

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM THE PUBLIC SERVICE COMMISSION

S.C. SUPREME COURT

Appellate Case No. 2018-001165

Commission Docket No. 2018-2-E

South Carolina Coastal
Conservation League and
Southern Alliance for Clean
Energy,

Appellants,

v.

South Carolina Public Service
Commission, South Carolina
Electric & Gas, CMC Steel South
Carolina, South Carolina Energy
Users Committee, South Carolina
Solar Business Alliance, LLC,
Southern Current, LLC, and South
Carolina Office of Regulatory
Staff

Respondents.

RETURN TO MOTION TO DISMISS APPEAL OR, IN THE ALTERNATIVE, TO HOLD
APPEAL IN ABEYANCE

The South Carolina Coastal Conservation League and Southern Alliance for Clean Energy (collectively, the “Conservation Groups”) pursuant to South Carolina Appellate Court Rule 240(e), file this Return to South Carolina Electric & Gas Company’s (“SCE&G”) motion to dismiss this appeal or, in the alternative, to hold the appeal in abeyance. The Conservation Groups oppose the motion to dismiss, but do not oppose SCE&G’s request to hold this appeal in

abeyance.

ARGUMENT

South Carolina Appellate Court Rule 203 requires that all notices of appeal from administrative tribunals be served within thirty days of receipt of the decision granting or denying any timely petition for rehearing. S.C. App. Ct. R. 203(b)(6). The only instance where this deadline can be extended is where “*a decision indicates* that a more full and complete decision is to follow.” *Id.* (emphasis added). In that case, a party “*need not* appeal until receipt of the more complete decision[.]” *Id.* (emphasis added).

The Conservation Groups have appealed the Amended Commission Order approving the fuel costs of SCE&G, filed May 2, 2018. The Conservation Groups petitioned for rehearing and reconsideration of this Order on May 10, 2018. The South Carolina Public Service Commission (“Commission”) denied the petition in a directive filed May 23, 2018. Because the May 23 directive did not expressly indicate that a more full and complete decision would follow, Conservation Groups filed their notice of appeal within thirty days from that directive.

While it may be possible to infer from other Commission directives that a more full and complete decision is forthcoming—as is required to extend the period in which a party may choose to file an appeal under Rule 203—SCE&G is incorrect to claim that the Commission’s May 23, 2018 directive contained any obvious indication about a further order. To the contrary, the Commission’s decision directs relief that is on its face self-executing, for example directing SCE&G, in response to the petition filed by the South Carolina Energy User Committee, to provide: “(1) copies of the monthly fuel recovery reports currently filed with the Commission and [Office of Regulatory Staff] and (2) quarterly forecasts beginning with the quarter ending June 30, 2018, of the expected fuel factors to be set at SCE&G’s next annual fuel proceeding and

SCE&G's historical over/under-collected balance to date." See Notice of Appeal Exhibit B. These provisions are exactly the same (save the reference to "2018") as those in previous fuel cost docket settlement agreements, and if anything indicate that the Commission did not need to provide or intend on providing additional explanation in an order formalizing its May 23, 2018 decision. See, e.g., Exhibit A (excerpt from 2017 fuel cost docket settlement agreement).

As SCE&G well knows, the requirement of service of the notice of appeal is jurisdictional. If a party misses the deadline, the appellate court "has no authority or discretion to rescue the delinquent party by extending or ignoring the deadline for service of the notice." *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 14–15, 602 S.E.2d 772, 775 (2004) (citations omitted). Therefore, to protect their right to appeal, the Conservation Groups relied specifically on the language in the Commission's decision (the directive)¹ denying their petition for rehearing. Seeing no affirmative written indication that an additional order would be forthcoming, and noting the language in Appellate Rule 203 that permits an earlier filing *even if* an additional order might be coming (the parties "need not appeal until receipt of the more complete decision"), the Conservation Groups filed their Notice of Appeal both to avoid any question about jurisdictional default and to speed this appeal along as quickly as possible.

SCE&G is simply incorrect that the Commission's directive cannot serve as an appealable "decision" under Appellate Court Rule 203. SCE&G cites language in the South

¹ The Conservation Groups appreciate the email clarification from the Hearing Officer that a more full and complete order will be forthcoming, but note that the clarification was provided *after* the Conservation Groups filed their notice of appeal. Appellate Court Rule 203 also specifically references the administrative tribunal's "decision." Nothing in the rule suggests that parties may rely on indications outside of the decision to extend the deadline.

Carolina Code and Regulations referring to final “orders” of the Commission,² but the term “Order” is in turn defined as “A written decision or opinion issued by the Commission representing the whole or any part of the disposition (whether affirmative, negative, injunctive or declaratory in form) of a proceeding before the Commission.” S.C. Code Ann. Regs. 103-804K. Because the Commission directive regarding the pending petitions for rehearing is a “decision” reduced to writing representing the disposition in this docket, it is an appealable order. This conclusion is confirmed by the Commission’s practice of routinely disposing of proceedings through directives.³

Given the language in Appellate Court Rule 203(b)(6) specifying that appeals may be delayed only where a “decision indicates” on its face that “a more full and complete decision is to follow,” there is no basis to dismiss the Conservation Groups’ appeal. However, in the interest of judicial economy, the Conservation Groups do not oppose SCE&G’s request to hold the appeal in abeyance until the Commission issues an apparently forthcoming written order on the petitions for rehearing. If this Court decides to hold the appeal in abeyance, the Conservation Groups respectfully request that this Court specify how the abeyance order would impact the timing of briefing in this case since the Conservation Groups have already ordered, but not yet received, the transcript of the proceedings from the Public Service Commission.

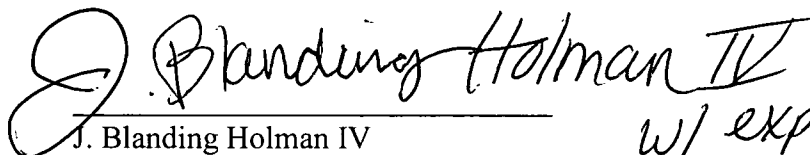
² See S.C. Code Ann. § 58-27-2310 (“No right of appeal accrues to vacate or set aside, either in whole or in part, an order of the commission, except an order on a rehearing, unless a petition to the commission for a rehearing is filed and refused”); S.C. Code Ann. Regs. 103-853 (“All proceedings before the Commission shall be disposed of by issuance of an Order”); S.C. Code Ann. Regs. 103-854 (“no cause of action shall accrue in any court of competent jurisdiction to vacate or set aside any Order of the Commission . . . unless a petition for rehearing or reconsideration . . . [is] with the Commission, and an Order has been issued disposing of the matter.”).

³ In those instances, the Commission has a practice of noting where a final order will *not* follow the directive. However it apparently has *no* practice of noting where a final order *will* follow a directive, which is what S.C. App. Ct. R. 203(b)(6) requires. See *id.* (later filed appeals allowed where “a *decision indicates* that a more full and complete decision *is to follow.*”)

CONCLUSION

For all these reasons, the Conservation Groups request that the Court deny SCE&G's motion to dismiss. The Conservation Groups do not oppose SCE&G's request to hold the appeal in abeyance.

July 6, 2018



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w/ express
permission
APP

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Exhibit A

fuel costs proceedings held under the procedure and criteria established in S.C. Code Ann. § 58-27-865 (2015).

Other

B.10. With regards to plant outages not completed as of December 31, 2016, if any, and outages where final reports of SCE&G, contractors, governmental entities or others are not available, if any, the Settling Parties agree that ORS retains the right to review the reasonableness of the plant outage(s) and associated costs in the review period during which the outage is completed or when the report(s) on such outage(s) become available.

B.11. Upon written request, SCE&G will provide the following to the Settling Parties:

- a. Copies of the monthly fuel recovery reports currently filed with the Commission and ORS; and,
- b. Quarterly forecasts beginning with the quarter ending June 30, 2017, of the expected fuel factors to be set at SCE&G's next annual fuel proceeding and SCE&G's historical over (under)-collected balance to date. SCE&G agrees it will put forth reasonable efforts to forecast the expected fuel factors to be set at its next annual fuel proceeding; however, the Settling Parties agree that these quarterly forecasts will not be admitted into evidence in any future SCE&G proceeding.

B.12. The Settling Parties support the Company's effort to use Internal Revenue Code Section 174 deduction claims to reduce the variable environmental and avoided capacity cost component of the total fuel cost factor and agree to the implementation of the benefit from the deferred tax liability in the manner outlined by SCE&G witness Coffey is reasonable.

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PROOF OF SERVICE

I hereby certify that the following persons have been served with one (1) copy of Appellants South Carolina Coastal Conservation League and Southern Alliance for Clean Energy Return to South Carolina Electric & Gas Company's Motion to Dismiss Appeal Or, In The Alternative, To Hold Appeal In Abeyance by depositing it in the United States Mail, postage prepaid, on July 6, 2018, at the addresses set forth below.

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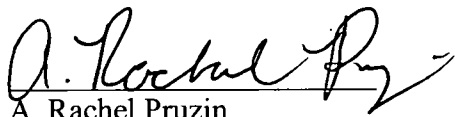
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This, the 6th day of July, 2018.



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