

**THE STATE OF SOUTH CAROLINA
In the Court of Appeals**

**APPEAL FROM THE ADMINISTRATIVE LAW COURT
S. PHILLIP LENSKI, ADMINISTRATIVE LAW JUDGE**

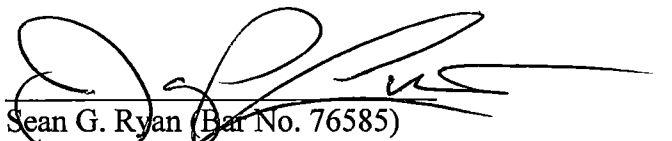
CASE NO. 2012-ALJ-17-0031-CC
APPELLATE CASE NO. 2017-001260

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

v.

South Carolina Department of Revenue,Appellant/Respondent

**APPELLANT'S RESPONSE IN OPPOSITION TO
RESPONDENT'S MOTION TO DISMISS**



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Columbia, South Carolina
September 18, 2017

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SC Court of Appeals

INTRODUCTION

This is an appeal from an order of the Honorable S. Phillip Lenski dated April 28, 2017, which granted summary judgment in favor of Respondent and held that the Respondent's storage canisters used for spent nuclear fuel rods are machines exempt from use tax under § 12-36-2120(17). On May 30, 2017, the Department timely filed and served its Notice of Appeal by mailing a copy to the ALC, the Clerk of Court for the Court of Appeals, and three attorneys for the Respondent, pursuant Rule 203(b), SCACR. (See Department's Notice of Appeal and Proof of Service, attached hereto as Exhibit A). On September 6, 2017, Respondent filed a Motion to Dismiss the appeal.

ARGUMENT

1. THE DEPARTMENT TIMELY NOTICED ITS APPEAL PURSUANT TO THE SOUTH CAROLINA APPELLATE COURT RULES.

This Court's review of decisions of the ALC is governed by S.C. Code Ann. § 1-23-380(1), which provides that an appeal of an ALC decision is "instituted by serving and filing notice of appeal as provided in the South Carolina Appellate Court Rules within thirty days of the final decision of the agency Copies of the Notice of Appeal must be served upon the agency and all parties of record." South Carolina Appellate Court Rules 203 and 262 further establish the requirements for filing and serving a Notice of Appeal.

Here, Respondent agrees that the Department's deadline to file its Notice of Appeal was May 30, 2017.¹ It is undisputed that the Department timely filed and served its Notice of Appeal

¹ The parties received the Order by electronic mail on April 28, 2017. Thirty days from April 28 was May 28, 2017, which was a Sunday. The following Monday was a federal holiday (Memorial Day), so the thirty (30) day deadline was extended to Tuesday, May 30, 2017. See Rule 263, SCACR.

(including the Proof of Service and a copy of the ALC decision) on the ALC, in accordance with Rule 203(b)(6) and (d)(2). It is further undisputed the Department timely filed its Notice of Appeal (and accompanying documents) with the clerk of the appellate court, as required by Rule 203(d)(2). The only dispute in this appeal, and the sole basis of Respondent's Motion to Dismiss, is whether the Department timely served Respondent with the Notice of Appeal.

a. The Department served three attorneys for Respondent.

Pursuant to Rule 262(b), SCACR, service upon a party is effective when the Notice of Appeal is served upon an attorney who represents the party.² As the Department's Proof of Service demonstrates, the Department served its Notice of Appeal on not one but three attorneys for Respondent: Burnett R. Maybank, III, Esq., Jeffrey A. Friedman, Esq., and Eric S. Tresh, Esq. The Department served all three of these attorneys based on its good faith belief each of these attorneys represent Respondent.

The Department mailed a notice of appeal to Eric S. Tresh, Esq., at his office in Atlanta, Georgia. Unfortunately, due to a clerical error, the envelope sent to Mr. Tresh inadvertently contained a notice of appeal for a separate and unrelated case, rather than the Notice of Appeal for

² Rule 262(b), SCACR, provides:

(b) Service. Whenever under these Rules service is required or permitted to be made upon a party represented by an attorney the service shall be made upon the attorney unless service upon the party himself is ordered by the appellate court. Service upon the attorney or upon a party shall be made by delivering a copy to him or by mailing it to him at his last known address or, if no address is known, by leaving it with the clerk of court. Delivery of a copy within this Rule means: handing it to the attorney or to the party; or leaving it at his office with his clerk or other person in charge thereof; or, if there be no one in charge, leaving it in a conspicuous place therein; or, if the office is closed or the person to be served has no office, leaving a copy at his dwelling place or usual place of abode with some person of suitable age and discretion then residing therein. Service by mail is complete upon mailing.

this case. The Department became aware of the clerical error when it received Mr. Tresh's email on June 6, 2017, the same day Mr. Tresh received the envelope. (See June 6, 2017 Email, attached as Exhibit B) The Department immediately advised Mr. Tresh of the error that same day, and the following day emailed him a copy of the Notice of Appeal. (See June 7, 2017 Email, attached as Exhibit C).

The Department also mailed a copy of the Notice of Appeal to Burnett R. Maybank, III, Esq., and Jeffrey A. Friedman, Esq., because both attorneys represent the Respondent in tax matters involving the Department. There is no dispute that Mr. Maybank received the Notice of Appeal.

Importantly, the summary judgment motion that forms the basis of this appeal was filed in May 2013 and a hearing was held on July 9, 2013, but the ALC did not enter an order or decision on the summary judgment until April 2017. During the four years it took the ALC to issue an order, a second dispute between the Department and Respondent was litigated and decided by the Supreme Court. See Duke Energy Corp. v. South Carolina Dept. of Revenue, 415 S.C. 351, 782 S.E.2d 590 (2016). As noted in the Supreme Court's opinion in that matter, counsel for Duke Energy Corporation (the Respondent herein) was: "Burnet Rhett Maybank, III, of Nexsen Pruet, LLC, of Columbia; Jeffrey A. Friedman, of Washington, D.C., Eric S. Tresh and Maria M. Todorova, of Atlanta, Georgia, all of Sutherland, Asbill & Brennan, LLP." Id., 415 S.C. at 351.³

³ The Department served Mr. Friedman at 1275 Pennsylvania Avenue, NW, Washington, D.C. 20004 in serving Attorney Friedman. The Department had previously served Mr. Friedman at this address. Upon information and belief that address is now or formerly was an address for Attorney Friedman's firm, Sutherland, Asbill & Brennan, LLP, now known as Eversheds Sutherland LLP.

In addition, although Respondent argues in its Motion that the proper mailing address for its attorneys in this appeal is the Atlanta, Georgia office of Eversheds Sutherland LLP, the Department would note that the return address on the letterhead for the cover letter filing Respondent's Motion to Dismiss is for Eversheds Sutherland's Washington, DC office.

These are the three attorneys and/or law firms to whom the Department mailed its Notice of Appeal in the instant case.

In short, by placing its Notice of Appeal and proof of service in the United States Mail on May 30, 2017, the Department timely served two different law firms and three different attorneys of Respondent, all of whom represent or have represented Respondent in disputes with the Department in the last year. At least two of those attorneys (Mr. Maybank and Mr. Tresh) received the Notice of Appeal. The third attorney (Mr. Friedman), is a partner in the same firm as Mr. Tresh and the Notice of Appeal was mailed to their firm's Washington, DC address. Respondents only argument regarding service on Mr. Friedman is "it appears that Mr. Friedman did not receive the Notice of Appeal because it was sent to the incorrect address"—not because he never received it.⁴

a. **Respondent received notice of the appeal, and was not prejudiced as a result of any clerical error in mailing the Notice of Appeal to Respondent's counsel.**

It is undisputed that at least two attorneys for Respondent received actual notice that the Department had appealed this matter. However, Respondent's Motion asks this Court to take the strict, hardline stance that service on the law firm(s) representing Respondent in tax disputes with the Department is insufficient. Further, Respondents ask this Court to find that where a party timely serves a notice of appeal on an attorney but inadvertently puts a copy of the wrong notice of appeal in the envelope, such clerical error constitutes insufficient service and is therefore a basis to dismiss this entire appeal (even where the error is immediately rectified).

⁴ Notably, the ALC did not serve a copy of its Order on Marsha A. Ward, Esq., and at the time the Department noticed its appeal in this case Attorney Ward was an inactive member of the South Carolina Bar. Her membership remained inactive until August 8, 2017. Moreover, Attorney Ward is no longer listed on the Eversheds Sutherland, LLP, web site as being an attorney with the firm. While the ALC did include Attorney Zachary Atkins on its email containing the ALC's Order, the Department did not serve Attorney Atkins. Attorney Atkins is not a member of the South Carolina bar and he is not listed on the Eversheds Sutherland, LLP, web site as an attorney with the firm.

The Appellate Court Rules do not require such draconian results. The cases cited by Respondent stand for the broad proposition that failure to timely serve a notice of appeal is grounds for dismissal, but those cases do not address situations where the lower tribunal and appellate court were timely served but errors existed related to service on opposing counsel. Moreover, the cases cited by Respondent do not address the implications of a clerical error in which the appellant mistakenly included the wrong materials but immediately rectified that error.

The purpose of the notice of appeal requirement is to put the lower court, appellate court, and opposing counsel on notice that a case is being appealed. The ALC, Court of Appeals, and opposing counsel were all put on notice of the instant appeal. In fact, despite the Department's initial clerical error, by immediately rectifying the error the Department put Respondent in the same position it would have been if the envelope had contained the correct Notice of Appeal.⁵ Thus, Respondent has not suffered any prejudice by any alleged deficiency with service as a result of the Department's clerical error, and Respondent's Motion to Dismiss should be denied. See Charleston Lumber Co., Inc. v. Miller Housing Corp., 318 S.C. 471, 478, 458 S.E.2d 431, 436 (Ct. App. 1995) (recognizing that there can be no doubt that respondent had notice that the cases were appealed and rejecting respondent's effort to take advantage of a mere clerical error by which they were in no way prejudiced or misled).

Our Supreme Court has long recognized that non-prejudicial clerical errors in the notice do not require dismissal of the appeal. See, e.g., Moody v. Dickinson, 54 S.C. 526, 32 S.E. 563 (1899) (a court may allow an appellant to correct a mere clerical error in the notice of intention to

⁵ On June 6, 2017, the day Mr. Tresh received the envelope the Department believed contained its Notice of Appeal in this case, Mr. Tresh emailed the Department: "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." (See attached Exhibit B). The Department's then General Counsel, Milton Kimpson, responded within minutes and stated: "Yes, we did appeal Duke." (Id.).

appeal where there is no prejudice to the appellee). In State v. Scott, 571 S.E.2d 700, 351 S.C. 584, (2002) the appellant erroneously served its Notice of Appeal on the Clerk of Court for Richland County, rather than Lexington County. Id. at 587. Upon discovery of the error, the appellant immediately rectified the error and served the Clerk of Court for Lexington County. Id. The Supreme Court denied respondent's motion to dismiss the appeal for failure to properly notice the appeal, finding that serving the wrong county was a clerical error from which the respondent suffered no prejudice. Id. at 587–88.

Respondent, through its attorney, learned of the appeal on the same day he would have had the clerical error not occurred. In accordance with the cases cited above, Respondent suffered no prejudice and therefore this Court should deny the Motion to Dismiss.

2. ANY ERROR CAUSED BY THE CLERICAL MAILING ERROR SATIFIES THE GOOD CAUSE STANDARD UNDER RULE 260, SCACR.

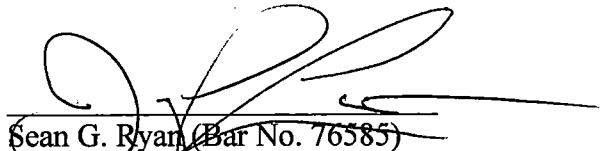
Even if this Court were to find that the service described above is technically insufficient under Rule 203, SCACR, this Court should still deny Respondent's Motion to Dismiss because the Department acted in good faith and its clerical errors satisfy the good cause standard of Rule 260. Pursuant to Rule 260, SCACR, the Clerk of this Court must dismiss an appeal when it appears that an appellant or petitioner failed to comply with the requirements of the Appellate Court Rules. This is the essence of Respondent's argument.

However, Rule 260 also provides that such dismissal may be reinstated upon good cause shown. Thus, this Court inherently holds the power to reinstate a case dismissed for insufficient service where a party shows good cause. The Department has not located any case law addressing what constitutes good cause under this Rule, but the Department contends that its efforts to timely serve the notice of appeal constitute good cause sufficient to warrant reinstatement of the appeal.

Thus, if good cause is sufficient grounds to reinstate an appeal, such good cause exists in the instant appeal and Respondent's Motion to Dismiss should be denied.

CONCLUSION

For the reasons set forth above, this Court should deny the Respondent's Motion to Dismiss as the Department complied with the service requirements of Rules 203 and 263, SCACR.



~~Sean G. Ryan (Bar No. 76585)~~
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*Attorneys for Appellant South Carolina Department
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Columbia, South Carolina
September 18, 2017

EXHIBIT A

THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

HONORABLE S. PHILLIP LENSKI, ADMINISTRATIVE 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, ADMINISTRATIVE LAW JUDGE

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

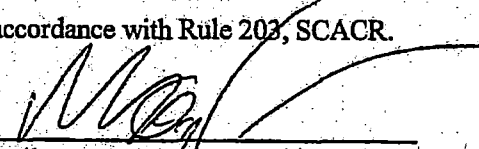
South Carolina Department of Revenue,.....Appellant/Respondent.

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.


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Attorney for Appellant
CourtOrders@dor.sc.gov

May 30, 2017.

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

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JUN 05 2017

NEXSEN PRUET, LLC
COLUMBIA

EXHIBIT B

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.stateandlocalfax.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 <erictrish@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-AJ-17-0244-CC
Appellate Case No. 2017-00968

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EXHIBIT C

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

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**THE STATE OF SOUTH CAROLINA
In the Court of Appeals**

**APPEAL FROM THE ADMINISTRATIVE LAW COURT
S. PHILLIP LENSKI, ADMINISTRATIVE LAW JUDGE**

CASE NO. 2012-ALJ-17-0031-CC
APPELLATE CASE NO. 2017-001260

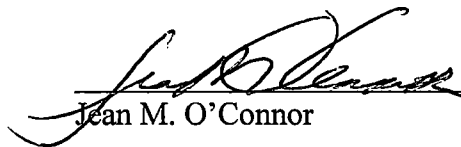
South Carolina Department of Revenue,Appellant/Respondent

vs.

Duke Energy Corporation,Respondent/Petitioner

PROOF OF SERVICE

I, Jean M. O'Connor, do hereby certify that I have caused to be mailed postage pre-paid, a copy of the Department of Revenue's Response In Opposition To Respondent's Motion to Dismiss re: Duke Energy Corporation v. South Carolina Department of Revenue, Docket No. 12-ALJ-17-0031-CC to Marsha A. Ward, Esquire; Eric S. Tresh, Esquire; and Maria M. Todorova, Esquire, Eversheds Sutherland (US) LLP, 999 Peachtree Street NE, Suite 2300, Atlanta, GA 30309. Copy of the same was also sent to the same parties to 700 Sixth Street, NW, Suite 700, Washington, DC 20001-3980 18th day of September 2017.


Jean M. O'Connor

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SC Court of Appeals