(1).

The policy animating the exemption for machines used in manufacturing supports the requirement that a machine must be used in an ongoing and continuous basis during manufacturing, and therefore necessary and integral to manufacturing, to be exempt. The purpose of the machine exemption is to avoid the pyramiding of taxes on the same

commodity thereby preventing the increase of sales price to the ultimate consumer. Southeastern-Kusan, Inc. v. S.C. Tax Comm'n, 276 S.C. 487, 280 S.E.2d 57 (1981); see also 85 C.J.S. Taxation § 2024 (2001) ("The theory underlying the sales tax exemption for tangible personal property sold for processing is that the cost of production is included in the retail price of a manufactured product and therefore would ultimately be subject to tax on the sale of the product."). Thus, only machines that represent a cost of production incorporated into the final product are exempt; machines that are not necessary and integral to production represent merely a cost of business and are not exempt. The statutes addressing exempt machines make this distinction between production costs and business costs. Specifically, § 12-36-2120(51) discusses, independent of the manufacturing machine exemption, an exemption for materials handling machinery used in a manufacturing facility. The Department's regulations and longstanding administrative positions also reflect the distinction. For example, Regulation 117-302.5(B)(4) elucidates the distinction between material handling and manufacturing:

> The general rule with reference to material handling machinery and/or mechanical conveyors is that such machinery is subject to the tax up to the point where the materials go into process. The machine feeding the first processing machine(s) is exempt. The last machine to come within the exemption is that machine which discharges the finished product from the last machine used in the process. Material handling machinery used for transporting (in process) material from one process stage to another comes within the exemption. Warehouse machinery used only for warehouse purposes, loading and unloading, storing, transporting raw materials and finished products, etc., is subject to the tax, unless exempt under the provisions of Code Section 12-36-2120(51).

See also Regulation 117-302.5(B)(7) ("Machines used at a manufacturing facility for storage are not exempt from the tax as a machine used in manufacturing tangible personal property;" this exclusion applies to "[s]torage tanks used to store raw materials."); Regulation 117-302.5(C)(8) (independently exempting "[t]anks which are a part of the chain of processing operations").

In the case at hand, the spent fuel storage systems are not used in an ongoing and continuous basis during manufacturing and are therefore not necessary and integral to manufacturing. Specifically, the systems are transported to the discharge pools only on occasion to collect and store spent fuel after the manufacturing process is completed. Even then, the systems do not manage the direct discharge of the machine responsible for actual processing; rather, they collect fuel ten years after it was actually used in production. The systems are then removed directly to a remote location and left alone indefinitely to carry out their fundamental purpose of shielding radiation. Thus, they are

not used at all during actual manufacturing, and indeed their principal operation is greatly attenuated in time and space from production generally. Like the storage racks in Springs Industries, Inc. v. S.C. Dep't of Revenue and Anonymous Taxpayer v. S.C. Dep't of Revenue, the spent fuel storage systems are used for handling and storing a product of the manufacturing process. Therefore, they are not integral to manufacturing.

Consistent with the system's failure to be integral to manufacturing, they represent a cost that is not incorporated into the final product, but rather is an isolated and residual cost of business. Accordingly, exempting the systems would be inconsistent with the policy of exempting only machines representing a cost of production.

In addition to exempting machines used in manufacturing, § 12-36-2120(17) also exempts the following parts and attachments to those machines:

> . . . the parts of machines [and] attachments . . . used . . . on or in the operation of [manufacturing] machines and which (a) are necessary to the operation of the machines and are customarily so used, or (b) are necessary to comply with the order of an agency of the United States or of this State for the prevention or abatement of pollution of air, water, or noise that is caused or threatened by any machine used as provided in this section.

In this case, the spent fuel storage systems are plainly not parts or attachments to the machines responsible for producing electricity. They are not an integrated component of the machines, nor are they even physically connected to the machines. Again, the systems only on occasion make a relatively brief trip to the discharge pools. The systems are then removed to a remote location away from the processing facility and left alone indefinitely. Indeed, the holding racks for which exemptions were denied in Springs Industries, Inc. v. S.C. Dep't of Revenue and Anonymous Taxpayer v. S.C. Dep't of Revenue were more closely physically connected with the manufacturing machines involved than are the spent fuel systems in this case. See also Regulation 117-302.5(B)(2) (exempt parts or attachments must be integral and necessary to the operation of the principal machine and the machine must not be able to do the work for which it was designed without the part or attachment).

Finally, because the spent fuel storage systems fall outside of the intended scope of § 12-36-2120(17), they cannot be exempt based on some other provision of Regulation 117-302.5 or based on a provision of Regulation 117-302.6. The Department promulgated Regulation 117-302.5 to clarify which machines used in connection with manufacturing are exempt under § 12-36-2120(17). Regulation 117-302.6 is intended to clarify which machines used to control pollution from manufacturing are exempt as machines used in manufacturing.[3] Regulations authorized by the Legislature have the force of law, but a

[3]Regulation 117-302.6 states:

regulation may not alter or add to a statute. Home Med. Sys., Inc. v. S. C. Dep't of Revenue, 382 S.C. 556, 564, 677 S.E.2d 582, 587 (2009). Thus, because the systems do not fall within the intended scope of § 12-36-2120(17), Regulations 117-302.5 and 302.6 cannot widen the exemption to include the systems.

January 6, 2012

> The purpose of this regulation is to classify . . . machines, their parts or attachments, as machines used in . . . manufacturing of tangible personal property when the same are installed and operated for compliance with an order of an agency of the United States or of this state to prevent or abate pollution caused or threatened by the operation of other machines used in . . . manufacturing of tangible personal property.
>
> The term "machine" as defined in Section 12-36-2120(17) shall include machines, their parts and attachments, when the same are necessary to comply with the order of an agency of the United States for the prevention or abatement of pollution that is caused or threatened by any machines used in the . . . manufacturing of tangible personal property.
>
> The order . . . must be issued by the agency of the United States or of this state that is primarily charged with the duty of preventing or abating the pollution.

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

DUKE ENERGY CORPORATION, Petitioner, v. SOUTH CAROLINA DEPARTMENT OF REVENUE, Respondent.	)	REQUEST FOR CONTESTED CASE HEARING DOCKET NO: ___-ALJ-___-___-___

BRIEF STATEMENT OF THE CASE & RELIEF SOUGHT

Petitioner Duke Energy Corporation ("Petitioner") files this Statement of the Case in conjunction with its Request for Contested Hearing pursuant to S.C. Code Ann. § 12-60-460 against Respondent South Carolina Department of Revenue ("Respondent"). Petitioner contests Respondent's Determination dated January 6, 2012 ("Determination"), assessing use tax, penalties and interest for the taxable periods beginning April 1, 2002 and ending December 31, 2004.

Respondent erroneously determined that Petitioner's purchases of spent nuclear fuel canisters, casks, and related equipment ("Canisters"), which are used to manage and control the nuclear fuel used in Petitioner's nuclear reactors in York and Oconee Counties, are not exempt from use tax under S.C. Code Ann. § 12-36-2120(17) or S.C. Code Regs. § 117-302.6 . Section 12-36-2120(17) exempts from sales or use tax "machines used in manufacturing, processing, recycling, compounding, mining, or quarrying tangible personal property for sale." Respondent made three critical errors in reaching its conclusion. First, Respondent determined that the Canisters are not "necessary and integral to the production of electricity." Second, Respondent determined that the Canisters are not "parts or attachments to a machine used in manufacturing." Third, Respondent failed to treat the Canisters as "pollution control machines," which are exempt from sales or use tax under S.C. Code Regs. § 117-302.6.

The Canisters at issue in this case constitute "machines" exempt from sales or use tax under S.C. Code Ann. § 12-36-2120(17). For purposes of South Carolina sales and use tax, tangible personal property used in the production of electricity is deemed to be exempt from sales and use tax. The Canisters are an essential and indispensable component of the manufacturing process (as such term is defined for sales and use tax) because, as a practical matter, the Canisters must be used to manage and control spent nuclear fuel in accordance with federal and state laws. Furthermore, the Canisters are "pollution control machines" within the

meaning of S.C. Code Regs. § 117-302.6 because they are necessary to comply with orders of an agency of the United States and/or South Carolina for the prevention or abatement of pollution caused or threatened by machines used in the manufacturing process.

Petitioner respectfully requests that the Court: (1) determine that Respondent's assessment of use tax, penalties and interest is erroneous and illegal, and (2) determine that Petitioner is entitled to such other and further relief as may be just and proper. Petitioner reserves the opportunity to present further information and to raise additional issues prior to or at the hearing.

This 30th day of January, 2012.

Respectfully submitted,

Marsha A. Ward, Esq.
Eric S. Tresh, Esq. (*pro hac vice admission pending*)
SUTHERLAND ASBILL & BRENNAN LLP
999 Peachtree Street, NE
Atlanta, Georgia 30309-3996
Tel. No. (404) 853-8000
Fax No. (404) 853-8806

Attorneys for Petitioner

Exhibit-B

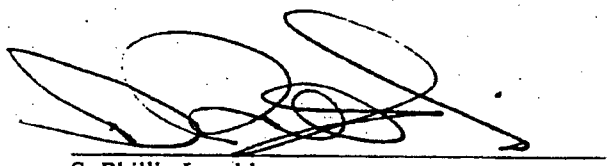
STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Duke Energy Corporation, Petitioner, vs. South Carolina Department of Revenue, Respondent.	)	Docket No. 12-ALJ-17-0031-CC **ORDER**

This matter is before the Court pursuant to the Motion to be Admitted *Pro Hac Vice*, filed by Eric S. Tresh, Esquire. The Supreme Court notified this Court that it has received a verified application requesting that the movant be admitted *Pro Hac Vice*. Furthermore, Mr. Tresh has associated Marsha A. Ward, Esquire, a member in good standing with the South Carolina Bar, to participate in this case.

Since the movant has complied with the requirements of Rule 404, SCACR, the motion is GRANTED.

AND IT IS SO ORDERED.

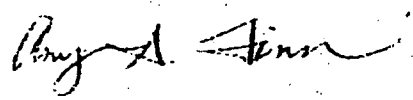


S. Phillip Lenski
Administrative Law Judge

February 16, 2012
Columbia, South Carolina

CERTIFICATE OF SERVICE

I, Amy S. Finn, hereby certify that I have this date served this Order upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, in the Interagency Mail Service, or by electronic mail to the address provided by the party(ies) and/or their attorney(s).



Amy S. Finn
Senior Staff Counsel

February 16, 2012
Columbia, South Carolina

Exhibit-C

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Duke Energy Corporation, Appellant, vs. South Carolina Department of Revenue, Respondent.	)	Docket No. 12-ALJ-17-0031-AP **ORDER**

This matter is before the Court pursuant to the Motion to be Admitted *Pro Hac Vice*, filed by Zachary T. Atkins, Esquire. The Supreme Court notified this Court that it has received a verified application requesting that the movant be admitted *Pro Hac Vice*. Furthermore, Mr. Atkins has associated Marsha A. Ward, a member in good standing with the South Carolina Bar, to participate in this case.

Since the movant has complied with the requirements of Rule 404, SCACR, the motion is GRANTED.

AND IT IS SO ORDERED.

S. Phillip Lenski
Administrative Law Judge

August 16, 2012
Columbia, South Carolina

CERTIFICATE OF SERVICE

I, Leah E. Garland, hereby certify that I have this date served this Order upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, in the Interagency Mail Service, or by electronic mail to the address provided by the party(ies) and/or their attorney(s).

Leah Garland

Leah E. Garland
Judicial Law Clerk

August 20, 2012
Columbia, South Carolina

Exhibit-D

Beaudro, Chris

From: Beaudro, Chris
Sent: Tuesday, August 22, 2017 10:52 AM
To: Beaudro, Chris
Subject: FW: Order Granting Petitioner's Motion for Summary Judgment in Duke Energy Corporation v SCDOR 12-ALJ-17-0031-CC
Attachments: OrderGrantingSJ12a0031DukevDOR.pdf; ATT00001.htm

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From: Edye Moran [mailto:emoran@scalc.net]
Sent: Friday, April 28, 2017 2:22 PM
To: Atkins, Zachary; Sean Ryan; Milton Kimpson
Cc: Edye Moran
Subject: Order Granting Petitioner's Motion for Summary Judgment in Duke Energy Corporation v SCDOR 12-ALJ-17-0031-CC

Dear Counsel,

Attached is Judge Lenski's Order Granting Petitioner's Motion for Summary Judgment in Duke Energy Corporation v. SC Department of Revenue.

Thanks in advance for acknowledging receipt of this Order.

Edye Ulmer Moran, Esq.
Judicial Law Clerk to the Honorable S. Phillip Lenski
South Carolina Administrative Law Court
1205 Pendleton Street, Suite 224
Columbia, S.C. 29201
emoran@scalc.net
803-734-6408

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Duke Energy Corporation, Petitioner, v. South Carolina Department of Revenue, Respondent.	Docket No. 12-ALJ-17-0031-CC **ORDER GRANTING PETITIONER'S MOTION FOR SUMMARY JUDGMENT**

STATEMENT OF THE CASE

This matter is before the Administrative Law Court (ALC or court) pursuant to a Request for Contested Case filed by Duke Energy Corporation (Petitioner). The Petitioner contests the determination of the South Carolina Department of Revenue regarding the tax-exempt status of canister systems purchased by the Petitioner to contain spent nuclear fuel.

The Petitioner filed South Carolina sales and use tax returns for the taxable periods April 1, 2002 through December 31, 2004. During that time, the Petitioner purchased $19,764,879.66 of out-of-state canister systems. Except for $167,398.11, which it claims was paid in error, the Petitioner did not pay South Carolina use tax on the canister systems. The Petitioner has requested a refund for the $167,398.11 with interest, while the Department maintains that this is only a portion of the use tax the Petitioner owes, totaling $1,018,436.60 plus interest and penalties.

The parties filed cross motions for summary judgment and a hearing was held for the parties to present their arguments. After review of the filings and arguments of the parties, the court grants the Petitioner's motion for summary judgment and denies the Respondent's.

ISSUES PRESENTED

Whether the canister systems utilized by the Petitioner to contain spent nuclear fuel rods following the manufacture of electricity are exempt under S.C. Code Ann. § 12-36-2120(17) as pollution control machines.

LEGAL STANDARD

The court has jurisdiction over this matter pursuant to S.C. Code Ann. § 12-60-460 (2014). Under this statute, the court hears this matter as a contested case. *See* S.C. Code Ann. § 12-60-460 (2014); *see also* S.C. Code Ann. § 1-23-600(A) (Supp. 2016). In a contested case, the court's

review is *de novo*. *Engaging & Guarding Laurens Cty.'s Env't (EAGLE) v. S.C. Dep't of Health & Envtl. Control*, 407 S.C. 334, 344, 755 S.E.2d 444, 449 (2014).

In this matter, both parties have filed for summary judgment. The ALC hears motions for summary judgment under Rule 68, SCALC, which grants discretion to apply the South Carolina Rules of Civil Procedure in a contested case. Rule 56(c), SCRCP, states that summary judgment shall be granted if "there is no genuine issue as to any material fact" and "the moving party is entitled to a judgment as a matter of law." "Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Singleton v. Sherer*, 377 S.C. 185, 197, 659 S.E.2d 196, 202 (Ct. App. 2008) (citations omitted). Summary judgment should be granted "when plain, palpable, and indisputable facts exist on which reasonable minds cannot differ." *Hedgepath v. Am. Tel. & Tel. Co.*, 348 S.C. 340, 355, 559 S.E.2d 327, 336 (Ct. App. 2001) (citation omitted). "In determining whether any triable issue of fact exists, the evidence and all inferences which can reasonably be drawn therefrom must be viewed in the light most favorable to the nonmoving party." *Pye v. Estate of Fox*, 369 S.C. 555, 563, 633 S.E.2d 505, 509 (2006) (citations omitted).

FINDINGS OF FACT

The court finds that the following material facts are undisputed in this matter.

The Petitioner is engaged in the generation, transmission, distribution, and sale of electricity in South Carolina. The Petitioner operates two nuclear power plants in South Carolina: Catawba Nuclear Station in York County, which began producing power in 1985, and Oconee Nuclear Station in Oconee County, which began producing power in 1973. The nuclear fuel used by the Petitioner in its plants consists of ceramic pellets containing uranium enriched in the uranium-235 isotope that are stacked in rods. These rods are arranged in nuclear fuel assemblies, which are loaded into the nuclear reactors.

When rods in the reactor have fissioned to the extent that the fuel can no longer sustain the chain reactions necessary to support normal operating levels of a nuclear reactor, the nuclear fuel is said to be "spent" (*i.e.*, reached the end of its useful life). Spent nuclear fuel assemblies must be unloaded from the reactor core, at which point the spent nuclear fuel is extremely hot and highly radioactive. The radiation from the rods can pollute the environment and pose significant health hazards to humans, especially if ingested or inhaled. To protect against these dangers, spent

nuclear fuel assemblies are removed from the reactors and transferred to "spent fuel pools." The spent fuel pools contain borated water and are designed to cool the spent nuclear fuel and shield operators and the public from radiation emitted by the spent nuclear fuel and other hazards.

Because of its inherent dangers, spent nuclear fuel is strictly regulated and licensed by the United States Nuclear Regulatory Commission (NRC) to prevent or mitigate pollution. When the Petitioner's spent fuel pool systems reach maximum capacity, the Petitioner has three (3) options available to it for storage that comply with NRC regulations. First, the Petitioner could expand its existing spent fuel pools or build new spent fuel pools, the costs of which can run into the hundreds of millions. Second, the Petitioner could build an independent spent fuel storage installation (ISFSI) at the reactor site and move the spent nuclear fuel to dry spent nuclear fuel storage systems. Third, the Petitioner could shut down the nuclear power plant and cease the production of electricity.[1]

Because the first option is unavailable and the third option is, for obvious reasons, not a viable one for the Petitioner, the Petitioner considers the ISFSI dry storage option to be the only option.[2] The ISFSI consists of canister systems that holds the spent fuel rods. The canister systems are mechanical devices that act to transmit forces, motion, and energy among their constituent components in a predetermined and acceptable manner. The canisters serve the same function as the spent fuel pools: confinement of radiation, shielding of radiation, and criticality control. The canister systems are designed to accommodate a tremendous range of external forces ranging from excessive and minimal solar heat input, heavy wind, snow and ice loadings, flooding, seismic excitation, to impact loads imposed by tornado missiles. Specifically, the Petitioner's expert witness, Charles Pennington, identified the following functions related to pollution control that the Canister Systems serve: (1) confinement of the radiation emitted by the spent nuclear fuel to protect the public and to assure environmental protection; (2) prevent criticality within the spent nuclear fuel by maintaining the spent nuclear fuel in an appropriate geometry; (3) cool the spent nuclear fuel; (4) assure appropriately non-reactive environments surrounding the spent nuclear fuel to avoid corrosion and preserve the integrity of the spent nuclear fuel; (5) protect important

[1] The Petitioner cannot move spent nuclear fuel off-site because the NRC has not licensed any facilities to accept spent nuclear fuel in significant quantities, and because the federal government has no immediate plans to open the Yucca Mountain Nuclear Waste Repository in Nevada, the only facility that could possibly accommodate the spent nuclear fuel.

[2] The Department determination states that the Petitioner spent a total of $19,764,879.66 on out-of-state ISFSI canister systems during the period at issue in this case (April 2002 to December 2004).

structures, systems, and components. All of these functions are related to NRC requirements.[3] Based on this undisputed evidence, the court finds that the canister systems are used to control or abate pollution caused by the spent nuclear fuel and avert significant harms to the Petitioner's employees and the public and are so used to comply with the requirements of the Petitioner's licensor and regulator, the NRC, a United States agency.

CONCLUSIONS OF LAW

Based upon the above Findings of Fact, the court makes the following conclusions as a matter of law:

Statutory Authority

In South Carolina, a sales tax is imposed "upon every person engaged or continuing within this State in the business of selling tangible personal property at retail." S.C. Code Ann. § 12-36-910(A) (2014). A use tax is "imposed on the storage, use, or other consumption in this State of tangible personal property purchased at retail for storage, use, or other consumption in this State . . . ." S.C. Code Ann. § 12-36-1310 (2014). Both of these taxes apply to the "gross proceeds accruing or proceeding from the sale of electricity[.]" S.C. Code Ann. §§ 12-36-910(B)(2) & 12-36-1310(B)(2) (2014). Exempted from these taxes are the "gross proceeds of sale,[4] or sales price[5] of:"

> ***
>
> (17) machines used in manufacturing, processing, agricultural packaging, recycling, compounding, mining, or quarrying tangible personal property for sale. "Machines" include the parts of machines, attachments, and replacements used, or manufactured for use, on or in the operation of the machines and which (a) are necessary to the operation of the machines and are customarily so used, or (b) are necessary to comply with the order of an agency of the United States or of this State for the prevention or abatement of pollution of air, water, or noise that is caused or threatened by any machine used as provided in this section. . . .

---

[3] The way the Petitioner maintains, handles, and stores spent nuclear is dictated by standards and limitations established by the NRC in the Code of Federal Regulations. *See, e.g.*, 10 C.F.R. § 20.1001; 42 U.S.C. § 2011 *et seq.* The Petitioner is required to use "procedures and engineering controls based upon sound radiation protection principles to achieve occupational doses and doses to members of the public that are as low as is reasonably achievable (ALARA)." 10 C.F.R. § 20.1101(b). The Petitioner must ensure that the annual, occupational dose limits for adults and minors, as well as dose limits to the lens of the eye, to the skin of the whole body, and to the skin of the extremities does not exceed certain limits. 10 C.F.R. §§ 20.1201(a), 20.1207, 20.1301. The Petitioner must ensure that direct radiation from the ISFSIs do not exceed annual dose limits for real individuals set forth in 10 C.F.R. § 72.104. *See* 10 C.F.R. § 72.106. The canister systems at issue in this case are listed by model name and number as having been approved by the NRC for use in the on-site management of spent nuclear fuel and the prevention or abatement of harmful radiation from the spent nuclear fuel. 10 C.F.R. § 72.214.

[4] Defined in S.C. Code Ann. § 12-36-90 (2014 & Supp. 2016).

[5] Defined in S.C. Code Ann. § 12-36-130 (2014).

S.C. Code Ann. § 12-36-2120(17) [6] (2014); *see also* S.C. Code Ann. Reg. 117-302.6 (2012) (further expounding upon "Pollution Control Machines"). Thus, the Petitioner, a manufacturer of electricity, is exempt from taxes on machines which are necessary to comply with the order of a United States agency to prevent or abate pollution that is precipitated by other manufacturing machines used in the process of generating electricity. From this, the court derives three elements that must be met: (1) a machine that (2) prevents or abates pollution caused by machines used in the manufacturing process and is (3) necessary to comply with the order of an agency.

"As a general rule, tax exemption statutes are strictly construed against the taxpayer." *Se.-Kusan, Inc. v. S.C. Tax Comm'n*, 276 S.C. 487, 489, 280 S.E.2d 57, 58 (1981) (citation omitted). This means that "constitutional and statutory language will not be strained or liberally construed in the taxpayer's favor," but neither will the court "search for an interpretation in the [Department's] favor where the plain and unambiguous language leaves no room for construction." *Id.* (citation omitted). In this case, the court finds the language of the statute to be plain and unambiguous. The machines which the Petitioner assert are tax exempt fall squarely within the plain meaning of the exemption statute. Conversely, the Department's interpretation strains the language and produces an absurd result.[7]

Machine

"The term 'machine' includes every mechanical device or combination of mechanical powers and devices to perform some function and produce a certain effect or result." *Hercules Contractors & Engineers, Inc. v. S.C. Tax Comm'n*, 280 S.C. 426, 431, 313 S.E.2d 300, 303 (Ct. App. 1984); *see also* S.C. Code Ann. Reg. 117-302.5(B)(1) (2012) (construing "machine" in the

[6] Subsection (b) was added by the General Assembly in 2000 by Act 399. This portion is referred to throughout this order as "Clause B." It is worth noting that the relatively recent advent of this addition means that prior case law and Department policy typically interpret only the prefatory language and Clause A of the statute.

[7] The Department argues that it is a fundamental misapprehension to separate the two clauses, (a) and (b), in the statute and that all machines exempted under this subsection must be integral and necessary to the manufacturing process. The court finds this contrary to the language of the statute on its face. Quite simply, the statute says "or." The statute exempts machines integral and necessary to the manufacturing process *or* machines that prevent or abate pollution from those integral and necessary machines. Although the pollution must originate from a manufacturing machine, the pollution control machine need not be integral to manufacturing itself. To read the statute otherwise would result in redundancy because the pollution control machine would already be exempt under Clause A and there would be no need for Clause B.

context of Clause A of the above subsection). A machine does not need moving parts to qualify for the exemption. *Id.* (citation omitted).

The uncontroverted evidence in this matter demonstrates that the canister systems are mechanical devices that act to transmit forces, motion, and energy among their constituent components to prevent or mitigate radiation exposure. The radiation exposure risk comes from the machines essential to the production of the electricity, namely the fuel rods and nuclear reactors. Therefore, the court concludes that the canister systems are machines for purposes of the statute. Furthermore, the court concludes that the canister systems are used because of pollution produced or potentially caused by machines necessary and integral to the Petitioner's manufacturing process.

Prevention or Abatement of Pollution

To be exempt under Clause B, a machine must be for the prevention or abatement of pollution of air, water, or noise. S.C. Code Ann. § 12-36-2120(17) (2014). It is undisputed that the canister systems used by the Petitioner control pollution in the form of radiation that would be extremely harmful to its employees, the public at large, and the environment. The canister systems prevent radiation exposure and prevent the fuel rods from going critical, even in catastrophic circumstances. For these reasons, the court concludes that the canister systems are for the prevention or abatement of pollution.

Necessary

Subsection (17) requires that the pollution control machines be necessary to comply with an agency order. The Department argues that the Petitioner's canister systems are not necessary under the terms of the statute. As explained in the facts, the Petitioner essentially has two choices for storing its spent fuel rods, assuming continued operation and absent a permanent storage solution from the federal government. The Petitioner chose the canister systems because they are more cost effective than expanding their spent fuel pool systems. Although, the Department conceded at the hearing that the spent fuel must be stored, it argues that because there is a choice in method of storage, the canister systems are not "necessary." The court finds this to result in absurdity. Where a necessary result must be achieved, one of the available routes to achieve that result must be utilized (*i.e.*, dry storage or wet storage). It defeats the purpose of the statute to conclude that a machine is unnecessary because there is more than one type of machine that can accomplish the same necessary pollution prevention task. The Petitioner must store the spent fuel

rods to prevent pollution and comply with the order of a federal agency. Thus, the machines in question are necessary.

Order of an Agency

Subsection (17) requires that the pollution control machine be "necessary to comply with the order of an agency of the United States or of this State." S.C. Code Ann. § 12-36-2120(17) (2014). The dictionary defines order as "a rule or regulation made by a competent authority." *Webster's Third New International Dictionary* 1588 (1993). In legal use, an order is a "command, direction, or instruction." *Black's Law Dictionary* (ORDER) (10th ed. 2014). A subtype of order is an "administrative order" which includes "[a]n agency regulation that interprets or applies a statutory provision." *Id.* Per regulation, the order "must be issued by the agency of the United States or of this state that is primarily charged with the duty of preventing or abating the pollution." S.C. Code Ann. Regs. 117-302.6 (2012).

Based upon the plain language meaning of the statute, the court concludes that agency regulations satisfy the statute. As discussed above, the canister systems are utilized by the Petitioner to comply with regulations of the NRC regarding hazardous nuclear material.[8] The NRC is an independent United States agency created specifically to help control the type of pollution at issue in this case. *See* 42 U.S.C. § 2201(b) ("In the performance of its functions the Commission[9] is authorized to . . . (b) establish by rule, regulation, or order, such standards and instructions to govern the possession and use of special nuclear material, source material, and byproduct material as the Commission may deem necessary or desirable . . . to protect health or to minimize danger to life or property . . . ."). Because the Petitioner is using the canister systems to comply with regulations of a United States agency created for the purpose of controlling nuclear fuel and its pollution, the court concludes that the requirement for compliance with an agency order is met.

However, Regulation 117-302.6 also requires that the taxpayer "furnish the department a certified statement from the ordering agency that any machine for which the exemption is claimed is necessary to prevent or abate pollution caused or threatened by the operation of other

[8] See, *supra*, note 3. Specifically, the Petitioner points to a comprehensive set of NRC regulations in 10 C.F.R. Part 20 and 10 C.F.R. Part 72, relating to spent nuclear fuel, radiation, and dry spent-fuel storage systems. Violations of these regulations can result in significant civil and criminal penalties. 10 C.F.R. § 72.86; *see* 42 U.S.C. § 2273.

[9] Under the cited statute the term "Commission" meant "the Atomic Energy Commission." 42 U.S.C. § 2014(f). After reorganization of the national nuclear regulatory scheme, the function of the Atomic Energy Commission devolved upon the NRC. 42 U.S.C. § 5841(f) ("There are hereby transferred to the Commission all the licensing and related regulatory functions of the Atomic Energy Commission . . . .").

machines . . . ." There is no evidence that the Petitioner has, as of this date, provided such a statement to the Department. The Department asserts that this provision is a record-keeping requirement that aids the Department in making a determination about a tax exemption. *See generally* S.C. Code Ann. § 12-36-2540 (2014). The court agrees. However, it is apparent, based on the deposition of the Department's policy expert, John McCormack, that the Department has not enunciated any policy defining what constitutes a certified statement. Because this is a record-keeping requirement which does not go directly to the merits of the exemption itself under the law, this court finds the Petitioner's failure to provide such a statement does not require a denial of the Petitioner's motion. Rather, the court conditions any refund the Petitioner may receive for the exemption of the pollution control machines upon provision of such a statement upon the Department providing the Petitioner with guidance on what it would accept as a certified statement for record-keeping purposes.

Department's Motion

In its motion for summary judgement the Department argues, based on the idea that the canister systems are not part of the manufacturing process, that they are not eligible for exemption under Subsection (17). As noted, *supra*, in note 7, the court rejects this argument. The Department's position is flawed for the following reasons: it is based on the improper assumption that the pollution control machines must be part of the manufacturing process, it ignores the addition of Clause B to the statute, it defeats the plain language purpose of Clause B, and it renders Clause B meaningless.

The Department interprets Subsection (17) to require that a machine that prevents or abates pollution also be a machine integral to manufacturing process.[10] This interpretation ignores the plain language of the statute ("or), and makes Clause B superfluous. The court "must read the statute so that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous, for the General Assembly obviously intended the statute to have some efficacy, or the legislature would not have enacted it into law." *CFRE, LLC v. Greenville Cty. Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011) (internal punctuation and citations omitted). A machine

[10] Because the court finds this contrary to the plain language of the statute, it does not address the Department's argument that the definition of a manufacturing machine from Regulation 302.5 directly applies in this case. As noted, the court agrees that the machine causing the pollution must be a manufacturing machine. However, there is a separate section of the same regulation for pollution control machines. Notably, that regulation specifically refers to "other machines" when discussing the cause of the pollution which must be control be machines exempt under Clause B. *See* S.C. Code Ann. Reg. 117-302.6 (2012).

integral to the manufacturing process was already exempted prior to the enactment of Clause B. There would be no reason to add Clause B to the statute if it did not accomplish an additional purpose.

The Department argues that the facts in this case are analogous to two prior ALC cases regarding storage. *See Anonymous Corporation v. S.C. Dep't of Revenue*, 02-ALJ-17-0350-CC (S.C. Admin. L. Judge Div. July 8, 2003); *Anonymous Corporation v. S.C. Dep't of Revenue*, 99-ALJ-17-0153-CC (S.C. Admin. L. Judge Div. Nov., 9, 1999) (*aff'd, S.C. Dep't of Revenue v. Springs Industries, Inc.*, Unpublished Opinion No. 2003-UP-029 (S.C. Ct. App. Feb. 28, 2003)). These cases dealt with racks used for storage of yarn or fiber and whether they were integral to the manufacturing process. The Department's analysis ignores the fact that unlike those cases where the manufacturers were storing yarn and fiber, the Petitioner is not storing its product, electricity. Rather, the Petitioner is storing a part or component of its manufacturing machines in order to prevent the active and ongoing disbursement of pollution. This is the purpose enunciated by the plain language of the statute. Moreover, the issue is not whether the canister systems produce a saleable good from a byproduct, eligible for a manufacturing machine exemption like in *U.S. Steel*,[11] but whether the canister systems prevent pollution in the manner required by the current version of the machine exemption subsection. For the foregoing reasons, the court concludes that the Department is not entitled to summary judgment as a matter of law and denies its motion.

Summary

The three elements that must be met for exemption under Subsection (17), Clause B are: (1) a machine that (2) prevents or abates pollution caused by machines used in the manufacturing process and is (3) necessary to comply with the order of an agency. In this case, there is no genuine issue of material fact that the canister systems are (1) machines that (2) prevent or abate nuclear radiation originating from machines used to manufacture electricity (3) necessary to comply with the regulations of a federal agency that has the responsibility to oversee control of this type of pollution. Therefore, the court concludes that the canister systems are exempt from tax under S.C. Code Ann. § 12-36-2120(17) as pollution control machines.

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[11] *U. S. Steel Corp. v. Bd. of Assessment & Revision of Taxes of Bucks Cty.*, 422 Pa. 463, 223 A.2d 92 (1966) (later superseded by legislative action as noted in *Reichard-Coulston, Inc. v. Revenue Appeals Bd. Northampton Cty.*, 102 Pa. Cmwlth. 227, 231–32, 517 A.2d 1372, 1374–75 (1986)) (discussing steel slag pits).

ORDER

THEREFORE, IT IS HEREBY ORDERED that the Petitioner's Motion for Summary Judgment is **GRANTED**.

IT IS FURTHER ORDERED that the Respondent's Motion for Summary Judgment is **DENIED**.

IT IS ALSO ORDERED that the Department shall provide guidance to the Petitioner on obtaining a certified statement within thirty (30) days. Within sixty (60) days of the provision of such a certified statement, the Department shall refund the Petitioner $167,398.11 plus applicable interest.

AND IT IS SO ORDERED.

S. Phillip Lenski, Judge
S.C. Administrative Law Court

April 27, 2017
Columbia, South Carolina

CERTIFICATE OF SERVICE

I, Edye U. Moran, hereby certify that I have this date served this Order upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, in the Interagency Mail Service, or by electronic mail to the address provided by the party(ies) and/or their attorney(s).

Edye U. Moran
Judicial Law Clerk to S. Phillip Lenski

April 28, 2017
Columbia, South Carolina

FILED
APR 28 2017

Exhibit-E

THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

HONORABLE S. PHILLIP LENSKI, ADMINISTATIVE LAW JUDGE

CASE NO. 2012-ALJ-17-0031-CC

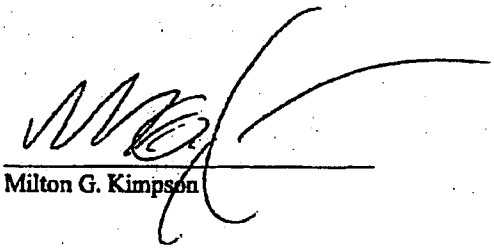
South Carolina Department of Revenue,.....Appellant/Respondent.

vs.

Duke Energy
Corporation,.....Respondent/Petitioner

PROOF OF SERVICE

I, Milton G. Kimpson, hereby affirm that I have caused to be mailed, via United States Postal Service, First Class Mail, postage pre-paid, a copy of the South Carolina Department of Revenue's Notice of Appeal in the above referenced matter to the Honorable S. Phillip Lenski, 1205 Pendleton Street, Suite 224, Columbia, SC 29201; Burnet R. Maybank, III, Esquire, PO Drawer 2426, Columbia, SC 29202; Eric S. Tresh, Esquire, 999 Peachtree Street, NE, Atlanta, GA 30309; and Jeffrey A. Friedman, Esquire, 1275 Pennsylvania Avenue, NW, Washington, DC 20004-2415 This 30th day of May 2017.



Milton G. Kimpson

THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

HONORABLE S. PHILLIP LENSKI, ADMINISTATIVE LAW JUDGE

CASE NO. 2012-ALJ-17-0031-CC

South Carolina Department of Revenue,.....Appellant/Respondent.

vs.

Duke Energy
Corporation,.....Respondent/Petitioner

NOTICE OF APPEAL

The South Carolina Department of Revenue appeals the Order of the Honorable S. Phillip Lenski, dated and filed April 28, 2017 The Department received a copy of the Order Granting Petitioners Motion for Summary Judgment on April 28, 2017. This Notice is in accordance with Rule 203, SCACR.

Milton G. Kimpson (Bar No. 7917)
General Counsel for Litigation
P.O. Box 12265
Columbia, SC 29211-9979
(803) 898-5130
Attorney for Appellant
CourtOrders@dor.sc.gov

May 30, 2017.

Other Counsel of Record:
Burnet R. Maybank, III
Eric S. Tresh
Jeffrey A. Friedman

Exhibit-F

STATE OF SOUTH CAROLINA
DEPARTMENT OF REVENUE
300A Outlet Pointe Blvd., Columbia, South Carolina 29210
P.O. Box 12265, Columbia, South Carolina 29211-9979

May 30, 2017

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

RE: Richard Beltram v. South Carolina Department of Revenue
Case No. 13-ALJ-17-0244-CC
Appellate Case No. 2017-000968

Dear Ms. Kitchings,

Enclosed for filing are the original and six copies of the Respondent's Reply to Return to Motion to Dismiss, with attachments. Also enclosed is a Proof of Service.

Sincerely,

OFFICE OF GENERAL COUNSEL

Nicole M. Wooten
Counsel for Litigation

cc: Ginger D. Goforth, Esq.
Enclosures

THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

HONORABLE PHILIP S. LENSKI, ADMINISTRATIVE LAW JUDGE

CASE NO. 13-ALJ-17-0244-CC

APPELLATE CASE NO. 2017-000968

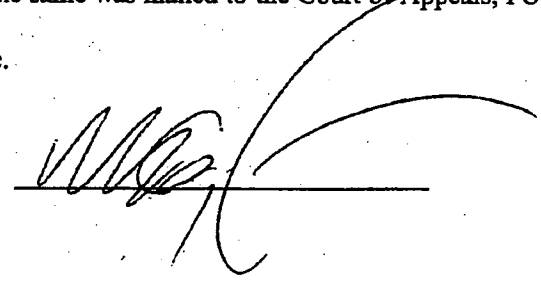
Richard Beltram,.....Appellant,

v.

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

PROOF OF SERVICE

I, Milton G. Kimpson, hereby certify that I have caused to be mailed a copy of the South Carolina Department of Revenue's Reply to Return to Motion to Dismiss regarding the above-referenced case, by depositing the same in the United States Mail, postage prepaid, on May 30, 2017, addressed to the attorney of record, Ginger D. Goforth, Esquire, The Ward Law Firm, P.A., P.O. Box 5663, Spartanburg, SC 29304. The same was mailed to the Court of Appeals, PO Box 11629, Columbia, SC 29211, this same date.



THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

HONORABLE PHILIP S. LENSKI, ADMINISTRATIVE LAW JUDGE

CASE NO. 13-ALJ-17-0244-CC
APPELLATE CASE NO. 2017-000968

Richard Beltram,.....Appellant/Respondent,

v.

South Carolina Department of Revenue,.....Respondent/Appellant.

REPLY TO APPELLANT/RESPONDENT'S RETURN TO MOTION TO DISMISS

Pursuant to Rule 240(f), SCACR, Respondent/Appellant South Carolina Department of Revenue (Department) replies to Appellant/Respondent Richard Beltram's (Beltram) Return to Motion to Dismiss (Return). By way of background, on April 27, 2017, the Department filed with this Court its Motion to Dismiss Appeal With Prejudice (Motion). In its Motion, the Department submits that due to Beltram's failure to pay the tax or post bond on such tax found to be due by the Administrative Law Court (ALC) prior to his appeal to this Court, such failure deprives this Court of appellate jurisdiction and requires dismissal of the instant appeal. For the reasons set forth in the Department's Motion and as set forth below, the Department respectfully requests this Court to dismiss Beltram's appeal with prejudice.

I. The South Carolina Court of Appeals Lacks Appellate Jurisdiction in This Matter.

In his Return, Beltram asserts that he has properly perfected his Notice of Appeal in this matter and argues that S.C. Code Ann. § 12-60-3370 (2014) "cannot override the specific rules of the South Carolina Court of Appeals" for complying with the procedural requirement for perfecting an appeal." (Return, p. 2.) The Department disagrees. The Revenue Procedures Act, specifically section 12-60-3370, provides a requirement to taxpayers who wish to appeal a final decision of the Administrative Law Court, and to the extent Beltram argues this section conflicts with the South Carolina Appellate Court Rules, the Department respectfully submits the language of the statute must control in this matter.

A. South Carolina Revenue Procedures Act Requires Payment of the Tax or Posting of a Bond.

In South Carolina, a taxpayer's right to challenge a dispute with the Department is authorized pursuant to the South Carolina Revenue Procedures Act (RPA). Specifically, in 1995, the South Carolina Legislature created the RPA "to provide the people of this State with a straightforward procedure to determine a dispute with the Department of Revenue . . . ." S.C. Code Ann. 12-60-20(2014); 1995 Act No. 60, § 4A. Further, the RPA "must be interpreted and construed in accordance with, and in furtherance of, that intent." Id. Pursuant to the S.C. Code Ann. § 12-60-3340 (2014), contested case hearings are held by the ALC to determine disputes between taxpayers and the Department. At the time of the RPA's enactment, appeals of ALC decisions regarding a dispute between a taxpayer and the Department were taken to the circuit court pursuant to then-existing section 12-60-3370[1] and S.C. Code Ann. § 1-23-610. In 2006,

[1]The requirement that the "taxpayer shall pay, or post a bond for, all taxes, including interest, penalties, and other amounts determined to be due by the Administrative Law Judge" was included in 1995 Act No. 60, § 60 (eff. Jun. 12, 1995).

these sections, in addition to S.C. Code Ann. § 12-60-3380, were amended to provide that appeals from ALC decisions are to the Court of Appeals. See 2006 Act No. 387, § 5, eff. July 1, 2006 (amending 1-23-610); 2006 Act No. 387, § 12, eff. July 1, 2006 (amending 12-60-3370); and 2006 Act No. 387, § 13, eff. July 1, 2006 (amending 12-60-3380). Section 53 of 2006 Act 387 further provides:

> This act is intended to provide a uniform procedure for contested cases and appeals from administrative agencies and to the extent that a provision of this act conflicts with an existing statute or regulation, the provisions of this act are controlling.

Pursuant to section 12-60-3370 of the RPA, the South Carolina Legislature explicitly conditioned a taxpayer's ability to appeal an ALC decision to this Court. Specifically, the RPA provides a definite requirement for a taxpayer seeking to challenge an ALC decision before this Court. Section 12-60-3370 states a taxpayer "shall pay, or post a bond for, all taxes, not including penalties or civil fines, determined to be due by the administrative law judge before appealing the decision to the court of appeals." (Emphasis added). Based on the plain language of section 12-60-3370, payment of the tax, or bond for such tax, is a prerequisite to filing a notice of appeal of the ALC's decision. Hodges v. Rainey, 341 S.C.79, 85, 533 S.E2d 578, 581 (2000) ("Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning.") Beltram's interpretation of section 12-60-3370 renders such section superfluous and meaningless. Accordingly, Beltram would have this Court rule that the Legislature made a futile act by establishing section 12-60-3770, despite including a mandatory prerequisite requirement on a taxpayer prior to his filing a notice of appeal with this Court. Denene, Inc. v. City of Charleston, 353 S.C. 208, 574 S.E.2d 196 (2002) ("The Court must presume the legislature did not intend a futile act, but rather intended its statutes to accomplish something.").

Moreover, section 12-60-3370 does not contain any permissive or optional language but instead includes the mandate "shall." The word "shall" in section 12-60-3370 must be afforded its plain and ordinary meaning. Buist v. Huggins, 367 S.C. 268, 625 S.E.2d 636 (2006) ("The words of a statute must be given their plain and ordinary meaning without resorting to subtle or forced construction or limit tor expand the statute's operation."). Furthermore, words within a statute cannot be omitted. Savannah Bank and Trust v. Shuman, 250 S.C.344, 157 S.E.2d 864 (1962) ("It is axiomatic that words in a statute cannot be ignored or deleted."). Section 12-60-3370 can only reasonably be read to provide a mandatory requirement to pay the tax, or post a bond for such tax, determined to be due by the administrative law judge prior to appealing the decision to this Court.

B. S.C. Code Ann. § 12-60-3370 Applies in This Matter.

Despite Beltram's assertion, without citation from supporting authority, that section 12-60-3370 "cannot override the specific rules of the South Carolina Court of Appeals," the Department asserts that section 12-60-3370 can be read together with the South Carolina Appellate Court rules. Nevertheless, to the extent the Court determines section 12-60-3370 is in conflict with Rule 203(b)(6) and (d)(2), SCACR, Rule 263(b), SCRCP or any other court rules of procedure, the Department respectfully submits that the requirement of section 12-60-3370 must control in this matter. State v. Cottingham, 224 S.C. 181, 187, 77 S.E.2d 897, 900 (1953) ("Statutes override rules of court, if in conflict."); see also Skinner v. Westinghouse Elec. Corp., 380 S.C. 91, 94, 668 S.C.2d 795, 796-797 (2008) ("Our jurisprudence confirms that jurisdictional appealability issues are governed by statute, and not by the rules of civil procedure.") (citing N.C. Fed. Sav. & Loan Ass'n v. Twin States Dev. Corp., 289 S.C. 480, 481, 347 S.E.2d 97, 97 (1986) (rejecting an attempt to invoke a rule of civil procedure as a basis of the right to appeal and holding, "[t]he right of

appeal arises from and is controlled by statutory law")); see also S.C. Code Ann. § 14–3–330 (Supp. 2007) (primary statute addressing appellate jurisdiction). Accordingly, the Department respectfully submits this Court lacks appellate jurisdiction in this matter and requests that Beltram's appeal be dismissed with prejudice.

C. A Taxpayer's "Lack of Knowledge" of Section 12-60-3370 is Not a Sufficient Reason to Excuse Him from Complying with the Requirements of the Statute.

In his Return, to include the accompanying affidavit, Beltram acknowledges that he did not pay either the amounts due under the ALC's Amended Final Order or post a bond prior to filing his appeal in this case as is required under 12-60-3370. (Return, p. 2; Beltram Affidavit, para. 4). Nevertheless, Beltram argues that this Court should excuse him from the requirements of section 12-60-3370 because "he was not aware of this requirement." (Return, p. 2.) It is a well-established principle "that ignorance of the law is no excuse" to relieve an individual from an act required under the law. Beltram cannot be excused from the statutory requirement of section 12-60-3370 simply because he was "unaware" of its existence.[2]

D. Beltram's Subsequent Remedial Action is Insufficient to Grant Appellate Jurisdiction to This Court.

In his Return and supporting affidavit, Beltram asserts that upon "notice of the requirement" to pay the tax or post bond, he completed the following actions:

> Beltram provided counsel with credit card information that would enable a prompt and full payment of the amounts at issue in order to proceed with his appeal. Beltram attempted to make an online payment to SCDOR, but there was no accommodation on the website for the collection of this type of payment.

---

[2]In his Return, Beltram asserts that the tax owed is $13,602.11. As explained in Part II, below, the Department believes that Beltram's interpretation of the ALC's Amended Final Order is incorrect and that the ALC has instead ordered Beltram to pay $52,273.05 in tax, including interest. Nevertheless, for the purposes of the Department's Motion and Reply, what is important is that Beltram failed to pay even the amount of tax he claims is owed (or post a bond for that amount) prior to filing his appeal as required by section 12-60-3370.

(Return, p. 2). Beltram's subsequent remedial actions are insufficient to grant appellate jurisdiction to this Court.

Section 12-60-3370 clearly and plainly requires a taxpayer to pay the tax or post a bond prior to filing the notice of appeal with the Court, and a taxpayer's failure to comply with section 12-60-3370 deprives this Court of appellate jurisdiction. See supra. Further, there are no exceptions to the requirements of section 12-60-3370. A party's failure to comply with statutory requirements prescribed by the Legislature should not be excused by the party's subsequent attempt to untimely rectify its previous error.[3]

II. The Department Correctly Determined the Tax Liability at Issue.

Although Beltram asserts that the Department did not accurately interpret the ALC's determination with regard to the "correct" amount of tax due in this matter, this issue is not relevant to this Court's analysis of whether it has appellate jurisdiction in this matter. Regardless of the correct interpretation of the ALC's decision, the fact remains that Beltram failed to pay any tax prior to filing his appeal – including the amount he asserts is the "correct" tax due. Nevertheless, because Beltram raised such issue in his Return, the Department believes it is necessary to provide the Court with supporting evidence showing that the Department correctly interpreted the ALC's Amended Final Order and Decision.

In support of its Motion, the Department submitted the affidavit of Perry T. Mathis, a Regional Manager with the Department. In his affidavit, Mr. Mathis confirmed that pursuant to the Department's interpretation of the ALC's Amended Final Order, Beltram's tax liability in this matter is $52,273.05 and such tax liability remains unpaid. (Aff. of Perry T. Mathis, p. 9; see also

[3]Regardless of a remedial attempt to pay any of the amounts due in this matter or post a bond for said amounts, Beltram failed to do so prior to filing his appeal in this matter.

Beltram's Return, Aff. of Richard Beltram.). However, in his Return, Beltram asserts that the tax liability determined to be due by the ALC in this matter is $13,602.11. For the reasons set forth below, the Department disagrees with Beltram's lower amount.

A. Beltram's Tax Liability Includes Accrued Interest Pursuant to S.C. Code Ann. § 12-60-30(37) (2014).

As outlined in Beltram's affidavit submitted with his Return, Beltram asserts that the total tax liability determined to be due by the ALC in this matter is $13,602.11. In his computation, Beltram included the following amounts as derived from the "lien date" for the withholding periods of September 2003, December 2003, March 2004, and June 2004, respectively: $4,258.28; $3,923.79; $3,528.79; $2,566.26; less ($675.00 per ALC Order). As discussed above, section 12-60-3370 of the RPA provides that a "taxpayer shall pay, or post a bond for, all taxes, not including penalties or civil fines, determined to be due by the administrative law judge before appealing the decision to the court of appeals." (Emphasis added). The RPA defines "tax" or "taxes" as "taxes . . . including interest . . . imposed by this title, or subject to assessment or collection by the department." S.C. Code Ann. § 12-60-30(37) (2014). Furthermore, as noted by the ALC in the Amended Final Order, interest continues to accrue on such tax liability until "paid in its entirety." S.C. Code Ann. § 12-54-25(A); ALC Amended Order, p. 23 (finding that "there is no statutory authority for the waiver of interest in this case"). Thus, Beltram's tax liability determined to be due by the ALC, and required to be paid or post a bond for pursuant to section 12-60-3370, must include all applicable interest on such tax assessments. Beltram's computation is simply in error as it does not include, pursuant to section 12-60-30(37), the interest due upon the tax liability in this matter.

B. The Department Correctly Interpreted the ALC's Determination of Beltram's Tax Liability.

At a minimum, Beltram's calculation is inaccurate because it fails to include the statutory interest amounts upon the tax liability. See supra discussion Part II, A. Nevertheless, Beltram further argues that the Department's calculation of tax liability is incorrect because the ALC's Amended Final Order "does not set forth a specific money judgment. Rather, it calls for a calculation of the judgment based on certain time parameters set forth in the Amended Final Order." (Return, p. 2.) The Department disagrees with such statement; moreover, Beltram did not include all the time periods found to be due by the ALC when making his calculation as outlined in his affidavit attached to the Return.

In its Amended Final Order, the ALC made the following finding of fact:

> 27. This court finds, additionally, that as of this date, all of the above-listed withholding taxes, penalties, and interest remain unpaid. This court also finds that the first three (3) tax liens (see footnote 5) filed against Intedge[9] have expired, since they were filed over ten (10) years ago.[10], [sic] all before May 1, 2013, which was the date of the Department Determination in this matter. This court also finds that the first three (3) tax liens have expired. Additionally, the last three (3) tax liens were for unpaid taxes during the tax periods that occurred after the Petitioner was no longer a responsible party.[11] The remaining tax liens were incurred during the Petitioner's tenure as the responsible party and amounted to $27,935.38, according to this court's calculations.[12]
>
> ***
>
> [12] Though there may be a need for the Department to alter these calculations, based on a more thorough review of the taxes due for these dates.

(ALC Amended Order, p. 9.) At least, and based on the clear and unambiguous language of the ALC's finding of fact, Beltram is the responsible party for withholding taxes in the amount of $27,935.38, subject to the Department's "more thorough review of the taxes due for these dates." (ALC Amended Final Order, p. 9, n.12.)

Subsequent to the ALC's Amended Final Order, the Department determined – in accordance with footnote 12 of the Amended Final Order – that the total amount of the remaining tax liens incurred during Beltram's tenure as the responsible party is $29,792.79. (Aff. of Perry Mathis.) In consideration of the ALC's reduction of the tax by $675.00, the final amount of withholding tax due under the ALC's Amended Final Order is $29,117.49. See Affidavit and Supplemental Affidavit of Perry T. Mathis. Further, because interest is included in the definition of "taxes" for purposes of section 12-60-3370, Beltram is also responsible for interest in the amount of $23,155.56 as of April 30, 2017, and such interest amounts continues to accrue until the entire liability is paid in full.[4]

The ALC did exclude certain withholding tax periods and one sales tax period from collection by the Department in this matter:

> 22. Because the Department is barred from collecting any taxes secured by a lien that was filed more than ten years before the May 1, 2013 Department Determination, the court holds that the following employee withholding taxes owed by Intedge can no longer be collected:
>
> a. Employee withholding taxes for the third quarter of 1999 for which a lien was properly filed in August of 2001;
> b. Employee withholding taxes for the first quarter of 2001 for which a lien was properly filed in November of 2001; and
> c. Employee withholding taxes for the second quarter of 2001 for which a lien was properly filed in February of 2002.

(ALC Amended Order, p. 18.)

***

> 26. However, because the Petitioner lost control of Intedge in July 2005, the court holds that he is not personally liable for any tax liability accruing to Intedge after 2005. Therefore, the Petitioner is

[4]Notably, the requirement of section 12-60-3370 protects a taxpayer because it halts the accrual of interest during a potentially lengthy appeal process. A taxpayer paying a tax prior to appeal is further protected in that such amounts are held in trust during the pendency of the appeal.

not liable for Intedge's employee withholding taxes for the following periods:

a. Legal tax lien July 5, 2006 (for taxes of $4,320 due on October 31, 2005, along with penalties and interest);
b. Legal tax lien December 14, 2006 (for taxes of $634.35 due on February 28, 2006, along with penalties and interest); and
c. Legal tax lien June 21, 2006 (for taxes of $1,500 due on October 20, 2005, along with penalties and interest).[5]

(ALC Amended Final Order, p. 20.)

***

29. As a retailer .... However, the court holds that the Petitioner no longer held a position of control within Intedge as of July 2005. Because the sales tax return should have been filed in September 2005, two months after the Petitioner lost his position of responsibility within Intedge, the court concludes that the Petitioner is not liable for the sales tax, interest, or penalty owed by Intedge.[6]

(ALC Amended Final Order, p. 21.)

Finally, the Court made an additional conclusion of law that is consistent the above reference findings of fact and conclusions of law:

The court holds that the Petitioner is personally liable for the employee withholding taxes, penalties and interest owed by Intedge for the period of May 1, 2003, through July 1, 2005. Any taxes, penalties and interest accruing before that period are time-barred. Additionally, any taxes, penalties and interest accruing after the Petitioner was no longer a responsible party (July 1, 2005) are not attributable to the Petitioner and are also barred. Furthermore, the

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[5]It appears the ALC Amended Order contains a harmless error with regard to the legal tax lien filed June 21, 2006 (for taxes of $1,500 due on October 20, 2005). Specifically, the ALC Amended Order references the basis of this tax lien as employee withholding taxes. However, this filed tax lien relates to sales tax due for the September 2005 period. The Department's proposed assessment in this matter included one sales tax period and that period is September 2005. (A business that sold tangible personal property at retail for the period September 2005 was required to file and remit the sales tax due on or before October 20, 2005).

Because the ALC further found that Beltram was not liable for such sales tax period of September 2005, the resulting error is harmless. Essentially, the ALC barred collection of one tax period (in the amount of $1,500.00) on two separate occasions within the same Amended Order.

[6]See supra n. 5.

> court holds that the Petitioner is not liable for the penalties in this matter due to the Department's eight (8) year delay in pursing the Petitioner as a responsible party. Furthermore, the Petitioner is required to pay interest that has continued to accrue, on the unpaid portion of the taxes for taxes Intedge incurred from May 1, 2003 through July 1, 2005.

(ALC Amended Order, pp. 24-25) (emphasis added.)

Despite Beltram's unsupported assertions to the contrary, the Department has considered the ALC's decision with regard to the barred time periods, and none of those periods are included in the Department's calculation of the tax liability due pursuant to section 12-60-3370. As further support for the Department's calculation, Exhibit "A" attached to this Reply includes a spreadsheet of all tax periods included by the Department in the proposed assessment issued to Beltram (the basis of the contested case hearing before the ALC.)[7] Pursuant to the language of the ALC Amended Order, the Department excluded the first three withholding tax periods from its calculation: September 2009, March 2001, and June 2001. (Exhibit A, p. 1.)[8] The Department also excluded the final three tax periods[9] from its calculation: September 2005, December 2005, and September 2005. (Id. at p. 3.)[10] The Department's calculation includes only the remaining withholding tax periods of the proposed assessment. This is clearly the decision rendered by the ALC. See ALC Amended Order, p. 9 ("The remaining tax liens were incurred during the Petitioner's tenure as the responsible party and amounted to $27,935.38, according to this court's

---

[7]Exhibit A attached to this Reply was admitted, without objection, at the hearing before the ALC as Respondent's Exhibit 2.

[8]These three withholding tax periods amount to $11,482.15. Notably, the ALC came to the same conclusion in footnote 9, page 9 of the Amended Final Order.

[9]The final three tax periods on Exhibit A include two withholding tax periods (September 2005 and December 2005) and one sales tax period (September 2005).

[10]These three tax periods amount to $6,454.35. Notably, the ALC come to the same conclusion in footnote 11, page 9 of the Amended Final Order.

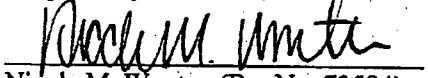
calculations."; Id. at pp. 24-25 ("The court holds that the Petitioner is personally liable for the employee withholding taxes . . . and interest owed by Intedge for the period of May 1, 2003, through July 1, 2005.).

Accordingly, there is simply no basis for Beltram's assertion that the tax liability in this matter is limited to $13,602.11. There is absolutely no language in the ALC Amended Order stating that Beltram is not responsible for the following withholding periods: September 2004, December 2004, March 2005, and June 2005. In fact, the ALC specifically found that "[Beltram] has not offered evidence or attempted to argue that all the tax liens [in this matter] have expired." (ALC Amended Order, p. 9, n. 10.) As clearly articulated above, and as evidenced by the Affidavits of Perry Mathis and Exhibit A, the Department has correctly interpreted the ALC's Amended Final Order. Further, "all taxes," as contemplated by section 12-60-3370 in this matter are due in the amount of $52,273.05 (with interest accrued as of April 30, 2017).

CONCLUSION

Accordingly, for the reasons set forth above and those contained in the Department's Motion, the Department respectfully submits this Court lacks appellate jurisdiction in this matter and requests that Beltram's appeal be dismissed with prejudice.

Respectfully submitted,



Nicole M. Wooten (Bar No. 73594)
Counsel for Litigation
Milton G. Kimpson (Bar No. 7917)
General Counsel for Litigation
300-A Outlet Pointe Blvd. (29201)
P.O. Box 12265
Columbia, SC 29211-9979
(803) 898-1826
Attorneys for Respondent

May 30, 2017

EXHIBIT A

NOTICE SENT TO: (ENTITY OR INDIVIDUAL)	Period Covered	TYPE OF NOTICE	DATE SENT	Where Tax Reported If Any	Type of Tax	TAX SHOWN ON RETURN BY TAXPAYER	TAX NOT DEPOSITED OR PAID TO DEPARTMENT	PENALTIES	INTEREST	COSTS	TOTAL	LIEN
Intedge Industries Inc.	Sep-99	PNOA	3/29/2001	Return	Empl With	$2,519.14	2519.14	113.36	164.49		2796.99	N
Intedge Industries Inc.	Sep-99	Assmt	5/15/2001	Return	Empl With		2519.14	239.31	368.22		3126.67	N
Intedge Industries Inc.	Sep-99	Tax Lien - 50368302-2	8/13/2001	Return	Empl With		2519.14	277.08	422.03	165.91	3384.16	Y
Intedge Industries Inc.	Mar-01	PNOA	6/27/2001	Return	Empl With	$4,660.71	4660.71	146.60	62.72		4870.03	N
Intedge Industries Inc.	Mar-01	Assmt	8/14/2001	Return	Empl With		4660.71	193.20	119.21		4973.12	N
Intedge Industries Inc.	Mar-01	Tax Lien - 50385821-9	11/13/2001	Return	Empl With		4660.71	263.10	203.35	261.36	5388.52	Y
Intedge Industries Inc.	Jun-01	PNOA	10/10/2001	Return	Empl With	$4,302.30	4302.30	43.02	50.62		4395.94	N
Intedge Industries Inc.	Jun-01	Assmt	11/27/2001	Return	Empl With		4302.30	107.55	128.10		4537.95	N
Intedge Industries Inc.	Jun-01	Tax Lien - 50399243-0	2/25/2002	Return	Empl With		4302.30	172.08	194.12	238.43	4906.93	Y
Intedge Industries Inc.	Mar-03	Return	4/30/2003	Return	Empl With	$3,787.41						
Intedge Industries Inc.	Mar-03	PNOA	7/29/2003	Return	Empl With		1867.85	18.67	15.67		1902.19	N
Intedge Industries Inc.	Mar-03	Assmt	9/15/2003	Return	Empl With		1867.85	46.68	39.56		1954.09	N
Intedge Industries Inc.	Mar-03	Tax Lien - 50650728-2	10/7/2005	Return	Empl With				17.48	225.41	242.89	Y (includes 3/03 and 3/05)
Intedge Industries Inc.	Sep-03	Return	10/31/2003	Return	Empl With	$4,258.28						
Intedge Industries Inc.	Sep-03	PNOA	2/17/2004	Return	Empl With		4258.28	63.87	43.11		4365.26	N
Intedge Industries Inc.	Sep-03	Assmt	5/18/2004	Return	Empl With		4258.28	170.32	125.57		4554.17	N
Intedge Industries Inc.	Sep-03	Tax Lien - 50577657-3	9/7/2004	Return	Empl With		4258.28	234.19	169.87	243.12	4905.46	Y
Intedge Industries Inc.	Dec-03	Return	2/28/2004	Return	Empl With	$3,923.79						
Intedge Industries Inc.	Dec-03	PNOA	7/30/2004	Return	Empl With		3923.79	58.85	29.92		4012.56	N
Intedge Industries Inc.	Dec-03	Assmt	10/29/2004	Return	Empl With		3923.79	196.18	136.99		4256.96	N
Intedge Industries Inc.	Dec-03	Tax Lien - 50604526-5	2/16/2005	Return	Empl With		3923.79	274.62	204.80	424.11	4827.32	Y (includes 12/03 and 3/04)

Intedge Industries Inc.	Mar-04	Return	4/30/2004	Return	Empl With	$4,044.90						
Intedge Industries Inc.	Mar-04	PNOA	7/30/2004	Return	Empl With		3528.79	35.28	29.53		3593.60	
Intedge Industries Inc.	Mar-04	Assmt	10/29/2004	Return	Empl With		3528.79	123.49	95.57		3747.85	
Intedge Industries Inc.	Mar-04	Tax Lien - 50604526-5	2/16/2005	Return	Empl With		3528.79	194.05	156.10		3878.94	Y (includes 12/03 and 3/04)
Intedge Industries Inc.	Jun-04	Return	7/31/2004	Return	Empl With	$3,673.30						
Intedge Industries Inc.	Jun-04	PNOA	11/1/2004	Return	Empl With		2566.25	38.49	28.12		2632.86	N
Intedge Industries Inc.	Jun-04	Assmt	2/1/2005	Return	Empl With		2566.25	89.81	71.06		2727.12	N
Intedge Industries Inc.	Jun-04	Tax Lien - 50619243-7	5/23/2005	Return	Empl With		2566.25	141.13	122.19	151.48	2981.05	Y
Intedge Industries Inc.	Sep-04	Return	10/31/2004	Return	Empl With	$4,711.65						
Intedge Industries Inc.	Sep-04	PNOA	1/14/2005	Return	Empl With		3995.31	59.92	50.57		4105.80	N
Intedge Industries Inc.	Sep-04	Assmt	4/15/2005	Return	Empl With		3995.31	119.84	103.56		4218.71	N
Intedge Industries Inc.	Sep-04	Tax Lien - 50630256-2	8/3/2005	Return	Empl With		3995.31	199.72	187.28	229.12	4611.43	Y
Intedge Industries Inc.	Dec-04	Return	2/28/2005	Return	Empl With	$3,753.26						
Intedge Industries Inc.	Dec-04	PNOA	5/5/2005	Return	Empl With		3753.26	37.53	34.60		3825.39	N
Intedge Industries Inc.	Dec-04	Assmt	8/3/2005	Return	Empl With		3753.26	112.59	111.96		3977.81	N
Intedge Industries Inc.	Dec-04	Tax Lien - 50639161-6	9/6/2005	Return	Empl With		3753.26	131.35	131.07	210.78	4226.46	Y
Intedge Industries Inc.	Mar-05	Return	4/30/2005	Return	Empl With	$4,041.85						
Intedge Industries Inc.	Mar-05	PNOA	6/1/2005	Return	Empl With		4041.85	40.41	40.73		4122.99	N
Intedge Industries Inc.	Mar-05	Assmt	8/31/2005	Return	Empl With		4041.85	101.03	102.94		4245.82	N
Intedge Industries Inc.	Mar-05	Tax Lien - 50650728-2	10/7/2005	Return	Empl With		4041.85	121.23	127.65		4290.73	Y (includes 3/03 and 3/05)
Intedge Industries Inc.	Jun-05	Return	7/31/2005	Return	Empl With	$3,724.96						
Intedge Industries Inc.	Jun-05	PNOA	11/4/2005	Return	Empl With		3724.96	37.24	37.54		3799.74	N
Intedge Industries Inc.	Jun-05	Assmt	2/3/2006	Return	Empl With		3724.96	130.38	148.08		4003.40	N

Intedge Industries Inc.	Jun-05	Tax Lien - 50700406-9	3/8/2006	Return	Empl With		3724.96	148.98	171.17	212.26	4257.37	Y
Intedge Industries Inc.	Sep-05	Return		Office Aud	Empl With							
Intedge Industries Inc.	Sep-05	PNOA	2/13/2006	Office Aud	Empl With		4320.00	1450.40	100.56		5870.96	N
Intedge Industries Inc.	Sep-05	Assmt	6/5/2006	Office Aud	Empl With		4320.00	1752.80	205.21		6278.01	N
Intedge Industries Inc.	Sep-05	Tax Lien - 50720549-7	7/5/2006	Office Aud	Empl With		4320.00	1774.40	236.06	326.52	6656.98	Y
Intedge Industries Inc.	Dec-05	Return	2/28/2006	Return	Empl With	$634.35						
Intedge Industries Inc.	Dec-05	PNOA	8/14/2006	Return	Empl With		634.35	6.34	7.46		648.15	N
Intedge Industries Inc.	Dec-05	Assmt	11/14/2006	Return	Empl With		634.35	28.54	37.16		700.05	N
Intedge Industries Inc.	Dec-05	Tax Lien - 50762228-3	12/14/2006	Return	Empl With		634.35	31.71	41.74	45.39	753.19	Y
Intedge Industries Inc.	Sep-05	PNOA	1/30/2006	Delq Est	Sales		1500.00	912.50	38.15		2450.65	N
Intedge Industries Inc.	Sep-05	Assmt	5/22/2006	Delq Est	Sales		1500.00	942.50	74.56		2517.06	N
Intedge Industries Inc.	Sep-05	Tax Lien - 50719459-7	6/21/2006	Delq Est	Sales		1500.00	950.00	85.29	136.76	2672.05	Y
Richard S Beltram	Sep-99 to Dec-05 listed above	PNOA Resp Par	9/2/2009	Return (see above)	Empl With		41196.13	20652.32	25198.92		86947.37	N
Richard S Beltram	Sep-05 listed above	PNOA Resp Par	9/2/2009	Delq Est (see above)	Sales		1500.00	1550.00	706.92		3756.92	N
Legend: Date Sent Column for returns listed is the postmark date												

EXHIBIT B

THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

HONORABLE PHILIP S. LENSKI, ADMINISTRATIVE LAW JUDGE

CASE NO. 13-ALJ-17-0244-CC

APPELLATE CASE NO. 2017-000968

Richard Beltram,.....Appellant/Respondent,

v.

South Carolina Department of Revenue,.....Respondent/Appellant.

SUPPLEMENTAL AFFIDAVIT OF PERRY T. MATHIS

COMES NOW, Perry T. Mathis, being duly sworn, deposes and states:

1. I am employed by the South Carolina Department of Revenue (Department) as a Regional Manager.

2. As Regional Manager, my duties and responsibilities include managing the Department's Field Collections' Midlands Region. As part of my duties with the Department, I have access to the Department's records concerning proposed tax assessments and outstanding tax liabilities.

3. At the request of the Department's Office of General Counsel, I was asked to determine the amount of Appellant's proposed tax assessments based upon the Department's

interpretation of the Administrative Law Court's March 17, 2017 Amended Final Order. Those proposed tax assessments are as follows:

Tax Period	Tax Due	Interest*	TOTAL DUE
Sept. 2003	$4,258.28	$3,616.89	$7,875.17
Dec. 2003	$3,923.79	$3,238.15	$7,161.94
Mar. 2004	$3,528.79	$2,863.46	$6,392.25
Jun. 2004	$2,566.25	$2,028.19	$4,594.44
Sept. 2004	$3,995.31	$3,080.05	$7,075.36
Dec. 2004	$3,753.26	$2,785.26	$6,538.52
Mar. 2005	$4,041.85	$2,935.08	$6,976.93
Jun. 2005	$3,724.96	$2,608.48	$6,333.44
PER ORDER	($675.00)		($675.00)
	$29,117.49	**$23,155.56**	**$52,273.05**

*Interest is accrued through April 30, 2017.

4. At the request of the Department's Office of General Counsel, I was asked to verify the status of Appellant's proposed tax assessments as outlines above.

5. As of May 29, 2017, such proposed tax assessments remain outstanding in that Appellant has neither paid any of the amounts due nor posted a bond for said amounts.

FURTHER AFFIANT SAYETH NOT.

Perry T. Mathis

Sworn to and subscribed before me this 30th
Day of May, 2017.

Notary Public for South Carolina
My Commission Expires: 1-10-2018

Exhibit-G

Beaudro, Chris

From: Todorova, Maria
Sent: Monday, August 21, 2017 2:57 PM
To: Beaudro, Chris
Subject: FW: Today's Mail - SC DOR

Maria Todorova | Partner | T: +1.404.853.8214

www.stateandlocaltax.com

From: Milton Kimpson [mailto:Milton.Kimpson@dor.sc.gov]
Sent: Tuesday, June 6, 2017 6:30 PM
To: Tresh, Eric
Cc: Atkins, Zachary; Todorova, Maria
Subject: Re: Today's Mail - SC DOR

Eric. When things go wrong....Yes, we did appeal Duke. You should not have received the memo on Beltram, however. Let's talk about it tomorrow.

Milton

Sent from my iPhone

On Jun 6, 2017, at 6:20 PM, Tresh, Eric <erictresh@eversheds-sutherland.com> wrote:

> Milton,
>
> We received the attached in today's mail. I don't think this is our case. Did you all decide to appeal the Duke case?
>
> Sent from my iPad
>
> Begin forwarded message:
>
> **From:** "Bragg, Melissa" <MelissaBragg@eversheds-sutherland.us>
> **To:** "Todorova, Maria" <mariatodorova@eversheds-sutherland.us>, "Tresh, Eric" <EricTresh@eversheds-sutherland.us>
> **Cc:** "Carr, Pearis" <PearisCarr@eversheds-sutherland.us>, "White, Rether D." <RetherWhite@eversheds-sutherland.us>
> **Subject: Today's Mail - SC DOR**
>
> The attached was received in the mail today.
>
> Can you please confirm which client this is for? The case information does not seem to be familiar to any of us. Thank you.

Richard Beltram v. South Carolina Department of Revenue
Case No. 13-ALJ-17-0244-CC
Appellate Case No. 2017-00968

<Scanned from a Xerox Multifunction Printer.pdf>

Exhibit-H

Beaudro, Chris

From:	Beaudro, Chris
Sent:	Tuesday, August 22, 2017 11:00 AM
To:	Beaudro, Chris
Subject:	FW: Notice of Appeal
Attachments:	Notice of Appeal.pdf; ATT00001.htm

From: Milton Kimpson <Milton.Kimpson@dor.sc.gov>
Date: June 7, 2017 at 3:30:04 PM EDT
To: "Tresh, Eric" <erictresh@eversheds-sutherland.com>
Subject: Notice of Appeal

As discussed.

Milton

Milton G. Kimpson
General Counsel for Litigation
803-898-5131
Milton.Kimpson@dor.sc.gov

South Carolina Department of Revenue
Office of General Counsel for Litigation
P.O. Box 12265 Columbia, SC 29211
dor.sc.gov

Exhibit-H

Beaudro, Chris

From:	Beaudro, Chris
Sent:	Tuesday, August 22, 2017 11:00 AM
To:	Beaudro, Chris
Subject:	FW: Notice of Appeal
Attachments:	Notice of Appeal.pdf; ATT00001.htm

From: Milton Kimpson <Milton.Kimpson@dor.sc.gov>
Date: June 7, 2017 at 3:30:04 PM EDT
To: "Tresh, Eric" <erictresh@eversheds-sutherland.com>
Subject: Notice of Appeal

As discussed.

Milton

Milton G. Kimpson
General Counsel for Litigation
803-898-5131
Milton.Kimpson@dor.sc.gov

South Carolina Department of Revenue
Office of General Counsel for Litigation
P.O. Box 12265 Columbia, SC 29211
dor.sc.gov

Exhibit-I

NEXSEN|PRUET

Burnet R. Maybank, III
Member
Admitted in SC

July 26, 2017

VIA U.S. MAIL
The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

Re: Duke Energy v. SCDOR
Appellate Case No. 2017-001260

Dear Ms. Kitchings:

I do not, and have never, represented Duke Energy in this matter. I have represented Duke in other matters, but never in this litigation and accordingly request that my name be removed from this appeal.

Very truly yours,

Burnet R. Maybank, III

BRM/sld

cc: Jason Phillip Luther, Esquire

Charleston
Charlotte
Columbia
Greensboro
Greenville
Hilton Head
Myrtle Beach
Raleigh

1230 Main Street
Suite 700 (29201)
PO BOX 2426
Columbia, SC 29202
www.nexsenpruet.com

T 803.540.2048
F 803.727.1472
E BMaybank@nexsenpruet.com
Nexsen Pruet, LLC
Attorneys and Counselors at Law

bcc: Eric Tresh, Esquire

CERTIFICATE OF SERVICE

I certify that I have this day served a copy of the foregoing *Motion to Dismiss* by United States mail, postage prepaid, addressed as follows:

Sean G. Ryan
Jason Luther
Counsel for Litigation
South Carolina Department of Revenue
P.O. Box 12265
Columbia, SC 29211-9979

This 6th day of September, 2017.

Chris Beaudro

EVERSHEDS SUTHERLAND

Eversheds Sutherland (US) L
700 Sixth Street, NW, Suite 700
Washington, DC 20001-3980

D: +1 202.383.0925
F: +1 202.637.3593

jaimelane@
eversheds-sutherland.com

September 6, 2017

Via Certified Mail

Ms. Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
P.O Box 11629
Columbia, South Carolina 29211

Re: Duke Energy Corporation v. South Carolina Department of Revenue
Appellate Case No. 2017-001260

Dear Ms. Kitchings:

Enclosed please find the original and seven (7) copies of the Motion to Dismiss and Memorandum in Support on behalf of Duke Energy Corporation in the above-referenced matter. Also enclosed is a check in the amount of $25.00 to cover the filing fee.

Please file the original and six (6) copies and return one file-stamped copy in the enclosed self-addressed stamped envelope.

Thank you for your assistance in this matter. Please do not hesitate to contact me with any questions.

Sincerely,

Jaime L. Lane
Paralegal Specialist

Enclosures
cc: Sean G. Ryan, Esq.
Marsha A. Ward, Esq.
Eric S. Tresh, Esq.
Maria M. Todorova, Esq.

EVERSHEDS SUTHERLAND

Eversheds Sutherland (US) LLP
999 Peachtree Street, NE, Suite 2300
Atlanta, GA 30309-3996

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FIRST CLASS MAIL

RECEIVED
SEP 12 2017
SC Court of Appeals

Jenny Kitchings, Clerk of Court
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211
US