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Feb 10 2021

SC Court of Appeals

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA PUBLIC SERVICE COMMISSION

South Carolina Public Service Commission Docket No. 2020-147-E

Appellate Case No. 2020-001445

Randy and Cheryl Gilchrist.....Appellants,

v.

Duke Energy Carolinas, LLCRespondent.

RESPONDENT’S MOTION TO STRIKE APPELLANTS’ DESIGNATION OF MATTER

Pursuant to Rules 240 and 210, SCACR, Duke Energy Carolinas, LLC (the “Company”) seeks an order striking various documents in the Designation of Matter to be included in the Record on Appeal that Appellant filed with the Court on February 3, 2021. The Court should strike the documents discussed below from Appellant’s Designation of Matter because these documents were not presented in the proceedings before the South Carolina Public Service Commission and the documents are not relevant to the limited issues on appeal.

BACKGROUND

This appeal arises out of a complaint filed by Appellants with the South Carolina Public Service Commission (the “Commission”) related to their aversion to “smart” meters. Rather than enrolling in the Company’s opt-out program approved by the Commission, Appellants filed the

complaint alleging unspecified privacy and health concerns. Thereafter, the Company filed a Motion to Dismiss the complaint because the complaint did not allege that the Company had violated any Commission-jurisdictional statute, order, or rule. The Commission granted the Company's Motion to Dismiss. Thereafter, the Commission denied Appellants' request for rehearing and this appeal followed.

LAW

The South Carolina Rules of Appellate Practice are clear that matter that was not presented to the lower tribunal must not be included in the Record on Appeal: "The Record on Appeal shall include all matter designated to be included by any party under Rule 209," but "shall not. . . include matter which was not presented to the lower court or tribunal." Rule 210(c), SCACR. Further, parties may not include any matter in his Designation of Matter that is not relevant to the appeal. *Id.*; Rule 209(b), SCACR. Additionally, briefs must contain "references to the transcript, pleadings, orders, exhibits, or other materials which may be properly included in the Record on Appeal to support the salient facts alleged." Rule 208(b)(4), SCACR (emphasis added). Finally, the court's review on appeal "must be confined to the record." S.C. Code Ann. § 1-23-380(4); *Argabright v. Argabright*, 398 S.C. 176, 179, 727 S.E.2d 748, 750 (2012) ("We are, of course, bound by the record established at trial.").

"[T]he South Carolina Appellate Court rules are not mere technicalities but provide the parties and this Court with an orderly mechanism through which to guide appeals in this State." *Henning v. Kaye*, 307 S.C. 436, 437, 415 S.E.2d 794, 794 (1992). "Whenever it appears that an appellant or a petitioner has failed to comply with the requirements of these Rules, the clerk shall issue an order of dismissal, which shall have the same force and effect as an order of the appellate court." Rule 231(a), SCACR. Although Respondent does not seek dismissal of the appeal, Rule 231(a) underscores the importance of the parties in complying with the appellate court rules.

ARGUMENT

Appellants have included a bevy of documents and materials that were not presented to the Commission and which are wholly irrelevant to their appeal. For these reasons, these materials should be stricken from their Designation of Matter and Appellants should be precluded from inserting these materials into the Record on Appeal. These materials are listed as follows and are numbered consistent with the numbering in Appellants' Designation of Matter:

- C.1 Fax dated 7-3-2017 from Randy Gilchrist to Duke Energy
- C.2 Letter from Duke Energy to Ralph Gilchrist dated April 10, 2018
- C.3 Letter from Duke Energy to Ralph Gilchrist dated May 18, 2018
- C.4 Letter from Ralph Gilchrist to Duke Energy dated June 7, 2018
- C.5 Letter from Ralph Gilchrist to Duke Energy dated July 18, 2018
- C.6 Letter from Randy Gilchrist to Duke Energy dated Aug. 25, 2018
- C.7 Affidavit of Randy Gilchrist to Duke Energy Corporation dated Oct. 4, 2018
- C.8 Copy of door hanger card left by Duke Energy
- C.9 Letter from Randy and Cheryl Gilchrist to Senator Thomas Alexander dated Nov. 24, 2018
- C.10 Letter from Duke Energy to Ralph Gilchrist dated Dec. 4, 2018
- C.11 Letter from Randy and Cheryl Gilchrist to Duke Energy dated Oct. 23, 2019
- C.12 Letter from Duke Energy to Mr. and Mrs. Randy Gilchrist dated Nov. 11, 2019
- C.13 Letter from Mr. and Mrs. Randy Gilchrist to Public Service Commission of South Carolina dated Nov. 29, 2019
- C.14 Letter from Duke Energy to Mr. Brad Kirby, Investigator, Office of Regulatory Staff, dated Dec. 12, 2019
- D.5¹ Randy and Cheryl Gilchrist's letter to Jocelyn G. Boyd, Chief Clerk/Executive Director of the Public Service Commission of SC dated Sept. 20, 2020
- F.1 Copy of "Constructive Contract" posted on Gilchrist's meter box
- F.2.a Privacy Attorneys Ropes & Gray online article
- F.2.b National Security Agency (NSA) Cyber Security Information Sheets
- F.2.c Defense Intelligence Agency (DIA) document dated Jan. 15, 2021
- G.1 European Molecular Microbiology Organization online article
- G.2 Motherboard online article
- G.3 PPJ Gazette online article
- G.4 Texas Utilities Code, Sec. 39.107(b)
- G.5 Associated Press article, Dec. 6, 2017
- G.6 E & E News online article, Feb. 1, 2019
- G.7 Technocracy News online article
- G.8 The Indiana Lawyer online article, March 5, 2019

¹ While the Designation of Matter asserts that this letter was sent to the Commission, it does not appear in the Commission's Docket Management System and was not served on Respondent.

This material should be stricken from the Designation of Matter and not included in the Record on Appeal because none of it was presented to the lower court or tribunal. *See* Rule 210(c), SCACR. Indeed, the court’s review on appeal “must be confined to the record.” S.C. Code Ann. § 1-23-380(4); *Argabright v. Argabright*, 398 S.C. 176, 179, 727 S.E.2d 748, 750 (2012) (“We are, of course, bound by the record established at trial.”). The complaint in this case was dismissed by the Commission prior to a hearing and the taking of evidence, principally because the Commission found that the complaint contained no Commission-jurisdictional violation of a statute, rule, or regulation, and because Appellants had not “stated a claim upon which relief may be granted by this Commission.” Because the materials listed above were never filed with or presented to the Commission, i.e., the lower tribunal, they should be stricken from Appellants’ Designation of Matter, consistent with SCACR Rule 210(c), S.C. Code Ann. § 1-23-380(4), and *Argabright*. Further, allowing these materials to become part of the Record would prejudice the Company. Not only were these materials not presented to the Commission, the Company itself has not been provided with many of these materials and has no knowledge as to what they may or may not contain. Adding these unknown materials to the record would offend due process. For these reasons, the Company believes that these materials should be stricken from Appellants’ Designation of Matter.

These erroneously included materials should also be stricken because they are not relevant to the sole issue on appeal, i.e., whether the Commission correctly dismissed the Complaint upon a finding that it did not allege a Commission-jurisdictional violation of a statute, rule, or regulation. Because the substance of the underlying case is not relevant to the issue actually on appeal, materials related to the merits of the underlying case should be stricken from the designation of matter.

CONCLUSION

For the reasons explained herein, the Company requests that the Court strike the documents enumerated above from Appellant's Designation of Matter because these documents were not presented in the proceedings before the Commission and the documents are not relevant to the limited issues on appeal.

Respectfully submitted,

s/Samuel J. Wellborn

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Attorneys for Respondent
Duke Energy Carolinas, LLC

Columbia, South Carolina
February 10, 2021

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In the Court of Appeals

APPEAL FROM THE SOUTH CAROLINA PUBLIC SERVICE COMMISSION

South Carolina Public Service Commission Docket No. 2019-290-WS

Appellate Case No. 2020-001445

Randy and Cheryl Gilchrist.....Appellants,

v.

Duke Energy Carolinas, LLCRespondent.

PROOF OF SERVICE

This is to certify that I, Toni C. Hawkins, a paralegal with the law firm of Robinson Gray Stepp & Laffitte, LLC have this day served a copy of Respondent’s Motion to Strike Appellants’ Designation of Matter by placing a copy of same in the United States Mail, postage prepaid, to Appellants (as addressed below) and by electronically filing a copy with the South Carolina Public Service Commission.

Randy and Cheryl Gilchrist
3010 Lake Keowee Lane
Seneca, SC 29672

South Carolina Public Service Commission
(via electronic filing)

Dated at Columbia, South Carolina, this 10th day of February, 2021.

Toni C. Hawkins



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February 10, 2021

Via Electronic Mail: ctappfilings@sccourts.org

The Honorable Jenny Abbott Kitchings
Clerk, Court of Appeals of South Carolina
1220 Senate Street
P.O. Box 11629
Columbia, South Carolina 29211

RE: Randy and Cheryl Gilchrist v. Duke Energy Carolinas, LLC
SCPSC Docket No. 2020-147-E
Appellate Case No. 2020-001445

Ms. Kitchings:

Attached for filing please find Respondent's Motion to Strike Appellants' Designation of Matter along with Proof of Service. Our \$50.00 check for the required filing will be placed in the US Mail today to your office.

Kind regards,

Sam Wellborn

SJW:tch

Enclosure

cc w/enc: Randy and Cheryl Gilchrist (via U.S. Mail)
S.C. Public Service Commission (via electronic filing)
Heather Shirley Smith, Deputy General Counsel (via email)
Katie M. Brown, Counsel (via email)

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