THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Ralph K. Anderson III, Chief Administrative Law Judge

Case No. 10-ALJ-17-0270-CC

Duke Energy Corporation,.....Appellant,

v.

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

FINAL BRIEF OF RESPONDENT

Jonathon Abraham Gutting
Harry A. Hancock

Milton G. Kimpson
South Carolina Department of Revenue
Post Office Box 12265
Columbia, South Carolina 29211
(803) 898-5131

John M.S. Hoefer
Tracey C. Green
John W. Roberts
Willoughby & Hoefer, P.A.
Post Office Box 8416
Columbia, South Carolina 29202
(803) 252-3300

Attorneys for Respondent

Table of Contents

Table of Authorities

Cases

Statutes

Rules

Acts

Other Authorities

Statement of the Issues

1. On December 30, 2002, Duke Energy filed amended returns for the years 1978-2001 seeking an income tax refund in excess of $120 million, plus interest. The 1978-1993 returns were filed outside of the statutory limitations periods for those years and the Department had no authority to extend those periods. Did the Administrative Law Court correctly determine that the refund claims for the years 1978-1993 were untimely?

2. Duke Energy regularly invests excess cash from its operations in relatively risk-free short-term investments and recovers the invested asset plus an investment return within a short period of days or a few weeks. Did the Administrative Law Court correctly determine that Duke Energy is not entitled to include in its apportionment formula the amount of principal recovered from short-term investments of excess cash from operations?

3. The Supreme Court has held at least twice that an entity engaged in generating electricity is engaged in manufacturing. Duke Energy is engaged in the generation, transmission, and distribution of electricity, the processes Duke Energy uses to produce electricity are interconnected, and the process of generating, transmitting, and distributing electricity employed by Duke Energy is machinery-intensive. Does substantial evidence support the Administrative Law Court's determination that Duke Energy is engaged in manufacturing?

Statement of the Case

This case involves Duke Energy Corporation's amended South Carolina corporate income tax returns for the years 1978-2001 (Periods at Issue) filed on December 30, 2002 and seeking a total refund of tax in the approximate amount of $125 million, plus interest (Refund Claims).[1] During the Periods at Issue, Duke Energy was engaged in the generation, transmission, distribution, and sale of electricity in portions of North Carolina and South Carolina. [*See* R. at 122 (Am. Final Order & Decision, p.3 (Dec. 4, 2012) (Mfg. Order)).] Because it operated in more than one state, Duke Energy was required to calculate its South Carolina taxable income using an appropriate apportionment formula. S.C. Code Ann. §§ 12-6-2210(B), -2240.

In its originally-filed returns for all the Periods at Issue, Duke Energy apportioned its income using the property, payroll, and sales factors,[2] used by entities "whose principal business in this State is (a) manufacturing or any form of collecting, buying, assembling, or processing goods and materials within this State or (b) selling, distributing, or dealing in tangible personal property within this State." *See* S.C. Code Ann. § 12-6-2250.[3] Duke Energy did not include in the apportionment formula of its 1978-1999 original returns the amount of principal recovered from short-term investment transactions. [R. at 51 (Am. Order Granting Summ J. in Part & Denying Summ. J. in Part, p.3 (Oct. 11, 2012) (SJ

---

[1] The refund amount was derived from a comparison of the original and amended returns filed by Duke Energy for the Periods at Issue. The amended returns followed an initial round of amended returns filed on or about September 24, 2002.

[2] This multi-factor apportionment formula reflects as a percentage the property, S.C. Code Ann. § 12-6-2260(A), payroll, S.C. Code Ann. § 12-6-2270(A), and sales, S.C. Code Ann. § 12-6-2280(A), of Duke Energy in South Carolina versus everywhere.

[3] The 2006 amendments to the apportionment formulas do not apply to the Periods at Issue. S.C. Code Ann. § 12-6-2252; *see* 2007 S.C. Acts. No. 110, § 50A, No. 116, § 55A.

Order)).] It did, however, include these amounts in its originally-filed returns for 2000-2001. [R. at 51 (SJ Order, p.3 n.6).]

The Refund Claims were based on the following substantive and substantial changes to its originally-applied apportionment formulas for the Periods at Issue:

- Duke Energy postulated that, despite years of contrary practice, it provides services and, as such, must use the single factor formula for entities whose "principal profits or income ... are derived from sources other than those described in Section 12-6-2250 ...." S.C. Code Ann. § 12-6-2290.[4]
- Duke Energy contended that the apportionment statutes require it to include in the denominator of the pertinent apportionment formula the amount of principal recovered from short-term investments of excess cash generated from its operations.

On February 4, 2010, the Department issued a written determination denying the Refund Claims in whole (Determination) on the following grounds:

- *Timeliness*. The applicable limitations periods for the governing refund statutes had expired for many of the Periods at Issue and could not be extended or revived by execution of myriad Forms FS-43 entitled "Field Services Division—Consent to Extend the Time to Assess Tax."[5] [R. at 5555-56 (Dep't Det'n, pp.9-10)].
- *Manufacturing*. Duke Energy is a manufacturer required to use the three-factor formula based on Supreme Court precedent and Department policy. [R. at 5548-49 (Dep't Det'n, pp.2-3).]
- *Recovery of Principal*. Including recovered principal in the apportionment formula was contrary to the Department's long-standing administrative policy, would unreasonably represent the amount of business Duke Energy does in South Carolina, and would lead to an absurd result. [R. at 5549-54 (Dep't Det'n, pp.3-8).]

Duke Energy timely filed a request for contested case hearing with the South Carolina Administrative Law Court (ALC) on March 3, 2010. After discovery concluded, the Department moved for summary judgment on April 20, 2012 on all three grounds in the Determination. On May 21, 2012, Duke Energy filed its opposition to the motion for

---

[4] Section 12-6-2290 was enacted in 1995 and was substantially the same as section 12-7-1190 under prior law. None of the exclusions in section 12-6-2290 apply here.

[5] [*See* R. at 216 (schedule showing Forms FS-43 expiration date, periods included, and dates signed); R. at 218-40 (separate Forms FS-43).]

summary judgment and also filed a cross-motion for summary judgment on the ground that it was entitled to include the return of investment principal in its apportionment formula as a matter of law. On June 4, 2012, the Department filed its reply and opposition to the cross-motion for summary judgment.

On June 26, 2012, the ALC heard arguments on the motions for summary judgment.[6] By Order dated August 9, 2012, the ALC granted in part the Department's motion for summary judgment, ruling that Duke Energy's amended returns filed for the 1978-1993 tax years were untimely and that Duke Energy could not include recovered principal in its apportionment formula. The ALC denied the Department's motion with respect to the manufacturing issue, concluding that a hearing would be necessary to determine factual issues related to the claim. Duke Energy filed a motion to reconsider the grant of summary judgment on August 20, 2012 and the Department filed its opposition to that motion on September 14, 2012.[7] On September 21, 2012, in response to an inquiry from the ALC on September 19, 2012, the parties stated their position regarding a statement made by Duke Energy in its motion to reconsider. On October 11, 2012, the ALC issued the SJ Order and its Order Denying Motion for Reconsideration in Part and Granting Reconsideration in Part (SJ Recons. Order), in which the ALC amended its original order in some respects but reaffirmed the grant of summary judgment to the Department on the same grounds.

In the meantime, the ALC conducted a contested case hearing on September 5-6, 2012 regarding the manufacturing issue. Both parties presented witnesses and introduced

---

[6] The ALC stated in a June 29, 2012 call that it would draft the Order regarding timeliness. Duke Energy's contrary assertion, Br. of Appellant, p.3 n.1, is incorrect.

[7] The ALC stayed its August 9, 2012 Order after the motion to reconsider was filed. [R. at 86 (SJ Recons. Order, p.2 n.1).]

exhibits, both separately and jointly. On November 2, 2012, the ALC issued an Order ruling that Duke Energy did not meet its burden to prove that it is not a manufacturer and, thus, is not eligible to use the single-factor apportionment method reported on its amended returns. Duke Energy moved to reconsider the ALC's order on November 13, 2012. On December 4, 2012, the ALC reaffirmed its original decision through the Mfg. Order and the Reconsideration Order (Mfg. Recons. Order).

Duke Energy timely filed a Notice of Appeal on January 3, 2013. Duke Energy moved to consolidate all appeals before this Court by motion dated January 14, 2013. This Court granted that motion by Order dated January 23, 2013.[8]

Summary of Arguments

The Pre-1994 Amended Returns were Untimely

The amended returns for 1978-1993 did not comply with the pertinent statutory requirements for filing refund claims during those years. Duke Energy's incantation of Forms FS-43, Consent to Extend the Time to Assess Tax, is unavailing because that form did not extend the time limitations for filing refund claims. At bottom, Duke Energy is demanding that the Department apply today's statutory standard retroactively even though that standard was unavailable to other filers during those periods. Duke Energy's position is not based in case law or the proper application of recognized principles of statutory construction. The ALC therefore correctly determined that Duke Energy's pre-1994 refund claims were untimely because none of those claims was filed before the applicable limitations periods closed and because the doctrines of estoppel and equitable tolling do not save or revive those claims.

[8] The Department does not accept Duke Energy's recitation of the facts *in toto*, but addresses the pertinent facts separately for each issue.

Apportionment Factors do not Include Recovered Principal

The ALC correctly ruled that Duke Energy was not entitled to include in its apportionment formula the amount of principal recovered as part of the company's routine and regular investment of excess cash from its operations in short-term instruments. As a matter of law, the principal recovered from an investment transaction is simply the return of a company asset and a reading of the statute that allows including such non-income in the apportionment formula is contrary to the plain language of the relevant statutes and yields an absurd result.

Generating Electricity is Manufacturing

The ALC also correctly ruled that Duke Energy did not meet its burden to prove that it is not a manufacturer of electricity. The Supreme Court has held that an electric utility which generates electricity is engaged in manufacturing. The ALC also correctly determined that the Department has consistently maintained a policy that electric utilities are manufacturers. And the substantial evidence introduced at the hearing shows that electricity is a unique product with unique physical characteristics required by customers that is produced at a generation facility using a mechanical device known as a generator. The electricity delivered to customers is measured and Duke Energy charges its customers based on the quantity of electricity consumed.

Standard of Review

This appeal presents two different standards of review. Below, the Department moved for summary judgment on all three of the issues comprising this appeal; however, Duke Energy took varying approaches in response, opposing the Department's motion as to two issues, while filing a cross-motion for summary judgment as to the third. The ALC

decided the timeliness and recovery-of-principal issues against Duke Energy in the context of summary judgment and decided the manufacturing issue following a contested case hearing. The pertinent standards of review are set forth below.

Timeliness. Because Duke Energy did not file a cross-motion for summary judgment on this issue, it is limited to arguing that a genuine issue of material fact exists. It instead argues that the ALC erred as a matter of law and that it is entitled to judgment. In analyzing this issue, the Court is required to apply the same standard applied by the trial court. *See Hansson v. Scalise Builders of S. Carolina*, 374 S.C. 352, 354, 650 S.E.2d 68, 70 (2007) ("When reviewing a grant of summary judgment, the appellate court applies the same standard applied by the trial court pursuant to Rule 56(c), SCRCP."); *see also* R.P.A.L.C. 68. Importantly, the non-moving party cannot simply rest on allegations or denials but must identify facts establishing a genuine issue for trial. *E.g.*, *Bennett v. Investors Title Ins. Co.*, 370 S.C. 578, 589, 635 S.E.2d 649, 654 (Ct. App. 2006).

Recovery-of-Principal. The parties filed cross-motions for summary judgment on this issue, thereby agreeing that there are no disputed issues of material fact and the issue may be resolved as a matter of law. *Alltel Commc'ns, Inc. v. S. Carolina Dep't of Rev.*, 399 S.C. 313, 319 n.2, 731 S.E.2d 869, 872 n.2 (2012). The standard to be applied in determining the legal question is the same as that for the timeliness issue.

Manufacturing. The ALC conducted a contested case hearing on the merits of this issue, ultimately agreeing with the Department. Consequently, this Court may reverse the ALC's determination of the manufacturing issue only if that decision was

(a) in violation of constitutional or statutory provisions;
(b) in excess of the statutory authority of the agency;
(c) made upon unlawful procedure;
(d) affected by other error of law;

(e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
(f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

S.C. Code Ann. § 1-23-610(B); *see Travelscape, LLC v. S. Carolina Dep't of Rev.*, 391 S.C. 89, 96-97, 705 S.E.2d 28, 32 (2011).

Argument

1. The ALC correctly determined that Duke Energy's refund claims for tax years prior to 1994 were untimely.

"A refund of taxes is solely a matter of governmental grace ... and any person seeking such relief must bring himself clearly within the terms of the statute authorizing same...." *Asmer v. Livingston*, 225 S.C. 341, 344, 82 S.E.2d 465, 466 (1954) (internal citations omitted); [*see* R. at 55 (SJ Order, p.7 ("This Court cannot simply by implication extend the time to file a refund request.")).] The "terms of the statute" include limitations periods, which are crucial aspects of the fair administration of tax policies and procedures. *Rothensies v. Electric Storage Battery Co.*, 329 U.S. 296, 301 (1946). The 1978-1993 amended returns did not comply with the pertinent limitations periods.

A. *The Refund Claims for 1978-1993 did not comply with the statutory requirements for claiming refunds in effect during those years.*

There is no genuine dispute of material fact that, with respect to the 1978-1993 tax years, Duke Energy did not pay any amounts under protest, did not institute any action in circuit court, and did not file a refund claim within three years after the original due date of the return. These failures are fatal to the refund claims for these years.[9] Instead, Duke

[9] The Department does not dispute that the Refund Claims for 1994 and later were timely because the limitations periods for those years were extended using the substantially-different provisions enacted effective August 1, 1995 by the Revenue Procedures Act (RPA). *See* 1995 S.C. Acts No. 60, § 4.D.(1).

Energy's arguments can be condensed to the following: the statutes at issue, and therefore the ALC's interpretation of their plain language, cannot mean what they say, because such a construction would be unfair to Duke Energy.

(1) *The Refund Claims for 1978-1989 did not comply with Sections 12-47-210 and 12-47-220, which authorized a refund only if the taxpayer paid the tax under protest and, within 30 days, instituted an action in circuit court.*

The South Carolina Supreme Court made clear in *Bass v. State* that, as of 1992, South Carolina Code Sections 12-47-210 and 12-47-220[10] were the "exclusive remedy" for obtaining a refund of income taxes for years prior to 1990. 307 S.C. 113, 116, 414 S.E.2d 110, 112 (1992), *cert. granted, judgment vacated on other grounds by Bass v. S. Carolina*, 509 U.S. 916 & *abrogated by Harper v. Virginia Dept. of Taxation*, 509 U.S. 86 (1993); *Perpetual Bldg. & Loan Ass'n of Columbia v. S. Carolina Tax Comm'n*, 255 S.C. 523, 527, 180 S.E.2d 195, 197 (1971) (noting "exclusive remedy"). Duke Energy's contrary assertion, Br. of Appellant, p.14, is incorrect.[11]

Sections 12-47-210 and 12-47-220 required a taxpayer who sought a refund of taxes to pay the amount under protest and institute an action in circuit court within 30 days after payment. *See S. Carolina Nat. Bank v. S. Carolina Tax Comm'n*, 297 S.C. 279, 282, 376 S.E.2d 512, 514 (1989). Failing to pay under protest was fatal to any refund claim.

---

[10] Because the statutes changed over the 23-year period at issue, the year is omitted from the citation. [*See* R. at 56 (SJ Order, p.8 n.10).] Some of the statutes at issue were repealed in 1995 and are not in the current Title 12 of the South Carolina Code of Laws.

[11] Duke Energy obliquely references "Due Process Clause concerns," Br. of Appellant, p.14, but has not preserved that issue for review. Nothing about constitutional issues, let alone Due Process, is included in its statement of issues on appeal. Br. of Appellant, p.1; *see* Rule 208(b)(1)(B), SCACR ("Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal."). Moreover, this claim would in any event be an "as applied" contention that has been waived because it was not presented to or ruled upon by the ALC. *See Travelscape,* 391 S.C. at 109, 705 S.E.2d at 38-39 (addressing the ALC's ability to consider "as applied" constitutional claims).

See, e.g., City of Columbia v. Glens Falls Ins. Co., 245 S.C. 119, 139 S.E.2d 529 (1964). There is no genuine dispute of fact that none of these payments was made under protest. [R. at 56 (SJ Order, p.8).] There also is no genuine dispute that Duke Energy did not file an action in circuit court within 30 days after the payment was made. [*Id.*] Consequently, the ALC correctly determined that Duke Energy's refund claims for the tax years 1978-1989 were untimely.[12]

(2) *The Refund Claims for 1990-1993 did not comply with sections 12-47-210 and 12-47-220 and also did not comply with section 12-47-440, which required filing a refund claim within three years of the original due date for the return.*

In 1994, the General Assembly amended section 12-47-440 to apply to refund claims for tax years beginning in 1990 and later. 1994 S.C. Acts No. 464, § 3(B). As amended, section 12-47-440 allowed filing an income tax refund claim within three years from the original due date of the return, without regard to extensions of time to file. Because Duke Energy's tax period is the calendar year, its tax returns and payment for any year originally were due on March 15th of the following year. S.C. Code Ann. § 12-6-4970(B)

---

[12] Although Duke Energy disputes, without support, the determination that an exclusive remedy existed for claiming a refund for payments made before 1990, it does not appeal from the finding that it neither made payment under protest nor instituted a challenge action in the circuit court within 30 days of payment. [*See* R. at 56 (SJ Order, p.8 ("[T]here is no evidence that any of the payments for [the years of 1978 to 1989] were made under protest ... and no action was filed in circuit court within 30 days after the payment was made.")).] Consequently, if the Court affirms the ruling that sections 12-47-210 and -220 were exclusive before 1990, the ALC's findings with respect to filing under protest and instituting an action are the law of the case and alone require affirming the ALC for 1978-1989. *See ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche*, 327 S.C. 238, 241, 489 S.E.2d 470, 472 (1997) (holding that an unappealed factual ruling by a lower court is the law of the case); *see also Brading v. County of Georgetown*, 327 S.C. 107, 113, 490 S.E.2d 4, 7 (1997) (holding an unappealed ruling is the law of the case); *State Farm Mut. Auto. Ins. Co. v. James*, 337 S.C. 86, 95, 522 S.E.2d 345, 349 (Ct. App.1999) (same).

(after 1995); S.C. Code Ann. § 12-7-1640 (before 1996). The applicable periods for the years 1990-1993 therefore were as follows:

Income Tax Year	Return Originally Due	Refund Period Closed
1990	March 15, 1991	March 15, 1994
1991	March 15, 1992	March 15, 1995
1992	March 15, 1993	March 15, 1996
1993	March 15, 1994	March 15, 1997

Because there is no dispute that claims for these years were not filed until December 2002, the refund claims for these years were untimely. [R. at 57, 65-66 (SJ Order, pp.9, 17-18).]

B. ***Forms FS-43 executed for the 1978-1993 tax years did not render Duke Energy's refund claims timely because those authorized an extension only of the time in which the Department could issue a notice of assessment.***

Despite failing to comply with sections 12-47-210, -220, and -440 for 1978-1993, Duke Energy contends that its claims were rendered timely by myriad Forms FS-43 executed by the parties. However, these forms, entitled "Consent to Extend the Time to Assess Tax," did nothing more than extend the time in which the Department could issue an assessment of taxes against Duke Energy because the Department had no authority to extend the time to file a refund claim before enactment of the RPA in 1995.

(1) *Form FS-43 must be interpreted in light of the authority granted by section 12-54-80 in effect during the Periods at Issue.*

Form FS-43, consistent with its title, simply explains its purpose as follows:

> This agreement extends the time for mailing the notice of assessment or refund of the above tax pursuant to the provisions of Section 12-54-80 of the 1976 South Carolina Code of Laws, as amended.[13]

[13] [R. at 218-40 (Forms FS-43).]

The legal effect of Form FS-43 thus depends on the provisions and limitations of section 12-54-80[14] because the form expressly references that statute and no employee or agent of the Department may exceed the authorization granted by a statute. *TNS Mills, Inc. v. S. Carolina Dep't. of Rev.*, 331 S.C. 611, 621-22, 503 S.E.2d 471, 478 (1998) ("[I]n fact, the only inference arising from the legislative history is that only the General Assembly may extend the application deadline."); *Asmer*, 225 S.C. at 343-44, 82 S.E.2d at 466.

Section 12-54-80 contains no language regarding refunds, let alone language authorizing an extension of time to claim a refund.[15] [R. at 55 (SJ Order, p.7)]. The statute governed the time in which a notice of assessment could be issued and, if a taxpayer consented in writing to an extension, allowed the "notice of assessment" to be mailed "at any time prior to the expiration of the period agreed upon." In sum, it is a statute directed to and operative on the Department because a notice of assessment always is issued to the taxpayer by the Department. [R. at 55, 59 (SJ Order, pp.7, 11)]; *see SCANA Corp. v. S. Carolina Dep't of Rev.*, 384 S.C. 388, 391, 683 S.E.2d 468, 469 (2009) (court must interpret tax statute according to its plain meaning). The statute does not apply to refund claims, shown by the fact that section 12-54-85, adopted in 1995 to replace section 12-54-80, contains express language regarding refund claims. *Compare* S.C. Code Ann. § 12-54-80 *with* S.C. Code Ann. § 12-54-85(F)(1).

---

[14] Section 12-54-80 became effective on September 1, 1985, but was not retroactive. *See S. Carolina Nat. Bank*, 297 S.C. at 280-81, 376 S.E.2d at 513. The RPA replaced section 12-54-80 with section 12-54-85.

[15] Duke Energy attempts to make much out of assertions that the Department requested the execution of some Forms FS-43. Br. of Appellant, p.11. However, in other situations, Duke Energy requested execution of the forms. [*See* R. at 836, 909-13 (Reply & Opp'n to Duke Resp. & Cross-Mot. p.12 & Exs. H & I).] Because Form FS-43 only extended the time in which the Department could issue an assessment, the question of who initially requested any of the Forms FS-43 is irrelevant to the issue before this Court.

The absence of language in section 12-54-80 authorizing extensions for refund claims is significant because, prior to enactment of the RPA in 1995, the Department had no authority to extend the time for filing refund claims. The statutes in effect before 1995, sections 12-47-210, -220, and -440, did not authorize extensions of time. Section 12-60-40, which generally authorizes the Department to "extend time limitations provided by [Title 12] and for other taxes," was not effective until 1995. *See* 1995 S.C. Acts No. 60, § 4.L. No other statutes authorized extensions of time for refund claims, which is confirmed by the fact that Duke Energy's brief does not cite to any other statutes for that proposition. In sum, the effect of Form FS-43 claimed by Duke Energy for 1978-1993 was wholly outside the Department's authority.

Prior to 1995, the only authority granted to the Department regarding income tax refunds other than sections 12-47-210, -220, and -440 was section 12-54-30, which permitted it to refund amounts discovered on examination of a return or otherwise even if a claim for refund was untimely.[16] This statute did not modify the refund statutes. S.C.

---

[16] Duke Energy contends that the Department paid other income tax refunds to Duke Energy many years after the pertinent limitations periods expired. Br. of Appellant, p.13. This and other assertions in Duke Energy's brief are supported by citation to an affidavit from T. Cooper Monroe, III, who currently is the Director of State and Local Tax for Duke Energy. However, the ALC expressly declined to consider Mr. Monroe's affidavit because it was submitted after the hearing on the summary judgment motion. [R. at 62 (SJ Order, p.14 n.13).] Parties are precluded from raising new issues and arguments in post-trial submissions to the court that could have been raised at trial. *See Patterson v. Reid*, 318 S.C. 183, 456 S.E.2d 436 (Ct. App. 1995). Moreover, Duke Energy did not request reconsideration of the ALC's ruling in a motion for reconsideration, [*see* R. at 1039-40 (Pet's. Mem. Auth. Supp. Mot. Recons., pp.4-5 (omitting any discussion of ruling rejecting Monroe Affidavit))], and, thus, has not preserved that issue for review. *See Wilder Corp.v. Wilke*, 330 S.C. 71, 497 S.E.2d 731 (1998) (first step in preserving an issue for appellate review is to actually raise it below); *see also Home Medical Sys., Inc. v. S. Carolina Dep't of Rev.*, 382 S.C. 556, 562, 677 S.E.2d 582, 586 (2009) ("Although a Rule 59(e) motion may effectively seek a reconsideration of issues and arguments, this type of motion is often **required** for issue preservation purposes.") (emphasis in

Tax Comm'n Decision 88-162, 1988 WL 409374 (June 30, 1988); *see CFRE, LLC v. Greenville County Assessor*, 395 S.C. 67, 77, 716 S.E.2d 877, 882 (2011) ("The construction of a statute by the agency charged with its administration will be accorded the most respectful consideration and will not be overruled absent compelling reasons."). Section 12-54-30 was a narrow remedy, available only in the context of review by the Department, and a taxpayer had no right to judicial review of any decision made under that statute. *See Argent Lumber Co. v. Query*, 178 S.C. 1, 182 S.E. 93 (1935) (holding no right to judicial review of predecessor statute), *overruled on other grounds by McCall by Andrews v. Batson*, 285 S.C. 243, 329 S.E.2d 741 (1985); *see also* S.C. Rev. Rul. 91-10, 1991 WL 11666893 (May 29, 1991) (noting no right to appeal decisions under section 12-54-30 and citing to *Argent Lumber*). But this statute did allow the Department to grant refunds in appropriate circumstances, such as overpayments identified during an examination, which explains the "refund" reference in Form FS-43.

(2) *Forms FS-43 did not extend the period in which Duke Energy could file a refund claim for any year before 1994.*

Duke Energy contends that the Forms FS-43 executed for the years 1978-1993 timely extended the period for filing a refund claim for these years. Even assuming, without at all conceding, that Form FS-43 authorized an extension of time to file a refund claim, Duke Energy fails to acknowledge that, once a tax limitations period closes, it cannot be reopened. *See Berry v. Commissioner*, 97 T.C. 339, 347 (1991) ("When the assessment period is extended after the period for filing a claim for credit or refund has expired, the consent agreement does not revive or extend the expired claim period.").

---

original). Indeed, based on the paucity of argument in its motion, virtually all of the issues presented in its brief concerning timeliness are not preserved for review.

There is no genuine dispute that the 30-day limitations period of sections 12-47-210 and -220 closed for 1978-1989 well before enactment of the RPA in 1995 and well before any Form FS-43 was executed for those years.[17] [R. at 216 (Form FS-43 Schedule).]

Similarly, although the limitations period for any open years could have been extended by a Form FS-43 after the RPA was enacted, *see* S.C. Rev. Proc. 95-5, 1995 WL 17817640 (1995), there is no genuine dispute that the limitations periods for the years 1990-1993 expired before any Form FS-43 was executed for those years. The refund periods for 1990 and 1991 closed before the RPA became effective on August 1, 1995. And although 1992-1993 had not closed on August 1, 1995, those years were not timely extended because a Form FS-43 was not executed before the applicable three-year period expired on March 15 of the succeeding year.[18] That is, the Form FS-43 for 1992 was not executed until May 30, 1996, [R. at 216 (Form FS-43 Schedule),] which is more than two months after the three-year period expired on March 15, 1996. The Form FS-43 for 1993 was not executed until June 20, 1997, [R. at 216 (Form FS-43 Schedule),] which is more than three months after the three-year period expired on March 15, 1997.

Finally, Duke Energy contends that its amended returns were timely because the Forms FS-43 were executed prior to the expiration of 180 days from an IRS adjustment

---

[17] The 1978-1983 tax years appeared for the first time on the Forms FS-43 with the execution of the form effective May 30, 1996. [R. at 218-40 (Forms FS-43).] The only available avenue for reviewing the taxable income of the years 1978-1982 in 1996 would have been an assessment based on an IRS adjustment. *See* S.C. Code Ann. §12-54-85(D)(1); *cf.* S.C. Code Ann. § 12-54-80 (prior law). Duke Energy makes no argument in its brief that the timeliness of refund claims for these years is saved by an IRS adjustment. *Cf.* Br. of Appellant, p.15 (alleging that IRS adjustment opened the years 1984, 1986-1989, & 1990-1993). In any event, any refund would be limited to the issue contained in the IRS adjustment, which would not include allocation and apportionment issues.

[18] [R. at 218-240 (Forms FS-43).]

for the years 1984, 1986-1989, and 1990-1993.[19] Br. of Appellant, p.15; *see* S.C. Code Ann. §12-54-85(D)(1); *cf.* S.C. Code Ann. § 12-54-80 (prior law). However, this assertion is supported by the post-hearing affidavit of T. Cooper Monroe, which Duke Energy cannot rely upon because the ALC correctly refused to consider the affidavit. *See* discussion *supra* p.13 n.16. In any event, any extension attributable to an IRS adjustment would have been limited to the tax issues raised by the IRS. [R. at 56-57 (SJ Order p.8-9 n.11).] To accept Duke Energy's argument would require this Court to hold that an IRS adjustment on any single issue serves to fully open an otherwise-closed tax year, a holding inconsistent with the rule that refund statutes are construed narrowly. *See, e.g., Asmer*, 225 S.C. at 344, 82 S.E.2d at 466. Because the state allocation and apportionment issues raised in the amended returns could not have been at issue in a federal determination, the purported extensions of the 1984, 1986-1989, and 1990-1993 tax years are in any event untimely as a matter of law.

C. *Duke Energy is not entitled to prevail based on theories of waiver, estoppel, or equitable tolling because these doctrines do not apply against the Department and are not applicable here in any event.*

In each of its arguments regarding waiver, estoppel, and equitable tolling, Duke Energy fails to recognize that the Department has no authority to extend a limitations period except as provided by statute. *See, e.g., TNS Mills,* 331 S.C. at 623, 503 S.E.2d at 478; *Asmer*, 225 S.C. at 343-44, 82 S.E.2d at 466. That is, even if any of these provisions are applicable against the Department, the application must involve a matter within the authority of the Department or its agent. Otherwise, Duke Energy was obligated to ascertain for itself the scope of the Department's authority, including the correct

[19] The Forms FS-43 actually were executed *before the IRS adjustment was even made.*

limitations periods for filing refund claims. *See Am. Legion Post 15 v. Horry County*, 381 S.C. 576, 583, 674 S.E.2d 181, 184 (Ct. App. 2009).

(1) *Duke Energy's waiver argument is based upon cases decided outside of the taxation context, a crucial distinction, and does not recognize that the Department has no authority to waive or extend limitations periods except as authorized by statute.*

Because refund limitations are unlike general statutes of limitation, employees of the Department cannot waive enforcement of a limitations period if they lack authority to do so. Put succinctly, rules regarding the waiver of general statutes of limitations cannot be transplanted into the revenue context. The Supreme Court long ago held that refund claims are not subject to estoppel or waiver. *See Heyward v. S. Carolina Tax Comm'n*, 240 S.C. 347, 351, 126 S.E.2d 15, 17 (1962). In the only waiver case cited by Duke Energy actually involving the Department, the theory of recovery was based on a contract. *Anon. Taxpayer v. S. Carolina Dept. of Rev.*, 377 S.C. 425, 431-32, 661 S.E.2d 73, 76 (2008) (noting that there "was a contract providing for continuing performance, thus the limitations period began anew each year.") Although a contractual limitations period is subject to waiver and estoppel, refund claims are not contractual. *See Heyward,* 240 S.C. at 351, 126 S.E.2d at 17 ("We have held that the State may be subject to the doctrine of estoppel in its <u>contractual relations</u>.") (emphasis added); *see also C. W. Matthews Contracting Co., Inc. v. S. Carolina Tax Comm'n,* 267 S.C. 548, 554, 230 S.E.2d 223, 226 (1976) (tax refund claim created by statute).

Duke Energy contends that waiver is appropriate because a "statute of limitations affects the remedy and not the right." Br. of Appellant, p.16 (citing *Hercules v. S. Carolina Tax Comm'n*, 274 S.C. 137, 143, 262 S.E.2d 45, 48 (1980)). But *Hercules* addressed not the refund limitations period, but the timeliness of an assessment based on

a tolling process expressly provided by statute. *See id.*, 274 S.C. at 140, 262 S.E.2d at 47. *Hercules* thus holds that refund periods may be extended when authorized by statute, not that employees of the Department may extend a limitations period without authorization. Duke Energy's waiver arguments do not render its 1978-1993 refund claims timely.

(2) *The Department is not subject to estoppel because it is not bound by an erroneous interpretation of law espoused by its employees or agents.*

Estoppel also does not assist Duke Energy because the Department is not bound by representations of its agents that are inconsistent with the statutory language and, thus, outside of the agent's scope of authority. *Texaco, Inc. v. Wasson*, 269 S.C. 255, 265, 237 S.E.2d 75, 79 (1977); *Heyward*, 240 S.C. at 352, 126 S.E.2d at 18. In *Texaco*, the Court held that the Department was not estopped from assessing additional taxes based on the use of an improper accounting method even though Department employees had expressly and in writing authorized the taxpayer to use that method "until such time as the South Carolina Tax Commission grants permission to change such method." *Texaco*, 269 S.C. at 264-65, 237 S.E.2d at 79. In *Heyward*, the taxpayer argued that the Department was estopped "because of acquiescence in and approval of the taxpayer's election of the installment method of reporting profit ...." *Heyward*, 240 S.C. at 351, 126 S.E.2d at 17. The Court rejected that argument, holding that "estoppel [does not] deprive the government of the due exercise of its police power, or ***to effect public revenues*** or property rights, or to frustrate the purpose of its laws or thwart its public policy." *Id.* (emphasis added).

Simply put, the Department cannot make changes in or expand the refund procedures and limitations established by the General Assembly. *TNS Mills,* 331 S.C. at 623, 503 S.E.2d at 478; *Asmer*, 225 S.C. at 343-44, 82 S.E.2d at 466. In *TNS Mills*, the taxpayer

contended that the Department had the authority to grant a property tax exemption retroactively—effectively a refund. 331 S.C. at 621, 503 S.E.2d at 476-77. This contention was based in part on a memorandum prepared by a Department employee opining that a recently-enacted statute authorized accepting exemption applications at any time. *Id.* The Court rejected this contention, holding that "[a]lthough [the employee] believed the Department had the authority to grant retroactive exemptions, and exemptions may have been granted under this erroneous view, neither the Commission nor the courts are bound by his erroneous interpretation." *Id.* at 621-22, 503 S.E.2d at 477.

Thus, the Department is not estopped from invoking the correct refund limitations period even if its employees erroneously believed they had the authority to grant extensions of time for filing refund claims. Form FS-43 did not extend the refund limitations periods for 1978-1993 even if Department and Duke Energy thought that it did. This conclusion is supported by *Quail Hill, LLC v. County of Richland*, 387 S.C. 223, 236, 692 S.E.2d 499, 506 (2010), which was cited by Duke Energy, Br. of Appellant, p.19, but which holds that the government is not estopped from contesting erroneous statements made by its employees. *See id.* at 236, 692 S.E.2d at 506 ("[W]e agree with County's argument that the RU zoning classification was a mistaken statement of law and, thus, could not be used to estop County from enforcing it."). In other words, *Quail Hill* is entirely consistent with the holdings of *Texaco*, *Heyward*, and *TNS Mills* discussed above and supports—not refutes—the Department's position.

Finally, as the ALC determined, Duke Energy also failed to establish that it met the elements of estoppel: (1) lack of knowledge; (2) justifiable reliance; and (3) prejudicial

change in position. [R. at 68 (SJ Order, p.20).] As a matter of law, Duke Energy could have referenced the pertinent statutes and learned the correct limitations periods. *Am. Legion Post 15*, 381 S.C. at 583, 674 S.E.2d at 184; [*see* R. at 69 (SJ Order, p.21).] Moreover, Duke Energy never introduced any evidence that it contemplated wholesale changes to its apportionment formula until the 1978-1993 years closed and never demonstrated any evidence regarding misrepresentations by a Department employee in this regard. [R. at 68-69 (SJ Order, pp.20-21).] The ALC correctly found that Duke Energy did not come forward with any evidence to support its estoppel argument. [R. at 68-69 (SJ Order, pp.20-21).]

(3) *For generally the same reasons that it is not subject to estoppel, the Department also is not subject to equitable tolling.*

Revenue statutes do not incorporate equitable limitations on their application. *See United States v. Brockamp*, 519 U.S. 347, 352 (1997); *see also Rothensies,* 329 U.S. at 301. This is reflected in the Supreme Court's repeated rejection of any effort to apply estoppel against the Department. In fact, in the only South Carolina appellate decision remotely touching upon taxation issues and equitable estoppel, this Court—in interpreting section 12-54-85(F)(1) regarding refunds—held that equitable estoppel did not bar a county from asserting the limitations period as a defense to refunding fees paid in connection with bingo games. *Am. Legion Post 15*, 381 S.C. at 583, 674 S.E.2d at 184. This Court rejected the taxpayer's argument that the refund request was timely based on a letter sent before the limitations period expired, holding that "[n]othing prevented the [taxpayers] from learning of the governing statutes, as we find is required for due diligence." *Id.* This Court also recognized that employees cannot bind the government when they act outside their scope of authority. *Id.*, 381 S.C. at 584, 674 S.E.2d at 185

("Estoppel will not lie against a governmental entity when a government employee gives erroneous information in contradiction of statute."). Duke Energy points to only two South Carolina decisions in support of this argument, neither of which involves the Department or taxpayers. Br. of Appellant, p.20 (citing *Hooper v. Ebenezer Sr. Svcs. & Rehab Ctr.*, 386 S.C. 108, 687 S.E.2d 29 (2009) & *Hooper v. Ebenezer Sr. Svcs. & Rehab Ctr.*, 377 S.C. 217, 659 S.E.2d 213 (Ct. App. 2008)). The ALC therefore correctly determined that the limitations periods for tax years prior to 1994 should not be equitably tolled.

Finally, although Duke Energy makes much of fairness, there is nothing at all unfair about requiring Duke Energy to abide by the same refund statutes today that every other taxpayer had to live by prior to 1995. [*See* R. at 69-70 (SJ Order, pp.21-22).] It would be unfair for Duke Energy to pull from the General Fund of this state money paid over 35 years ago using—as discussed more fully below—methods uniformly applied when the original returns were filed and the taxes paid. In short, fairness dictates that Duke Energy not receive a windfall benefit unavailable to any other entity for years prior to 1995 by pursuing refunds for long-closed years based on novel theories of law wholly inconsistent with Supreme Court precedent.

2. The ALC correctly determined that Duke Energy is not entitled to include in its apportionment formula the amount of principal recovered from short-term investments of excess cash from operations.

Duke Energy's recovery of principal from short-term investment transactions should not be included in the apportionment formula because these transactions are nothing more than loans and the principal recovered is just the return of Duke Energy's own money. Because the investments occurred outside of South Carolina, Duke Energy reported the

principal solely in the denominator of the sales factor (or the erroneous single-factor formula reported on the amended returns) and drastically diminished its taxable income apportioned to South Carolina.[20]

A. *Factual Background*

During the Periods at Issue, Duke Energy used its excess cash from operations for various short-term investment transactions. [R. at 2998:4-10 (Love Dep.).] These transactions consisted of investing in municipal bonds, loan repurchase agreements, and commercial paper and then, after a short time period, recovering the invested cash (i.e., the principal) plus a small amount of interest or gain. [R. at 3007:16-21 (Love Dep.).] These transactions were not risky and were typically outstanding between one and 30 days. [R. at 3007:22-3008:3, 3034:21-25, 3039:5-7 (Love Dep.).] Indeed, Duke Energy never suffered a loss on these investments. [R. at 3039:2-7 (Love Dep.).] The gain or interest was minimal relative to the principal invested, but Duke Energy could repeatedly reinvest the principal recovered. [*See* R. at 2998:4-17 (Love Dep.).] All activities concerning these transactions occurred outside of South Carolina. [R. at 3012:19-3016:14 (Love Dep.).]

---

[20] For example, on its originally-filed 1999 return, Duke Energy reported about $1.2 billion in sales within South Carolina and $4.8 billion in total sales from everywhere, yielding a sales factor of approximately 25%. [*See* R. at 5193 (Pet'r Hr'g Ex. 22).] On its 1999 amended return, Duke Energy added almost $6 billion of recovered principal to its total sales, thereby reducing the apportionment formula to approximately 11% because sales in this state did not change. [*Id.*]

B. *The ALC correctly rejected Duke Energy's position that recovered principal must be included in the apportionment formulas.*

(1) *The plain language of sections 12-6-2280 and 12-6-2290 requires the exclusion of recovered principal from the calculation of the apportionment formulas.*

Recovered or returned principal is like nothing else in tax apportionment accounting. As the ALC correctly recognized, it is not income; it is not an expense; and it is not a deduction. [R. at 75-77 (SJ Order, pp.27-29); *see also* R. at 1831-32 (Mem. Opp'n. Duke Energy's Mot. for Recons of SJ Order, pp.12-13).] It is merely the return of the taxpayer's own money. As the ALC determined, the logical interpretations of the apportionment statutes and the terms "sales"[21] and "gross receipts" exclude the return of principal. [R. at 75-79 (SJ Order, pp.27-31 & n.28);] *see Moon v. City of Greer*, 348 S.C. 184, 188, 558 S.E.2d 527, 529 (Ct. App. 2002) ("Statutes, as a whole, must receive practical, reasonable, and fair interpretation, consonant with the purpose, design, and policy of lawmakers.") (internal quotation marks and citations omitted). Duke Energy provides no explanation as to why the terms "gross receipts" *and* "sales," and the apportionment formula statutes as a whole, should be read to include the return of principal from short-term investment transactions other than to say "gross means gross." Br. of Appellant, p.22. However, taken to its logical conclusion, Duke Energy's interpretation would require an entity to record a "sale" or "gross receipt" every time it makes a withdrawal from the bank and would require a car rental entity to include the basis of the vehicle as a "sale" or "gross receipt" every time a customer returns a leased

[21] Duke Energy argues the ALC's focus on the "sales" factor's emphasis on income-producing activity improperly narrows the definition of "sales." Br. of Appellant, p.32. However, it is Duke Energy's interpretation that improperly expands the term "sales" to include recovered principal from loan repurchase agreements and the redemption of municipal bonds and commercial paper.

vehicle. The ALC correctly rejected this interpretation. *See Moon*, 348 S.C. at 188, 558 S.E.2d at 529 ("Subtle or forced construction of statutory words for the purpose of expanding the operation of a statute is prohibited.") (citing *TNS Mills*, 331 S.C. at 624, 503 S.E.2d at 479).

(2) *Because it achieves absurd results, Duke Energy's interpretation must be rejected.*

The ALC correctly rejected Duke Energy's illogical position and proposed construction because it would lead to absurd results. [R. at 73-75, 83 (SJ Order, pp.25-27, 35).] No matter how "plain the ordinary meaning of the words used in a statute may be, the courts will reject that meaning when to accept it would lead to a result so plainly absurd that it could not possibly have been intended by the Legislature or would defeat the plain legislative intention." *Kiriakides v. United Artists Commc'ns, Inc.*, 312 S.C. 271, 275, 440 S.E.2d 364, 366 (1994). Including the amounts of repeatedly invested and recovered principal in the apportionment formula is absurd because the transactions giving rise to the invested cash (i.e., Duke Energy's sales of electricity) already have been reflected in the apportionment formula.

As such, Duke Energy's position is inconsistent with the statutory requirement that an entity's taxable income in this State must be calculated upon a base which reasonably represents the proportion of trade or business carried on within this State. S.C. Code Ann. § 12-6-2210; S.C. Code Ann. § 12-7-250 (repealed in 1995); *Hertz Corp. v. S. Carolina Tax Comm'n*, 246 S.C. 92, 94-95, 142 S.E.2d 445, 446 (1965). Because statutory "language must be construed in the light of the intended purpose of the statute," the standard apportionment formulas must be construed in a way that promotes the reasonable representation of the taxpayer's business activities. *Kiriakides,* 312 S.C. at

275, 440 S.E.2d at 366; *see Travelscape*, 391 S.C. at 99, 705 S.E.2d at 33 (stating that undefined words must be construed in conjunction with whole purpose of the statute and policy of law); *Lockwood Green Eng'rs, Inc. v. S. Carolina Tax Comm'n*, 293 S.C. 447, 361 S.E.2d 346 (Ct. App. 1987) (interpreting the single-factor apportionment formula in accordance with the purpose of the allocation and apportionment statutes).

Contrary to Duke Energy's contentions, *see* Br. of Appellant, pp.26-30, the absurdity of its interpretation does not hinge on the extent to which the inclusion of principal unreasonably represents its business activity.[22] [*See* R. at 83-84 (SJ Order, pp.35-36).] The absurdity is that the inclusion of principal will never, absent pure coincidence, reasonably represent the business activities of a taxpayer whose principal business does not include transactions in financial instruments. This view would allow two taxpayers, equal in all respects except for their level of investment activity, to report drastically different apportionment formulas due solely to this difference in investment activity unrelated to their primary operations. Even more, it would provide an undue benefit to larger corporate taxpayers that engage in more of these investment transactions than other taxpayers with less excess cash or resources by allowing them to load up the denominator of the apportionment formula with recovered principal and thereby decrease the amount of income tax owed in South Carolina.

While an issue of first impression for South Carolina courts, courts in other states have rejected Duke Energy's position. [*See* R. at 71-75 (SJ Order, pp.23-27).] One court concluded that the position advanced by Duke Energy is absurd because "[i]t is no true reflection of the scope of [the taxpayer's] business done within and without [the state] to

[22] However, it does perfectly illustrate the absurdity that Duke Energy's interpretation would promote. [R. at 81-82 (SJ Order, p.33-34, n.31).]

allocate to the numerator or the denominator of the [standard apportionment formula] fraction the full amount of money returned to [the taxpayer] upon the sale or redemption of investment paper." *Am. Tel. & Tel. Co. v. Dir., Div. of Taxation*, 476 A.2d 800, 802 (N.J. App. Div. 1984). "To include such receipts in the fraction would be comparable to measuring business activity by the amount of money that a taxpayer repeatedly deposited and withdrew from its own bank account." *Id.*

Other courts agree. The court in *Walgreen Ariz. Drug Co. v. Ariz. Dept. of Rev.*, 97 P.3d 896 (Ariz. Ct. App. 2004), rejected the taxpayer's "mechanistic interpretation" like that proposed by Duke Energy and concluded that the return of principal from short-term investments is not included in the denominator of the apportionment formula because "the 'strict' interpretation approach urged by the [t]axpayer would create a tax loophole...neither intended by the [] Legislature nor required by the plain meaning of the [statute] and the related statutory scheme." 97 P.3d at 902. Likewise, the court in *Sherwin-Williams Co. v. Indiana Dept. of State Rev.*, 673 N.E.2d 849 (Ind. T.C. 1996), determined that "'gross receipts' for the purpose of the [standard apportionment formula] includes only the interest income, and not the *rolled over capital* or return of principal, realized from the sale of investment securities." 673 N.E.2d at 853 (emphasis added).

(3) *The Department's long-standing administrative policy to exclude the return of principal from the calculation of the apportionment formulas is entitled to deference.*

Duke Energy contends the ALC erred by determining there was an ambiguity in the statutes and then not resolving the ambiguity in Duke Energy's favor. Br. of Appellant, p.24. However, the statutes are not ambiguous because the interpretation reached by the ALC is the only reasonable and logical interpretation of the apportionment statutes. *See S. Carolina Dep't of Soc. Servs v. Lisa C.*, 380 S.C. 406, 416, 669 S.E.2d 647, 652 (Ct.

App.2008) (stating statute is ambiguous if susceptible to two *reasonable* interpretations). Because Duke Energy's position is unreasonable, the ALC would have been required to ignore the absurdity resulting from Duke Energy's interpretation and mechanistically accept Duke Energy's interpretation as South Carolina law. A prerequisite to a taxpayer receiving the "benefit of the doubt" is that they put forth a reasonable and acceptable alternative to the Department's interpretation. *See id.* Duke Energy did not do that, and the ALC properly rejected its interpretation.

Moreover, the Supreme Court has previously held that the rule of resolving doubt in favor of the taxpayer is subordinate to the Department's long-standing administrative interpretation if the Legislature has given such interpretation at least its implied assent. *Ryder Truck Lines, Inc. v. S. Carolina Tax Comm'n*, 248 S.C. 148, 152-53, 149 S.E.2d 435, 437 (1966). In resolving a similar issue as in this case, the Supreme Court in *Ryder* held that "a strong presumption arises that [a 35-year] administrative construction has the approval of the legislature..." and that the Court "would not be justified in overturning the commission's long continued application of the statute to which the legislature has given at least implied assent." *Id.*; *see also Etiwan Fertilizer Co. v. S. Carolina Tax Comm'n*, 217 S.C. 354, 359, 60 S.E.2d 682, 684 (1950) ("[W]here the construction of the statute has been uniform for many years in administrative practice, and has been acquiesced in by the General Assembly for a long period of time, such construction is entitled to weight, and should not be overruled without cogent reasons").

For over 30 years, the Department interpreted the allocation and apportionment statutes and the terms "sales" and "gross receipts" as excluding the return of principal. [*See* R. at 87 (SJ Recons. Order, p.3 & n.2); R. at. 203 (Dep't Mot. Summ J., p.36); R. at

857-66 (Dep't Mot. Summ J. Reply, pp.33-42).] Duke Energy recognized this policy for at least 21 years by filing its original returns based on the Department's policy. And although the statutes were amended numerous times throughout this period, and were even completely reenacted under a new chapter of the Code of Laws, the Legislature never altered or amended the statutes to reject the Department's interpretation and, in fact, ultimately adopted legislation affirming the Department's position.[23] [R. at 864-66 (Dep't Mot. Summ J. Reply, pp.40-42).]

(4) *The Legislature's express confirmation that the terms "gross receipts" and "sales" do not include the return of principal from short-term investment transactions does not support Duke Energy's interpretation.*

After the Periods at Issue, the Legislature enacted S.C. Code Section 12-6-2295, which, in part, expressly defined the terms "gross receipts" and "sales" to exclude "the repayment, maturity, or redemption of the principal of a loan, bond, or mutual fund or certificate of deposit or similar marketable instrument" and "the principal amount received under a repurchase agreement or other transaction properly characterized as a loan." S.C. Code Ann. § 12-6-2295 ("Items included and excluded from terms 'sales' and 'gross receipts'"). The ALC correctly rejected Duke Energy's argument that this statute resulted in a "material and drastic"[24] change to South Carolina law that confirms the

---

[23] *See* discussion *infra* Part 2.B.(4).

[24] Duke Energy also misreads the statute, contending that "[t]he 2006 law change added a new section to the statute which excluded ten new categories of receipts, including the sales of securities, from the definition of 'gross receipts.'" Br. of Appellant, p.23. However, Section 12-6-2295(B) plainly excludes only the "principal" and thus is entirely consistent with the Department's long-standing administrative policy and the ALC's decision. [R. at 87-92 (SJ Recons. Order, pp.3-8); R. at 1831 (Mem. Opp'n. Duke Energy's Mot. for Recons of SJ Order, p.12 n.6).]

plain meaning of these terms includes the return of principal.[25] Br. of Appellant, pp.22-24. The Legislature may amend the law to clarify its original intent. [R. at 88 (SJ Recons. Order, p.4 ("An amendment to the language of a law does not necessarily mean a change in the meaning of that law, for an amendment may also be interpreted as a clarification by the legislature of its original intent") (citing cases));] *see also Stuckey v. State Budget and Control Bd.*, 339 S.C. 397, 401, 529 S.E.2d 706, 708 (2000) ("A subsequent statutory amendment may be interpreted as clarifying original legislative intent"). This is especially so given the Department's long-standing interpretation of the apportionment formulas.[26] In view of the Department's policy, the ALC correctly determined that "[i]f the Legislature was so troubled by an interpretation that would allow the inclusion of principal in the sales factor, it is just as likely, if not more so, that this troublesomeness would motivate the Legislature to clarify the existing law so as to avoid an application that it never intended." [R. at 86 (SJ Recons. Order, p.2);] *see Cotty v. Yartzeff*, 309 S.C. 259, 262 n.1, 422 S.E.2d 100, 102 n.1 (1992) ("[L]ight may be shed upon the intent of the General Assembly by reference to subsequent amendments which, although normally presumed to change existing law, may be interpreted as clarifying it.").

---

[25] In support, Duke Energy cites to *Duke Power Co. v. S. Carolina Tax Comm'n,* 292 S.C. 64, 354 S.E.2d 902 (1987). However, that decision is rendered in the license fee context. Moreover, in contrast to the situation here, where the General Assembly later amended the apportionment statutes to conform to the Department's long-standing policy, the General Assembly amended the license fee statute to reject the result in *Duke Power*. 292 S.C. at 66, 354 S.E.2d at 903.

[26] Duke Energy has not challenged the ALC's finding that it was the Department's long-standing administrative policy to exclude recovered principal from the apportionment formulas, and thus, it is the law of the case, thereby further diminishing Duke Energy's "drastic and material" change argument. *ML-Lee*, 327 S.C at 241, 489 S.E.2d at 472

(5) *The existence of the alternative apportionment provision does not negate the need to properly interpret the standard apportionment formulas.*

Duke Energy contends that the ALC's analysis is inappropriate because there is a statute "intended to provide a remedy for any inequities that may result from the application of the standard apportionment statute." Br. of Appellant, p.28.[27] The statute to which Duke Energy refers is South Carolina Code Section 12-6-2320, which, for years after 1995, provided that a taxpayer could request, or the Department could require, an alternative apportionment formula if application of the standard apportionment formula did "not fairly represent the extent of the taxpayer's business activity in this State." *See* 1995 S.C. Acts No. 76, § 25 (effective for taxable years beginning after 1995). Thus, section 12-6-2320 as adopted by Act 76 is not even available for tax years prior to 1995, further undermining Duke Energy's argument that, even if its interpretation of the standard apportionment formulas leads to an absurd result, it nonetheless should be accepted because section 12-6-2320 exists to cure any problem. *See* Br. of Appellant, p.28 (arguing that "[t]he Court is required by South Carolina law to apply the standard apportionment formula in a manner that gives full effect to the legislative intent of enacting the alternative apportionment statute and that does not render it meaningless.").

---

[27] Although not mentioned in its brief, Duke Energy essentially advocates the positions in *Sherwin Williams Co. v. Johnson*, 989 S.W.2d 710 (Tenn. App. 1998), and *Microsoft Corp. v. Franchise Tax Bd.*, 139 P.3d 1169 (Cal. 2006) that were addressed by the ALC. [R. at 74-75, 79-82 (SJ Order, pp.26-27, 31-34).] The ALC properly rejected these holdings, concluding that the absurdity determination must be part of the statutory construction of the standard apportionment formula or else the alternative apportionment provision will become the standard. [R. at 80-82 (SJ Order, pp.32-34).] Notably, both of these courts ultimately excluded the return of principal. *Johnson*, 989 S.W.2d at 715 ("The very absurdity of the result sought...lays a sound basis for the implementation of [the alternative apportionment method statute]"); *Microsoft*, 139 P.3d at 1177 (applying the alternative apportionment method to exclude the return of principal "so that...an 'absurd result' may be avoided.").

The critical failure of Duke Energy's position is that it turns the entire scheme on its head because the standard formulas—as reflected in the language of section 12-6-2320—are the presumptive base for apportioning income and the alternative relief provisions apply only when the standard formula "does not fairly represent" the taxpayer's business activity in the state. Moreover, the statute at issue was not enacted until 1995 and, thus, has not always accompanied the standard apportionment formula. The ALC was correct in determining that section 12-6-2320 should *not* be interpreted in a manner to minimize the coverage or application of the standard apportionment formulas.

Duke Energy's position, however, would make application of section 12-6-2320 the rule and not the exception because large corporations commonly engage in these types of transactions.[28] The ALC correctly recognized this flaw, finding that the alternative apportionment method is the *exception* that "should be utilized only when the standard apportionment statute does not operate sensibly in a given case." [R. at 79-81, 83 (SJ Order, pp.31-33, 35); *see also* R. at 1821-31 (Mem. Opp'n. Duke Energy's Mot. for Recons. of SJ Order, pp.2-12).] Duke Energy acknowledges that the standard apportionment formulas are intended "to provide a reasonable representation of taxpayers' business activities in South Carolina" and that the alternative apportionment statute is a "relief mechanism" to be used only "when the standard apportionment formula does not fairly represent the taxpayer's business activities in the State." Br. of Appellant, p.27. Duke Energy nevertheless maintains that section 12-6-2320 must drive

[28] Although it claims the ALC "imputed an alternative apportionment mechanism into the standard apportionment provision" by constructing the standard apportionment formula to avoid an "absurd result," Br. of Appellant, p.28, Duke Energy's interpretation would actually have this effect by requiring the application of the alternative apportionment provision in every instance.

application of the standard apportionment statutes. The ALC correctly rejected this position.

Duke Energy latches onto the ALC's use of the term "distortion," arguing that "distortion" implies a factual inquiry. However, the ALC's use of the term "distortion" was not a factual analysis and not an invocation of section 12-6-2320 because that statute never uses the term "distortion." Rather, the ALC used the term "distortion" to illustrate the unreasonableness and arbitrariness of Duke Energy's principal-inclusion position and that such a position would encourage misrepresentation of business activity. [R. at 80-81 (SJ Order, pp.32-33).] More importantly, though, the ALC correctly stated that it was "not the amount of distortion that determines absurdity here." [R. at 83-84 (SJ Order, p.35-36).] Instead, the ALC rejected Duke Energy's interpretation because it promotes distortion in all cases but still requires the Department to engage in an intensely factual inquiry under section 12-6-2320 on a case-by-case basis each time a taxpayer includes the return of principal from short-term investment transactions in its apportionment formula. [*Id.*][29]

(6) *Use of the term "gross receipts" in other contexts does not support the inclusion of the return of principal for purposes of the standard apportionment formula.*

Duke Energy does not identify a single example in which "gross receipts" or "sales" were defined to include the return of principal from short-term investment transactions in any context.[30] Instead, Duke Energy cites to *Travelscape* as affirming the "broad meaning" of this term. Br. of Appellant, p.25. However, in *Travelscape*, the term "gross

---

[29] If, however, the Court were to reverse the ALC on the recovery-of-principal issue, it would be necessary to remand for further proceedings pursuant to section 12-6-2320.

[30] Indeed, Duke Energy does not even provide one reference to the use of the term "sales" in other contexts.

proceeds" was defined for sales tax purposes to include "the value obtained...**without deduction for the cost of services**." 391 S.C. at 98, 705 S.E.2d at 33 (emphasis in original). Thus, in that context, the statute defined the term at issue. Duke Energy's citation to statutes using the term "gross receipts" in different contexts and for separate purposes does not assist the resolution of this case, especially in light of the Department's long-standing policy regarding the exact issue in this case.

C. *The ALC did not* sua sponte *consider the application of the alternative apportionment formula.*

The cases cited by Duke Energy regarding *sua sponte* decision-making deal with a trial court granting a new trial *sua sponte*. *See* Br. of Appellant, p.30 (citing *State v. Dicapua*, 383 S.C. 394 (2009) (holding trial court lacks authority to grant new criminal trial on ground not raised by party) & *Southern Ry. Co. v. Coltex, Inc.*, 285 S.C. 213 (1985) (holding trial court lacks authority to grant new civil trial on ground not raised by party)). That situation obviously does not apply here if for no other reason than that the issues decided by the ALC were raised by the Department. [R. at 201, 204-05 (Dep't Mot. Summ J., pp.34, 37-38; R. at 857-61 (Dep't Mot. Summ. J. Reply, pp.33-37).]

3. Based on the substantial evidence of record, the ALC correctly determined that Duke Energy failed to establish that its principal business is not manufacturing.

The ALC correctly rejected Duke Energy's argument that it is not a manufacturer and, thus, that the apportionment formula it used for 23 years was wrong. Interestingly, its predecessor, Duke Power Company, was specifically incorporated, *inter alia*, "[t]o *manufacture*, generate, buy, sell, accumulate, store, transmit, furnish and distribute *electric current* for light, heat and power." [R. at 7938-8085 (Resp't Hrg. Exs. 2-4 (emphasis added)).]

A. *Factual background.*

Duke Energy's "primary business" is "providing electricity." [R. at 2496:18-2497:5.] Duke Energy operates generation plants in both South Carolina and North Carolina. [R. at 2537:14-2538:19.] In South Carolina alone, Duke Energy has two nuclear power plants, four coal power plants, three hydroelectric power plants, and several oil or gas power plants. [*Id.*] Although the sources or inputs (e.g., coal, uranium, and water) used at generation facilities may vary, all use a generator to produce electricity. [R. at 2538:20-2539:6.] A generator is a "fairly large machine" and "mechanical device" that uses mechanical energy to produce electricity. [R. at 2539:7-16, 2718:25-2719:12.] The generator creates an electric current that is processed through the transmission and distribution system. [R. at 2537:9-13.] Generators have been used to produce electricity in substantially the same manner for over 100 years. [R. at 2539:7-16, 2550:11-24, 2669:6-19, 2718:25-2719:12, 2730:3-20.] Many, though not all, of Duke Energy's generation facilities use a turbine driven by steam power to turn the generator. [R. at 2538:15-2539:6, 2549:25-2550:6, 2674:18-2675:6.] The design of a turbine used in these generation facilities has not significantly changed since the early 20th century. [R. at 2550:7-10.]

The generator is connected to the transmission and distribution network, which is a "fairly elaborate system." [R. at 2532:3-6, 2539:17-22.] Duke Energy cannot provide electricity to its customers without the transmission and distribution system. [R. at 2563:19-2564:1.] The transmission and distribution system consists of transmission and distribution lines, which are conductors made of copper, towers and poles, and transformers. [R. at 2483:11-2484:2, 2532:3-12, 2551:19-22, 2753:11-12.] Duke Energy

processes electrons and manipulates the charges and other aspects of electricity to transmit and distribute electricity to the consumer. [R. at 2680:4-19.] During the transmission and distribution process, the transformers process electricity by "stepping up" and "stepping down" the voltage. [R. at 2532:3-2533:7.] This processing is done in order to efficiently deliver electricity at the specified voltage so that it can be used by customers in their homes and businesses while at the same time reducing "line loss," which is the loss to Duke Energy of a quantity of electricity as heat during the transmission and distribution process. [R. at 2483:11-20, 2539:23-2541:4.] Thus, the process by which Duke Energy generates or produces electricity does not end at the generator.

After processing, electricity is delivered "at the right specification for customer use." [R. at 2481:16-22.] Electricity is not usable by a customer unless it typically is at 120 volts, although sometimes it is delivered at 220 volts. [R. at 2495:21-23.] Whatever the required voltage, electricity delivered to a customer must be "stepped down" to the usable voltage, which is "done closer to the customer's house." [R. at 2483:23-2484:2.] A customer obtains electricity through a meter by activating a switch, which creates a load and completes a circuit. [R. at 2531:14-22, 2712:3-13.] The electricity then passes through the customer's meter and operates the device. [R. at 2456:16-23, 2718:25-2719:12.] Duke Energy measures the amount of electricity consumed by each customer using the meter and then charges the consumer by the quantity consumed. [R. at 2456:16-23, 2711:8-2712:2, 2717:14-17; *see also* R. at 2530:9-2531:6.]

B. ***Based on holdings of the Supreme Court, Duke Energy is a manufacturer for purposes of a tax statute as a matter of law.***

Because electricity has been generated using the same process for over 100 years, the Supreme Court already has held on two occasions that the process employed by Duke Energy is manufacturing. In 1926, the Court held that a corporation generating electricity was engaged in manufacturing and thereby subject to a tax imposed on manufacturers. *Columbia Ry., Gas & Elec. Co. v. Query*, 134 S.C. 319, 324, 132 S.E. 611 (1926) ("We do not think that there is any doubt that the [company] is engaged in the business of manufacturing gas and electricity, and it is clearly within the provisions of [the Manufacturer's Tax Act]."). And even more significantly, the Court held in 1930 that Duke Power Co., a predecessor of Duke Energy, was entitled to an exemption for manufactories—defined as a physical plant, or a place or building, where manufacturing is carried on—because it was a manufacturer. *Duke Power Co. v. Bell*, 156 S.C. 299, 306, 152 S.E. 865, 868 (1930) (citing *Columbia Ry.,* 134 S.C. 319, 132 S.E. 611 (1926)).

In short, the Supreme Court has held that electric utilities in general, and Duke Energy in particular, are engaged in manufacturing for purposes of all tax statutes. *See Duke Power*, 156 S.C. at 306, 152 S.E. at 868 ("If a company engaged in the generation of electricity is a 'manufacturer' *for the purposes of a Statute imposing a tax* ...) (emphasis added). Aside from the fact that the two cases reached the same conclusion with respect to separate tax statutes,[31] the Manufacturer's Tax Act at issue in *Columbia*

[31] Other states have concluded that generating or producing electricity is manufacturing, some even citing to *Columbia Railway* and *Duke Power*. [R. at 134 (Mfg. Order, p.15 n.19).] *See generally State ex rel. Winterfield v. Hardin County Rural Elec. Co-op.*, 285 N.W. 219, 224-25 (Iowa 1939) ("The great preponderance of authority as evidenced by the decisions of the courts supports the proposition that one engaged in the generation of electricity is engaged in a manufacturing or mechanical business.").

Railway also supports this conclusion. That statute stated that "every person, firm or corporation engaged in the business of manufacturing" was subject to the tax imposed on manufacturers. 1923 S.C. Acts 12, No. 21, §11-A. And although the tax at issue was a license tax on "the entire receipts," it was specifically imposed on "the business of manufacturing." Thus, the *Columbia Railway* decision is based on a statute using identical language as the apportionment statute at issue in this case. *Compare* S.C. Code Ann. § 12-6-2250 (applying to "a taxpayer whose principal business in this State is ... manufacturing") *with* 1923 S.C. Acts 12, No. 21, §11-A (applying to a taxpayer "engaged in the business of manufacturing"). [*See* R. at 133 (Mfg. Order, p.14 n.18).] The *Columbia Railway* and *Duke Power* decisions mean that Duke Energy is engaged in manufacturing as a matter of law.[32]

C. *Substantial evidence supports the ALC's determination that Duke Energy did not meet its burden of proof to show that it is not engaged in manufacturing, especially in view of Duke Energy's failure to appeal certain factual findings by the ALC.*

In addition to the decisions of the Supreme Court, substantial evidence reflects that Duke Energy is engaged in manufacturing. Duke Energy's argument hinges upon its assertion that it is not engaged in manufacturing because it is not engaged in producing tangible personal property. Because section 12-6-2250 does not define manufacturing, it is necessary to ascertain whether the term's usual and customary meaning includes the production of tangible personal property. *E.g.*, *Travelscape,* 91 S.C. at 99-100, 705 S.E.2d at 33-34. The ALC recognized that "manufacture" is defined as "the process of making wares by hand or by machinery especially when carried on systematically with

[32] In addition to the fact that the electric generation process has remained unchanged, Duke Energy's charter remained exactly the same during the Periods at Issue as that described in the *Duke Power* decision. *Compare* [R. at 7941 (Resp't Hrg. Ex. 2, art. III, § (b))] with *Duke Power*, 156 S.C. at 303, 152 S.E. at 867.

division of labor" and includes "productive industry using mechanical power and machinery." [R. at 132 (Mfg. Order, p.13) (citing to Merriam-Webster dictionary).] By comparison, the 1927 Century Dictionary defined manufacture as "the making of goods or wares by ... machinery, esp. on a large scale ...." [R. at 133 (Mfg. Order, p.14 n.17).][33]

Manufacturing is, in short, a process and the question in this case really is whether the process of generating electricity is manufacturing, not whether electricity is tangible personal property. Section 12-6-2250 is directed at "manufacturing," not tangible personal property. Although section 12-6-2250(a) references "manufacturing or any form of collecting, buying, assembling, or processing goods and materials within this State," the statutory history reflects that the subsequent clause does not modify "manufacturing." The original apportionment statute applied only to corporations "engaged in the business of manufacturing." 1927 S.C. Acts 1, No. 1, § 15(1). That language was codified in section 2451 of the 1932 and 1942 Codes and remained unchanged until it was amended in 1946 to apply to taxpayers whose "principal business ... in this State is manufacturing, or if it is any form of collecting, buying, selling, assembling or processing goods and materials within this State." 1946 S.C. Acts 1491, No. 553, § 3. In short, section 12-6-2250 is implicated if a taxpayer is engaged in "manufacturing."

Substantial evidence supports the ALC's determination that producing electricity is manufacturing based on the common understanding of that term. Duke Energy provides electricity that is created, processed, and delivered through its interconnected generation, transmission, and distribution system. *See* discussion *supra* Part 3.A. As such, the

[33] The 1927 definition is substantially the same as the current definition, further supporting the continuing application of *Columbia Railway* and *Duke Power*. [*See also* R. at 132-33 (Mfg. Order, pp.13-14 (citing *Winterfield*, 285 N.W. at 224-225)).]

interconnected process of producing and delivering electricity employed by Duke Energy is substantially the same as that used by any entity that creates and produces a product using an assembly line and then charges the customer based on the quantity sold. [R. at 135-38 (Mfg. Order, pp.16-19).]

The ALC also found that electricity is a "physical product with physical characteristics." [R. at 126 (Mfg. Order, p.7).][34] This finding alone requires affirming the ALC because Duke Energy did not appeal from the ALC's factual ruling in this regard and, thus, the finding is the law of the case. *ML-Lee*, 327 S.C at 241, 489 S.E.2d at 472; *see also Brading,* 327 S.C. at 113, 490 S.E.2d at 7; *State Farm*, 337 S.C. at 95, 522 S.E.2d at 349. In fact, Duke Energy's statement of the issues on appeal contains no reference to the ALC's finding in this regard. *See* Br. of Appellant, p.1 (no reference to "product").

In any event, substantial evidence supports the conclusion that electricity is a manufactured product. Duke Energy's itself regularly and repeatedly uses the term "produce electricity,"[35] which means that it is engaged in the "act or process of producing something" and that "something" necessarily is a product. That electricity is a product further is shown by the fact that electric current delivered to a customer is a flow of charges or charged particles, the rate of which is measured in amperes. [R. at 2665:21-25, 2668:8-15, 2709:3-13, 2710:1-14.] Electricity also is a fungible product that is sold in quantifiable amounts. [R. at 2717:3-9.] In short, electricity can be measured and is

---

[34] The fact that the amount of the electricity produced that will be lost can be quantified further supports that characterization of electricity as a product.

[35] [*E.g.*, R. at 2482:16-19; R. at 5810 (Pet'r Hr'g Ex. 37) (identifying "Functions" of Duke Energy as "Production," "Transmissions," and "Distribution.").]

delivered to customers in specified amounts at precise specifications. [R. at 2481:13-22, 2483:11-2484:2.] The fact that electricity may exist in nature does not change that conclusion because Duke Energy generates and produces the electricity that it sells and the electricity found in nature is not usable. *See, e.g., Chicago, M., St. P.& P.R. Co. v. Custer County*, 32 P.2d 8, 9 (Mont. 1934) (holding that "the electricity which exists in nature is not subject to use; the current which will cause the wheels of industry to turn, or will light a city, must be produced by the employment of labor and machinery and is, therefore, generally said to be manufactured"). The nature of electricity as a product manufactured by Duke Energy is also shown by the fact that Duke Energy's ability to generate electricity is limited by its generation capacity. [R. at 2551:13-18.]

Duke Energy's citations to ALC decisions and Department rulings in other contexts, Br. of Appellant, p.34, do not change the analysis properly applied by the ALC. Contrary to Duke Energy's citation to general assertions involving other businesses, the Supreme Court has specifically held that producing electricity is manufacturing. None of the authorities Duke Energy references in this context are from the Supreme Court or this Court. Moreover, the authorities that Duke Energy does cite implicitly recognize that tangible personal property is not always involved in the manufacturing process because all of the quotes set forth by Duke Energy use the words "generally" or "typically. Br. of Appellant, p.34 ("typically used by businesses that manufacture ... tangible personal property"; "generally requires the use of one of the following apportionment methods; "typically used by businesses that manufacture ... tangible personal property"; "typically used in the financial businesses and service businesses"). In short, these general authorities do not assist in resolving the question before this Court.

D. ***Substantial evidence supports the ALC's determination that electricity is tangible personal property.***

Even assuming that Duke Energy is correct that the term manufacturing requires production of a tangible product, there is substantial evidence supporting the ALC's determination that electricity is tangible personal property. [*See* R. at 126-27 (Mfg. Order, pp.7-8 (discussing physical nature of electricity)).] As noted above, electricity is a physical product with physical characteristics. [*See also* R. at 2503:12-21, 2715:12-14.] The electric charge associated with electricity is a physical property of matter. [R. at 2639:19-25.] Electricity can be felt. [R. at 2715:9-11; *see also* R. at 2500:1-4, 2653:9-11.] It also can be moved and manipulated. [R. at 2483:21-2484:2, 2493:18-23, 2494:13-2495:25.] The electric charge can be stored. [R. at 2639:23-25, 2657:18-20.] In short, there is substantial evidence that, in addition to constituting a physical product, electricity is tangible.[36] Because, as the ALC determined, electricity becomes a customer's personal property after delivery through the meter, it also is tangible personal property.

In making its determination, the ALC applied section 12-6-30(11) of the Income Tax Code, which defines "tangible property" as "including ... corporeal personal property ...." [R. at 142 (Mfg. Order, p.23).] The term "corporeal," as the ALC noted, generally means tangible, [R. at 142-43 (Mfg. Order, p.23 & nn.31-32),] and the ALC determined that electricity is tangible based on the evidence. Duke Energy's argument that the "ALC's reasoning makes little sense," Br. of Appellant, pp.36-37, misses the mark because the court based its determination that electricity is tangible on the record and on section 12-6-30(11), not on section 12-36-60 found in the sales tax code. As the ALC

[36] Duke Energy is wrong in stating that the Department's expert testified that electricity is not tangible. *See* Br. of Appellant, pp.32-33. In fact, he testified exactly the opposite. [R. at 2715:20-21 ("Q: So you believe electricity is tangible? A: Yes.").]

noted, Duke Energy has not been consistent with the invocation of section 12-36-60. [R. at 143 (Mfg. Order, p.24).] This inconsistency continues with its citation of section 12-36-60 on appeal to support its argument that selling electricity is a service. Actions taken by the General Assembly to ensure coverage of electricity in the sales tax context, a wholly different taxing framework, should not govern the determination of whether Duke Energy is a manufacturer in the income tax context. That is especially so when the sales tax statute at issue never references the term—manufacturing—that is in the income tax statute actually before the Court. Because the statutory frameworks are different, there is no imperative to interpret them consistently. *See Sloan v. S. Carolina Bd. of Physical Therapy Exam'rs*, 370 S.C. 452, 470, 636 S.E.2d 598, 607 (2006) (noting that only "statutes dealing with the same subject matter are *in pari materia*"); *State v. Liggett & Myers Tobacco Co.*, 171 S.C. 511, 531, 172 S.E. 857, 864 (1933) (holding that a "license tax based upon property or business done within the state" is not *in pari materia* with a "fee based upon authorized capital"). Finally, Duke Energy's reference to the *Alltel* decision in this context is unhelpful because the issue resolved by the ALC is whether electricity is tangible, not whether the term "tangible property" as found in section 12-6-30(11) was ambiguous.[37]

Although dismissing decisions of the Supreme Court, Duke Energy has repeatedly relied on *Consolidated Hydro Southeast, Inc. v. Dep't of Rev.*, No. 95-ALJ-17-0634, 1996 WL 909155 (S.C. Admin. Law J. Div. May 13, 1996). As the ALC noted, that decision is not binding. [R. at 144 (Mfg. Order, p.25).] Moreover, *Consolidated Hydro*

[37] A review of Duke Energy's motion for reconsideration and the ALC's reconsideration order reflects that Duke Energy never presented to the ALC any claim that the term "tangible property" is ambiguous. That claim therefore is not preserved for review. *Home Medical*, 382 S.C. at 562, 677 S.E.2d at 586.

involved the question of whether providing electricity was a service under the license tax, not whether providing electricity is manufacturing for purposes of the apportionment statutes. [R. at 144 (Mfg. Order, p.25).] Like the sales tax, the license tax is a wholly-different taxing framework than the income tax and, thus, is not *in pari materia* with the apportionment statutes. *See Sloan*, 370 S.C. at 470, 636 S.E.2d at 607; *Liggett & Myers*, 171 S.C. at 531, 172 S.E. at 864. Characterizing the sale of electricity as a service for license fee—or sales tax—purposes does not mean that it is a service for income tax apportionment purposes. [R. at 144 (Mfg. Order, p.25).]

The ALC's decision hardly is an isolated enclave. Numerous other courts have determined that electricity is tangible in the taxation context, negating Duke Energy's inferential suggestion, Br. of Appellant, pp.40-42, that finding electricity tangible is unreasonable based on decisions in other states. [*See* R. at 145 (Mfg. Order, p.26 n.34).][38] Moreover, bankruptcy courts have concluded that electricity is a tangible good for purposes of Article 2 of the Uniform Commercial Code because it "really is some *thing*, something that can be felt (although we are loathe to) and something that can be created, measured and stored." *In re Erving Industries, Inc.*, 432 B.R. 354, 367-69 (emphasis in original) (finding that, for purposes of Article 2 of the Uniform Commercial Code, "electricity is tangible and *does* possess physical properties"); *see also GFI Wisconsin, Inc. v. Reedsburg Util. Comm'n*, 440 B.R. 791 (W.D. Wisc.) (electricity is a good under Article 2), *aff'g In re Grede Foundries, Inc.*, 435 B.R. 593 (Bankr. W.D. Wisc. 2010) (same); *In re Pac. Gas & Elec. Co.*, 271 B.R. 626, 640 (Bankr. N.D. Cal. 2002) (same).

[38] Interestingly, in one case cited by Duke Energy, *Powerex Corp.v. Dep't of Rev.*, TC 4800, 2012 WL 4068501 (Or. T.C. Sept. 17, 2012), the Court noted the expert testimony that science had not yet resolved the nature of electricity.

Courts also have determined that electricity is a commodity, specifically including the electricity produced by Duke Energy. *Williams v. Duke Energy Intern., Inc.*, 681 F.3d 788, 800 (6th. Cir. 2012) ("[E]lectricity is a commodity as it is produced, sold, stored in small quantities, transmitted, and distributed in discrete quantities") (internal quotation marks and citation omitted); *see also Town of Concord, Mass. v. Bos Edison Co.*, 676 F.Supp. 396, 397-98 (D. Mass.1988); *City of Gainesville v. Fl. Power & Light Co.*, 488 F.Supp. 1258, 1280-83 (S.D. Fla.1980). These decisions, rendered in contexts other than taxation, demonstrate that a finding that electricity is tangible is not dependent upon issues of revenue.

E. *Duke Energy's self-characterization of itself as a service provider does not control its characterization under the apportionment statutes.*

Duke Energy's position in this case really boils down to nothing more than an *ipse dixit* assertion that it is a service provider. *See* Br. of Appellant, pp.44-45. But Duke Energy's witness testimony or its self-characterization in Forms 10-K filed with the United States Securities and Exchange Commission, Br. of Appellant, p.44, are not determinative for state apportionment purposes. Similarly, Duke Energy's self-characterization on its federal income tax returns for purposes of the North American Industry Classification System (NAICS) is not determinative.[39] And Duke Energy's

[39] Although it never sought to introduce the actual NAICS codes before the ALC, [*see* R. at 2432:12-2435:25,] Duke Energy now cites to those codes on the internet. Br. of Appellant, p.45 n.23. This citation should be rejected because it involves evidence not before the lower court. S.C. R. App. P. 210(c) ("The Record shall not ... include matter which was not presented to the lower court or tribunal."). In any event, Duke Energy identified only the NAICS codes adopted after the Periods at Issue. [R. at 2461:7-16, 2463:6-2464:12, 2464:20-2465:14.] And contrary to Duke Energy's suggestion, Br. of Appellant, p.45 n.23, the ALC was entitled to give the testimony of Mr. Monroe regarding these codes as much or as little weight as it deemed prudent. *E.g., MRI at Belfair, LLC v. S. Carolina Dep't of Health & Envtl. Control*, 392 S.C. 314, 324, 709

regulation by the South Carolina Public Service Commission is not determinative of the issue here because, as the ALC noted, the definition of service includes "a facility supplying some public demand." [R. at 144 (Mfg. Order, p.25).] Although Duke Energy regularly cites to a statement in the Determination that it provides a service, a statement best understood as recognizing Duke Energy's nature as a public utility, it fails to ascribe similar weight to the repeated statements that it is a manufacturer. [R. at 5549 (Dep't Det'n, p.3 ("The taxpayer is a manufacturer within the meaning of the statute ....")).]

The ALC correctly rejected Duke Energy's self-characterization argument in favor of analyzing the company's actual nature and the characteristics of electricity. Duke Energy cannot provide its "electric service" without electricity, which is a physical and tangible product that is produced and generated by Duke Energy based on the substantial evidence of record. [R. at 138-39 (Mfg. Order, pp.19-20).] Undaunted, Duke Energy contends that it provides services, based in large part on the testimony of its expert witness. Br. of Appellant, pp.38-39. However, in its reconsideration order, the ALC specifically found that the testimony of Duke Energy's expert witnesses in this regard "was not persuasive," noting also that it "gave this evidence little, if any weight" in "reaching [its] factual determinations." [R. at 153 (Mfg. Recons. Order, p.7 ¶16).] This determination is wholly within the province of the finder of fact. *See, e.g., S.C. Cable Television Ass'n v. S. Bell Tel.& Tel. Co.*, 308 S.C. 216, 222, 417 S.E.2d 586, 589 (1992). Because Duke Energy did not appeal from this factual determination, it is the law of the case and the expert testimony therefore is improperly used in support of Duke Energy's argument. *E.g., ML-Lee Acquisition Fund,* 327 S.C. at 241, 489 S.E.2d at 472.

S.E.2d 626, 631 (2011). Ultimately, neither the NAICS nor federal classification for data purposes answers the question of whether Duke Energy is a manufacturer.

In any event, although its expert witness did testify that electricity is a service and lacks physical characteristics, the record contains other testimony and evidence supporting the ALC's determination that electricity is tangible and does have physical characteristics. *See* discussion *supra* pp.39-44. The Mfg. Order reflects that the ALC weighed and evaluated all of the evidence and testimony of the experts in reaching its determination that Duke Energy failed to meet its burden of proof. And the testimony of Duke Energy's expert witness that it does not create the electrons residing in the power lines is a red herring. Although acknowledging that electrons are used to "facilitate the propagation of electricity," Br. of Appellant, p.39, Duke Energy ignores the fact that the propagated electricity it delivers to customers is generated and produced by Duke Energy and does not exist but for Duke Energy's operation of its generators. As the ALC and other courts have recognized, a customer gets "some thing" when electricity passes through the meter. That "some thing" was generated and produced by Duke Energy.

F. *Substantial evidence supports the determination that the Department had a long-standing policy that electric utilities are engaged in manufacturing.*

Aside from the fact that substantial evidence supports a contrary conclusion, Duke Energy's self-characterization that it provides a service is inconsistent with the Department's long-standing policy that electric utilities are manufacturers. [R. at 129-31 (Mfg. Order, pp.10-12).] Duke Energy did not appeal from the finding that the Department had a long-standing administrative policy that electric utilities are manufacturers. As such, that finding is the law of the case and an alternative sustaining ground. *E.g., ML-Lee Acquisition Fund,* 327 S.C. at 241, 489 S.E.2d at 472; *see also I'On, LLC v. Town of Mt. Pleasant*, 338 S.C 406, 419, 526 S.E.2d 716, 723 (2000).

At any rate, the record reflects that the Department's policy was based on the Supreme Court's decisions in *Columbia Railway* and *Duke Power*. In 1985, the South Carolina Tax Commission determined that "'X' Electric and Gas" was a manufacturer because the Supreme Court had held that its predecessor was a manufacturer in the *Columbia Railway* decision. S.C. Tax Comm'n Decision P-D-532, 1985 WL 192777 (Apr. 11, 1985) (allowing utility the lower property tax assessment rate applicable to manufacturers). Although this ruling was rendered in the context of property taxes, it reflects the Department's policy to apply the plain language of the *Columbia Railway* and *Duke Power* decisions in all instances involving the question of whether an electric utility is a manufacturer. This published ruling also shows that the audit manual introduced at the hearing is not the "only evidence," Br. of Appellant, p.43, of the Department's long-standing policy. [*See* R. at 154 (Mfg. Recons. Order, p.8 ¶18 (noting that finding of a long-standing policy was based in part on P-D-532 and not solely on the audit manual)).] Given the existence of *Columbia Railway* and *Duke Power*, it is not surprising that the Department has not issued numerous publications on that issue.

Substantial evidence also reflected that this policy was implemented and consistently applied. The audit manual required electric utilities to use the multi-factor apportionment formula. [R. at 7931 (Resp't Hr'g Ex. 1, p.37); R. at 2581:17-2582:23.] Although Duke Energy contends that the manual is conflicting, Br. of Appellant, p.43, that is so only if Duke Energy's position is accepted as given, a flawed conclusion in light of the Supreme Court's previous decisions regarding electric utilities and tax statutes. The policy also was consistently applied as evidenced by the testimony that no other electric utility challenged the policy. [R. at 2582:24-2583:2.] The conclusion that the policy was known

and consistently applied is further supported by the fact that, for 23 years, Duke Energy filed its returns using the multi-factor apportionment formula before filing the Refund Claims. [R. at 129-30 (Mfg. Order, pp.10-11).] Although Cooper Monroe testified that Duke Energy filed its returns in error for 23 years, he acknowledged but failed to account for the fact that "Duke Energy and accounting firms 'in [his] experience' apply a review process before a tax return is filed." [R. at 130 (Mfg. Order, p.11); *see* R. at 2465:15-2466:18.] Duke Energy's challenge to the policy does not mean that the Department had no policy during the Periods at Issue or that Duke Energy was unaware of it. [*See also* R. at 154-55 (Mfg. Recons. Order, pp.8-9 ¶21).]

G. *Duke Energy did not meet its burden of proving that more than 50 percent of its gross receipts were derived from services rendered.*

The ALC correctly rejected Duke Energy's contention that the applicable test to determine whether Duke Energy files under section 12-6-2250 or section 12-6-2290 is to determine whether "over 50 percent of [its] gross receipts are from providing services." Br. of Appellant, p.45 (citing S.C. Rev. Rul. 87-5 (Sept. 16, 1987)). Duke Energy introduced no evidence supporting any breakdown of its gross receipts between services and non-services or otherwise. [R. at 145-46 (Mfg. Order, pp.26-27).] This entire argument is based on Duke Energy's characterization of itself as a service provider through the testimony of its witnesses and the filing and submissions of various forms and documents. *See* Br. of Appellant, pp.45-46; *see also* discussion *supra* Part 3.E. Because the ALC determined that Duke Energy is engaged in manufacturing and because substantial evidence supports that determination, this argument simply is without merit.[40]

[40] Combining this "50 percent" argument with the recovery-of-principal argument would mean that Duke Energy's principal business is in financial services or investment

H. ***Duke Energy did not meet its burden of proving that it does not fall within section 12-6-2250 because its business does not constitute "any form of ... processing goods and materials within this state."***

The ALC also correctly determined that that manufacturing, generating, transmitting, and distributing electricity constitutes "any form of...processing goods and materials within this state." S.C. Code Ann. § 12-6-2250(a); [R. at 141 (Mfg. Order, p.22).] The record shows that generating electricity is a form of processing raw materials and inputs such as coal, water, or nuclear fuel. These items are goods and materials, [R. at 2675:20-22, 2677:14-18,] that are processed and used to turn a generator either directly or indirectly. [R. at 141 (Mfg. Order, p.22); R. at 2538:20-2539:6, 2549:25-2550:6.] Although citing no evidence or support for its contention, Duke Energy makes the conclusory statement that operating a generator itself does not involve processing goods and materials. *See* Br. of Appellant, p.46.[41] However, the fact is that the generator would not operate without the processing and consumption of these raw materials. The use of "any form" in the statute reflects a legislative intent that the language be applied as broadly as possible and, concomitantly, a legislative preference for using the three-factor formula whenever possible. *Hertz*, 246 S.C. at 96, 142 S.E.2d at 447 (identifying "any form" in predecessor to section 12-6-2250 as "broad language"). Substantial evidence therefore supports the ALC's determination that Duke Energy's processing of inputs to

---

trading because the "gross receipts" from these transactions would exceed those from the production and sale of electricity.

[41] By making only this conclusory statement, Duke Energy has abandoned this issue and the ALC's findings are the law of the case. *Fields v. Melrose Ltd. Partnership*, 312 S.C. 102, 106, n.3, 439 S.E.2d 283, 285, n.3 ("[A]n issue is deemed abandoned on appeal and, therefore, not presented for review, if it is argued in a short, conclusory statement without supporting authority."). In fact, it is not clear if Duke Energy is challenging the finding that the raw materials are "goods or materials" or the finding that Duke Energy is involved in "any form of...*processing*" these materials. As such, this is an alternative sustaining ground on which to affirm the ALC. *I'On,* 338 S.C at 419, 526 S.E.2d at 723.

operate its generators constitutes "any form of...processing goods and materials within this state."

Conclusion

For the reasons explained above, this Court should deny the appeal of Duke Energy and affirm the Orders of the Administrative Law Court.

Respectfully submitted,

SOUTH CAROLINA DEPARTMENT OF REVENUE

Milton G. Kimpson
PO Box 12265
Columbia, SC 29211
KimpsoM@sctax.org
(803) 898-5131

WILLOUGHBY & HOEFER, P.A.

John M.S. Hoefer
Tracey C. Green
John W. Roberts
PO Box 8416
Columbia, SC 29202
jhoefer@willoughbyhoefer.com
tgreen@willoughbyhoefer.com
jroberts@willoughbyhoefer.com
(803) 252-3300

Attorneys for Department of Revenue

Columbia, South Carolina
July 8, 2013

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Ralph K. Anderson III, Chief Administrative Law Judge

Case No. 10-ALJ-17-0270-CC

Duke Energy Corporation,.....Appellant,

v.

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

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR

Respectfully submitted,

SOUTH CAROLINA DEPARTMENT OF REVENUE
Milton G. Kimpson
PO Box 12265
Columbia, SC 29211
KimpsoM@sctax.org
(803) 898-5131

WILLOUGHBY & HOEFER, P.A.

John M.S. Hoefer
Tracey C. Green
John W. Roberts
PO Box 8416
Columbia, SC 29202
jhoefer@willoughbyhoefer.com
tgreen@willoughbyhoefer.com
jroberts@willoughbyhoefer.com
(803) 252-3300
Attorneys for Department of Revenue

Columbia, South Carolina
July 8, 2013

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Ralph K. Anderson III, Chief Administrative Law Judge

Case No. 10-ALJ-17-0270-CC

Duke Energy Corporation,.....Appellant,

v.

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

CERTIFICATE OF SERVICE

This is to certify that I, an administrative assistant with the law firm Willoughby & Hoefer, P.A., have caused to be served this day one (1) copy of the **Final Brief of Respondent South Carolina Department of Revenue** by placing the same in the care and custody of the U.S. Postal Service addressed as follows:

Burnet R. Maybank, III, Esquire
James Fredrick Reames, III, Esquire
NEXSEN PRUET, LLC
1230 Main St., Suite 700
Columbia, SC 29201

Jeffery A. Friedman, Esquire
SUTHERLAND ASBILL & BRENNAN, LLP
1275 Pennsylvania Avenue, NW
Washington, DC 20004-2415

Eric S. Tresh, Esquire
Maria Todorova, Esquire
SUTHERLAND ASBILL & BRENNAN, LLP
999 Peachtree Street, NE
Atlanta, GA 30309

Lindsey Gilbert

Columbia, South Carolina
This 8th day of July 2013.