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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Ralph K. Anderson III, Administrative Law Judge

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

Duke Energy Corporation.....Appellant,

v.

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

RECORD ON APPEAL

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STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW JUDGE DIVISION

Anonymous Taxpayer, Petitioner, vs. South Carolina Department of Revenue, Respondent.	)	**CONSENT ORDER** DOCKET NO. 03-ALJ-17-0094-CC

This matter came before the Court from an appeal by the Petitioner, Anonymous Taxpayer, of a final agency determination of the Respondent, the South Carolina Department of Revenue (the "Department") regarding the calculation of interest on an agreed refund of corporate income tax due to Petitioner for periods prior to September 1, 1985.

A hearing was initially scheduled in this matter for December 18, 2003. This hearing date and all discovery deadlines were postponed at the request of both parties upon their notification to the Court that settlement negotiations were underway. The parties have now reached an agreement resolving this matter on the following terms and conditions:

1. The Department agrees to allow tax credits against the South Carolina corporate income tax and license fees of Petitioner in the amount of $554,244 for the tax year ending 2002, $554,244 for the tax year ending 2003, and $554,244 for the tax year ending 2004. In the event the tax credits are not fully utilized in any one year, they may be carried forward to future years until fully utilized.

2. The parties further acknowledge and agree that the Petitioner has certain refund claims pending before the Department which also relate to tax years prior to September 1, 1985. The settlement of this matter shall not constitute a resolution of the substantive issue of the

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calculation of interest for pre-September 1, 1985 tax periods and shall not be binding on either party with respect to Petitioner's pending claims.

Having reviewed this Agreement in Settlement and Compromise, I hereby order its adoption and dismiss the Petition in this matter with prejudice.

IT IS SO ORDERED.

Marvin F. Kittrell
Chief Administrative Law Judge

Columbia, South Carolina

August 8, 2003

WE CONSENT:

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CERTIFICATE OF SERVICE
This is to certify that the undersigned has this date served this order in the above entitled action upon all parties to this cause by depositing a copy hereof, in the United States mail, postage paid, or in the Interagency Mail Service addressed to the party(ies) or their attorney(s).

This 11th day of August 2003

By: Brigitte M Bost
Judicial Law Clerk

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Duke Energy Corporation, Petitioner, vs. South Carolina Department of Revenue, Respondent.	)	Docket No. 10-ALJ-17-0270-CC **ORDER GRANTING SUMMARY JUDGMENT IN PART AND DENYING SUMMARY JUDGMENT IN PART**

Appearances:

For the Petitioners: Burnet R. Maybank, III, Esq.; Eric S. Tresh, Esq.; Jeffrey A. Friedman, Esq.; and Maria M. Todorova, Esq.

For the Respondent: Tracey C. Green, Esq.; John W. Roberts, Esq.; Harry Hancock, Esq.; and J. Abraham Gutting, Esq.

This matter is before the Administrative Law Court (ALC or Court) upon a Motion for Summary Judgment filed by Respondent Department of Revenue (Department) and a Cross-motion for Partial Summary Judgment filed by Petitioner Duke Energy Corporation (Duke Energy). The underlying case arises from the Department's denial of amended corporate income tax returns filed by Duke Energy in 2002 for income tax years 1978-2001.[1] In its Motion for Summary Judgment, the Department contends that prior to the effective date of the Revenue Procedures Act (RPA), August 1, 1995, it lacked authority to extend the limitation period during which a taxpayer could file a refund claim and therefore, as a matter of law, the Forms FS-43 executed by Duke Energy and the Department prior to that time were ineffective in extending the refund-claim filing periods, rendering Duke Energy's filing of amended corporate income tax returns for tax years ending 1978-1993 untimely.[2] The Department also contends that Duke Energy, as a matter of law, is a "manufacturer" under the applicable apportionment statute and must therefore use a multi-factor apportionment formula, consisting of property, sales, and

[1] These are the tax periods at issue in this case.

[2] Both parties stipulate that Duke Energy's amended return for tax year 1994 was timely filed.

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payroll factors, not a single-factor gross-receipts formula.[3] The Department further contends that as a matter of law, Duke Energy cannot, in its calculation of corporate income tax owed to South Carolina, include in the apportionment formula the return of principal from its sales of securities and other investment transactions. Finally, Duke Energy, in its Cross-Motion for Summary Judgment, argues that it was required to include in the apportionment formula the return of principal from its sales of securities and other investment transactions.

A hearing regarding these motions was held before this Court on June 26, 2012, in Columbia, South Carolina. For the reasons set forth below, I conclude that the Department's Motion for Summary Judgment as to the timeliness of Duke Energy's amended refund claims for tax years ending 1978-1993 must be granted; that the Department's Motion for Summary Judgment as to whether Duke Energy is considered a "manufacturer" under the applicable apportionment statute must be denied; and that the Department's Motion for Summary Judgment as to Duke Energy's inclusion of the return of principal in its apportionment formula must be granted and Duke Energy's Cross-Motion for Partial Summary Judgment on this issue must be denied.

FACTUAL BACKGROUND

The Department began auditing Duke Energy's corporate income taxes for income tax year ending 1978. That audit was extended a number of times, over a period of years due to the pending results of an audit of Duke Energy by the Internal Revenue Service (IRS), and also due to the health issues experienced by the Department's auditor and changes in the Department's personnel. These extensions were approved by Forms FS-43, each entitled "Field Services Division – Consent to Extend the Time to Assess Tax." The first Form FS-43, executed in August 1988, pertained to the income tax years ending December 31, 1983 and 1984. Significantly, the income tax years ending December 31, 1978 through December 31, 1982 were incorporated into the executed Forms FS-43 in May 1996. Additional Forms FS-43 periodically

[3] Between the tax years ending 1978-1993, taxpayers whose principal business in South Carolina was "(a) manufacturing or a 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," were required to apportion their income based on a multi-factor apportionment formula, consisting of property, sales, and payroll factors. S.C. Code Ann. § 12-6-2250 (applicable to tax years after 1995); S.C. Code Ann. § 12-7-1120 (applicable to tax years prior to 1996). In this case, no party argued that Duke Energy engaged in collecting, buying, assembling, or processing of goods and materials within South Carolina, or that Duke Energy engaged in selling, distributing, or dealing in tangible personal property within South Carolina. Therefore, the Court will only focus its discussion on whether Duke Energy was a manufacturer for purposes of Section 12-6-2250.

were executed and additional income tax years added until the execution of the final Form FS-43 in June 2002.

In December 2002, Duke Energy filed amended corporate tax returns for the income tax years 1978-2001 seeking a total refund of $126,240,645 plus interest.[4] Duke Energy sought to change the apportionment formula – the mechanism for determining how much income is associated with Duke Energy's South Carolina's business activities – to the single-factor gross-receipts apportionment formula instead of the three-factor formula that it had previously used. It also sought to include the gross receipts, including the return of principal, from its sales of securities and other capital investments in the denominator of the gross-receipts formula for tax years 1978-1999.[5] However, on February 4, 2010, the Department denied Duke Energy's refund claims, after which Duke Energy filed a request for a contested case hearing with this Court on March 3, 2010.

STANDARD OF REVIEW

Rule 68 of the Administrative Law Court Rules provides that "[t]he South Carolina Rules of Civil Procedure . . . may, in the discretion of the presiding administrative law judge, be applied in proceedings before the Court to resolve questions not addressed by these rules." ALC Rule 68. Rule 56(c) of the South Carolina Rules of Civil Procedure states that summary judgment is properly granted when the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP.

"The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder." George v. Fabri, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001). "In determining whether summary judgment is proper, the court must construe all ambiguities, conclusions, and inferences arising from the evidence against the moving party. Byers v. Westinghouse Elec. Corp., 310 S.C. 5, 7, 425 S.E.2d 23, 24 (1992). Because it is a

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[4] This is the amount set forth by the Department. However, Duke Energy stated in its Memorandum in Opposition to the Department's Motion for Summary Judgment and in Support of Duke Energy's Cross-Motion for Partial Summary Judgment that the Department's refund calculations in its Memorandum were incorrect, and that damages would need to be resolved should the Court find in the Department's favor on any issue.

[5] For 2000 and 2001, Duke Energy's original tax returns included receipts from sales of securities in the sales factor in the denominator of the three-factor formula.

drastic remedy, summary judgment should be cautiously invoked to ensure that a litigant is not improperly deprived of a trial on disputed factual issues. Helena Chem. Co. v. Allianz Underwriters Ins. Co., 357 S.C. 631, 644, 594 S.E.2d 455, 462 (2004). However, "when plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted." Bayle v. S.C. Dep't of Transp., 344 S.C. 115, 120, 542 S.E.2d 736, 738 (Ct. App. 2001).

S.C Code Ann. § 1-23-600(A) (Supp. 2010) grants jurisdiction to the ALC to hear contested cases under the Administrative Procedures Act. Additionally, Section 12-60-460 grants the ALC the authority to conduct contested case hearings in matters concerning tax assessment and refunds.

DISCUSSION

I. Timeliness of Duke Energy's Amended Income Tax Return Filings

The Department asserts that Duke Energy did not timely file its request for tax refunds for tax years ending 1978-1993, and therefore this case should be summarily dismissed. Undisputedly, in every instance Duke Energy's amended tax returns for tax years ending 1978-1993 do not meet the statutory deadline to file its amended tax returns. Duke Energy nevertheless argues that its amended tax returns for the disputed tax years were timely filed because the Forms FS-43 extended the statutory deadlines for filing claims for tax refunds and waived any refund limitation periods. In this case, there is no dispute that both parties executed a number of Forms FS-43 periodically between the years 1988 and 2002. The parties also stipulated in their respective memoranda regarding the motions for summary judgment and in the hearing held before this Court on June 26, 2012 that the Form FS-43 executed on December 19, 1997 for the tax year ending 1994 effectively extended the period for filing a refund claim. [6]

Duke Energy argues that the execution of the Forms FS-43 covering the income tax years ending 1978-1993 extended the deadlines for filing claims for tax refunds and waived any refund limitation periods. Duke Energy also argues that because the Department could order a refund if

[6] Pursuant to S.C. Code Ann. § 12-47-440 (****), which applied to the tax years ending 1990-1994, the period for filing a refund claim was three years. Moreover, S.C. Code Ann. § 12-6-4970(B), which was also applicable during these years, allowed a three-year time period for filing a refund claim for the tax year ending 1994 which would have begun on March 15, 1995. Therefore, because the filing of the Form FS-43 for the year 1994 was executed on December 19, 1997- after the enactment of the RPA and, and thus before March 15, 1998 - the period for filing a refund claim was still open. Consequently, the extension of the deadline was effective.

it discovered that a taxpayer had overpaid a tax, a penalty, or interest, even after a refund limitation period, this allows Duke Energy to file a claim for a refund after the limitation period. The analysis of Duke Energy's arguments is addressed in three parts: A) Did S.C. Code Ann. § 12-54-80 grant authority to the Department to extend the time to file an amended tax return; B) did S.C. Code Ann. § 12-54-30 authorize Duke Energy to file an amended tax return requesting a refund beyond the statutorily-prescribed timeframe; and C) did the language in the Form FS-43 executed by the Department extend the time for Duke Energy to file an amended tax return?

A. Statutory Authority to Extend the Time to File an Amended Tax Return

Duke Energy contends that Section 12-54-80 authorizes a taxpayer to request a refund once an extension is granted pursuant to that provision. Section 12-54-80, which applied to the tax periods prior to August 1, 1995 (the enactment date of the Revenue Procedures Act (RPA)), provided:

> If, before the expiration of the time prescribed in this section for the mailing of a notice of assessment, the taxpayer has consented in writing to the mailing of the notice after the time, **notice of assessment may be mailed** at any time prior to the expiration of the period agreed upon. The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon.

S.C. Code Ann. § 12-54-80 (1978) (repealed in 1995) (emphasis added).

In general, when interpreting a statute, the sole function of the Court is to determine and give effect to the intent of the legislature. Hodges v. Rainey, 341 S.C 79, 85, 533 S.E.2d 578, 581 (2000). The starting point in doing so should always be the text of the statute itself. Id. (holding that "[w]hat a legislature says in the text of a statute is considered the best evidence of the legislative intent or will"); Wigfall v. Tideland Utils., Inc., 354 S.C. 100, 110, 580 S.E.2d 100, 105 (2003). In interpreting the text, the plain meaning rule requires that "words must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand that statute's operation." State v. Leopard, 349 S.C. 467, 471, 563 S.E.2d 342, 344 (Ct. App. 2002). Finally, "[w]here the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning." Hodges, 341 S.C. at 85, 533 S.E.2d at 581.

Moreover, in considering this issue, this Court is further bound by the rules of statutory construction relating to tax law. For instance "[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 the same. . . ." Asmer v. Livingston, 225 S.C. 341, 344, 82 S.E.2d 465, 466 (1954) (internal citations omitted); Guar. Bank & Trust Co. v. S. Carolina Tax Comm'n, 254 S.C. 82, 173 S.E.2d 367 (1970) ("A refund of taxes is solely a matter of governmental or legislative grace and any person seeking such relief must bring himself clearly within the terms of the statute authorizing the same."). The Court's analysis in Guaranty Bank, also offers guidance in this case. In Guaranty Bank, the taxpayer claimed it was entitled to recover income tax paid on gain from an involuntary conversion of property. However, the law at the time prescribed a specific timeframe in which the proceeds from the converted property must be reinvested. In construing whether the taxpayer's claim was timely the Court held that the "statutory language creating exemption from taxation will not be strained or liberally construed in favor of the taxpayer claiming an exemption, and he must, in order to be entitled to such exemption, clearly bring himself within the exemption on which he relies." 254 S.C. at 89, 173 S.E.2d at 370.[7] Furthermore, in making that determination, the Court recognized its previous holding that "a taxpayer who seeks to take advantage of a tax deduction must meet the conditions of the statute creating such." Id.

Here, the plain language of Section 12-54-80 does not establish any authority to extend a taxpayer's right to seek a refund but rather allowed the Department, with the taxpayer's consent, to extend the time for it to mail its assessment of the tax owed by the taxpayer. Clearly, when speaking of mailing an assessment, the statute is speaking to an action by the Department. Thus, the plain language of the form extends the timeframe for the Department to mail an assessment to the taxpayer.

Moreover, Section 12-54-80 does not use the word "refund" anywhere within that provision. As explained below, the legislature set forth specific provisions expressing the timeframe to seek a refund for tax years ending 1978-1993. In Spectre, LLC v. S.C. Dep't of Health & Envtl. Control, 386 S.C. 357, 372, 688 S.E.2d 844, 852 (2010), the South Carolina Supreme Court held that: "Where there is one statute addressing an issue in general terms and another statute dealing with the identical issue in a more specific and definite manner, the more specific statute will be considered an exception to, or a qualifier of, the general statute and given

[7] The court in Guaranty Bank, likewise held that "in order for a taxpayer to avail himself of a deduction in the calculation of a tax, he must bring himself squarely within the terms of the statute expressly authorizing it." 254 S.C. at 89-90, 173 S.E.2d at 370.

such effect." Here, it is incredulous that the legislature intended to grant an exception to the timeframe to seek a refund without even mentioning the term.

The Court nevertheless recognizes that the **application** of Section 12-54-80 could result in a refund of taxes paid by the taxpayer, but clearly such a refund would occur within the context of fulfilling the purpose of the statute. The purpose of Section 12-54-80 is to provide an option for the Department to extend the time during which the "notice of assessment may be mailed." If, after the extension of time to make its determination, the Department decided that a taxpayer owed additional taxes, it would notify the taxpayer of that assessment and seek payment based upon that assessment. Conversely, if the Department's assessment of the taxes owed was less than the taxes proffered by the taxpayer, the taxpayer would be refunded the difference.[8] However, there is simply no language in Section 12-54-80 that provides that if the Department requests to extend its time to mail a notice of assessment—or determination of the taxes owed—this request, in turn, creates a right for a taxpayer to amend its previous filing and seek a refund upon its revised request.

This Court cannot simply by implication extend the time to file a refund request. Duke Energy must establish a statutory right to make that claim. To the contrary, Duke Energy failed to meet the required timeframes to request a refund for tax years 1978 to 1993. The timeframes for making those refund requests fell into two distinct regulatory periods: 1) 1978 to 1989; and 2) 1990 to 1993.

1. Income Tax Years Ending 1978-1989

The South Carolina Supreme Court set forth in Bass v. State that Section 12-47-440 only applied to property taxes and that "the exclusive remedy for contesting an alleged erroneous assessment of *income taxes* [is] by payment under protest of the tax claimed as illegal and a suit at law for recovery of the sum so paid, in accordance with Sections 65-2661 and 65-2662 of the Code. [predecessors of §§ 12-47-210 and 12-47-220]." 307 S.C. 113, 117, 414 S.E.2d 110, 112 (1992), (internal quotation marks omitted) (emphasis in the original), cert. granted, judgment vacated on other grounds by Bass v. South Carolina, 509 U.S. 916 and abrogated by Harper v. Virginia Dep't of Taxation, 509 U.S. 86 (1993); see also Perpetual Bldg. & Loan Ass'n of Columbia v. S.C. Tax Comm'n, 255 S.C. 523, 527, 180 S.E.2d 195, 197 (1971). Thus, the

[8] As addressed more fully below, S.C. Code Ann. § 12-54-30 (****) granted the Department the authority to issue a refund under those circumstances.

timeliness of Duke Energy's refund claims for the years 1978-1989 is governed by S.C. Code Ann. §§ 12-47-210 and 12-47-220 (****).[9]

Sections 12-47-210 and 12-47-220 required a taxpayer who sought to receive a refund of amounts paid to the state to expressly pay the taxes under protest and then institute an action in circuit court within 30 days after payment of the taxes. See S.C. Nat. Bank v. S.C. Tax Comm'n, 297 S.C. 279, 282, 376 S.E.2d 512, 514 (1989). Failure to pay the taxes under protest was fatal to a refund claim. See, e.g., City of Columbia v. Glens Falls Ins. Co., 245 S.C. 119, 139 S.E.2d 529 (1964). Here, there is no evidence that any of the payments for these years were made under protest. And even if the payments were made under protest, no action was filed in circuit court within 30 days after the payment was made. Rather, the refund claims were filed in the ALC well after the 30-day period expired.[10] Therefore, none of the refund claims filed for Duke Energy's 1978-1989 tax years were timely. I thus conclude that the refund claims for the tax years 1978-1989 also are barred from consideration by this Court.

2. Income Tax Years Ending 1990-1994

As explained above, in 1992 the South Carolina Supreme Court in Bass held that Section 12-47-440 only applied to property taxes and that the exclusive remedy for obtaining a refund of income taxes was Sections 12-47-210 and 12-47-220 (****). Id. However, the General Assembly thereafter amended Section 12-47-440 to expressly apply to income tax refund claims, but only for tax years beginning in 1990 and later. See Act No. 464, 1994 S.C. Acts, Section 3(B).

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[9] (****) is used in this order in lieu of statutory years because this case involves numerous tax years, and therefore the years of the applicable statutes are equally numerous and varying, and the law applicable during many years was unchanged. The statutory law can be divided into two yearly ranges: 1978-1995 and 1996-2001, as the law regarding this issue did not change during the first range, and then did not change during the second range after the RPA changes in 1995.

[10] There is also an additional reason for concluding the purported extensions of the corporate income tax years 1978-1982 are untimely. These years appeared for the first time on the face of the executed Form FS-43 effective May 30, 1996. Obviously, under either the modern era provisions or the pre-1995 provisions, these extensions were executed well after the refund periods had closed. See S.C. Code Ann. § 12-54-85 (three years from date return filed or two years after date of payment); S.C. Code Ann. §§ 12-47-210, -220 (pay under protest and file claim for refund within 30 days). The only available avenue for reviewing the taxable income of the years 1978-1982 therefore would have been the statutory provisions regarding an assessment based on a determination issued by the IRS. See S.C. Code Ann. §12-54-85(D)(1); *cf.* S.C. Code Ann. § 12-54-80 (prior law). However, Duke Energy did not establish that the IRS issued a final determination within 180 days of May 30, 1996. Moreover, any extension attributable to an IRS determination in that circumstance would have been limited to the tax issues raised by the IRS. Because the allocation and apportionment issues raised by the taxpayers could not have been at issue in an IRS determination, the purported extensions of the 1978-1982 tax years are untimely for purposes of the issues before this Court.

Section 12-47-440 provides for a three-year period of limitation in which to file a refund claim. Therefore, for the 1990-1994 tax years, Duke Energy was required to file its claims for refund within three years after its corporate income tax return was originally due. It is undisputed that Duke Energy filed its corporate income tax returns based on a calendar year. Thus, the returns and payment originally were due without regard to any extension on March 15th of the following year. S.C. Code Ann. §§ 12-6-4970(B) (effective for tax years beginning after 1995); 12-7-1640 (effective for tax years prior to 1996). The refund periods applicable to Duke Energy under Section 12-47-440 for the income tax years 1990-1994 were therefore as follows:

Income Tax Years	**Return Originally Due**	**Close of Refund Period**
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
1994	March 15, 1995	March 15, 1998

B Section 12-54-30

In its Post-Trial Brief, Duke Energy nevertheless argues that during the tax years at issue S.C. Code Ann. § 12-54-30 (****) provided a different "mechanism" by which it could file an amended tax return requesting a refund. Section 12-54-30 provided in relevant part that: "If the commission discovers on examination of a return or otherwise that the tax, penalty, or interest paid by any person is in excess of the amount legally due, the commission may order a refund or give credit for the overpayment." The plain language of Section 12-54-30 permitted the Department to refund amounts discovered on examination of a return. See Anders v. S.C. Parole & Cmty. Corr. Bd., 279 S.C. 206, 305 S.E.2d 229 (1983) ("[T]he Court's primary function in interpreting a statute is to ascertain the intention of the legislature, and when the terms of the statute are clear and unambiguous, the Court must apply them according to the literal meaning."). Section 12-54-30 does not reference whatsoever the timeframe for a taxpayer to file a request for a refund. To the contrary, as set forth above, there were specific statutes that articulated the timeframe in which a taxpayer could file for a refund for tax years 1978 to 1993. As aforementioned, the statute which deals with an issue in a more specific and definite manner prevails over a statute which addresses the issue in general terms, Spectre, 688 S.E.2d 844. Furthermore, "[w]hen construing statutory language, the statute must be read as a whole, and sections which are part of the same general statutory law must be construed together and each

one given effect." Duvall v. S.C. Budget and Control Bd., 377 S.C. 36, 42, 659 S.E.2d 125, 127 (2008).

Thus, Section 12-54-30 allowed the Department to grant relief to a taxpayer if it discovered an overpayment on examination of a return or otherwise, even if a claim for refund would be untimely. It did not, however, change the fact that the taxpayer had to strictly comply with the provisions of the refund statutes if it wanted to file a claim for refund that would be subject to judicial review. See Hodges v. Rainey, 341 S.C. 79, 533 S.E.2d 578 (2000) ("The canon of construction '*expressio unius est exclusio alterius*' or '*inclusio unius est exclusio alterius*' holds that 'to express or include one thing implies the exclusion of another, or of the alternative.'"). The logic of this interpretation of Section 12-54-30 was reflected in Argent Lumber Co. v. Query, 178 S.C. 1, 182 S.E. 93 (1935), overruled on other grounds by McCall by Andrews v. Batson, 285 S.C. 243, 329 S.E.2d 741 (1985). The Court in Argent Lumber held that under a statute similar to the one in the present case, the taxpayer had no right to judicial review of the Tax Commission's refusal to grant the taxpayer a refund notwithstanding the Commission's discovery of overpaid taxes and the Commission's authority to grant refunds at the time of the tax periods at issue. The reason for this, aside from a lack of statutory authority at the time to compel the Commission to issue a refund of overpaid taxes, was that the taxpayer had failed to comply with the refund statute but instead waited more than ten years after the overpayment and almost four years after the amount of the claim was ascertained to bring suit. Id. at 94-95.

C. Form FS-43

In light of the statutory timeframes for filing an amended return requesting a refund, Duke Energy's case centers upon the implications of the Department's Form FS-43. Duke Energy contends that the Forms FS-43 executed in this case allowed it additional time to file a claim for a refund, an extension that would run for more than twenty years in some cases. At the outset, I do not find that the Forms FS-43 authorized a party to seek a refund after the statutory time for filing such a request.

The language contained in the Form FS-43 prior to August 1, 1995 was 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.

(Emphasis added).

Clearly, when referencing the mailing of the notice of an assessment or refund, Form FS-43 is speaking to an action by the Department. Thus, the plain language of the form extends the timeframe for the Department to mail the notice of a refund or assessment to the taxpayer in keeping with Section 12-54-80. That purpose is reflected by the title of the Form FS-43: "Consent to Extend the Time to Assess Tax." The purpose also logically flows from the operation of the tax laws. Because a notice of assessment is issued and mailed by the Department, it necessarily follows that Form FS-43 applies only to extend the time in which the Department may issue and mail a notice of assessment or refund that it determines is due. Thus, the refund language in Form FS 43 refers **not** to allowing a taxpayer additional time in which to file a claim for a refund—which, as explained above, the statutory provisions did not permit—but to affording the Department additional time to review the taxpayer's records and issue a notice of assessment or refund, as it determines appropriate based on a review of the taxpayer's records.

Furthermore, Form FS-43 does not **infer** that a taxpayer has a right to amend its previous tax filing and seek a refund upon alternative grounds. Duke Energy's proposition is not supported by a specific statutory grant of the authority to extend the timeframe to file an amended request for a refund. Rather, Duke Energy reasons that the use of the term "refund" in the Form FS-43 language infers the grant of an extension to file its request for a refund. However, Form FS-43 reflects its limited purpose by referencing the time an assessment or refund is allowed "pursuant to the provisions of Section 12-54-80." As explained above, Section 12-54-80 does not authorize a taxpayer to file a request for a refund outside of the statutes that specifically set forth that timeframe.

Duke Energy nonetheless contends that since the Department agrees that Form FS-43 had that effect for 1995 and later, it must have had that effect before 1995. Duke Energy avers that since the "refund" language is absent in S.C. Code Ann. § 12-54-85(C)(5) (****) – the section with which the RPA supplanted Section 12-54-80 as of August 1, 1995 – that indeed Section 12-54-80 must have also have granted it the right to file an amended tax return seeking a refund. [11]

[11] Duke Energy also pointed out that the Forms FS-43 executed by the Department and Duke Energy from 1996 to 1999, well after the redesignation of Section 12-54-80 as Section 12-54-85, continued to make reference to Section 12-54-80, a statute that no longer existed. And the Forms FS-43 executed by the Department and Duke Energy from 2000 through 2002 incorrectly cited to subsection (C)(5) of S.C. Code Ann. § 12-54-85 instead of subsection (C)(4). Those arguments carry no legal value, but are probative as to the apparent shoddy fashion in which the Forms FS-43 were executed.

Indeed, Form FS-43 now operates to extend the time for both assessment and refunds for 1995 and later. The language contained in the Form FS-43 following August 1, 1995 is the same except that instead of reference to "Section 12-54-80," it makes reference to "Section 12-54-85(C)(5)." The language contained in Section 12-54-85(C)(5) provides the following:

> Taxes may be determined after the thirty-six month limitation if:
>
> * * *
>
> (5) the person liable for any taxes consents in writing, before the expiration of the time prescribed in this section for assessing taxes due, to the assessment of the taxes after the time prescribed by this section.

Duke Energy's argument, however, ignores the substantial and wholesale changes that were enacted as part of the RPA. As with Section 12-54-80, the provisions addressing the authority and timeframes within which to seek a refund were addressed in separate statutory provisions. The RPA added S.C. Code Ann. § 12-60-470 (****), which states that "[a] taxpayer may seek a refund of any state tax by filing a written claim for refund with the [D]epartment. . ." and that a "claim for refund is timely filed if filed within the period specified in Section 12-54-85 . . . ." The RPA also added S.C. Code Ann. § 12-60-40 (****), which allows the Department to grant extensions of any tax-related time limitations. "It will be presumed that the Legislature in adopting an amendment to a statute intended to make some change in the existing law." Vernon v. Harleyville Mut. Cas. Co., 244 S.C. 152, 155, 135 S.E.2d 841, 844 (1964). It is therefore clear that the General Assembly intended to grant the Department, through the RPA, the authority to extend the period for filing of refund claims, an extension of power which the General Assembly had theretofore limited to the deadline for mailing notices of assessment.

Moreover, "[a]n administrative agency has only the powers conferred on it by law and must act within the authority created for that purpose." SGM-Moonglo, Inc. v. S.C. Dep't of Revenue, 378 S.C. 293, 295, 662 S.E.2d 487, 488 (Ct. App. 2008). In fact, "[a]ny action taken by [the Department] outside of its statutory and regulatory authority is null and void." Triska v. Dep't of Health & Envtl. Control, 292 S.C. 190, 194, 355 S.E.2d 531, 533 (1987). Thus, even if Form FS-43 inferred that a taxpayer has a right to extend the timeframe to request for refund, the Department cannot exceed its statutory authority based upon that form.

In its Memorandum of Law in opposition to the Department's Motion for Summary Judgment, Duke Energy further argues that because Form FS-43 does not reference Section 12-54-30, that statute does not apply to the Department's determination in this matter. Putting aside

the application of Section 12-54-30 in this case, the fallacy of Duke Energy's assertion is referred to as "the fallacy of denying the antecedent" and is illustrated in a hypothetical syllogism as:

> If A, then B.
>
> Not A.
>
> Therefore, not B.

Ruggero J. Aldisert, Logic for Lawyers: A Guide to Clear Legal Thinking 160 (National Institute for Trial Advocacy 3d ed. 1997); see also Irving M. Copi, Introduction to Logic 295 (5th ed. 1978).

Stated in terms of syllogism, Duke Energy's arguments proceed as follows:

> If Form FS-43 had referenced Section 12-54-30, then that section would be applicable to determining the timeframe for a refund pursuant to Form FS-43.
>
> Form FS-43 did not reference Section 12-54-30.
>
> Therefore, Section 12-54-30 is not applicable to determining the timeframe for a refund pursuant to Form FS-43.

Other courts have also found this reasoning to be faulty. For instance, in Crouse-Hinds Co. v. InterNorth, Inc., 634 F.2d 690, 703 (2d Cir. 1980), the court held that:

> The proposition that "A implies B" is not the equivalent of "non-A implies non-B," and neither proposition follows logically from the other. The process of inferring one from the other is known as "the fallacy of denying the antecedent."

634 F.2d at 703 (cited in Logic for Lawyers).

Moreover, logic dictates a conclusion contrary to Duke Energy's assertion. The failure to reference a provision that governs when the Department may issue a refund upon its own initiative does not suggest it is inapplicable. Nevertheless, the failure to reference any statute (including Section 12-54-30) that addresses the authority of the Department to issue refunds profoundly suggests that Form FS-43 was not addressing a taxpayer's authority to amend its tax returns and seek a refund, or the Department's authority to extend the timeframe within which a refund claim could be filed. If Form FS-43 was granting the authority to extend the time to make refund claims, it would not only reference the statute upon which that authority was granted, but would presumably do so with clarity rather than making the reference: "mailing of notice of assessment or refund." To the contrary, Form FS-43 was based upon Section 12-54-80, which governs the time period in which the Department could assess taxes – a provision that says nothing about refunds or extensions of time to file refund claims.

Waiver of a Statute of Limitations

Duke Energy also contends that the Department "waived" the "statute of limitations" for filing a refund. Duke Energy bases its contention upon the language of Form FS-43; upon the alleged grant by Department employees of an extension of the time during which to file a request for a refund; and upon Duke Energy's belief that the Department's Revenue Procedures reflected that right. Duke Energy contends that "[f]or years, the Department advised taxpayers that it had in place a policy to execute waiver agreements extending the statute of limitations for both assessments and refunds."[12]

However, the phrase "statute of limitations" invokes specific case law that is not applicable to this matter. Obviously, this case does not involve a "cause of action" in which the Court must first determine when the statute of limitations begins to run. In other words, it does not involve parties who possess the discretion to control when a cause of action may properly accrue. Rather, this case involves a determination of when the State of South Carolina grants a right to seek a refund pursuant to the existing tax laws. In Dep't of Conservation v. Co-De Coal Co., 388 S.W.2d 614 (Ky. 1965), the court aptly explained the distinction between a statute of limitations and a statutory timeframe for filing a request for refund from a state. The court noted: "whereas a statute of limitations neither creates nor extinguishes any rights, but merely places a limitation upon the remedy (which can be waived or tolled), a limitation such as the one in question is a condition essential to the existence of the right." Co-De Coal, 388 S.W.2d at 617 (internal citations omitted). The court added: "The bringing of the action within the limited time is a condition to the exercise of the right, and, if the condition is not complied with, there is neither right nor remedy." Id. (internal citation and quotation marks omitted).

Indeed, this concept is supported by South Carolina case law. In Labruce v. City of N. Charleston, 268 S.C. 465, 234 S.E.2d 866 (1977), the appellants instituted an action to recover business license taxes paid under protest. The Court recognized that at that time, Section 65-2661 et seq., Code of Laws, 1962, provided the exclusive remedy for the recovery of contested taxes and held that "[s]trict compliance with the conditions precedent is prescribed when one

[12] In its post-hearing brief, Duke Energy alleges that the Department had respected the "waiver" agreements it had with Duke Energy for tax years 1978-1994 by agreeing, in 2002, to offset refunds of its South Carolina corporate income tax for tax years 1978-1994 against the corporate income, license, and sales taxes for those same years, resulting in a net refund owed to Duke Energy. However, this allegation was based on an affidavit referred to as the "Monroe Affidavit," designated as "Exhibit A," that was not submitted prior to, or during, the hearing. Therefore, this Court will not consider this information in rendering its decision.

invokes the statutory remedy." 234 S.E.2d at 867. See also 4 S.C. Jur. Action § 13 ("One who invokes a statutory remedy must bring himself within the statute and comply with the conditions prescribed therein. Moreover, the Court of Appeals recently reiterated this principle, noting that a nonclaim statute (the sort at issue in the present case)[13] differs from a statute of limitations in that a nonclaim statute creates no enforceable right of action "[u]nless the claim is filed within the prescribed time set out in the statute," whereas a statute of limitations "creates a defense to an action brought after the expiration of the time allowed by law for the bringing of such an action." Phillips ex rel. Barnett v. Quick, Op. No. 5003, 2012 WL 2913296 (S.C. Ct. App. filed July 18, 2012) (citing Estate of Decker v. Farm Credit Servs. Of Mid-Am, ACA, 684 N.E.2d 1137, 1138-39 (Ind. 1997).

As a general rule, when a statute creates a new right and at the same time prescribes a remedy for enforcing the right, the prescribed statutory course must be followed by anyone claiming the right."); 72 Am. Jur. 2d State and Local Taxation § 996 ("Strict compliance with conditions precedent is required to invoke the statutory remedy for recovery of contested taxes."). When a statute both creates a cause of action and includes a time limit for its commencement, compliance with the time limit is a condition precedent to the maintenance of the action. 54 C.J.S. Limitations of Actions § 31 (updated October 2010). "Such a statutory time limit conditions the existence of the right of action, thereby creating a substantive, rather than procedural, limitation on the right. Bringing suit within the prescribed time is a condition of liability itself, not of the remedy alone." Id.

Thus, the statutes that grant a South Carolina taxpayer a right to seek a refund are not statutes of limitations but rather conditions precedent to obtain a right to a refund. Accordingly, the courts have not adopted the doctrine of waiver involving tax claims. To the contrary, a refund of taxes is considered "solely a matter of governmental grace, . . . and any person seeking such relief must bring himself clearly within the terms of the statute authorizing the same." Asmer v. Livingston, 225 S.C. 341, 344, 82 S.E.2d 465, 466 (1954) (internal citations omitted); see also C.W. Matthews Contracting Co., Inc. v. S.C. Tax Comm'n, 267 S.C. 548, 554, 230 S.E.2d 223, 226 (1976); Guar. Bank & Trust Co. v. S.C. Tax Comm'n, 254 S.C. 82, 173 S.E.2d

[13] A nonclaim statute is one that creates a right of action and provides a time limit on exercising that right. It imposes a condition precedent, as the time element is part of the right of action. 54 C.J.S. Limitation of Actions §33 (updated May 2012).

367 (1970) (holding that the circuit court erred in extending the time periods under the statute because that is a legislative and not a judicial function). Therefore, the South Carolina Supreme Court held in TNS Mills, Inc. v. S.C. Dep't of Revenue, 331 S.C. 611, 623, 503 S.E.2d 471, 478 (1998) that the Department employee's erroneous interpretation of a statute was not binding on the courts, and that Department employees cannot make changes in the refund procedure established by the General Assembly or exceed the authorization granted by a statute. See also Argent Lumber Co., 182 S.E. at 95 ("[T]he agent of the tax commission could not alter, amend, or change the statute law of this state, either orally or by written agreement . . . ."). The United States Supreme Court further explained that an employee of the government has no authority to waive or extend a refund period except to the extent authorized by the governing statute. U.S. v. Garbutt Oil Co., 302 U.S. 528 (1938) (Officers of the government have no power to waive statutes of limitations; and Commissioner cannot consider untimely filed returns); see also Dickow v. United States, 740 F. Supp. 2d 231, 237 (D. Mass. 2010) aff'd, 654 F.3d 144 (1st Cir. 2011) cert. denied, 132 S. Ct. 1046 (2012) ("The Executor cannot rely upon the IRS' failure to advise him of the denial to justify his purported conclusion that his second request had been granted where, as here, the IRS clearly did *not* have the authority to issue such extension.").

The only case cited by Duke Energy that involved a refund claim was Anonymous Taxpayer v. S.C. Dep't of Revenue, 377 S.C. 425, 661 S.E.2d 73 (2008). However, the relief sought by the taxpayer in that case was based on the contention that the taxpayer's right to retirement benefits was in the nature of a contract. The Supreme Court's discussion of the statute of limitations in Anonymous Taxpayer was predicated upon the taxpayer's argument that there "was a contract providing for continuing performance, thus the limitations period began anew each year." The Court noted long ago that statutes of limitations could be waived with respect to actions based on contract. See Heyward v. S.C. Tax Comm'n, 240 S.C. 347, 351, 126 S.E.2d 15, 17 (1962) ("We have held that the State may be subject to the doctrine of estoppel in its contractual relations."). Nevertheless, the Court did not hold that refund claims are in the nature of a contract and, in fact, has held the opposite. See id.; see also C. W. Matthews Contracting Co., 267 S.C. at 554, 230 S.E.2d at 226 (a tax refund claim is created by statute and is not in the nature of a debt collection claim).

In sum, since no employee or agent of the Department has any authority to waive the authorization granted by Section 12-54-80, Form FS-43 could grant no more rights than those

permitted by this statute. Thus, any statement made by a Department employee, either verbally or in writing, agreeing to waive the time to request a refund, which was inconsistent with Section 12-54-80, was outside of that employee's authority. Consequently, I conclude that the Forms FS-43 executed before August 1, 1995, and any other statements, written or oral, given by DOR's employees, were ineffective in extending the statutory filing period for Duke Energy's refund claims or in waiving that period.

Moreover, even under section 12-54-85(F)(1), with the exception of situations where there are changes made to taxable income reported to the IRS, or when the IRS changes a corporation's taxable income, "claims for . . . refund must be filed within three years of the time the return was filed, or two years from the date of payment, whichever is later. If no return was filed, a claim for refund must be filed within two years from the date of payment." S.C. Code Ann. § 12-54-85(F)(1) (1995). Also, "[a] claim for refund can be amended prior to, but not after, the expiration of the time for filing the claim for refund under Section 12–54–85(F)." Id. § 12-60-470(H). Read together, these sections lead to the conclusion that once a refund period expires under the terms set forth by the legislature, that period of time cannot be revived by the consent of the Department or otherwise; rather, any amendments **must** be made **prior to** the expiration of the statutory period for filing refund claims. See Am. Legion Post 15 v. Horry County, 381 S.C. 576, 582, 674 S.E.2d 181, 183-84 (Ct. App. 2009) (holding in part that the three-year limitations period under section 12-54-85(F)(1) barred a taxpayer's action seeking a refund). Thus, even after the RPA took effect on August 1, 1995, and the Department received its new power to extend the period for filing refund claims, the Department was unable to use this power to revive refund claims periods that had expired due to the close of the three-year limitations period applicable to the income tax years ending 1990 through 1994 or due to failure to pay under protest and file a claim for a refund within thirty (30) days for the tax years ending prior to 1990.

Equitable Estoppel

Duke Energy similarly asserts that the Department should be estopped from asserting its "statute of limitations." The basis for this contention is that the Department employees purportedly viewed Form FS-43 as waiving the statutory refund limitations period, and that Duke Energy "agreed to the waivers because the Department represented verbally and in writing that the statute of limitations was extended for both tax assessments and tax refund claims."

As with waiver of a statute of limitations, the courts have recognized that the estoppel doctrine is limited in reviewing tax claims. As a general rule, "the doctrine of estoppel will not be applied to 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." Heyward v. S.C. Tax Comm'n, 240 S.C. 347, 351, 126 S.E.2d 15, 17 (1962) (emphasis added). In the only South Carolina appellate decision touching upon taxation issues and equitable estoppel, the Court of Appeals held that equitable estoppel did not apply to bar a county from asserting the statute of limitations as a defense to refunding admissions fees paid in connection with bingo games. Am. Legion Post 15, 381 S.C. at 583, 674 S.E.2d at 184.

Also, to invoke estoppel in this case, the Department employees must be authorized to change the procedure for obtaining a refund. However, in Texaco, Inc. v. Wasson, the South Carolina Supreme Court explained 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." 269 S.C. 255, 264-65, 237 S.E.2d 75, 79 (1977). Similarly, in TNS Mills, Inc., the taxpayer contended that the Department had the authority to grant a property tax exemption retroactively. Its contention was based in part on a memorandum prepared and issued by a Department employee opining that a recently-enacted statute gave the Department authority to accept exemption applications at any time. The South Carolina Supreme Court rejected that contention, holding instead 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." 331 S.C. at 621-22, 503 S.E.2d at 477; see also S.C. Coastal Council v. Vogel, 292 S.C. 449, 357 S.E.2d 187 (Ct. App. 1987) ("The public cannot be estopped ... by the unauthorized or erroneous conduct or statements of its officers or agents which have been relied on by a third party to his detriment.").

In addition, the authority that Duke Energy itself cited supports a conclusion that the Department is not estopped from rejecting actions taken by its employees that are not authorized by statute. Duke Energy cited Quail Hill, LLC v. County of Richland and quoted the following language from that case: "A governmental body is not immune from the application of the doctrine of estoppel where its officers of agents act within the proper scope of their authority."

387 S.C. 223, 236, 692 S.E.2d 499, 506 (2010) (italics omitted). However, Duke Energy only quoted the first part of the pertinent language. The entire relevant passage was quoted by the Court as follows:

> A governmental body is not immune from the application of the doctrine of estoppel *where its officers or agents act within the proper scope of their authority ... The public cannot be estopped, however, by the unauthorized or erroneous conduct or statements of its officers or agents which have been relied on by a third party to his detriment.*

Quail Hill, 387 S.C. at 236, 692 S.E.2d at 506 (italics in original) (quoting DeStefano v. City of Charleston, 304 S.C. 250, 257-58, 403 S.E.2d 648, 653 (1991)). That passage followed the Court's recognition at the beginning of the paragraph: "As a general rule, estoppel does not lie against the government to prevent the due exercise of its police power or to thwart the application of public policy." Id. (quotation marks omitted).

Following the above precedents, the Court ultimately held that: "For reasons ... discussed [in the opinion], we believe the Court of Appeals erred in reversing the circuit court's grant of summary judgment to County as to Quail Hill's claim of equitable estoppel." Id., 387 S.C. at 237, 692 S.E.2d at 506. In other words, the Supreme Court in Quail Hill affirmed that the government was not estopped from contesting erroneous statements made by its staff. See id., 387 S.C. at 238, 692 S.E.2d at 507 ("[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."). That holding is entirely consistent with the holdings of Texaco, Heyward, and TNS Mills and, in fact, relies on the same rationale stated by the Court in Heyward – that the government cannot be estopped from exercising its police power. Compare id., 387 S.C. at 236, 692 S.E.2d at 506 (discussing police power rationale for not applying estoppel to governmental entities) with Heyward, 240 S.C. at 351, 126 S.E.2d at 17 (holding that "estoppel will not be applied to deprive the government of the due exercise of its police power, or to effect public revenues or property rights ....").

Thus, I conclude that the Department is not estopped from invoking the correct refund limitations period, even if Department employees believed they had the authority to allow the taxpayer to extend the time in which a claim for refund could be filed. This court clearly does not wish to shield a governmental agency from the doctrine of equitable estoppel where its agents **act within the scope of their authority**. Rather, this Court recognizes that however

Duke Energy seeks to characterize the evidence presented in response to the Department's summary judgment motion, the Department's employees did not have the authority to create an unauthorized refund procedure. Moreover, execution of Forms FS-43 by Department employees can provide the taxpayer with no greater remedies than those provided by the governing statutes for refund claims and the like. It is upon these principles that the court in Phillips held that "[w]hile equitable principles may extend the time for commencing an action under statutes of limitation, **nonclaim statutes impose a condition precedent to the enforcement of a right of action and are not subject to equitable exceptions.**" Supra. (citing Estate of Decker, 684 N.E.2d at 1139) (emphasis added).

In fact, even if estoppel was applicable here, Duke Energy failed to set forth a genuine issue of material fact as to its meeting those requirements. "To prove estoppel against the government, the relying party must prove: (1) the lack of knowledge and of the means of knowledge of the truth of the facts in question; (2) justifiable reliance upon the government's conduct; and (3) a prejudicial change in position." S.C. Dep't of Transp. v. Horry County, 391 S.C. 76, 83, 705 S.E.2d 21, 25 (2011). Furthermore, "[o]nce the party moving for summary judgment meets the initial burden of showing the absence of a genuine issue as to any material fact, the nonmoving party may not simply rest on the mere allegations contained in the pleadings." Grant v. Mount Vernon Mills, Inc., 370 S.C. 138, 142, 634 S.E.2d 15, 17 (Ct. App. 2006). "Rather, the nonmoving party must come forward with specific facts showing there is a genuine issue for trial." Id. (quoting Peterson v. W. Am. Ins. Co., 336 S.C. 89, 94, 518 S.E.2d 608, 610 (Ct.App.1999)). Here, there is no dispute that Duke Energy could have referenced the governing refund statutes and learned that Department employees cannot extend the time periods set forth in the applicable refund statutes. See Am. Legion Post 15, 381 S.C. at 583, 674 S.E.2d at 184. Moreover, I do not find that the Form FS-43 misinformed Duke Energy that it could file an amended tax return requesting a refund after the statutory timeframe.

Equitable Tolling

Duke Energy contends that the Department should be equitably tolled from requiring Duke Energy to comply with the statutory time frame within which to file a refund because the Department's employees induced Duke Energy to file belatedly. In support of this remedy, Duke Energy contends that it agreed to the waivers because the Department represented that the statute of limitations was extended for both tax assessments and tax refund claims.

"[T]he doctrine of equitable tolling may be applied to toll the running of the statute of limitations." Hooper v. Ebenezer Sr. Servs. & Rehab. Ctr., 386 S.C. 108, 115, 687 S.E.2d 29, 32 (2009) (quoting 54 C.J.S. Limitations of Actions § 115 (2005)). As explained above, however, the statute requiring that refunds be filed within specific timeframes creates a condition precedent to seeking that remedy and thus is not subject to the equitable remedies for statutes of limitations. See Phillips, supra. Thus, equitable tolling is not a proper remedy in this case. Cf. United States v. Brockamp, 519 U.S. 347 (1997) (holding that the statutory limitations period on tax refund claims under the applicable provision of the Internal Revenue Code does not authorize equitable tolling).

Even if, *arguendo*, equitable tolling could apply here, in Hooper, the South Carolina Supreme Court explained that "equitable tolling is a doctrine that should be used sparingly and only when the interests of justice compel its use." 386 S.C. at 117, 687 S.E.2d at 33. Here, however, in an attempt to invoke this extraordinary remedy, Duke Energy submitted affidavits and deposition testimony that reference the belief by Department employees that Duke Energy could seek a "refund" based upon extensions granted by the executed Forms FS-43. However, those affidavits do not contain an averment by any Department employee that he or she specifically stated to a Duke Energy representative that Duke Energy's time to seek a "refund" was extended by Form FS-43. More importantly, there is no reference that any Department employee stated that Duke Energy could file an amended tax return seeking a refund based upon a new basis. Nor is there any sworn testimony by a Duke Energy representative that he or she was misdirected by a Department employee.

Therefore, I conclude that equitable tolling does not lie in this case.

Conclusion

Finally, the context of Duke Energy's request is important in recognizing the proper resolution of this issue. Duke Energy asserts that there are disputed facts regarding this issue because some of the Department's employees viewed Form FS-43 as extending the period during which a taxpayer could seek a refund. However, statements to that effect do not answer the issue in this case. This case is **not** simply about whether Duke Energy can seek a refund based upon a tax review that had been held open pending the Department's determination of the proper tax to assess. Rather, Duke Energy originally filed as a manufacturer using the three-factor formula. Now, it seeks a refund, not based upon the initial filing, but based upon an amended tax return

using the single-factor gross-receipts apportionment formula – an entirely different basis. Duke Energy's amended return also now includes the gross receipts from the sale of its securities and other capital investments, which further includes the principal.

Duke Energy interprets Form FS-43 as not only allowing it to question its initial filing but as allowing it to file a new (amended) tax return and claim an entirely new basis for a refund. The plain reading of the tax statutes and review of the affidavits and deposition testimony submitted by Duke Energy fail to establish a genuine issue of material fact regarding the request of Duke Energy. In other words, though there are statements regarding the right of Duke Energy to seek a refund, no evidence was presented that any Department employees interpreted Form FS-43 as allowing a taxpayer to file **an amended return** on an **entirely different basis** than the original return and then seek a refund based on that amended return.[14] Therefore, the Department's Motion for Summary Judgment as to the issue of the timeliness of Duke Energy's amended income tax return filings is granted.

II. Apportionment Method

The next issue is whether Duke Energy is a "manufacturer" and therefore required to use the multi-factor apportionment formula pursuant to S.C. Code Ann. § 12-6-2250 (****) (applicable to tax years after 1995)/ Section12-7-1140 (applicable to tax years prior to 1996); or whether Duke Energy was required to use the single-factor gross-receipts formula pursuant to Section 12-6-2290 (****) (applicable to tax years after 1995)/ Section 12-7-1190 (applicable to tax years prior to 1996). Duke Energy argues that it is not a manufacturer, even though it filed its original corporate income tax returns under this status. Duke Energy contends that it is actually a seller of services, and therefore amended its tax return filing using the single-factor gross receipts formula.

During the tax periods at issue, taxpayers whose principal business in South Carolina was "(a) manufacturing . . . goods and materials within this State . . . ." had to apportion their income using a three-factor formula composed of property, payroll, and sales. S.C. Code Ann. § 12-6-2250 (applicable to tax years after 1995); S.C. Code Ann. § 12-7-1140 (applicable to tax years prior to 1996). All other taxpayers (except certain specific industries not relevant here) had to

[14] Review of the record does not even establish the validity of the Form FS-43 agreements for tax years 1978 through 1983. In fact, Duke Energy has even conceded that it has not located the executed Form FS-43 agreements for tax years 1978 through 1983.

apportion their income using a single-factor gross-receipts apportionment formula. S.C. Code Ann. § 12-6-2290 (applicable to tax years after 1995); Id. § 12-7-1190 (applicable to tax years prior to 1996). "Manufacturing" is not, and was not during the tax periods at issue, statutorily defined for South Carolina apportionment law purposes.[15]

Based on the record, I find that genuine issues of material fact exist necessitating an evidentiary hearing as to whether Duke Energy, based on its activities within the State, falls under Section 12-6-2250 as a "manufactur[er]," or whether Duke Energy is a seller of services, or otherwise falls under none of the above-categories, and is therefore required to apportion its income to South Carolina based on the single-factor gross-receipts apportionment formula pursuant to Section 12-6-2290 (applicable to tax years after 1995)/ Section 12-7-1190 (applicable to tax years prior to 1996). Accordingly, the Court denies the Department's Motion for Summary Judgment with respect to this issue.

III. Gross Receipts

The final issue is whether Duke Energy was allowed, in its calculation of corporate income tax owed to South Carolina, to include in the apportionment formula the return of principal from its sales of securities and other capital investments. Duke Energy argues that "gross receipts" in the gross receipts factor of the denominator of the single-factor gross-receipts apportionment formula and "sales" in the sales factor of the denominator of the three-factor apportionment formula include the entire amount of return capital from a sale of securities or other capital investments, **including the return of principal**. The Department, however, argues that gross receipts and sales include only the net proceeds from sales of securities or other capital investments.

South Carolina law provides that a taxpayer required to apply the single-factor gross-receipts apportionment formula must do so "using a fraction in which the numerator is gross receipts from within this State during the taxable year and the denominator is total gross receipts from everywhere during the taxable year." See S.C. Code Ann. § 12-6-2290 (****) (applicable for tax years beginning after 1995); see also id. § 12-7-1190 (****) (applicable for tax years

[15] "Manufacturing" is not statutorily defined, but it is discussed in Columbia Ry., Gas & Elec. Co. v. S.C. Tax Comm'n, 134 S. C. 319, 132 S.E. 611 (1926), a case in which the South Carolina Supreme Court held that a company engaged in the business of generating electricity was properly considered a "manufacturer" for purposes of a particular statute that imposed a corporate income tax on "a corporation engaged in the business of manufacturing."

prior to 1996).[16] "Gross receipts" was not defined for South Carolina apportionment law purposes during the tax periods at issue.

For purposes of the multi-factor apportionment formula[17] the sales factor consists of "[t]he ratio of sales made by such taxpayer during the income year which are attributable to this State to the total sales made by such taxpayer everywhere during the income year ...." S.C. Code Ann. § 12-7-1170 (****) (for tax years prior to 1996).[18] The term "sales" includes: "(1) rentals from tangible personal property located in this State which are not separately allocated; and (2) sales of intangible personal property and receipts from services if the entire income-producing activity is within this State. If the income-producing activity is performed partly within and partly without this State, sales are attributable to this State to the extent the income-producing activity is performed within this State." Id. [19]

"The language of a tax statute must be given its plain ordinary meaning in the absence of an ambiguity therein. . . [I]f a legislative intent is clearly apparent from the language of the statute there is no occasion for resort to the rule of statutory construction." Beach v. Livingston, 248 S.C. 135, 139, 149 S.E.2d 328, 330 (1996) (internal citation omitted). "If the statute is ambiguous, however, courts must construe the terms of the statute." S.C. Energy Users Comm. v. S.C. Pub. Serv. Comm'n, 388 S.C. 486, 491, 697 S.E.2d 587, 590 (2010) (internal citation omitted). "A statutory provision should be given a reasonable and practical construction consistent with the purpose and policy expressed in the statute." Lockwood Greene Eng'rs, Inc. v. S.C. Tax Comm'n, 293 S.C. 447, 449, 361 S.E.2d 346, 347 (Ct. App. 1987). "When faced with an undefined statutory term, the term must be interpreted in accordance with its usual and customary meaning." Id. at 492, 697 S.E.2d at 590 (internal citation omitted). "Courts should

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[16] Even though the Court finds as a matter of law that Duke Energy's filings of tax refund claims for tax years ending 1978-1993 were untimely, and thus will not be considered here, the filing for tax year 1994 was timely, and thus statutes applicable to tax years prior to 1996 will be discussed.

[17] Section 12-6-2250 (applicable to tax years after 1995) and Section 12-7-1140 (applicable to tax years prior to 1996).

[18] For tax years after 1995, S.C. Code Ann. § 12-6-2280 (****) similarly provides that: "The sales factor is a fraction in which the numerator is the total sales of the taxpayer in this State during the taxable year and the denominator is the total sales of the taxpayer everywhere during the taxable year."

[19] For tax years after 1995, S.C. Code Ann. § 12-6-2280 (B) (****) similarly provides that the term "'sales in this State' includes sales of goods, merchandise, or property received by a purchaser in this State. The place where goods are received by the purchaser after all transportation is completed is considered the place at which the goods are received by the purchaser. Direct delivery into this State by the taxpayer to a person designated by a purchaser constitutes delivery to the purchaser in this State."

not merely consider the language of the particular clause being construed, but the undefined word and its meaning in conjunction with the purpose of the whole statute and the policy of the law." Id. Finally, "[s]tatutes should not be construed so as to lead to an absurd result." Kennedy v. S.C. Ret. Sys., 345 S.C. 339, 351, 549 S.E.2d 243, 249 (2001) (internal citation omitted).

Here, there is no genuine issue of material fact with regard to the Gross Receipts Issue. The sole question of law is whether Duke Energy could include the return of principal from its sales of securities and other investment transactions as part of the sales or gross receipts factors in the apportionment formula. This is a novel question in South Carolina, but is not unprecedented in some of our sister States.

The first approach to this issue was taken by New Jersey in Am. Tel. and Tel. Co. v. Dir., Div. of Taxation, 194 N.J. Super. 168, 476 A.2d 800 (App. Div. 1984). In that case, the New Jersey Supreme Court concluded that the inclusion of gross or full revenues from the short-term sale or redemption of investment paper in the denominator of the receipts fraction of the apportionment formula would lead to "absurd results" in that such inclusion would greatly distort the amount of business the taxpayer did within and without New Jersey and would thus defeat the intent and purpose of the apportionment statute. Id. at 172, 476 A.2d at 802. Both Indiana and Arizona have adopted similar rationales to the one used by the New Jersey court. See Sherwin-Williams Co. v. Ind. Dept. of State Revenue, 673 N.E.2d 849 (Ind. Tax 1996) (holding that "'gross receipts' for the purpose of the sales factor includes only the interest income, and not the rolled over capital or return of principal, realized from the sale of investment securities"); Walgreen Ariz. Drug Co. v. Ariz. Dep't of Revenue, 209 Ariz. 71, 97 P.3d 896 (App. 2004) (holding that the return of principal from the type of short-term investments at issue was not includable in the sales factor denominator).

The other approach to this issue was taken by Tennessee and California.[20] In Sherwin-Williams Co. v. Johnson, 989 S.W.2d 710 (Tenn. App. 1998), the chancellor had followed the same reasoning employed by the New Jersey and Indiana courts (and later the Arizona court), holding that "to include the principal in the sales factor denominator would distort the extent of Sherwin-Williams' business activities in Tennessee and other states in which it does business

[20] South Carolina's apportionment provisions, like those in New Jersey, Indiana, Arizona, Tennessee, and California, are based on the Uniform Division of Income for Tax Purposes Act (UDITPA).

and defeat the intent and purpose of the [apportionment] statute. . ." and that "the amount of return of principal on the sale or redemption of interest bearing securities related to its, [sic] working capital investments should not be included in the denominator of the sales factor." Id. at 714. The Tennessee Court of Appeals, though finding the chancellor's holding "logical and appealing," nevertheless decided not to follow the "absurd result standard." The court instead concluded that:

> An absurd result is not necessary, for in spite of the plain language of the [sales factor statute], the commissioner may opt for a different scheme of assessment whenever the resulting apportionment does not fairly represent the taxpayer's business in this state. The very absurdity of the result sought . . . lays a sound basis for the implementation of [the alternative apportionment method statute].

Id. at 714-15.

The California Supreme Court, in Microsoft Corp. v. Franchise Tax Bd., quoted this passage with approval as it went on to hold that "gross receipts" is not limited to net proceeds. 39 Cal.4th 750, 763, 139 P.3d 1169, 1177 (2006). Referencing California's alternative apportionment method, the court concluded that "[t]he UDITPA contains an equitable relief provision so that, in cases where application of the statutory sales definition results in excessive distortion, an 'absurd result' may be avoided."

After considering the two lines of reasoning set forth by our sister States, I conclude that the law of South Carolina favors the view expressed by the courts in New Jersey, Indiana, and Arizona.

As the Tennessee Court of Appeals correctly noted, "[i]f the words of a statute plainly mean one thing they cannot be given another meaning by judicial construction." Johnson, 989 S.W.2d at 714-15 (internal citation omitted); see also Denman v. City of Columbia, 387 S.C. 131, 138, 691 S.E.2d 465, 468 (2010) ("Under the plain meaning rule, it is not the Court's place to change the meaning of a clear and unambiguous statute."). However, to rearrange the order of the court's sentences, "This sound rule . . . is met by the equally well settled rule that: . . . 'It is presumed that the legislature enacting a statute did not intend an absurdity, and such a result will be avoided by this court if the terms of the statute admit of it by reasonable construction.'" Johnson, 989 S.W.2d at 714 (internal citations omitted).

Alternative Apportionment Method

The Tennessee and California opinions rely upon the presupposition that "an absurd result is not necessary" because the Department "may opt for a different scheme of assessment

whenever the resulting apportionment does not fairly represent the taxpayer's business in this State." Microsoft, 39 Cal.4th at 763, 139 P.3d at 1177 (quoting Johnson, 989 S.W.2d at 715). South Carolina indeed has a similar provision. S.C. Code Ann § 12-6-2320(A) (2002) provided that:

> If the allocation and apportionment provisions of this chapter **do not fairly represent** the extent of the taxpayer's business activity in this State, the taxpayer may petition for, or the department may require, in respect to all or any part of the taxpayer's business activity, if reasonable:separate accounting;
>
> (1) the exclusion of one or more of the factors;
>
> (2) the inclusion of one or more additional factors which will fairly represent the taxpayer's business activity in the State; or
>
> (3) the employment of any other method to effectuate an equitable allocation and apportionment of the taxpayer's income.

(Emphasis added).

I nevertheless find that the California and Tennessee cases, in relying upon this statutory option, miss an important distinction between the court's roles of statutory construction and application of the alternative apportionment provision. Though the alternative relief provision exists as a mechanism to correct problems caused by the application of the standard apportionment statutes (see Media Gen. Commc'ns v. S.C. Dep't of Revenue, 388 S.C. 138, 694 S.E.2d, 525 (2010)), the standard application statutes should not be so construed as to encourage excessive distortion simply because the alternative relief provision exists to remedy that distortion. In applying the principles of statutory construction, the court's function is, in part, to construe statutory law to avoid an absurd result. Ventures S.C., LLC v. S.C. Dep't of Revenue, 378 S.C. 5, 9, 661 S.E.2d 339, 341 (2008) ("[T]he Court will reject the plain meaning of the words used in a statute if it would lead to an absurd result. . . ."). If, as here, the proposed construction of a statute reaches an absurd result, our courts should recognize that absurdity and end the inquiry.

On the other hand, the function of the alternative apportionment provision is quite different. The alternative apportionment provision should be utilized only when the standard apportionment statute does not operate sensibly in a given case. As the Florida Supreme Court pointed out in Roger Dean Enters, Inc. v. State, "[t]here is a very strong presumption in favor of normal three-factor apportionment and against the applicability of the relief provisions. . . Departures from the basic formula should be avoided except where reasonableness requires."

387 So.2d 358, 363 (internal citations omitted). Further, in St. Johnsbury Trucking Co. v. New Hampshire, the New Hampshire Supreme Court, in addressing very similar statutory language, held that:

> The statutory provisions require that the three-factor formula will be used for apportioning business profits, and an alternative formula may be used if the statutory method of apportionment "does not fairly reflect the extent of the business activities of a business organization within this state." The legislature has, therefore, specified that an alternative formula **is the exception**, and the party who wants to use an alternative formula accordingly has the burden of showing that the alternative is appropriate.

118 N.H. 209, 212, 385 A.2d 215, 217 (1978) (emphasis added).[21]

In this case, to interpret the standard apportionment formula to include the return of principal in either the sales factor or gross-receipts factor of the denominator would engender an absurd application of the standard apportionment statute simply because another statute exists which allows for another means of accounting when the standard apportionment statute does not "fairly represent the extent of the taxpayer's business activity in this State." In other words, such an interpretation would create the very absurdity that courts are to avoid in their statutory construction. Rather than having Section 12-6-2320(A) available as a remedial back-up, a corporation would have nothing to lose and everything to gain by adding the return of principal to the denominator and thereby reducing the amount of taxes owed to South Carolina, regardless of whether the numbers accurately reflected the corporation's business activity within and without the State. As a result, the alternative apportionment statute, which was intended to be a remedy held in reserve for the relatively infrequent occasion that the standard formula did not result in a fair representation, would then become a standard follow-up to the application of the standard apportionment statute. Indeed, both statutes would become standard, because distortion of business activity representation would be fostered on the front end (through the principal-inclusive standard apportionment formula) so that it could, and necessarily would, be dealt with on the back end (through the alternative apportionment formula).[22]

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[21] The following states have followed the holding in St. Johnsbury Trucking: **Idaho** - Union Pac. Corp. v. Idaho State Tax Comm'n, 83 P.3d 116, 120 (Idaho 2004); and **Kentucky** - Ruby Const. Co., Inc. v. Dep't of Revenue, 578 S.W.2d 248, 253 (Ky. Ct. App. 1978).

[22] In its Memorandum in Opposition to the Department's Motion for Summary Judgment and in Support of its Cross-Motion for Partial Summary Judgment, Duke Energy argues that the definitions of "sales" and "gross receipts" set forth in S.C. Code Ann. § 12-6-2295 (2007) (effective for tax years beginning after 2006), shows the Legislature's intent to make a "drastic" change to the existing law based on its various inclusions in, and exclusions

Of course, this "best-case scenario" assumes that the Department will be able to detect when a business is including principal in the standard apportionment formula and will be able to pursue those cases. In reality, however, limited resources would dictate the exercise of more discretion in the application of the alternative apportionment method. Consequently, much, if not all, of the smaller amounts of tax revenue that the State would have received would become avoidable by including principal in the standard formula and hiding behind the newly-targeted "bigger fish" that would be including more principal in their formulas. In the aggregate, these small amounts, which the State would otherwise have gained but would instead lose through undetected inflation of the denominator and consequent underestimation of the taxes owed to the State, will equate to a rather sizeable sum lost to the State. Thus, the distortion that inevitably results from the inclusion of principal in the standard apportionment formula will pose problems for the Department and South Carolina, regardless of the size of the distortion. This potential for abuse by corporations and the futility of going through this extra-step process needlessly is reflected in a finding by the Arizona Court of Appeals that in most of the cases that the taxpayer cited to support the inclusion of the return of principal in the sales factor denominator of the standard apportionment formula, the courts "nonetheless approved exclusion of the principal from the sales factor denominator pursuant to their states' version of UDITPA's 'relief provision' [, i.e., alternative apportionment method]." Walgreen, 209 Ariz. at 901-02, 97 P.3d 896 at 76-77 (citing Union Pac. Corp. v. Idaho State Tax Comm'n, 139 Idaho 572, 83 P.3d 116, 122 (2004); Am. Tel. & Tel. Co. v. State Tax Appeal Bd., 241 Mont. 440, 787 P.2d 754, 757–58 (1990); Johnson, 989 S.W.2d at 715). Microsoft, which was decided two years after Walgreen, can be added to this list, as it applied California's alternative apportionment method statute to

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from, the definitions of "sales" and "gross receipts" that had previously not existed. According to Duke's argument, therefore, these inclusions and exclusions did not apply prior to the enactment of Section 12-6-2295. One of the inclusions would be "**net gain** from the sale of property used in the trade or business[, such as] **intangible property** used in the trade or business . . ." (Section 12-6-2295(A)(4) (emphasis added)), and one of the exclusions is the "repayment, maturity, or redemption of the **principal** of a loan, bond, or mutual fund or certificate of deposit or similar marketable instrument . . . ." Id. (B)(1) (emphasis added). According to the Supreme Court in Duvall, 377 S.C. at 46, 659 S.E.2d at 130: "When the Legislature adopts an amendment to a statute, th[e] Court recognizes a presumption that the Legislature intended to change the existing law. **Nonetheless, a subsequent statutory amendment may also be interpreted as clarifying original legislative intent.**" (Internal citations omitted) (emphasis added). In this case, the inclusion and exclusion quoted above demonstrate that the Legislature intended to exclude the return of principal from the sale of securities and other capital investments in the apportionment formula. In light of all of the reasons discussed above as to why the return of principal was excluded from the apportionment formula prior to the enactment of Section 12-6-2295, it is evident that the Legislature intended Section 12-6-2295 to clarify the existing law.

"fairly represent the extent of the taxpayer's business activity in this state" after the court included principal in the sales denominator of its standard apportionment formula.[23] Thus, any benefits from this principal-inclusion method seem to be vastly outweighed by the great cost of revenue that this State would face through continuous underestimation of taxes due to distortions.

Logical Definition of Gross Receipts

The term "gross receipts" does not plausibly include the return of principal from the sale of securities and other capital investments. "Gross income", at least in the context of self-employment or self-owned businesses, is defined as "gross receipts minus ordinary and necessary expenses required for self-employment or business operation. . . ." Spreeuw v. Barker, 385 S.C. 45, 65, 682 S.E.2d 843, 853 (Ct. App. 2009) (citing S.C. Code Ann. Regs. 114-4720(A)(4) (Supp. 2008)). This definition would logically apply to other types of businesses, too. According to this definition, gross receipts equal gross income plus ordinary and necessary expenses of business operations. The South Carolina Supreme Court in Roper v. S.C. Tax Comm'n, Title 65-Section 251 of the 1952 Code of Laws of South Carolina also defined "gross income" as: "the **income** of a taxpayer **derived from** . . . interest, rent, dividends, **securities**, or **the transaction of any business carried on for gain or profit** . . . ." 231 S.C. 587, 598, 99 S.E.2d 377, 382 (1957) (emphasis added); see also S.C. Code Ann. § 12-7-415 (****) (adopting the Internal Revenue Code's (I.R.C.) determination of gross income with modifications specified in Section 12-7-430 (which are not relevant here)); I.R.C. § 61(a) (****) (generally defining corporate gross income as "all income from whatever source derived" and covering many of the same categories mentioned in Roper)[24]; S.C. Code Ann. § 12-6-1110 (****). The Court went on

[23] Paradoxically, the court went on to justify this decision to apply the alternative method statute because it was "unable to accept, even for a moment, the notion that more than 11 percent of [taxpayer's] entire unitary business activities should be attributed to *any* single state solely because it is the center of working capital investment activities that are clearly only an incidental part of one of America's largest, and most widespread, businesses." This rationale highlights the precise reason why principal from the sale of securities and other capital investment activities should not be included in the standard apportionment formula in the first place: the inclusion of principal causes distortions as to the amount of business activity actually performed in a State, which, in turn, have to be remedied.

[24] Nowhere in South Carolina's statutory law or in the federal statutory law adopted by South Carolina is principal from investments listed as part of gross income. In fact, principal would later be excluded in S.C. Code Ann. § 2295(B)(1) (2007), which became effective for tax years after 2006. Also, it is worth noting that even in the context of child support, gross income does not include principal in the return from the sale of investments. Indeed, the inclusion of "capital gains" in the list of items considered part of gross income for child support purposes

to point out that "the word 'income' as used in a tax statute, is to be taken in its ordinary sense of gain or profit." Id. (reaffirmed as "well-settled" in Scott v. S.C. Tax Comm'n, 262 S.C. 144, 148, 202 S.E.2d 854, 856 (1974)). Because gross income includes "all income," and income, being gain or profit, excludes principal, then gross income necessarily excludes principal. Therefore, the only remaining question is whether "ordinary and necessary expenses of business operations" includes principal.

Principal, by definition, cannot be an expense of a business operation. Since ordinary and necessary business expenses are subtracted from gross receipts to yield gross income, and neither business expenses nor gross income include principal, it is impossible for gross receipts to include principal. Put another way, because gross receipts are equivalent to gross income plus ordinary and necessary business expenses, and neither gross income nor business expenses include principal, gross receipts, being the sum of those two parts, cannot include principal.[25] Inversely, Duke Energy contends that the principal is a component of the gross receipts it received. If gross receipts were also a component of gross income, then, according to Duke Energy's argument, gross income must include principal. However, inclusion of principal in gross income would create an absurd result. Generally, the taxable income of a business is its gross income minus any deductions that are allowed by state law.[26] Principal is not an item that is specifically excluded from gross income. See 26 U.S.C.A. Subt. A, Ch. 1, Subch. B, Pt. III. Thus, the logical extension of Duke Energy's argument is that taxable income includes the

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necessarily implies the exclusion of principal from the return of investment sales. See S.C. Code Ann. Regs. 114-4720(A)(2) (2012).

[25] For examples in the I.R.C. of exclusion of principal from gross receipts, see I.R.C. § 165(g)(3)(B) (****) (in the context of determining whether a corporation is affiliated with a taxpayer, "in computing gross receipts for purposes of [calculating the percentage of gross receipts that have come from particular sources], gross receipts from sales or exchanges of stocks and securities shall be taken into account *only to the extent of gains* therefrom.") (emphasis added); id. § 1362(d)(3) (in the context of a small business corporation's termination of its election to be an S corporation, where its passive investment income exceeds twenty-five percent of gross receipts for three consecutive taxable years and the corporation has accumulated earnings and profits at the close of each of those years, when capital assets (other than stocks or securities) are disposed of, "gross receipts from such dispositions shall be taken into account *only to the extent of the capital gain net income* therefrom[;] and in the case of sales or exchanges of stock or securities, gross receipts shall be taken into account *only to the extent of the gains* therefrom.") (emphasis added); and id. § 1244 (in the context of calculating the percentage of gross receipts from particular sources for determining whether "stock" means stock in a domestic corporation for determining losses on small business stocks, "gross receipts from the sales or exchanges of stock or securities shall be taken into account *only to the extent of gains* therefrom.") (emphasis added).

[26] I.R.C. § 63(a) (****).

principal and the gain. Consequently, taxpayers would be taxed not only upon the specific gains from the principal but upon the return of the principal itself.[27]

Furthermore, a corporation's South Carolina gross income and taxable income is computed as determined under the I.R.C. with the modifications as provided in the South Carolina Tax Code. See S.C. Code Ann. §§ 12-6-580 (****) and 12-7-415 (****). The I.R.C. provides that except in the case of individuals who do not itemize deductions, "taxable income" is defined as "gross income minus the deductions allowed by this chapter (other than the standard deduction)." I.R.C. § 63(a) (****); see also U.S. v. Foster Lumber Co., 429 U.S. 32, 36-37 (1976) (recognizing this definition for taxable income as applicable to the corporate respondent in that case). For the reasons given above, gross income does not include principal. Consequently, principal cannot be included in taxable income, the remainder of gross income following deductions (other than the standard deduction). Indeed, because principal is also not a deduction allowed by state law, principal cannot even be included in the calculation of taxable income.[28]

Therefore, because income is the gain or profit realized from principal, gross income, and thus taxable income, necessarily exclude principal.

Logical Definition of Sales

It is equally implausible to include principal from the sale of securities and other capital investments in the definition of "sales" for purposes of the standard apportionment formula. A major difference between the Tennessee case and the present case is that Tennessee's standard apportionment statute defined "the term 'sales' to include all **gross receipts** of the taxpayer not otherwise allocated under the Excise Tax Law." Johnson, 989 S.W.2d at 713 (emphasis in original). Likewise, the California standard apportionment statute included "all gross receipts" in the definition of "sales." South Carolina's standard apportionment statute defines the term

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[27] In light of the above analysis, the application of the holding in Roper v. S.C. Tax Comm'n, 231 S.C. 587, 99 S.E.2d 377 (1957) is even more pertinent.

[28] It is worth noting that in Foster Lumber Co., the U.S. Supreme Court reasoned that the inclusion of "gains derived from dealing in property" as part of "all income from whatever source derived" in the definition of gross income under I.R.C. Section 61(a) meant that taxable income, which includes gross income according to Section 63(a), also therefore included capital gains as well as ordinary income, in the absence of a specific exclusion of capital gains. 429 U.S. at 37. The Court's inclusion of capital gains impliedly excludes principal from gross income and thus taxable income.

"sales," but this definition does not include "gross receipts."[29] Instead, under its definition of "sales," "[i]f the income-producing activity is performed partly within and partly without this State, sales are attributable to this State to the extent the **income-producing** activity is performed within this State." (Emphasis added). This phrase "income-producing" is used to modify "activity" several other times in the definition of "sales." "Income" means "an actual gain or actual increase of wealth." See Scott v. S.C. Tax Comm'n, 262 S.C. 144, 148-49, 202 S.E.2d 854, 856 (1974) (Bussey, J., dissenting) (citing 85 C.J.S. Taxation 1096, p. 730). This emphasis on income production suggests that principal is excluded from the definition of "sales."[30] Moreover, this limitation of "sales" to the net income derived therefrom is not a novel interpretation. Indeed, our own Supreme Court has approved of an apportionment formula "whereby [a business's] sales, payroll, and property in South Carolina were divided by its national **net** sales, payroll, and property." See Eastman Kodak Co. v. S.C. Tax Comm'n, 308 S.C. 415, 416, 419, 418 S.E.2d 542, 542, 544 (1992) (holding in part that safe harbor lease transactions that were part of a corporation's business "were properly included in the denominator of the apportionment formula in computing [that corporation's] national **net income** from payroll, property, and sales.") (emphasis added). The Supreme Court in Texaco, Inc. v. Wasson, referring to S.C. Code Ann. § 12-7-1140 (****), the immediate predecessor to Section 12-6-2250 (****), further noted that "[u]nder the [three-factor] apportionment method, a corporation's entire **net income** is apportioned to this state by applying to that entire **net income** a percentage based on the 'three-factor formula' of property, payroll, and sales in this state to the corporation's total property, payroll, and sales." 269 S.C. 255, 259, 237 S.E.2d 75, 76 (1977) (emphasis added). The Court also noted that this apportionment was of the "**net income**" remaining after the direct allocation of certain items listed under Section 12-7-1120 (****) (currently Section 12-6-2220 (****)). Id. at 266, 237 S.E.2d at 80 (emphasis added). Using this

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[29] "Sales" and "gross receipts" were later further defined together by S.C. Code Ann. § 12-6-2295 (2007) (effective for tax years beginning after 2006). However, the years at issue here are 1978-2001. Further, because the Court finds as a matter of law that the refund claims filed for tax years ending 1978-1993 are untimely, the only years that will be considered for the gross receipts issue will be tax years ending 1994-2001.

[30] Though Duke Energy is a nonresident corporation, it is worth noting that South Carolina taxable income for nonresident individuals, nonresident trusts, nonresident estates, and nonresident beneficiaries include only amounts attributable to, among other things, "income from intangible personal property, including annuities, dividends, interest, and gains that is derived from property employed in a trade, business, profession, or occupation carried on in this State." It is interesting that nowhere is "principal" mentioned as an inclusion in taxable income.

interpretation and limiting the sales factor in the denominator of the three-part apportionment formula to net income is the more sound application of the apportionment formula.

The conclusion in this case is further supported by the fact that in the context of consolidated returns filed by multiple corporations conducting business within and without the State, the returns included in the sales factor of the standard apportionment formula must "contain such other information necessary to compute the **net income** of each taxpayer properly attributable to the state so that South Carolina can impose a tax on the taxpayers concerned." Emerson Elec. Co. v. Wasson, 287 S.C. 394, 396-97, 339 S.E.2d 118, 120 (1986) (discussing S.C. Code Ann. § 12-7-1570 (****) (for tax years prior to 1996), the predecessor of § 12-6-5020 (****) (for tax years after 1996)) (emphasis altered). This infers that when a single corporation also conducts business within and without the State, its net income only, and not principal, is included in the sales factor for purposes of apportioning the amount of corporate income taxes the State could impose on that corporation. See, e.g., Eastman Kodak Co., 308 S.C. at 416, 418 S.E.2d at 542 (Kodak included only the net income in the sales factor in the denominator of the apportionment formula).

Criticism of the "Absurd Results Standard"

The California Supreme Court in Microsoft criticized the proponents of the "absurd results standard," in part, because "[i]n each case, the same language governs both sales of off-the-shelf products and sales of securities. *AT&T* [(the New Jersey case)] and its progeny offer no explanation why in one instance that language should require inclusion of gross proceeds and in the other require inclusion of only net proceeds." 39 Cal.4th at 763, 139 P.3d at 1177.[31] Nevertheless, the resolution of this issue has been clarified in South Carolina by the Supreme Court's holding in Hay v. Leonard, 212 S.C. 81, 46 S.E.2d 653 (1948).

Hay involved a challenge to the validity of Charleston County's levying an annual license tax for the privilege of engaging in each and every business and occupation in Charleston County, except in the City of Charleston. In reaching its decision, the South Carolina Supreme Court explained the reason why merchandise, or "off-the-shelf products," includes gross proceeds in its taxation, and the Court's reasoning suggests why the sale of securities would not include gross proceeds. The Court explained: "the [license] tax is not on the property itself; it is

[31] This is the first of the "two problems" that the California Supreme Court had with the "absurd results" cases. The second problem will be discussed in the immediately-following paragraph.

on the **privilege of dealing with it.** The value of such privilege is measured by the gross receipts therefrom, and this is a familiar and valid method of ascertaining such value." Id. at 97, 46 S.E.2d at 660 (emphasis added). A merchant is required to possess a license in order to have the privilege of dealing in merchandise; and the tax is on this privilege, not on the merchandise. This is why "[t]he sale of all merchandise includes previous taxation . . . ." Id.; see also State ex rel. Roddey v. Byrnes, 219 S.C. 485, 514, 66 S.E.2d 33, 45 (1951) ("In general, the sales tax [,a form of excise tax], is [, like a license tax,] an imposition upon the privilege of the business of selling at retail and measured by the amount of business done . . . ."). The sale of securities is altogether different in that a license is not required to purchase or sell securities,[32] and no sales tax is imposed upon the sale of securities.[33] Therefore, here there exist no "privilege" grounds upon which to include principal in the gross receipts, as the value received from the sales of the securities for tax purposes would be measured by the capital gains, not by the principal. The principal would consist of the business's "idle cash" that would presumably have been taxed already.

Conclusion

This Court hereby follows New Jersey, Indiana, and Arizona in adopting the "absurd results" approach to interpreting South Carolina's standard apportionment statute and therefore rejects Duke Energy's attempt to include the return of principal in the denominator of the standard apportionment formula. In sum, the alternative apportionment formula exists to remediate any nonsensical application of the standard apportionment formula. However, that remediation should not be the result of a court's addition, through its failure to apply the rules of statutory interpretation, of a component to the standard apportionment formula that neither exists in the statute nor was intended by the Legislature. The absurdity that the alternative apportionment formula is intended to remediate is when a taxpayer follows the standard apportionment formula but the result is nevertheless an unfair representation of the extent of the taxpayer's business activity in the State. Construing the purpose of the alternative provision to avoid an absurd use of the standard apportionment statute clearly could open the door to the abuse of the standard apportionment statute and an excessive need to apply Section 12-6-

[32] This statement does not include securities brokering.

[33] Capital gains tax is imposed upon the sale of securities (assuming a profit is made from the sale). This tax is imposed on the profit, or "gains," made on the capital originally invested, not on the returned principal.

2320(A). Furthermore, to use the alternative apportionment provision as a means to avoid absurdity resulting from an interpretation of the standard apportionment provision that is not envisioned by the tax laws places upon the State a burden of policing tax returns that simply should not exist.

Importantly, it is not the amount of distortion that determines absurdity here. If it was, then there would exist an issue of material fact in this case, and indeed in every such case, as to the amount of distortion that would result from the inclusion of principal, and a hearing would be necessary to obtain facts whereby the degree of distortion could be measured so as to determine whether the results of principal inclusion would be absurd in this case. But such a case-by-case determination is not necessary where, as here, principal cannot, as a matter of law, be included in sales or gross receipts for purposes of the standard apportionment formula. Thus, no hearing is necessary on the gross receipts issue, and the Department's Motion for Summary Judgment as to this issue is therefore granted for the reasons set forth above.

ORDER

THEREFORE, IT IS HEREBY ORDERED that: (1) the Department's Motion for Summary Judgment with respect to the Timeliness Issue is **GRANTED**; (2) the Department's Motion for Summary Judgment with respect to the Apportionment Method Issue is **DENIED**; and (3) the Department's Motion for Summary Judgment with respect to the Gross Receipts Issue is **GRANTED**, and Duke Energy's Cross-Motion for Partial Summary Judgment as to this same issue is therefore **DENIED**.

IT IS SO ORDERED.

Ralph K. Anderson, III
Chief Administrative Law Judge

August 9, 2012
Columbia, South Carolina

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Duke Energy Corporation, Petitioner, vs. South Carolina Department of Revenue, Respondent.	)	Docket No. 10-ALJ-17-0270-CC **ORDER**

A hearing was held in this matter on June 26, 2012, at the Administrative Law Court (ALC or Court). This Court issued an Order Granting Summary Judgment in Part and Denying Summary Judgment in Part on August 9, 2012. Thereafter, Petitioner Duke Energy Corporation filed a Motion for Reconsideration of the Court's Order Granting the South Carolina Department of Revenue's Motion for Summary Judgment as to the Waiver and Gross Receipts Issues. The Department requested additional time to respond to the Petitioner's motion in light of the impending trial upon the remaining issues. Therefore,

IT IS HEREBY ORDERED that my Order that granting the South Carolina Department of Revenue partial summary judgment is hereby suspended until a decision is made upon Duke Energy Corporation's Motion.

AND IT IS SO ORDERED.

Ralph King Anderson, III
Chief Administrative Law Judge

August 29, 2012
Columbia, South Carolina

FILED
August 29, 2012
SC ADMIN. LAW COURT

CERTIFICATE OF SERVICE

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

E. Harvin Belser Fair
Judicial Law Clerk

August 29, 2012
Columbia, South Carolina

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Duke Energy Corporation, Petitioner, vs. South Carolina Department of Revenue, Respondent.	)	Docket No. 10-ALJ-17-0270-CC **AMENDED ORDER GRANTING SUMMARY JUDGMENT IN PART AND DENYING SUMMARY JUDGMENT IN PART**

Appearances:

For the Petitioners: Burnet R. Maybank, III, Esq.; Eric S. Tresh, Esq.; Jeffrey A. Friedman, Esq.; and Maria M. Todorova, Esq.

For the Respondent: Tracey C. Green, Esq.; John W. Roberts, Esq.; Harry Hancock, Esq.; and J. Abraham Gutting, Esq.

This matter is before the Administrative Law Court (ALC or Court) upon a Motion for Summary Judgment filed by Respondent Department of Revenue (Department) and a Cross-motion for Partial Summary Judgment filed by Petitioner Duke Energy Corporation (Duke Energy). The underlying case arises from the Department's denial of amended corporate income tax returns filed by Duke Energy in 2002 for income tax years 1978-2001.[1] In its Motion for Summary Judgment, the Department contends that prior to the effective date of the Revenue Procedures Act (RPA), August 1, 1995, it lacked authority to extend the limitation period during which a taxpayer could file a refund claim and therefore, as a matter of law, the Forms FS-43 executed by Duke Energy and the Department prior to that time were ineffective in extending the refund-claim filing periods, rendering Duke Energy's filing of amended corporate income tax returns for tax years ending 1978-1993 untimely.[2] The Department also contends that Duke Energy, as a matter of law, is a "manufacturer" under the applicable apportionment statute and must therefore use a multi-factor apportionment formula, consisting of property, sales, and

[1] These are the tax periods at issue in this case.

[2] Both parties stipulate that Duke Energy's amended return for tax year 1994 was timely filed.

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payroll factors, not a single-factor gross-receipts formula.[3] The Department further contends that as a matter of law, Duke Energy cannot, in its calculation of corporate income tax owed to South Carolina, include in the apportionment formula the return of principal from its sales of securities and other investment transactions. Finally, Duke Energy, in its Cross-Motion for Summary Judgment, argues that it was required to include in the apportionment formula the return of principal from its sales of securities and other investment transactions.

A hearing regarding these motions was held before this Court on June 26, 2012, in Columbia, South Carolina. On August 9, 2012, the Court issued an Order in which it granted the Department's Motion for Summary Judgment as to the timeliness of Duke Energy's amended refund claims for tax years ending 1978-1993; denied the Department's Motion for Summary Judgment as to whether Duke Energy is considered a "manufacturer" under the applicable apportionment statute; and granted the Department's Motion for Summary Judgment as to Duke Energy's inclusion of the return of principal in its apportionment formula and denied Duke Energy's Cross-Motion for Partial Summary Judgment on this issue. On August 20, 2012, Duke Energy filed a Motion for Reconsideration of the Court's Order Granting the South Carolina Department of Revenue's Motion for Summary Judgment as to the Waiver and Gross Receipts Issues. The Department filed its Memorandum in Opposition to Duke Energy's Motion for Reconsideration on September 14, 2012. After careful consideration of the arguments made by both parties, the Court has amended its August 9, 2012 Order accordingly below.[4]

FACTUAL BACKGROUND

The Department began auditing Duke Energy's corporate income taxes for income tax year ending 1978. That audit was extended a number of times, over a period of years due to the

[3] Between the tax years ending 1978-1993, taxpayers whose principal business in South Carolina was "(a) manufacturing or a 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," were required to apportion their income based on a multi-factor apportionment formula, consisting of property, sales, and payroll factors. S.C. Code Ann. § 12-6-2250 (applicable to tax years after 1995); S.C. Code Ann. § 12-7-1120 (applicable to tax years prior to 1996). In this case, no party argued that Duke Energy engaged in collecting, buying, assembling, or processing of goods and materials within South Carolina, or that Duke Energy engaged in selling, distributing, or dealing in tangible personal property within South Carolina. Therefore, the Court will only focus its discussion on whether Duke Energy was a manufacturer for purposes of Section 12-6-2250.

[4] The Court notes that Duke Energy filed an appeal of the Court's original decision granting partial summary judgment "out of an abundance of caution." Following Duke Energy's filing of a Motion to Reconsider, this Court issued an Order staying its decision granting partial summary judgment. Therefore, there was no effective decision regarding the issues addressed in the parties' cross motions for Summary Judgment until the issuance of this decision.

pending results of an audit of Duke Energy by the Internal Revenue Service (IRS), and also due to the health issues experienced by the Department's auditor and changes in the Department's personnel. These extensions were approved by Forms FS-43, each entitled "Field Services Division – Consent to Extend the Time to Assess Tax." The first Form FS-43, executed in August 1988, pertained to the income tax years ending December 31, 1983 and 1984. Significantly, the income tax years ending December 31, 1978 through December 31, 1982 were incorporated into the executed Forms FS-43 in May 1996. Additional Forms FS-43 periodically were executed and additional income tax years added until the execution of the final Form FS-43 in June 2002.

In December 2002, Duke Energy filed amended corporate tax returns for the income tax years 1978-2001 seeking a total refund of $126,240,645 plus interest.[5] Duke Energy sought to change the apportionment formula – the mechanism for determining how much income is associated with Duke Energy's South Carolina's business activities – to the single-factor gross-receipts apportionment formula instead of the three-factor formula that it had previously used. It also sought to include the gross receipts, including the return of principal, from its sales of securities and other capital investments in the denominator of the gross-receipts formula for tax years 1978-1999.[6] However, on February 4, 2010, the Department denied Duke Energy's refund claims, after which Duke Energy filed a request for a contested case hearing with this Court on March 3, 2010.

STANDARD OF REVIEW

Rule 68 of the Administrative Law Court Rules provides that "[t]he South Carolina Rules of Civil Procedure . . . may, in the discretion of the presiding administrative law judge, be applied in proceedings before the Court to resolve questions not addressed by these rules." ALC Rule 68. Rule 56(c) of the South Carolina Rules of Civil Procedure states that summary judgment is properly granted when the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to

[5] This is the amount set forth by the Department. However, Duke Energy stated in its Memorandum in Opposition to the Department's Motion for Summary Judgment and in Support of Duke Energy's Cross-Motion for Partial Summary Judgment that the Department's refund calculations in its Memorandum were incorrect, and that damages would need to be resolved should the Court find in the Department's favor on any issue.

[6] For 2000 and 2001, Duke Energy's original tax returns included receipts from sales of securities in the sales factor in the denominator of the three-factor formula.

any material fact and that any party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP.

"The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder." George v. Fabri, 345 S.C. 440, 452, 548 S.E.2d 868, 874 (2001). "In determining whether summary judgment is proper, the court must construe all ambiguities, conclusions, and inferences arising from the evidence against the moving party. Byers v. Westinghouse Elec. Corp., 310 S.C. 5, 7, 425 S.E.2d 23, 24 (1992). Because it is a drastic remedy, summary judgment should be cautiously invoked to ensure that a litigant is not improperly deprived of a trial on disputed factual issues. Helena Chem. Co. v. Allianz Underwriters Ins. Co., 357 S.C. 631, 644, 594 S.E.2d 455, 462 (2004). However, "when plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted." Bayle v. S.C. Dep't of Transp., 344 S.C. 115, 120, 542 S.E.2d 736, 738 (Ct. App. 2001).

S.C Code Ann. § 1-23-600(A) (Supp. 2010) grants jurisdiction to the ALC to hear contested cases under the Administrative Procedures Act. Additionally, Section 12-60-460 grants the ALC the authority to conduct contested case hearings in matters concerning tax assessment and refunds.

DISCUSSION

I. Timeliness of Duke Energy's Amended Income Tax Return Filings

The Department asserts that Duke Energy did not timely file its request for tax refunds for tax years ending 1978-1993 and therefore this case should be summarily dismissed. Undisputedly, in every instance Duke Energy's amended tax returns for tax years ending 1978-1993 do not meet the statutory deadline to file its amended tax returns. Duke Energy nevertheless argues that its amended tax returns for the disputed tax years were timely filed because the Forms FS-43 extended the statutory deadlines for filing claims for tax refunds and waived any refund limitation periods. In this case, there is no dispute that both parties executed a number of Forms FS-43 periodically between the years 1988 and 2002. The parties also stipulated in their respective memoranda regarding the motions for summary judgment and in the

hearing held before this Court on June 26, 2012 that the Form FS-43 executed on December 19, 1997 for the tax year ending 1994 effectively extended the period for filing a refund claim. [7]

Duke Energy argues that the execution of the Forms FS-43 covering the income tax years ending 1978-1993 extended the deadlines for filing claims for tax refunds and waived any refund limitation periods. Duke Energy also argues that because the Department could order a refund if it discovered that a taxpayer had overpaid a tax, a penalty, or interest, even after a refund limitation period, this allows Duke Energy to file a claim for a refund after the limitation period. The analysis of Duke Energy's arguments is addressed in three parts: A) Did S.C. Code Ann. § 12-54-80 grant authority to the Department to extend the time to file an amended tax return; B) did S.C. Code Ann. § 12-54-30 authorize Duke Energy to file an amended tax return requesting a refund beyond the statutorily-prescribed timeframe; and C) did the language in the Form FS-43 executed by the Department extend the time for Duke Energy to file an amended tax return?

A. Statutory Authority to Extend the Time to File an Amended Tax Return

Duke Energy contends that Section 12-54-80 authorizes a taxpayer to request a refund once an extension is granted pursuant to that provision. Section 12-54-80, which applied to the tax periods prior to August 1, 1995 (the enactment date of the Revenue Procedures Act (RPA)), provided:

> If, before the expiration of the time prescribed in this section for the mailing of a notice of assessment, the taxpayer has consented in writing to the mailing of the notice after the time, **notice of assessment may be mailed** at any time prior to the expiration of the period agreed upon. The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon.

S.C. Code Ann. § 12-54-80 (1978) (repealed in 1995) (emphasis added).

In general, when interpreting a statute, the sole function of the Court is to determine and give effect to the intent of the legislature. Hodges v. Rainey, 341 S.C 79, 85, 533 S.E.2d 578, 581 (2000). The starting point in doing so should always be the text of the statute itself. Id. (holding that "[w]hat a legislature says in the text of a statute is considered the best evidence of

[7] Pursuant to S.C. Code Ann. § 12-47-440 (****), which applied to the tax years ending 1990-1994, the period for filing a refund claim was three years. Moreover, S.C. Code Ann. § 12-6-4970(B), which was also applicable during these years, allowed a three-year time period for filing a refund claim for the tax year ending 1994 which would have begun on March 15, 1995. Therefore, because the filing of the Form FS-43 for the year 1994 was executed on December 19, 1997- after the enactment of the RPA and, and thus before March 15, 1998 - the period for filing a refund claim was still open. Consequently, the extension of the deadline was effective.

the legislative intent or will"); Wigfall v. Tideland Utils., Inc., 354 S.C. 100, 110, 580 S.E.2d 100, 105 (2003). In interpreting the text, the plain meaning rule requires that "words must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand that statute's operation." State v. Leopard, 349 S.C. 467, 471, 563 S.E.2d 342, 344 (Ct. App. 2002). Finally, "[w]here the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning." Hodges, 341 S.C. at 85, 533 S.E.2d at 581.

Moreover, in considering this issue, this Court is further bound by the rules of statutory construction relating to tax law. For instance "[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 the same. . . ." Asmer v. Livingston, 225 S.C. 341, 344, 82 S.E.2d 465, 466 (1954) (internal citations omitted); Guar. Bank & Trust Co. v. S. Carolina Tax Comm'n, 254 S.C. 82, 173 S.E.2d 367 (1970) ("A refund of taxes is solely a matter of governmental or legislative grace and any person seeking such relief must bring himself clearly within the terms of the statute authorizing the same."). The Court's analysis in Guaranty Bank, also offers guidance in this case. In Guaranty Bank, the taxpayer claimed it was entitled to recover income tax paid on gain from an involuntary conversion of property. However, the law at the time prescribed a specific timeframe in which the proceeds from the converted property must be reinvested. In construing whether the taxpayer's claim was timely the Court held that the "statutory language creating exemption from taxation will not be strained or liberally construed in favor of the taxpayer claiming an exemption, and he must, in order to be entitled to such exemption, clearly bring himself within the exemption on which he relies." 254 S.C. at 89, 173 S.E.2d at 370.[8] Furthermore, in making that determination, the Court recognized its previous holding that "a taxpayer who seeks to take advantage of a tax deduction must meet the conditions of the statute creating such." Id.

Here, the plain language of Section 12-54-80 does not establish any authority to extend a taxpayer's right to seek a refund but rather allowed the Department, with the taxpayer's consent, to extend the time for it to mail its assessment of the tax owed by the taxpayer. Clearly, when

[8] The court in Guaranty Bank, likewise held that "in order for a taxpayer to avail himself of a deduction in the calculation of a tax, he must bring himself squarely within the terms of the statute expressly authorizing it." 254 S.C. at 89-90, 173 S.E.2d at 370.

speaking of mailing an assessment, the statute is speaking to an action by the Department. Thus, the plain language of the form extends the timeframe for the Department to mail an assessment to the taxpayer.

Moreover, Section 12-54-80 does not use the word "refund" anywhere within that provision. As explained below, the legislature set forth specific provisions expressing the timeframe to seek a refund for tax years ending 1978-1993. In Spectre, LLC v. S.C. Dep't of Health & Envtl. Control, 386 S.C. 357, 372, 688 S.E.2d 844, 852 (2010), the South Carolina Supreme Court held that: "Where there is one statute addressing an issue in general terms and another statute dealing with the identical issue in a more specific and definite manner, the more specific statute will be considered an exception to, or a qualifier of, the general statute and given such effect." Here, it is incredulous that the legislature intended to grant an exception to the timeframe to seek a refund without even mentioning the term.

The Court nevertheless recognizes that the **application** of Section 12-54-80 could result in a refund of taxes paid by the taxpayer, but clearly such a refund would occur within the context of fulfilling the purpose of the statute. The purpose of Section 12-54-80 is to provide an option for the Department to extend the time during which the "notice of assessment may be mailed." If, after the extension of time to make its determination, the Department decided that a taxpayer owed additional taxes, it would notify the taxpayer of that assessment and seek payment based upon that assessment. Conversely, if the Department's assessment of the taxes owed was less than the taxes proffered by the taxpayer, the taxpayer would be refunded the difference.[9] However, there is simply no language in Section 12-54-80 that provides that if the Department requests to extend its time to mail a notice of assessment—or determination of the taxes owed—this request, in turn, creates a right for a taxpayer to amend its previous filing and seek a refund upon its revised request.

This Court cannot simply by implication extend the time to file a refund request. Duke Energy must establish a statutory right to make that claim. To the contrary, Duke Energy failed to meet the required timeframes to request a refund for tax years 1978 to 1993. The timeframes for making those refund requests fell into two distinct regulatory periods: 1) 1978 to 1989; and 2) 1990 to 1993.

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[9] As addressed more fully below, S.C. Code Ann. § 12-54-30 (****) granted the Department the authority to issue a refund under those circumstances.

1. Income Tax Years Ending 1978-1989

The South Carolina Supreme Court set forth in Bass v. State that Section 12-47-440 only applied to property taxes and that "the exclusive remedy for contesting an alleged erroneous assessment of *income taxes* [is] by payment under protest of the tax claimed as illegal and a suit at law for recovery of the sum so paid, in accordance with Sections 65-2661 and 65-2662 of the Code. [predecessors of §§ 12-47-210 and 12-47-220]." 307 S.C. 113, 117, 414 S.E.2d 110, 112 (1992), (internal quotation marks omitted) (emphasis in the original), cert. granted, judgment vacated on other grounds by Bass v. South Carolina, 509 U.S. 916 and abrogated by Harper v. Virginia Dep't of Taxation, 509 U.S. 86 (1993); see also Perpetual Bldg. & Loan Ass'n of Columbia v. S.C. Tax Comm'n, 255 S.C. 523, 527, 180 S.E.2d 195, 197 (1971). Thus, the timeliness of Duke Energy's refund claims for the years 1978-1989 is governed by S.C. Code Ann. §§ 12-47-210 and 12-47-220 (****).[10]

Sections 12-47-210 and 12-47-220 required a taxpayer who sought to receive a refund of amounts paid to the state to expressly pay the taxes under protest and then institute an action in circuit court within 30 days after payment of the taxes. See S.C. Nat. Bank v. S.C. Tax Comm'n, 297 S.C. 279, 282, 376 S.E.2d 512, 514 (1989). Failure to pay the taxes under protest was fatal to a refund claim. See, e.g., City of Columbia v. Glens Falls Ins. Co., 245 S.C. 119, 139 S.E.2d 529 (1964). Here, there is no evidence that any of the payments for these years were made under protest. And even if the payments were made under protest, no action was filed in circuit court within 30 days after the payment was made. Rather, the refund claims were filed in the ALC well after the 30-day period expired.[11] Therefore, none of the refund claims filed for Duke

[10] (****) is used in this order in lieu of statutory years because this case involves numerous tax years, and therefore the years of the applicable statutes are equally numerous and varying, and the law applicable during many years was unchanged. The statutory law can be divided into two yearly ranges: 1978-1995 and 1996-2001, as the law regarding this issue did not change during the first range, and then did not change during the second range after the RPA changes in 1995.

[11] There is also an additional reason for concluding the purported extensions of the corporate income tax years 1978-1982 are untimely. These years appeared for the first time on the face of the executed Form FS-43 effective May 30, 1996. Obviously, under either the modern era provisions or the pre-1995 provisions, these extensions were executed well after the refund periods had closed. See S.C. Code Ann. § 12-54-85 (three years from date return filed or two years after date of payment); S.C. Code Ann. §§ 12-47-210, -220 (pay under protest and file claim for refund within 30 days). The only available avenue for reviewing the taxable income of the years 1978-1982 therefore would have been the statutory provisions regarding an assessment based on a determination issued by the IRS. See S.C. Code Ann. §12-54-85(D)(1); *cf.* S.C. Code Ann. § 12-54-80 (prior law). However, Duke Energy did not establish that the IRS issued a final determination within 180 days of May 30, 1996. Moreover, any extension attributable to an IRS determination in that circumstance would have been limited to the tax issues raised by the IRS. Because the allocation and apportionment issues raised by the taxpayers could not have been at issue in an IRS

Energy's 1978-1989 tax years were timely. I thus conclude that the refund claims for the tax years 1978-1989 also are barred from consideration by this Court.

2. Income Tax Years Ending 1990-1994

As explained above, in 1992 the South Carolina Supreme Court in Bass held that Section 12-47-440 only applied to property taxes and that the exclusive remedy for obtaining a refund of income taxes was Sections 12-47-210 and 12-47-220 (****). Id. However, the General Assembly thereafter amended Section 12-47-440 to expressly apply to income tax refund claims, but only for tax years beginning in 1990 and later. See Act No. 464, 1994 S.C. Acts, Section 3(B).

Section 12-47-440 provides for a three-year period of limitation in which to file a refund claim. Therefore, for the 1990-1994 tax years, Duke Energy was required to file its claims for refund within three years after its corporate income tax return was originally due. It is undisputed that Duke Energy filed its corporate income tax returns based on a calendar year. Thus, the returns and payment originally were due without regard to any extension on March 15th of the following year. S.C. Code Ann. §§ 12-6-4970(B) (effective for tax years beginning after 1995); 12-7-1640 (effective for tax years prior to 1996). The refund periods applicable to Duke Energy under Section 12-47-440 for the income tax years 1990-1994 were therefore as follows:

Income Tax Years	**Return Originally Due**	**Close of Refund Period**
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
1994	March 15, 1995	March 15, 1998

B. Section 12-54-30

In its Post-Trial Brief, Duke Energy nevertheless argues that during the tax years at issue S.C. Code Ann. § 12-54-30 (****) provided a different "mechanism" by which it could file an amended tax return requesting a refund. Section 12-54-30 provided in relevant part that: "If the commission discovers on examination of a return or otherwise that the tax, penalty, or interest paid by any person is in excess of the amount legally due, the commission may order a refund or give credit for the overpayment." The plain language of Section 12-54-30 permitted the

determination, the purported extensions of the 1978-1982 tax years are untimely for purposes of the issues before this Court.

Department to refund amounts discovered on examination of a return. See Anders v. S.C. Parole & Cmty. Corr. Bd., 279 S.C. 206, 305 S.E.2d 229 (1983) ("[T]he Court's primary function in interpreting a statute is to ascertain the intention of the legislature, and when the terms of the statute are clear and unambiguous, the Court must apply them according to the literal meaning."). Section 12-54-30 does not reference whatsoever the timeframe for a taxpayer to file a request for a refund. To the contrary, as set forth above, there were specific statutes that articulated the timeframe in which a taxpayer could file for a refund for tax years 1978 to 1993. As aforementioned, the statute which deals with an issue in a more specific and definite manner prevails over a statute which addresses the issue in general terms, Spectre, 688 S.E.2d 844. Furthermore, "[w]hen construing statutory language, the statute must be read as a whole, and sections which are part of the same general statutory law must be construed together and each one given effect." Duvall v. S.C. Budget and Control Bd., 377 S.C. 36, 42, 659 S.E.2d 125, 127 (2008).

Thus, Section 12-54-30 allowed the Department to grant relief to a taxpayer if it discovered an overpayment on examination of a return or otherwise, even if a claim for refund would be untimely. It did not, however, change the fact that the taxpayer had to strictly comply with the provisions of the refund statutes if it wanted to file a claim for refund that would be subject to judicial review. See Hodges v. Rainey, 341 S.C. 79, 533 S.E.2d 578 (2000) ("The canon of construction '*expressio unius est exclusio alterius*' or '*inclusio unius est exclusio alterius*' holds that 'to express or include one thing implies the exclusion of another, or of the alternative.'"). The logic of this interpretation of Section 12-54-30 was reflected in Argent Lumber Co. v. Query, 178 S.C. 1, 182 S.E. 93 (1935), overruled on other grounds by McCall by Andrews v. Batson, 285 S.C. 243, 329 S.E.2d 741 (1985). The Court in Argent Lumber held that under a statute similar to the one in the present case, the taxpayer had no right to judicial review of the Tax Commission's refusal to grant the taxpayer a refund notwithstanding the Commission's discovery of overpaid taxes and the Commission's authority to grant refunds at the time of the tax periods at issue. The reason for this, aside from a lack of statutory authority at the time to compel the Commission to issue a refund of overpaid taxes, was that the taxpayer had failed to comply with the refund statute but instead waited more than ten years after the overpayment and almost four years after the amount of the claim was ascertained to bring suit. Id. at 94-95.

C. Form FS-43

In light of the statutory timeframes for filing an amended return requesting a refund, Duke Energy's case centers upon the implications of the Department's Form FS-43. Duke Energy contends that the Forms FS-43 executed in this case allowed it additional time to file a claim for a refund, an extension that would run for more than twenty years in some cases. At the outset, I do not find that the Forms FS-43 authorized a party to seek a refund after the statutory time for filing such a request.

The language contained in the Form FS-43 prior to August 1, 1995 was 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.

(Emphasis added).

Clearly, when referencing the mailing of the notice of an assessment or refund, Form FS-43 is speaking to an action by the Department. Thus, the plain language of the form extends the timeframe for the Department to mail the notice of a refund or assessment to the taxpayer in keeping with Section 12-54-80. That purpose is reflected by the title of the Form FS-43: "Consent to Extend the Time to Assess Tax." The purpose also logically flows from the operation of the tax laws. Because a notice of assessment is issued and mailed by the Department, it necessarily follows that Form FS-43 applies only to extend the time in which the Department may issue and mail a notice of assessment or refund that it determines is due. Thus, the refund language in Form FS 43 refers **not** to allowing a taxpayer additional time in which to file a claim for a refund—which, as explained above, the statutory provisions did not permit—but to affording the Department additional time to review the taxpayer's records and issue a notice of assessment or refund, as it determines appropriate based on a review of the taxpayer's records.

Furthermore, Form FS-43 does not **infer** that a taxpayer has a right to amend its previous tax filing and seek a refund upon alternative grounds. Duke Energy's proposition is not supported by a specific statutory grant of the authority to extend the timeframe to file an amended request for a refund. Rather, Duke Energy reasons that the use of the term "refund" in the Form FS-43 language infers the grant of an extension to file its request for a refund. However, Form FS-43 reflects its limited purpose by referencing the time an assessment or refund is allowed "pursuant to the provisions of Section 12-54-80." As explained above, Section

12-54-80 does not authorize a taxpayer to file a request for a refund outside of the statutes that specifically set forth that timeframe.

Duke Energy nonetheless contends that since the Department agrees that Form FS-43 had that effect for 1995 and later, it must have had that effect before 1995. Duke Energy avers that since the "refund" language is absent in S.C. Code Ann. § 12-54-85(C)(5) (****) – the section with which the RPA supplanted Section 12-54-80 as of August 1, 1995 – that indeed Section 12-54-80 must have also have granted it the right to file an amended tax return seeking a refund. [12] Indeed, Form FS-43 now operates to extend the time for both assessment and refunds for 1995 and later. The language contained in the Form FS-43 following August 1, 1995 is the same except that instead of reference to "Section 12-54-80," it makes reference to "Section 12-54-85(C)(5)." The language contained in Section 12-54-85(C)(5) provides the following:

> Taxes may be determined after the thirty-six month limitation if:
>
> * * *
>
> (5) the person liable for any taxes consents in writing, before the expiration of the time prescribed in this section for assessing taxes due, to the assessment of the taxes after the time prescribed by this section.

Duke Energy's argument, however, ignores the substantial and wholesale changes that were enacted as part of the RPA. As with Section 12-54-80, the provisions addressing the authority and timeframes within which to seek a refund were addressed in separate statutory provisions. The RPA added S.C. Code Ann. § 12-60-470 (****), which states that "[a] taxpayer may seek a refund of any state tax by filing a written claim for refund with the [D]epartment. . ." and that a "claim for refund is timely filed if filed within the period specified in Section 12-54-85 . . . ." The RPA also added S.C. Code Ann. § 12-60-40 (****), which allows the Department to grant extensions of any tax-related time limitations. "It will be presumed that the Legislature in adopting an amendment to a statute intended to make some change in the existing law." Vernon v. Harleyville Mut. Cas. Co., 244 S.C. 152, 155, 135 S.E.2d 841, 844 (1964). It is therefore clear that the General Assembly intended to grant the Department, through the RPA, the authority to

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[12] Duke Energy also pointed out that the Forms FS-43 executed by the Department and Duke Energy from 1996 to 1999, well after the redesignation of Section 12-54-80 as Section 12-54-85, continued to make reference to Section 12-54-80, a statute that no longer existed. And the Forms FS-43 executed by the Department and Duke Energy from 2000 through 2002 incorrectly cited to subsection (C)(5) of S.C. Code Ann. § 12-54-85 instead of subsection (C)(4). Those arguments carry no legal value, but are probative as to the apparent shoddy fashion in which the Forms FS-43 were executed.

extend the period for filing of refund claims, an extension of power which the General Assembly had theretofore limited to the deadline for mailing notices of assessment.

Moreover, "[a]n administrative agency has only the powers conferred on it by law and must act within the authority created for that purpose." SGM-Moonglo, Inc. v. S.C. Dep't of Revenue, 378 S.C. 293, 295, 662 S.E.2d 487, 488 (Ct. App. 2008). In fact, "[a]ny action taken by [the Department] outside of its statutory and regulatory authority is null and void." Triska v. Dep't of Health & Envtl. Control, 292 S.C. 190, 194, 355 S.E.2d 531, 533 (1987). Thus, even if Form FS-43 inferred that a taxpayer has a right to extend the timeframe to request for refund, the Department cannot exceed its statutory authority based upon that form.

In its Memorandum of Law in opposition to the Department's Motion for Summary Judgment, Duke Energy further argues that because Form FS-43 does not reference Section 12-54-30, that statute does not apply to the Department's determination in this matter. Putting aside the application of Section 12-54-30 in this case, the fallacy of Duke Energy's assertion is referred to as "the fallacy of denying the antecedent" and is illustrated in a hypothetical syllogism as:

> If A, then B.
>
> Not A.
>
> Therefore, not B.

Ruggero J. Aldisert, Logic for Lawyers: A Guide to Clear Legal Thinking 160 (National Institute for Trial Advocacy 3d ed. 1997); see also Irving M. Copi, Introduction to Logic 295 (5th ed. 1978).

Stated in terms of syllogism, Duke Energy's arguments proceed as follows:

> If Form FS-43 had referenced Section 12-54-30, then that section would be applicable to determining the timeframe for a refund pursuant to Form FS-43.
>
> Form FS-43 did not reference Section 12-54-30.
>
> Therefore, Section 12-54-30 is not applicable to determining the timeframe for a refund pursuant to Form FS-43.

Other courts have also found this reasoning to be faulty. For instance, in Crouse-Hinds Co. v. InterNorth, Inc., 634 F.2d 690, 703 (2d Cir. 1980), the court held that:

> The proposition that "A implies B" is not the equivalent of "non-A implies non-B," and neither proposition follows logically from the other. The process of inferring one from the other is known as "the fallacy of denying the antecedent."

634 F.2d at 703 (cited in Logic for Lawyers).

Moreover, logic dictates a conclusion contrary to Duke Energy's assertion. The failure to reference a provision that governs when the Department may issue a refund upon its own initiative does not suggest it is inapplicable. Nevertheless, the failure to reference any statute (including Section 12-54-30) that addresses the authority of the Department to issue refunds profoundly suggests that Form FS-43 was not addressing a taxpayer's authority to amend its tax returns and seek a refund, or the Department's authority to extend the timeframe within which a refund claim could be filed. If Form FS-43 was granting the authority to extend the time to make refund claims, it would not only reference the statute upon which that authority was granted, but would presumably do so with clarity rather than making the reference: "mailing of notice of assessment or refund." To the contrary, Form FS-43 was based upon Section 12-54-80, which governs the time period in which the Department could assess taxes – a provision that says nothing about refunds or extensions of time to file refund claims.

Waiver of a Statute of Limitations

Duke Energy also contends that the Department "waived" the "statute of limitations" for filing a refund. Duke Energy bases its contention upon the language of Form FS-43; upon the alleged grant by Department employees of an extension of the time during which to file a request for a refund; and upon Duke Energy's belief that the Department's Revenue Procedures reflected that right. Duke Energy contends that "[f]or years, the Department advised taxpayers that it had in place a policy to execute waiver agreements extending the statute of limitations for both assessments and refunds."[13]

However, the phrase "statute of limitations" invokes specific case law that is not applicable to this matter. Obviously, this case does not involve a "cause of action" in which the Court must first determine when the statute of limitations begins to run. In other words, it does not involve parties who possess the discretion to control when a cause of action may properly accrue. Rather, this case involves a determination of when the State of South Carolina grants a right to seek a refund pursuant to the existing tax laws. In Dep't of Conservation v. Co-De Coal Co., 388 S.W.2d 614 (Ky. 1965), the court aptly explained the distinction between a statute of

[13] In its post-hearing brief, Duke Energy alleges that the Department had respected the "waiver" agreements it had with Duke Energy for tax years 1978-1994 by agreeing, in 2002, to offset refunds of its South Carolina corporate income tax for tax years 1978-1994 against the corporate income, license, and sales taxes for those same years, resulting in a net refund owed to Duke Energy. However, this allegation was based on an affidavit referred to as the "Monroe Affidavit," designated as "Exhibit A," that was not submitted prior to, or during, the hearing. Therefore, this Court will not consider this information in rendering its decision.

limitations and a statutory timeframe for filing a request for refund from a state. The court noted: "whereas a statute of limitations neither creates nor extinguishes any rights, but merely places a limitation upon the remedy (which can be waived or tolled), a limitation such as the one in question is a condition essential to the existence of the right." Co-De Coal, 388 S.W.2d at 617 (internal citations omitted). The court added: "The bringing of the action within the limited time is a condition to the exercise of the right, and, if the condition is not complied with, there is neither right nor remedy." Id. (internal citation and quotation marks omitted).

Indeed, this concept is supported by South Carolina case law. In Labruce v. City of N. Charleston, 268 S.C. 465, 234 S.E.2d 866 (1977), the appellants instituted an action to recover business license taxes paid under protest. The Court recognized that at that time, Section 65-2661 et seq., Code of Laws, 1962, provided the exclusive remedy for the recovery of contested taxes and held that "[s]trict compliance with the conditions precedent is prescribed when one invokes the statutory remedy." 234 S.E.2d at 867. See also 4 S.C. Jur. Action § 13 ("One who invokes a statutory remedy must bring himself within the statute and comply with the conditions prescribed therein. Moreover, the Court of Appeals recently reiterated this principle, noting that a nonclaim statute (the sort at issue in the present case)[14] differs from a statute of limitations in that a nonclaim statute creates no enforceable right of action "[u]nless the claim is filed within the prescribed time set out in the statute," whereas a statute of limitations "creates a defense to an action brought after the expiration of the time allowed by law for the bringing of such an action." Phillips ex rel. Barnett v. Quick, Op. No. 5003, 2012 WL 2913296 (S.C. Ct. App. filed July 18, 2012) (citing Estate of Decker v. Farm Credit Servs. Of Mid-Am, ACA, 684 N.E.2d 1137, 1138-39 (Ind. 1997).

As a general rule, when a statute creates a new right and at the same time prescribes a remedy for enforcing the right, the prescribed statutory course must be followed by anyone claiming the right."); 72 Am. Jur. 2d State and Local Taxation § 996 ("Strict compliance with conditions precedent is required to invoke the statutory remedy for recovery of contested taxes."). When a statute both creates a cause of action and includes a time limit for its commencement, compliance with the time limit is a condition precedent to the maintenance of

[14] A nonclaim statute is one that creates a right of action and provides a time limit on exercising that right. It imposes a condition precedent, as the time element is part of the right of action. 54 C.J.S. Limitation of Actions §33 (updated May 2012).

the action. 54 C.J.S. Limitations of Actions § 31 (updated October 2010). "Such a statutory time limit conditions the existence of the right of action, thereby creating a substantive, rather than procedural, limitation on the right. Bringing suit within the prescribed time is a condition of liability itself, not of the remedy alone." Id.

Thus, the statutes that grant a South Carolina taxpayer a right to seek a refund are not statutes of limitations but rather conditions precedent to obtain a right to a refund. Accordingly, the courts have not adopted the doctrine of waiver involving tax claims. To the contrary, a refund of taxes is considered "solely a matter of governmental grace, . . . and any person seeking such relief must bring himself clearly within the terms of the statute authorizing the same." Asmer v. Livingston, 225 S.C. 341, 344, 82 S.E.2d 465, 466 (1954) (internal citations omitted); see also C.W. Matthews Contracting Co., Inc. v. S.C. Tax Comm'n, 267 S.C. 548, 554, 230 S.E.2d 223, 226 (1976); Guar. Bank & Trust Co. v. S.C. Tax Comm'n, 254 S.C. 82, 173 S.E.2d 367 (1970) (holding that the circuit court erred in extending the time periods under the statute because that is a legislative and not a judicial function). Therefore, the South Carolina Supreme Court held in TNS Mills, Inc. v. S.C. Dep't of Revenue, 331 S.C. 611, 623, 503 S.E.2d 471, 478 (1998) that the Department employee's erroneous interpretation of a statute was not binding on the courts, and that Department employees cannot make changes in the refund procedure established by the General Assembly or exceed the authorization granted by a statute. See also Argent Lumber Co., 182 S.E. at 95 ("[T]he agent of the tax commission could not alter, amend, or change the statute law of this state, either orally or by written agreement . . . ."). The United States Supreme Court further explained that an employee of the government has no authority to waive or extend a refund period except to the extent authorized by the governing statute. U.S. v. Garbutt Oil Co., 302 U.S. 528 (1938) (Officers of the government have no power to waive statutes of limitations; and Commissioner cannot consider untimely filed returns); see also Dickow v. United States, 740 F. Supp. 2d 231, 237 (D. Mass. 2010) aff'd, 654 F.3d 144 (1st Cir. 2011) cert. denied, 132 S. Ct. 1046 (2012) ("The Executor cannot rely upon the IRS' failure to advise him of the denial to justify his purported conclusion that his second request had been granted where, as here, the IRS clearly did *not* have the authority to issue such extension.").

The only case cited by Duke Energy that involved a refund claim was Anonymous Taxpayer v. S.C. Dep't of Revenue, 377 S.C. 425, 661 S.E.2d 73 (2008). However, the relief sought by the taxpayer in that case was based on the contention that the taxpayer's right to

retirement benefits was in the nature of a contract. The Supreme Court's discussion of the statute of limitations in Anonymous Taxpayer was predicated upon the taxpayer's argument that there "was a contract providing for continuing performance, thus the limitations period began anew each year." The Court noted long ago that statutes of limitations could be waived with respect to actions based on contract. See Heyward v. S.C. Tax Comm'n, 240 S.C. 347, 351, 126 S.E.2d 15, 17 (1962) ("We have held that the State may be subject to the doctrine of estoppel in its contractual relations."). Nevertheless, the Court did not hold that refund claims are in the nature of a contract and, in fact, has held the opposite. See id.; see also C. W. Matthews Contracting Co., 267 S.C. at 554, 230 S.E.2d at 226 (a tax refund claim is created by statute and is not in the nature of a debt collection claim).

In sum, since no employee or agent of the Department has any authority to waive the authorization granted by Section 12-54-80, Form FS-43 could grant no more rights than those permitted by this statute. Thus, any statement made by a Department employee, either verbally or in writing, agreeing to waive the time to request a refund, which was inconsistent with Section 12-54-80, was outside of that employee's authority. Consequently, I conclude that the Forms FS-43 executed before August 1, 1995, and any other statements, written or oral, given by DOR's employees, were ineffective in extending the statutory filing period for Duke Energy's refund claims or in waiving that period.

Moreover, even under section 12-54-85(F)(1), with the exception of situations where there are changes made to taxable income reported to the IRS, or when the IRS changes a corporation's taxable income, "claims for . . . refund must be filed within three years of the time the return was filed, or two years from the date of payment, whichever is later. If no return was filed, a claim for refund must be filed within two years from the date of payment." S.C. Code Ann. § 12-54-85(F)(1) (1995). Also, "[a] claim for refund can be amended prior to, but not after, the expiration of the time for filing the claim for refund under Section 12–54–85(F)." Id. § 12-60-470(H). Read together, these sections lead to the conclusion that once a refund period expires under the terms set forth by the legislature, that period of time cannot be revived by the consent of the Department or otherwise; rather, any amendments **must** be made **prior to** the expiration of the statutory period for filing refund claims. See Am. Legion Post 15 v. Horry County, 381 S.C. 576, 582, 674 S.E.2d 181, 183-84 (Ct. App. 2009) (holding in part that the three-year limitations period under section 12-54-85(F)(1) barred a taxpayer's action seeking a refund). Thus, even

after the RPA took effect on August 1, 1995, and the Department received its new power to extend the period for filing refund claims, the Department was unable to use this power to revive refund claims periods that had expired due to the close of the three-year limitations period applicable to the income tax years ending 1990 through 1994 or due to failure to pay under protest and file a claim for a refund within thirty (30) days for the tax years ending prior to 1990.

Equitable Estoppel

Duke Energy similarly asserts that the Department should be estopped from asserting its "statute of limitations." The basis for this contention is that the Department employees purportedly viewed Form FS-43 as waiving the statutory refund limitations period, and that Duke Energy "agreed to the waivers because the Department represented verbally and in writing that the statute of limitations was extended for both tax assessments and tax refund claims."

As with waiver of a statute of limitations, the courts have recognized that the estoppel doctrine is limited in reviewing tax claims. As a general rule, "the doctrine of estoppel will not be applied to 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." Heyward v. S.C. Tax Comm'n, 240 S.C. 347, 351, 126 S.E.2d 15, 17 (1962) (emphasis added). In the only South Carolina appellate decision touching upon taxation issues and equitable estoppel, the Court of Appeals held that equitable estoppel did not apply to bar a county from asserting the statute of limitations as a defense to refunding admissions fees paid in connection with bingo games. Am. Legion Post 15, 381 S.C. at 583, 674 S.E.2d at 184.

Also, to invoke estoppel in this case, the Department employees must be authorized to change the procedure for obtaining a refund. However, in Texaco, Inc. v. Wasson, the South Carolina Supreme Court explained 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." 269 S.C. 255, 264-65, 237 S.E.2d 75, 79 (1977). Similarly, in TNS Mills, Inc., the taxpayer contended that the Department had the authority to grant a property tax exemption retroactively. Its contention was based in part on a memorandum prepared and issued by a Department employee opining that a recently-enacted statute gave the Department authority to accept exemption applications at any time. The South Carolina Supreme Court rejected that contention,

holding instead 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." 331 S.C. at 621-22, 503 S.E.2d at 477; see also S.C. Coastal Council v. Vogel, 292 S.C. 449, 357 S.E.2d 187 (Ct. App. 1987) ("The public cannot be estopped ... by the unauthorized or erroneous conduct or statements of its officers or agents which have been relied on by a third party to his detriment.").

In addition, the authority that Duke Energy itself cited supports a conclusion that the Department is not estopped from rejecting actions taken by its employees that are not authorized by statute. Duke Energy cited Quail Hill, LLC v. County of Richland and quoted the following language from that case: "A governmental body is not immune from the application of the doctrine of estoppel where its officers of agents act within the proper scope of their authority." 387 S.C. 223, 236, 692 S.E.2d 499, 506 (2010) (italics omitted). However, Duke Energy only quoted the first part of the pertinent language. The entire relevant passage was quoted by the Court as follows:

> A governmental body is not immune from the application of the doctrine of estoppel *where its officers or agents act within the proper scope of their authority ... The public cannot be estopped, however, by the unauthorized or erroneous conduct or statements of its officers* **or** *agents which have been relied on by a third party to his detriment.*

Quail Hill, 387 S.C. at 236, 692 S.E.2d at 506 (italics in original) (quoting DeStefano v. City of Charleston, 304 S.C. 250, 257-58, 403 S.E.2d 648, 653 (1991)). That passage followed the Court's recognition at the beginning of the paragraph: "As a general rule, estoppel does not lie against the government to prevent the due exercise of its police power or to thwart the application of public policy." Id. (quotation marks omitted).

Following the above precedents, the Court ultimately held that: "For reasons ... discussed [in the opinion], we believe the Court of Appeals erred in reversing the circuit court's grant of summary judgment to County as to Quail Hill's claim of equitable estoppel." Id., 387 S.C. at 237, 692 S.E.2d at 506. In other words, the Supreme Court in Quail Hill affirmed that the government was not estopped from contesting erroneous statements made by its staff. See id., 387 S.C. at 238, 692 S.E.2d at 507 ("[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."). That holding is entirely consistent with the holdings of Texaco, Heyward, and

TNS Mills and, in fact, relies on the same rationale stated by the Court in Heyward – that the government cannot be estopped from exercising its police power. Compare id., 387 S.C. at 236, 692 S.E.2d at 506 (discussing police power rationale for not applying estoppel to governmental entities) with Heyward, 240 S.C. at 351, 126 S.E.2d at 17 (holding that "estoppel will not be applied to deprive the government of the due exercise of its police power, or to effect public revenues or property rights ....").

Thus, I conclude that the Department is not estopped from invoking the correct refund limitations period, even if Department employees believed they had the authority to allow the taxpayer to extend the time in which a claim for refund could be filed. This court clearly does not wish to shield a governmental agency from the doctrine of equitable estoppel where its agents **act within the scope of their authority**. Rather, this Court recognizes that however Duke Energy seeks to characterize the evidence presented in response to the Department's summary judgment motion, the Department's employees did not have the authority to create an unauthorized refund procedure. Moreover, execution of Forms FS-43 by Department employees can provide the taxpayer with no greater remedies than those provided by the governing statutes for refund claims and the like. It is upon these principles that the court in Phillips held that "[w]hile equitable principles may extend the time for commencing an action under statutes of limitation, **nonclaim statutes impose a condition precedent to the enforcement of a right of action and are not subject to equitable exceptions.**" Supra. (citing Estate of Decker, 684 N.E.2d at 1139) (emphasis added).

In fact, even if estoppel was applicable here, Duke Energy failed to set forth a genuine issue of material fact as to its meeting those requirements. "To prove estoppel against the government, the relying party must prove: (1) the lack of knowledge and of the means of knowledge of the truth of the facts in question; (2) justifiable reliance upon the government's conduct; and (3) a prejudicial change in position." S.C. Dep't of Transp. v. Horry County, 391 S.C. 76, 83, 705 S.E.2d 21, 25 (2011). Furthermore, "[o]nce the party moving for summary judgment meets the initial burden of showing the absence of a genuine issue as to any material fact, the nonmoving party may not simply rest on the mere allegations contained in the pleadings." Grant v. Mount Vernon Mills, Inc., 370 S.C. 138, 142, 634 S.E.2d 15, 17 (Ct. App. 2006). "Rather, the nonmoving party must come forward with specific facts showing there is a genuine issue for trial." Id. (quoting Peterson v. W. Am. Ins. Co., 336 S.C. 89, 94, 518 S.E.2d

608, 610 (Ct.App.1999)). Here, there is no dispute that Duke Energy could have referenced the governing refund statutes and learned that Department employees cannot extend the time periods set forth in the applicable refund statutes. See Am. Legion Post 15, 381 S.C. at 583, 674 S.E.2d at 184. Moreover, I do not find that the Form FS-43 misinformed Duke Energy that it could file an amended tax return requesting a refund after the statutory timeframe.

Equitable Tolling

Duke Energy contends that the Department should be equitably tolled from requiring Duke Energy to comply with the statutory time frame within which to file a refund because the Department's employees induced Duke Energy to file belatedly. In support of this remedy, Duke Energy contends that it agreed to the waivers because the Department represented that the statute of limitations was extended for both tax assessments and tax refund claims.

"[T]he doctrine of equitable tolling may be applied to toll the running of the statute of limitations." Hooper v. Ebenezer Sr. Servs. & Rehab. Ctr., 386 S.C. 108, 115, 687 S.E.2d 29, 32 (2009) (quoting 54 C.J.S. Limitations of Actions § 115 (2005)). As explained above, however, the statute requiring that refunds be filed within specific timeframes creates a condition precedent to seeking that remedy and thus is not subject to the equitable remedies for statutes of limitations. See Phillips, supra. Thus, equitable tolling is not a proper remedy in this case. Cf. United States v. Brockamp, 519 U.S. 347 (1997) (holding that the statutory limitations period on tax refund claims under the applicable provision of the Internal Revenue Code does not authorize equitable tolling).

Even if, arguendo, equitable tolling could apply here, in Hooper, the South Carolina Supreme Court explained that "equitable tolling is a doctrine that should be used sparingly and only when the interests of justice compel its use." 386 S.C. at 117, 687 S.E.2d at 33. Here, however, in an attempt to invoke this extraordinary remedy, Duke Energy submitted affidavits and deposition testimony that reference the belief by Department employees that Duke Energy could seek a "refund" based upon extensions granted by the executed Forms FS-43. However, those affidavits do not contain an averment by any Department employee that he or she specifically stated to a Duke Energy representative that Duke Energy's time to seek a "refund" was extended by Form FS-43. More importantly, there is no reference that any Department employee stated that Duke Energy could file an amended tax return seeking a refund based upon

a new basis. Nor is there any sworn testimony by a Duke Energy representative that he or she was misdirected by a Department employee.

Therefore, I conclude that equitable tolling does not lie in this case.

Conclusion

Finally, the context of Duke Energy's request is important in recognizing the proper resolution of this issue. Duke Energy asserts that there are disputed facts regarding this issue because some of the Department's employees viewed Form FS-43 as extending the period during which a taxpayer could seek a refund. However, statements to that effect do not answer the issue in this case. This case is **not** simply about whether Duke Energy can seek a refund based upon a tax review that had been held open pending the Department's determination of the proper tax to assess. Rather, Duke Energy originally filed as a manufacturer using the three-factor formula. Now, it seeks a refund, not based upon the initial filing, but based upon an amended tax return using the single-factor gross-receipts apportionment formula – an entirely different basis. Duke Energy's amended return also now includes the gross receipts from the sale of its securities and other capital investments, which further includes the principal.

Duke Energy interprets Form FS-43 as not only allowing it to question its initial filing but as allowing it to file a new (amended) tax return and claim an entirely new basis for a refund. The plain reading of the tax statutes and review of the affidavits and deposition testimony submitted by Duke Energy fail to establish a genuine issue of material fact regarding the request of Duke Energy. In other words, though there are statements regarding the right of Duke Energy to seek a refund, no evidence was presented that any Department employees interpreted Form FS-43 as allowing a taxpayer to file **an amended return** on an **entirely different basis** than the original return and then seek a refund based on that amended return.[15] Therefore, the Department's Motion for Summary Judgment as to the issue of the timeliness of Duke Energy's amended income tax return filings is granted.

II. Apportionment Method

The next issue is whether Duke Energy is a "manufacturer" and therefore required to use the multi-factor apportionment formula pursuant to S.C. Code Ann. § 12-6-2250 (****)

[15] Review of the record does not even establish the validity of the Form FS-43 agreements for tax years 1978 through 1983. In fact, Duke Energy has even conceded that it has not located the executed Form FS-43 agreements for tax years 1978 through 1983.

(applicable to tax years after 1995)/ Section12-7-1140 (applicable to tax years prior to 1996); or whether Duke Energy was required to use the single-factor gross-receipts formula pursuant to Section 12-6-2290 (****) (applicable to tax years after 1995)/ Section 12-7-1190 (applicable to tax years prior to 1996). Duke Energy argues that it is not a manufacturer, even though it filed its original corporate income tax returns under this status. Duke Energy contends that it is actually a seller of services, and therefore amended its tax return filing using the single-factor gross receipts formula.

During the tax periods at issue, taxpayers whose principal business in South Carolina was "(a) manufacturing . . . goods and materials within this State . . . ." had to apportion their income using a three-factor formula composed of property, payroll, and sales. S.C. Code Ann. § 12-6-2250 (applicable to tax years after 1995); S.C. Code Ann. § 12-7-1140 (applicable to tax years prior to 1996). All other taxpayers (except certain specific industries not relevant here) had to apportion their income using a single-factor gross-receipts apportionment formula. S.C. Code Ann. § 12-6-2290 (applicable to tax years after 1995); Id. § 12-7-1190 (applicable to tax years prior to 1996). "Manufacturing" is not, and was not during the tax periods at issue, statutorily defined for South Carolina apportionment law purposes.[16]

Based on the record, I find that genuine issues of material fact exist necessitating an evidentiary hearing as to whether Duke Energy, based on its activities within the State, falls under Section 12-6-2250 as a "manufactur[er]," or whether Duke Energy is a seller of services, or otherwise falls under none of the above-categories, and is therefore required to apportion its income to South Carolina based on the single-factor gross-receipts apportionment formula pursuant to Section 12-6-2290 (applicable to tax years after 1995)/ Section 12-7-1190 (applicable to tax years prior to 1996). Accordingly, the Court denies the Department's Motion for Summary Judgment with respect to this issue.

III. Gross Receipts

The final issue is whether Duke Energy was allowed, in its calculation of corporate income tax owed to South Carolina, to include in the apportionment formula the return of

[16] "Manufacturing" is not statutorily defined, but it is discussed in Columbia Ry., Gas & Elec. Co. v. S.C. Tax Comm'n, 134 S. C. 319, 132 S.E. 611 (1926), a case in which the South Carolina Supreme Court held that a company engaged in the business of generating electricity was properly considered a "manufacturer" for purposes of a particular statute that imposed a corporate income tax on "a corporation engaged in the business of manufacturing."

principal from its sales of securities and other capital investments. Duke Energy argues that "gross receipts" in the gross receipts factor of the denominator of the single-factor gross-receipts apportionment formula and "sales" in the sales factor of the denominator of the three-factor apportionment formula include the entire amount of return capital from a sale of securities or other capital investments, **including the return of principal**. The Department, however, argues that gross receipts and sales include only the net proceeds from sales of securities or other capital investments.

South Carolina law provides that a taxpayer required to apply the single-factor gross-receipts apportionment formula must do so "using a fraction in which the numerator is gross receipts from within this State during the taxable year and the denominator is total gross receipts from everywhere during the taxable year." See S.C. Code Ann. § 12-6-2290 (****) (applicable for tax years beginning after 1995); see also id. § 12-7-1190 (****) (applicable for tax years prior to 1996).[17] "Gross receipts" was not defined for South Carolina apportionment law purposes during the tax periods at issue.

For purposes of the multi-factor apportionment formula[18] the sales factor consists of "[t]he ratio of sales made by such taxpayer during the income year which are attributable to this State to the total sales made by such taxpayer everywhere during the income year ...." S.C. Code Ann. § 12-7-1170 (****) (for tax years prior to 1996).[19] The term "sales" includes: "(1) rentals from tangible personal property located in this State which are not separately allocated; and (2) sales of intangible personal property and receipts from services if the entire income-producing activity is within this State. If the income-producing activity is performed partly within and partly without this State, sales are attributable to this State to the extent the income-producing activity is performed within this State." Id. [20]

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[17] Even though the Court finds as a matter of law that Duke Energy's filings of tax refund claims for tax years ending 1978-1993 were untimely, and thus will not be considered here, the filing for tax year 1994 was timely, and thus statutes applicable to tax years prior to 1996 will be discussed.

[18] Section 12-6-2250 (applicable to tax years after 1995) and Section 12-7-1140 (applicable to tax years prior to 1996).

[19] For tax years after 1995, S.C. Code Ann. § 12-6-2280 (****) similarly provides that: "The sales factor is a fraction in which the numerator is the total sales of the taxpayer in this State during the taxable year and the denominator is the total sales of the taxpayer everywhere during the taxable year."

[20] For tax years after 1995, S.C. Code Ann. § 12-6-2280 (B) (****) similarly provides that the term "'sales in this State' includes sales of goods, merchandise, or property received by a purchaser in this State. The place where goods are received by the purchaser after all transportation is completed is considered the place at which the goods are

"The language of a tax statute must be given its plain ordinary meaning in the absence of an ambiguity therein. . . [I]f a legislative intent is clearly apparent from the language of the statute there is no occasion for resort to the rule of statutory construction." Beach v. Livingston, 248 S.C. 135, 139, 149 S.E.2d 328, 330 (1996) (internal citation omitted). "If the statute is ambiguous, however, courts must construe the terms of the statute." S.C. Energy Users Comm. v. S.C. Pub. Serv. Comm'n, 388 S.C. 486, 491, 697 S.E.2d 587, 590 (2010) (internal citation omitted). "A statutory provision should be given a reasonable and practical construction consistent with the purpose and policy expressed in the statute." Lockwood Greene Eng'rs, Inc. v. S.C. Tax Comm'n, 293 S.C. 447, 449, 361 S.E.2d 346, 347 (Ct. App. 1987). "When faced with an undefined statutory term, the term must be interpreted in accordance with its usual and customary meaning." Id. at 492, 697 S.E.2d at 590 (internal citation omitted). "Courts should not merely consider the language of the particular clause being construed, but the undefined word and its meaning in conjunction with the purpose of the whole statute and the policy of the law." Id. Finally, "[s]tatutes should not be construed so as to lead to an absurd result." Kennedy v. S.C. Ret. Sys., 345 S.C. 339, 351, 549 S.E.2d 243, 249 (2001) (internal citation omitted).

Here, there is no genuine issue of material fact with regard to the Gross Receipts Issue. The sole question of law is whether Duke Energy could include the return of principal from its sales of securities and other investment transactions as part of the sales or gross receipts factors in the apportionment formula. This is a novel question in South Carolina, but is not unprecedented in some of our sister States.

The first approach to this issue was taken by New Jersey in Am. Tel. and Tel. Co. v. Dir., Div. of Taxation, 194 N.J. Super. 168, 476 A.2d 800 (App. Div. 1984). In that case, the New Jersey Supreme Court concluded that the inclusion of gross or full revenues from the short-term sale or redemption of investment paper in the denominator of the receipts fraction of the apportionment formula would lead to "absurd results" in that such inclusion would greatly distort the amount of business the taxpayer did within and without New Jersey and would thus defeat the intent and purpose of the apportionment statute. Id. at 172, 476 A.2d at 802. Both Indiana and Arizona have adopted similar rationales to the one used by the New Jersey court. See

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received by the purchaser. Direct delivery into this State by the taxpayer to a person designated by a purchaser constitutes delivery to the purchaser in this State."

Sherwin-Williams Co. v. Ind. Dept. of State Revenue, 673 N.E.2d 849 (Ind. Tax 1996) (holding that "'gross receipts' for the purpose of the sales factor includes only the interest income, and not the rolled over capital or return of principal, realized from the sale of investment securities"); Walgreen Ariz. Drug Co. v. Ariz. Dep't of Revenue, 209 Ariz. 71, 97 P.3d 896 (App. 2004) (holding that the return of principal from the type of short-term investments at issue was not includable in the sales factor denominator).

The other approach to this issue was taken by Tennessee and California.[21] In Sherwin-Williams Co. v. Johnson, 989 S.W.2d 710 (Tenn. App. 1998), the chancellor had followed the same reasoning employed by the New Jersey and Indiana courts (and later the Arizona court), holding that "to include the principal in the sales factor denominator would distort the extent of Sherwin-Williams' business activities in Tennessee and other states in which it does business and defeat the intent and purpose of the [apportionment] statute. . ." and that "the amount of return of principal on the sale or redemption of interest bearing securities related to its, [sic] working capital investments should not be included in the denominator of the sales factor." Id. at 714. The Tennessee Court of Appeals, though finding the chancellor's holding "logical and appealing," nevertheless decided not to follow the "absurd result standard." The court instead concluded that:

> An absurd result is not necessary, for in spite of the plain language of the [sales factor statute], the commissioner may opt for a different scheme of assessment whenever the resulting apportionment does not fairly represent the taxpayer's business in this state. The very absurdity of the result sought . . . lays a sound basis for the implementation of [the alternative apportionment method statute].

Id. at 714-15.

The California Supreme Court, in Microsoft Corp. v. Franchise Tax Bd., quoted this passage with approval as it went on to hold that "gross receipts" is not limited to net proceeds. 39 Cal.4th 750, 763, 139 P.3d 1169, 1177 (2006). Referencing California's alternative apportionment method, the court concluded that "[t]he UDITPA contains an equitable relief provision so that, in cases where application of the statutory sales definition results in excessive distortion, an 'absurd result' may be avoided."

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[21] South Carolina's apportionment provisions, like those in New Jersey, Indiana, Arizona, Tennessee, and California, are based on the Uniform Division of Income for Tax Purposes Act (UDITPA).

After considering the two lines of reasoning set forth by our sister States, I conclude that the law of South Carolina favors the view expressed by the courts in New Jersey, Indiana, and Arizona.

As the Tennessee Court of Appeals correctly noted, "[i]f the words of a statute plainly mean one thing they cannot be given another meaning by judicial construction." Johnson, 989 S.W.2d at 714-15 (internal citation omitted); see also Denman v. City of Columbia, 387 S.C. 131, 138, 691 S.E.2d 465, 468 (2010) ("Under the plain meaning rule, it is not the Court's place to change the meaning of a clear and unambiguous statute."). However, to rearrange the order of the court's sentences, "This sound rule . . . is met by the equally well settled rule that: . . . 'It is presumed that the legislature enacting a statute did not intend an absurdity, and such a result will be avoided by this court if the terms of the statute admit of it by reasonable construction.'" Johnson, 989 S.W.2d at 714 (internal citations omitted).

Logical Definition of Gross Receipts

The term "gross receipts" does not plausibly include the return of principal from the sale of securities and other capital investments. In examining the meaning of "gross receipts it is helpful to start first with a consideration from a macro perspective of the known interpretation of the meaning of "gross income." "Gross income", at least in the context of self-employment or self-owned businesses, is defined as "gross receipts minus ordinary and necessary expenses required for self-employment or business operation. . . ." Spreeuw v. Barker, 385 S.C. 45, 65, 682 S.E.2d 843, 853 (Ct. App. 2009) (citing S.C. Code Ann. Regs. 114-4720(A)(4) (Supp. 2008)). This definition logically applies to other types of businesses, too. Based on the implication of this definition, it logically flows that gross receipts equal gross income plus ordinary and necessary expenses of business operations. The South Carolina Supreme Court in Roper v. S.C. Tax Comm'n, Title 65-Section 251 of the 1952 Code of Laws of South Carolina also defined "gross income" as: "the **income** of a taxpayer **derived from** . . . interest, rent, dividends, **securities**, or **the transaction of any business carried on for gain or profit** . . . ." 231 S.C. 587, 598, 99 S.E.2d 377, 382 (1957) (emphasis added); see also S.C. Code Ann. § 12-7-415 (****) (adopting the Internal Revenue Code's (I.R.C.) determination of gross income with modifications specified in Section 12-7-430 (which are not relevant here)); I.R.C. § 61(a) (****) (generally defining corporate gross income as "all income from whatever source derived" and

covering many of the same categories mentioned in Roper)[22]; S.C. Code Ann. § 12-6-1110 (****). The Court went on to point out that "the word 'income' as used in a tax statute, is to be taken in its ordinary sense of gain or profit." Id. (reaffirmed as "well-settled" in Scott v. S.C. Tax Comm'n, 262 S.C. 144, 148, 202 S.E.2d 854, 856 (1974)). Here, too, we find the same deductive reasoning that because gross income includes "all income," and income, being gain or profit, excludes principal, then gross income necessarily excludes principal.

The U.S. Supreme Court also followed this reasoning in U.S. v. Forest Lumber Co., 429 U.S. 32 (1976). In that case, the Court found that the inclusion of "gains derived from dealing in property" as part of "all income from whatever source derived" in the definition of gross income under I.R.C. Section 61(a) (****) meant that taxable income, which includes gross income according to Section 63(a),[23] also therefore included capital gains as well as ordinary income, in the absence of a specific exclusion of capital gains. 429 U.S. at 37. The Court's inclusion of capital gains impliedly excludes principal from gross income (and taxable income). Because, as mentioned earlier, gross receipts equal gross income plus the amount spent for ordinary and necessary business expenses, and gross income includes only the capital gains from sales of securities, then gross receipts can only include capital gains from sales of securities, which necessarily excludes principal. Therefore, the only remaining question is whether "ordinary and necessary expenses of business operations" includes principal.

Principal, by definition, cannot be an expense of a business operation. Since ordinary and necessary business expenses are subtracted from gross receipts to yield gross income, and neither business expenses nor gross income include principal, it is impossible for gross receipts to include principal. Put another way, because gross receipts are equivalent to gross income plus

[22] Nowhere in South Carolina's statutory law or in the federal statutory law adopted by South Carolina is principal from investments listed as part of gross income. In fact, principal would later be excluded in S.C. Code Ann. § 2295(B)(1) (2007), which became effective for tax years after 2006. Also, it is worth noting that even in the context of child support, gross income does not include principal in the return from the sale of investments. Indeed, the inclusion of "capital gains" in the list of items considered part of gross income for child support purposes necessarily implies the exclusion of principal from the return of investment sales. See S.C. Code Ann. Regs. 114-4720(A)(2) (2012).

[23] Generally, the taxable income of a business is its gross income minus any deductions that are allowed by state law. I.R.C. § 63(a) (****).

ordinary and necessary business expenses, and neither gross income nor business expenses include principal, gross receipts, being the sum of those two parts, cannot include principal.[24]

Logical Definition of Sales

It is equally implausible to include principal from the sale of securities and other capital investments in the definition of "sales" for purposes of the standard apportionment formula. A major difference between the Tennessee case and the present case is that Tennessee's standard apportionment statute defined "the term 'sales' to include all **gross receipts** of the taxpayer not otherwise allocated under the Excise Tax Law." Johnson, 989 S.W.2d at 713 (emphasis in original). Likewise, the California standard apportionment statute included "all gross receipts" in the definition of "sales." South Carolina's standard apportionment statute defines the term "sales," but this definition does not include "gross receipts."[25] Instead, under its definition of "sales," "[i]f the income-producing activity is performed partly within and partly without this State, sales are attributable to this State to the extent the **income-producing** activity is performed within this State." S.C. Code Ann. § 12-6-2280(C)(2) (****) (formerly 12-7-1170 (****)) (emphasis added).[26] This phrase "income-producing" is used to modify "activity" several other times in the definition of "sales." "Income" means "an actual gain or actual increase of wealth."

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[24] For examples in the I.R.C. of exclusion of principal from gross receipts, see I.R.C. § 165(g)(3)(B) (****) (in the context of determining whether a corporation is affiliated with a taxpayer, "in computing gross receipts for purposes of [calculating the percentage of gross receipts that have come from particular sources], gross receipts from sales or exchanges of stocks and securities shall be taken into account *only to the extent of gains* therefrom.") (emphasis added); id. § 1362(d)(3) (in the context of a small business corporation's termination of its election to be an S corporation, where its passive investment income exceeds twenty-five percent of gross receipts for three consecutive taxable years and the corporation has accumulated earnings and profits at the close of each of those years, when capital assets (other than stocks or securities) are disposed of, "gross receipts from such dispositions shall be taken into account *only to the extent of the capital gain net income* therefrom[;] and in the case of sales or exchanges of stock or securities, gross receipts shall be taken into account *only to the extent of the gains* therefrom.") (emphasis added); and id. § 1244 (in the context of calculating the percentage of gross receipts from particular sources for determining whether "stock" means stock in a domestic corporation for determining losses on small business stocks, "gross receipts from the sales or exchanges of stock or securities shall be taken into account *only to the extent of gains* therefrom.") (emphasis added).

[25] "Sales" and "gross receipts" were later further defined together by S.C. Code Ann. § 12-6-2295 (2007) (effective for tax years beginning after 2006). However, the years at issue here are 1978-2001. Further, because the Court finds as a matter of law that the refund claims filed for tax years ending 1978-1993 are untimely, the only years that will be considered for the gross receipts issue will be tax years ending 1994-2001.

[26] Duke Energy states in its Motion for Reconsideration that "[t]he concept of income-producing activity has no bearing on the definition of 'total sales' and whether the principal from sales of securities should be included in the sales factor denominator." However, the Legislature clearly intended to specify what kind of activity would be used to measure "sales" for purposes of the apportionment formula, and did so by including the modifying phrase "income-producing."

See Scott v. S.C. Tax Comm'n, 262 S.C. 144, 148-49, 202 S.E.2d 854, 856 (1974) (Bussey, J., dissenting) (citing 85 C.J.S. Taxation 1096, p. 730). This emphasis on income production suggests that principal is excluded from the definition of "sales."[27] Moreover, this limitation of "sales" to the net income derived therefrom is not a novel interpretation. Indeed, our own Supreme Court has approved of an apportionment formula "whereby [a business's] sales, payroll, and property in South Carolina were divided by its national **net** sales, payroll, and property." See Eastman Kodak Co. v. S.C. Tax Comm'n, 308 S.C. 415, 416, 419, 418 S.E.2d 542, 542, 544 (1992) (holding in part that safe harbor lease transactions that were part of a corporation's business "were properly included in the denominator of the apportionment formula in computing [that corporation's] national **net income** from payroll, property, and sales.") (emphasis added). Using this interpretation and limiting the sales factor in the denominator of the three-part apportionment formula to net income is the more sound application of the apportionment formula.

The conclusion in this case is further supported by the fact that in the context of consolidated returns filed by multiple corporations conducting business within and without the State, the returns included in the sales factor of the standard apportionment formula must "contain such other information necessary to compute the **net income** of each taxpayer properly attributable to the state so that South Carolina can impose a tax on the taxpayers concerned." Emerson Elec. Co. v. Wasson, 287 S.C. 394, 396-97, 339 S.E.2d 118, 120 (1986) (discussing S.C. Code Ann. § 12-7-1570 (****) (for tax years prior to 1996), the predecessor of § 12-6-5020 (****) (for tax years after 1996)) (emphasis altered). This infers that when a single corporation also conducts business within and without the State, its net income only, and not principal, is included in the sales factor for purposes of apportioning the amount of corporate income taxes the State could impose on that corporation. See, e.g., Eastman Kodak Co., 308 S.C. at 416, 418 S.E.2d at 542 (Kodak included only the net income in the sales factor in the denominator of the apportionment formula).[28]

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[27] Though Duke Energy is a nonresident corporation, it is worth noting that South Carolina taxable income for nonresident individuals, nonresident trusts, nonresident estates, and nonresident beneficiaries include only amounts attributable to, among other things, "income from intangible personal property, including annuities, dividends, interest, and gains that is derived from property employed in a trade, business, profession, or occupation carried on in this State." It is interesting that nowhere is "principal" mentioned as an inclusion in taxable income.

[28] In its Motion for Reconsideration, Duke Energy attempted to analogize this case with S.C. Dep't of Revenue v. Blue Moon of Newberry, Inc., 397 S.C. 256, 725 S.E.2d 480 (2012) to support its proposition that "the Court should

Alternative Apportionment Method

The Tennessee and California opinions rely upon the presupposition that "an absurd result is not necessary" because the Department "may opt for a different scheme of assessment whenever the resulting apportionment does not fairly represent the taxpayer's business in this State." Microsoft, 39 Cal.4th at 763, 139 P.3d at 1177 (quoting Johnson, 989 S.W.2d at 715). South Carolina indeed has a similar provision. S.C. Code Ann § 12-6-2320(A) (2002) provided that:

> If the allocation and apportionment provisions of this chapter **do not fairly represent** the extent of the taxpayer's business activity in this State, the taxpayer may petition for, or the department may require, in respect to all or any part of the taxpayer's business activity, if reasonable:
>
> (1) separate accounting;
>
> (2) the exclusion of one or more of the factors;
>
> (3) the inclusion of one or more additional factors which will fairly represent the taxpayer's business activity in the State; or
>
> (4) the employment of any other method to effectuate an equitable allocation and apportionment of the taxpayer's income.

(Emphasis added).

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not restrict the meaning of 'gross receipts' and 'total sales' when the language of the statute does not contain or require any limitations." In Blue Moon of Newberry, a case involving a regulation that restricted the sale of alcoholic beverages by nonprofit organizations to "bona fide members and bona fide guests of members of such organizations," the South Carolina Supreme Court rejected the Department's view that "bona fide implie[d] that the guest have some degree of familiarity or camaraderie with the member," because "the plain language of the regulation contain[ed] no support of this, and the ordinary definition of bona fide d[id] not require it." Id. at 258, 263-64, 725 S.E.2d at 482, 484-85. Rather, the regulation clearly defined "bona fide guests" as those "who accompany a member onto the premises or for whom the member has made prior arrangements with the management of the organization." Id. at 258, 725 S.E.2d at 482. In the present case, however, the term "gross receipts," unlike "bona fide guests" in Blue Moon of Newberry is not defined for South Carolina apportionment law purposes during the tax periods at issue. Therefore, this Court must determine whether principal was included in the components of gross receipts (gross income and ordinary and necessary expenses of business operations). For the reasons given above, state and federal law establishes that principal is excluded from the components of gross receipts. Indeed, it is the inclusion of principal that has no foundation whatsoever in South Carolina or federal tax law. Though "sales" is defined for South Carolina apportionment law purposes, the ordinary meaning of the terms comprising its definition do not support, let alone require, the inclusion of principal, for the reasons explained above. Also, this Court's purpose in excluding the return of principal from the definitions of "gross receipts" and "sales" is the same as the Court's in Blue Moon of Newberry – to preserve the purpose of the apportionment statutes and prevent the production of an absurd result. Contrary to Duke Energy's assertion, the Court's opposition to "artificially inflat[ing] the denominator of either the sales factor or gross receipt factor and thereby decreas[ing] the amount of income subject to tax in South Carolina" is not based upon a belief that taxpayers should be required to "pay the *most* taxes." Rather, the Court's opposition is based upon the belief that taxpayers are required to pay the correct amount of taxes owed to this State, which is the amount that "fairly represents the taxpayer's business activity in this State." Indeed, this is the whole purpose of the apportionment statutes.

I nevertheless find that the California and Tennessee cases, in relying upon this statutory option, miss an important distinction between the court's roles of statutory construction and application of the alternative apportionment provision. Though the alternative relief provision exists as a mechanism to correct problems caused by the application of the standard apportionment statutes (see Media Gen. Commc'ns v. S.C. Dep't of Revenue, 388 S.C. 138, 694 S.E.2d, 525 (2010)), the standard application statutes should not be so construed as to encourage excessive distortion simply because the alternative relief provision exists to remedy that distortion. In applying the principles of statutory construction, the court's function is, in part, to construe statutory law to avoid an absurd result. Ventures S.C., LLC v. S.C. Dep't of Revenue, 378 S.C. 5, 9, 661 S.E.2d 339, 341 (2008) ("[T]he Court will reject the plain meaning of the words used in a statute if it would lead to an absurd result. . . ."). If, as here, the proposed construction of a statute reaches an absurd result, our courts should recognize that absurdity and end the inquiry.

On the other hand, the function of the alternative apportionment provision is quite different. The alternative apportionment provision should be utilized only when the standard apportionment statute does not operate sensibly in a given case. As the Florida Supreme Court pointed out in Roger Dean Enters, Inc. v. State, "[t]here is a very strong presumption in favor of normal three-factor apportionment and against the applicability of the relief provisions. . . Departures from the basic formula should be avoided except where reasonableness requires." 387 So.2d 358, 363 (internal citations omitted). Further, in St. Johnsbury Trucking Co. v. New Hampshire, the New Hampshire Supreme Court, in addressing very similar statutory language, held that:

> The statutory provisions require that the three-factor formula will be used for apportioning business profits, and an alternative formula may be used if the statutory method of apportionment "does not fairly reflect the extent of the business activities of a business organization within this state." The legislature has, therefore, specified that an alternative formula **is the exception**, and the party who wants to use an alternative formula accordingly has the burden of showing that the alternative is appropriate.

118 N.H. 209, 212, 385 A.2d 215, 217 (1978) (emphasis added).[29]

[29] The following states have followed the holding in St. Johnsbury Trucking: **Idaho** - Union Pac. Corp. v. Idaho State Tax Comm'n, 83 P.3d 116, 120 (Idaho 2004); and **Kentucky** - Ruby Const. Co., Inc. v. Dep't of Revenue, 578 S.W.2d 248, 253 (Ky. Ct. App. 1978).

In this case, to interpret the standard apportionment formula to include the return of principal in either the sales factor or gross-receipts factor of the denominator would engender an absurd application of the standard apportionment statute simply because another statute exists which allows for another means of accounting when the standard apportionment statute does not "fairly represent the extent of the taxpayer's business activity in this State." In other words, such an interpretation would create the very absurdity that courts are to avoid in their statutory construction. Rather than having Section 12-6-2320(A) available as a remedial back-up, a corporation would have nothing to lose and everything to gain by adding the return of principal to the denominator and thereby reducing the amount of taxes owed to South Carolina, regardless of whether the numbers accurately reflected the corporation's business activity within and without the State. As a result, the alternative apportionment statute, which was intended to be a remedy held in reserve for the relatively infrequent occasion that the standard formula did not result in a fair representation, would then become a standard follow-up to the application of the standard apportionment statute. Indeed, both statutes would become standard, because distortion of business activity representation would be fostered on the front end (through the principal-inclusive standard apportionment formula) so that it could, and necessarily would, be dealt with on the back end (through the alternative apportionment formula).[30]

This potential for abuse by corporations and the futility of going through this extra-step process needlessly is reflected in a finding by the Arizona Court of Appeals that in most of the cases that the taxpayer cited to support the inclusion of the return of principal in the sales factor denominator of the standard apportionment formula, the courts "nonetheless approved exclusion of the principal from the sales factor denominator pursuant to their states' version of UDITPA's 'relief provision' [, i.e., alternative apportionment method]." Walgreen, 209 Ariz. at 901-02, 97 P.3d 896 at 76-77 (citing Union Pac. Corp. v. Idaho State Tax Comm'n, 139 Idaho 572, 83 P.3d 116, 122 (2004); Am. Tel. & Tel. Co. v. State Tax Appeal Bd., 241 Mont. 440, 787 P.2d 754, 757–58 (1990); Johnson, 989 S.W.2d at 715). Microsoft, which was decided two years after Walgreen, can be added to this list, as it applied California's alternative apportionment method

[30] In its Memorandum in Opposition to the Department's Motion for Summary Judgment and in Support of its Cross-Motion for Partial Summary Judgment, Duke Energy argues that the definitions of "sales" and "gross receipts" set forth in S.C. Code Ann. § 12-6-2295 (2007) (effective for tax years beginning after 2006), shows the Legislature's intent to make a "drastic" change to the existing law based on its various inclusions in, and exclusions from, the definitions of "sales" and "gross receipts" that had previously not existed. This Court's response to that argument is set forth in its Order Denying Motion For Reconsideration in Part and Granting Reconsideration in Part.

statute to "fairly represent the extent of the taxpayer's business activity in this state" after the court included principal in the sales denominator of its standard apportionment formula.[31]

Criticism of the "Absurd Results Standard"

The California Supreme Court in Microsoft criticized the proponents of the "absurd results standard," in part, because "[i]n each case, the same language governs both sales of off-the-shelf products and sales of securities. *AT&T* [(the New Jersey case)] and its progeny offer no explanation why in one instance that language should require inclusion of gross proceeds and in the other require inclusion of only net proceeds." 39 Cal.4th at 763, 139 P.3d at 1177.[32] Nevertheless, the resolution of this issue has been clarified in South Carolina by the Supreme Court's holding in Hay v. Leonard, 212 S.C. 81, 46 S.E.2d 653 (1948).

Hay involved a challenge to the validity of Charleston County's levying an annual license tax for the privilege of engaging in each and every business and occupation in Charleston County, except in the City of Charleston. In reaching its decision, the South Carolina Supreme Court explained the reason why merchandise, or "off-the-shelf products," includes gross proceeds in its taxation, and the Court's reasoning suggests why the sale of securities would not include gross proceeds. The Court explained: "the [license] tax is not on the property itself; it is on the **privilege of dealing with it**. The value of such privilege is measured by the gross receipts therefrom, and this is a familiar and valid method of ascertaining such value." Id. at 97, 46 S.E.2d at 660 (emphasis added). A merchant is required to possess a license in order to have the privilege of dealing in merchandise; and the tax is on this privilege, not on the merchandise. This is why "[t]he sale of all merchandise includes previous taxation . . . ." Id.; see also State ex rel. Roddey v. Byrnes, 219 S.C. 485, 514, 66 S.E.2d 33, 45 (1951) ("In general, the sales tax [,a form of excise tax], is [, like a license tax,] an imposition upon the privilege of the business of selling at retail and measured by the amount of business done . . . ."). The sale of securities is

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[31] Paradoxically, the court went on to justify this decision to apply the alternative method statute because it was "unable to accept, even for a moment, the notion that more than 11 percent of [taxpayer's] entire unitary business activities should be attributed to *any* single state solely because it is the center of working capital investment activities that are clearly only an incidental part of one of America's largest, and most widespread, businesses." This rationale highlights the precise reason why principal from the sale of securities and other capital investment activities should not be included in the standard apportionment formula in the first place: the inclusion of principal causes distortions as to the amount of business activity actually performed in a State, which, in turn, have to be remedied.

[32] This is the first of the "two problems" that the California Supreme Court had with the "absurd results" cases. The second problem will be discussed in the immediately-following paragraph.

altogether different in that a license is not required to purchase or sell securities,[33] and no sales tax is imposed upon the sale of securities.[34] Therefore, here there exist no "privilege" grounds upon which to include principal in the gross receipts, as the value received from the sales of the securities for tax purposes would be measured by the capital gains, not by the principal. The principal would consist of the business's "idle cash" that would presumably have been taxed already.

Conclusion

This Court hereby follows New Jersey, Indiana, and Arizona in adopting the "absurd results" approach to interpreting South Carolina's standard apportionment statute and therefore rejects Duke Energy's attempt to include the return of principal in the denominator of the standard apportionment formula. In sum, the alternative apportionment formula exists to remediate any nonsensical application of the standard apportionment formula. However, that remediation should not be the result of a court's addition, through its failure to apply the rules of statutory interpretation, of a component to the standard apportionment formula that neither exists in the statute nor was intended by the Legislature. The absurdity that the alternative apportionment formula is intended to remediate is when a taxpayer follows the standard apportionment formula but the result is nevertheless an unfair representation of the extent of the taxpayer's business activity in the State. Construing the purpose of the alternative provision to avoid an absurd use of the standard apportionment statute clearly could open the door to the abuse of the standard apportionment statute and an excessive need to apply Section 12-6-2320(A). Furthermore, to use the alternative apportionment provision as a means to avoid absurdity resulting from an interpretation of the standard apportionment provision that is not envisioned by the tax laws places upon the State a burden of policing tax returns that simply should not exist.

Importantly, it is not the amount of distortion that determines absurdity here. If it was, then there would exist an issue of material fact in this case, and indeed in every such case, as to the amount of distortion that would result from the inclusion of principal, and a hearing would be necessary to obtain facts whereby the degree of distortion could be measured so as to determine

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[33] This statement does not include securities brokering.

[34] Capital gains tax is imposed upon the sale of securities (assuming a profit is made from the sale). This tax is imposed on the profit, or "gains," made on the capital originally invested, not on the returned principal.

whether the results of principal inclusion would be absurd in this case. But such a case-by-case determination is not necessary where, as here, principal cannot, as a matter of law, be included in sales or gross receipts for purposes of the standard apportionment formula. Thus, no hearing is necessary on the gross receipts issue, and the Department's Motion for Summary Judgment as to this issue is therefore granted for the reasons set forth above.

ORDER

THEREFORE, IT IS HEREBY ORDERED that: (1) the Department's Motion for Summary Judgment with respect to the Timeliness Issue is **GRANTED**; (2) the Department's Motion for Summary Judgment with respect to the Apportionment Method Issue is **DENIED;** and (3) the Department's Motion for Summary Judgment with respect to the Gross Receipts Issue is **GRANTED**, and Duke Energy's Cross-Motion for Partial Summary Judgment as to this same issue is therefore **DENIED**.

IT IS SO ORDERED.

Ralph K. Anderson, III
Chief Administrative Law Judge

October 11, 2012
Columbia, South Carolina

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Duke Energy Corporation, Petitioner, vs. South Carolina Department of Revenue, Respondent.	)	Docket No. 10-ALJ-17-0270-CC **ORDER DENYING MOTION FOR RECONSIDERATION IN PART AND GRANTING RECONSIDERATION IN PART**

Appearances:

For the Petitioners: Burnet R. Maybank, III, Esq.; Eric S. Tresh, Esq.; Jeffrey A. Friedman, Esq.; and Maria M. Todorova, Esq.

For the Respondent: Tracey C. Green, Esq.; John W. Roberts, Esq.; Harry Hancock, Esq.; and J. Abraham Gutting, Esq.

This matter was initially before the Administrative Law Court (ALC or Court) upon a Motion for Summary Judgment filed by Respondent Department of Revenue (Department) and a Cross-motion for Partial Summary Judgment filed by Petitioner Duke Energy Corporation (Duke Energy). The underlying case arises from the Department's denial of amended corporate income tax returns filed by Duke Energy in 2002 for income tax years 1978-2001. On August 9, 2012, the Court issued an Order in which it granted the Department's Motion for Summary Judgment as to the timeliness of Duke Energy's amended refund claims for tax years ending 1978-1993; denied the Department's Motion for Summary Judgment as to whether Duke Energy is considered a "manufacturer" under the applicable apportionment statute; and granted the Department's Motion for Summary Judgment as to Duke Energy's inclusion of the return of principal in its apportionment formula and denied Duke Energy's Cross-Motion for Partial Summary Judgment on this issue.

On August 20, 2012, Duke Energy filed a Motion for Reconsideration of the Court's Order Granting the South Carolina Department of Revenue's Motion for Summary Judgment as to the Waiver and Gross Receipts Issues. The Department filed its Memorandum in Opposition to Duke Energy's Motion for Reconsideration on September 14, 2012. Some of the arguments warrant reconsideration and clarification of the original Order. Accordingly, I am issuing an

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Amended Order Granting Summary Judgment in Part and Denying Summary Judgment in Part in this case addressing those issues. The remaining arguments will be addressed below.[1]

DISCUSSION

In its Memorandum in Opposition to the Department's Motion for Summary Judgment and in Support of its Cross-Motion for Partial Summary Judgment, Duke Energy argues that in 2007, the South Carolina Legislature made a "drastic" change in the law when it specifically excluded from its definitions of "sales" and "gross receipts" the principal from bonds, loans, or similar marketable instruments. See 2007 S.C. Laws Act 110 § 51.A (enacted as S.C. Code Ann. § 12-6-2295(B)(1)) (Setting forth that "[t]he terms 'sales' as used in Section 12-6-2280 and 'gross receipts' as used in Section 12-6-2290 do not include: (1) repayment, maturity, or redemption of the principal of a loan, bond, or mutual fund or certificate of deposit or similar marketable instrument."). According to Duke Energy, the addition of that exclusion created a material change to the law, and thus "there is a presumption that the Legislature intended to change the existing law rather than to clarify its original intent." It is true that "[w]hen the Legislature adopts an amendment to a statute, th[e] Court recognizes a presumption that the Legislature intended to change the existing law. **Nonetheless, a subsequent statutory amendment may also be interpreted as clarifying original legislative intent.**" Duvall v. South Carolina Budget and Control Bd., 377 S.C. 36, 659 S.E.2d 125 (2008) (Internal citations omitted) (emphasis added).

In its Motion for Reconsideration, Duke Energy further explained that: "**Presumably**, the South Carolina Legislature was **troubled** by the inclusion of the principal in the sales factor, which led to its changing the statute to exclude receipts." (Emphasis added). I find no support for such a presumption. If the Legislature was so troubled by an interpretation that would allow 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. Duke Energy instead relies on an unsupported statutory

[1] The Court notes that Duke Energy filed an appeal of the Court's original decision granting partial summary judgment "out of an abundance of caution." Following Duke Energy's filing of a Motion to Reconsider, this Court issued an Order staying its decision granting partial summary judgment. Therefore, there was no valid decision regarding the issues addressed in the parties' cross motions for Summary Judgment until the issuance of the Amended Order Granting Summary Judgment In Part and Denying Summary Judgment in Part entered simultaneously with this Order on October 11, 2012

interpretation premised on the notion that because principal is excluded in S.C. Code Ann. §12-6-2295 (2007) (effective for tax years beginning after 2006), then principal must necessarily have been included in the gross receipts/sales factor prior to the enactment of this statute. On the contrary, the Department asserts that it has had a longstanding interpretation that principal was not included in gross receipts, an assertion that Duke Energy did not dispute. In light of the reasons discussed in the Amended Order Granting Summary Judgment in Part and Denying Summary Judgment in Part as to why the return of principal was excluded from the apportionment formula prior to the enactment of Section 12-6-2295, as well as the Department's longstanding policy of excluding principal from the apportionment formula,[2] it is clear that the Legislature intended Section 12-6-2295 to clarify the existing law.

However, Duke Energy further contends in its Motion for Reconsideration that this Court, presumably to avoid inconsistency, must interpret Section 12-6-2295 as reflecting a change in the existing law, not clarification of it, since "the Department (and this Court) allowed the sales of Duke Energy securities to be included at net – not excluded all together [sic] as the statutory regime now requires." The problem with this argument is that it misinterprets Section 12-6-2295, the current "statutory regime," as excluding the sales of Duke Energy's securities altogether from the definitions of "sales" and "gross receipts." Though Duke Energy did not in its Motion for Reconsideration cite to a specific subsection to support its position, it clarified in a written response, dated September 21, 2012, to a question posed by this Court that it was

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[2] Duke Energy asserts in its responses to the inquiries presented by the Court on September 19, 2012 that the Department "recently abandoned" its position that it had a long-standing policy "to require only the inclusion of the net gain or interest from short-term investment transactions in the calculation of the apportionment formula," citing the Department's Memorandum in Support of Its Motion for Summary Judgment at 33. The Court finds no such abandonment by the Department – indeed, quite the opposite. On page 33 of the Department's Memorandum in Support of Its Motion for Summary Judgment, the Department states in the heading for section 3, in bold-face type, the following:

> **Because the Department's long-standing administrative policy excluding the return of principal from short-term investment transactions in the calculation of a taxpayer's apportionment formula is a reasonable application of the legislative intent and the allocation and apportionment statutes, Duke Energy is prohibited from including the return of principal from short-term investment transactions in the calculation of its sales factor or gross receipts factor.**

Moreover, the very first sentence of the discussion under this heading states the following: "It has been the long-standing administrative policy of the Department to require only the inclusion of the net gain or interest from short-term investment transactions in the calculation of the apportionment formula regardless of whether a taxpayer files using the three-factor formula or the single factor gross receipts formula." The remainder of the Department's discussion is consistent with this position.

referring to Section 12-6-2295(B)(1).[3] Also in its written response, Duke Energy likened the inclusions and exclusions set forth in Section 12-6-2295 to the amended language of S.C. Code Ann. § 12-50-150 (2000), which the South Carolina Supreme Court, in Key Corporate Capital, Inc. v. County of Beaufort, considered to be a change in the law, rather than a clarification. 373 S.C. 55, 644 S.E.2d 675 (2007). As Duke Energy correctly points out, the Court in Key Corporate Capital held that the subsequent amendment of the statute at issue, which added "plus interest in the amount actually earned by the county on the amount refunded" to "the amount paid" in determining the total amount refunded to a successful bidder when a tax sale is voided, constituted a change in the statute, not a clarification. The Court reasoned that the plain meaning of the original statute included only "the amount paid" in the refund, and that the "plus interest" language that was added "materially changed the terminology of the statute, [and that] a departure from existing law [, therefore,] clearly was intended, rather than a clarification of original intent."

Unlike the Court in Key Corporate Capital, which "s[aw] no reason not to apply the presumption[,]" this Court has set forth in its Amended Order reasons not to apply the presumption but instead finds that Section 12-6-2295(B)((1) was "a subsequent statutory amendment . . . clarifying original legislative intent."[4] Key Corporate Capital, 373 S.C. at 60, 644 S.E.2d at 678 n.3 (quoting Stuckey v. State Budget and Control Bd., 339 S.C. 397, 401, 529 S.E.2d 706, 708 (2000)). 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. See Duvall, 377 S.C. at 46, 659 S.E.2d at 130 ("[A] subsequent statutory amendment may also be interpreted as clarifying original legislative intent."). Rather, the Court must look at whether an amendment to the language of a statute alters the meaning of the statute to determine whether a change, rather than a mere clarification, was intended by the Legislature.

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[3] In its Motion for Reconsideration, Duke Energy made the following statement: "This legislative change made clear that the sales of securities are excluded from the factor entirely." In response to this statement, the Court posed two questions to the parties: "(1) To which subsection of 12-6-2295 is 'legislative change' referring? (2) How, specifically, does this subsection exclude Duke Energy's sales of securities, e.g. municipal bonds and commercial paper?"

[4] The Court quite agrees that parts of Section 12-6-2295(B) reflect changes made by the Legislature to prior law, such as subsections (7) and (9), which respectively exclude from "sales" and "gross receipts" pension reversions and income from forgiveness of indebtedness, both of which had not been so excluded before.

The amendment to the statute in Key Corporate Capital constituted a clear change in the meaning of the statute at issue in that case by adding interest to "the amount paid" in calculating the total amount refunded to a successful bidder when a tax sale is voided. As a result of the new statutory language, the successful bidder would be refunded a higher amount than he/she originally paid, and therefore would receive more under the new statute than under the old statute, which only refunded the amount paid and did not include interest. Thus, because the meaning of the statute was altered by the "material[] change[s to] the terminology of the statute," the Court held that "a departure from existing law clearly was intended, rather than a clarification of original intent. . . ." 373 S.C. at 61, 644 S.E.2d at 678. In the present case, however, Section 12-6-2295(B)(1) merely follows the existing law in South Carolina with regard to the treatment of principal, specifically that principal is excluded from "sales" and "gross receipts," as has been previously discussed. Section 12-6-2295(B)(1) thus simply clarifies that exclusion of principal from "sales" and "gross receipts" for purposes of the apportionment formula applies to "repayment, maturity, or redemption of **the principal of** a loan, bond, or mutual fund or certificate of deposit or similar marketable instrument[.]" (Emphasis added).

Nevertheless, Duke Energy argues in its responses to the Court's inquiries dated September 19, 2012 that the language of Section 12-6-2295(B)(1) "does not exclude the 'sales' of securities," only "the repayment, maturity or redemption of a security," and that the Department's auditor, Joe Southard, created an ambiguity by stating in his deposition testimony that the exclusion did apply to the sales of securities. (Emphasis omitted). It must be noted from the outset that Duke Energy's position that Section 12-6-2295(B)(1) does not exclude the sales of securities stands in complete contradiction to the position that Duke Energy took in its Memorandum in Support of Its Motion for Reconsideration, in which it stated: "This legislative change [set forth in S.C. Code Ann. § 12-6-2295(B)(1)] made clear that **the sales of securities are excluded from the factor entirely**." (Emphasis added). Because Duke Energy's initial argument was that the sales are excluded by the "change" Section 12-6-2295, and Duke Energy confirmed that it was relying on subsection (B)(1) when referencing that change, Duke Energy cannot now argue that sales of securities are **not** excluded by Section 12-6-2295(B)(1). See Cothran v. Brown, 357 S.C. 210, 215, 592 S.E.2d 629, 631 (2004) (citations omitted) ("Judicial estoppel is an equitable concept that prevents a litigant from asserting position inconsistent with, or in conflict with, one the litigant has previously asserted in the same or related proceeding. The

purpose of the doctrine is to ensure the integrity of the judicial process, not to protect the parties from allegedly dishonest conduct by their adversary.").

In response to Duke Energy's initial argument, this Court finds that "sales" of securities are not subject to the exclusion under 12-6-2295(B)(1), but only to the extent of the net gains from those sales; the principal from those sales is excluded. The Court also disagrees with Duke Energy's statement that "th[e] exclusion is limited to the repayment, maturity or redemption of a security," because this statement excludes a key phrase in the language of the statute: "the principal of." The statutory exclusion under (B)(1) applies only to "repayment, maturity, or redemption of **the principal of** a loan, bond, or mutual fund or certificate of deposit or similar marketable instrument[.]" (Emphasis added).[5] Hence, the exclusion only applies to the extent of the principal of the securities that have been repaid, have matured, or have been redeemed. Indeed, this was the understanding that the Department's auditor had, as reflected in his response that only the net amount from the repayment, maturity, or redemption of the principal of a marketable instrument falling under (B)(1) would be included in the sales factor, not the principal. Thus, the auditor's deposition testimony cited by Duke Energy in footnote 3 of its responses to the Court's inquiries dated September 19, 2012 does not create an ambiguity, but rather echoes the Department's long-standing policy of excluding principal from "sales" and "gross receipts" in the apportionment formula.

Finally, Duke Energy argues that "principal" in Section 12-6-2295(B)(1) modifies only "a loan, bond or mutual fund" and does not modify "certificate of deposit" and "similar marketable instrument." Section 12-6-2295(B)(1) excludes from the definitions of "sales" and "gross receipts" "repayment, maturity, or redemption of the principal of a loan, bond, or mutual fund or certificate of deposit or similar marketable instrument." Duke Energy maintains that "the word 'or' is a disjunctive particle [sic] and its use before 'certificate of deposit' and before 'similar marketable instrument' signifies an alternative." Thus, "principal" modifies only "a loan, bond, or mutual fund."

As an initial matter, because Duke Energy admits that "[t]he statute requires the exclusion of the 'principal' of 'a loan, bond, or mutual fund,'" and admits that it "purchased and

[5] According to Duke Energy's letter dated July 17, 2012 in response to inquiries issued by the Court, the securities that Duke Energy purchased and sold as a part of its business included municipal bonds, loan repurchase agreements, and commercial paper.

sold securities[,] including municipal bonds . . .," Duke Energy essentially concedes that the principal of at least some of the securities that it sold is excluded from "sales" and "gross receipts" in the apportionment formula under Section 12-6-2295(B)(1). However, as discussed in this Court's Amended Order, the principal from the sales of securities was likewise excluded from the "sales" or "gross receipts" factor of the apportionment formula prior to the enactment of Section 12-6-2295(B)(1). Therefore, no change took place with respect to the exclusion of principal from the sales of securities under the "sales" or "gross receipts" factors of the apportionment formula. This stands in contradiction to Duke Energy's contention that the apportionment formula was substantially changed based upon the language of Section 12-6-2295(B)(1) enacted by the Legislature in 2007.[6]

As to Duke Energy's statutory interpretation of Section 12-6-2295(B)(1), the Court agrees that the "or" is a logical disjunction, coordinating conjunction, or disjunctive conjunction or disjunctive participle that signifies an alternative between the phrases "loan, bond, or mutual fund"; "certificate of deposit"; and similar marketable instrument." See Garris v. Governing Bd. of the S.C. Reinsurance Facility, 333 S.C. 432, 440, 551 S.E.2d 48, 52 (1998) (recognizing "where a statute contains two clauses which prescribe its applicability and the clauses are connected by the disjunctive 'or,' application of the statute is not limited to cases falling within both clauses, but applies to cases falling within either"); Brewer v. Brewer, 242 S.C. 9, 14, 129 S.E.2d 736, 738 (1963) (holding the word "or" used in a statue or regulation is a disjunctive participle marking an alternative). However, the use of "or" here does not limit the application of "the principal of" to the first phrase – "loan, bond, or mutual fund." Rather, "the principal of" modifies all three phrases in subsection (B)(1). The controlling language of this subsection is the first part of the subsection – "repayment, maturity, or redemption of the principal of." "The principal" cannot be separated from "repayment, maturity, or redemption," as the "repayment, maturity, or redemption" is "of the principal." Likewise, the latter part of the subsection "a loan, bond, or mutual fund or certificate of deposit or similar marketable instrument" cannot be separated from the controlling, first half of the subsection – "repayment, maturity, or redemption

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[6] Duke Energy infers that a distinction there exist between the sale of securities, and the repayment, maturity, or redemption of securities. I find no such distinction evident from the language of Section 12-6-2295(B)(1). Moreover, as explained above, Duke Energy in both its Memorandum in Support of its Cross-Motion for Partial Summary Judgment and in its Motion for Reconsideration contends that the sales of securities are **excluded** from the apportionment formula of Section 12-2-2295 entirely.

of the principal of." Had the Legislature intended "certificate of deposit" and "similar marketable instrument" to be interpreted as separate items that were not modified by "repayment, maturity, or redemption of the principal of," then the Legislature would have listed "certificate of deposit" and "similar marketable instrument" as separate, enumerated items, as it did in subsections (B)(2)-(10). Rather, the Legislature clearly put these various terms under one subsection because they were "similar marketable instrument[s]." Hence, each of the terms, "loan," "bond," "mutual fund," "certificate of deposit," and "similar marketable instrument" are all singular, all being modified by the same indefinite article "a." Furthermore, from a practical standpoint, to adopt Duke Energy's interpretation would be to endorse the absurd notions that the net gain from certificates of deposit or similar marketable instruments is excluded from "sales" and "gross receipts" for purposes of tax apportionment, and that certificates of deposit should be treated differently from bonds. The Legislature could hardly have intended such an absurd application. Therefore, this Court rejects Duke Energy's interpretation of Section 12-6-2295(B)(1).

IT IS THEREFORE ORDERED that that the Petitioners' Motion for Reconsideration is denied, in part, and granted, in part, in keeping with this Order.

AND IT IS SO ORDERED.

Ralph King Anderson, III
Administrative Law Judge

October 11, 2012
Columbia, South Carolina

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Duke Energy Corporation, Petitioner, vs. South Carolina Department of Revenue, Respondent.	)	Docket No. 10-ALJ-17-0270-CC **FINAL ORDER AND DECISION**

Appearances:

For the Petitioners: Burnet R. Maybank, III, Esq.; Eric S. Tresh, Esq.; Jeffrey A. Friedman, Esq.; and Maria M. Todorova, Esq.

For the Respondent: Tracey C. Green, Esq.; John W. Roberts, Esq.; Harry Hancock, Esq.; and J. Abraham Gutting, Esq.

STATEMENT OF THE CASE

This matter comes before the Administrative Law Court (ALC or Court) following Duke Energy Corporation's (Duke Energy) request for a contested case hearing under S.C. Code Ann. § 12-60-460 (Supp. 2006). Duke Energy is contesting the Determination of the South Carolina Department of Revenue (Department) denying Duke Energy's claim for a refund of South Carolina corporate income taxes for the tax years 1994 through 2001 (Tax Periods at Issue).[1] Duke Energy asserts that it is a service provider and thus is required to apportion its income to South Carolina on the basis of the single-factor gross-receipts apportionment formula. A hearing was held before this Court on September 5 and 6, 2012.

LEGAL ISSUES RAISED

The following issue is raised in this proceeding: Whether Duke Energy, based on its activities within the State of South Carolina, falls under Section 12-6-2250 as a "manufactur[er]" or some other category listed in 12-6-2250, or whether Duke Energy is required to apportion its

[1] Duke Energy originally sought refunds for the tax years 1978 through 2001. On October 11, 2012, this Court ruled that Duke Energy's refund claims for the tax years 1978 through 1993 are untimely. Thus, Duke Energy's refund claims for 1978-1993 are not before the Court at this time.

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income to South Carolina based on the single-factor gross-receipts apportionment formula pursuant to Section 12-6-2290.[2]

STIPULATIONS OF FACT

At the hearing into this matter and pursuant to ALC Rule 25(C), the parties entered the following written stipulations of fact into the Record:

Preliminary Definitions

1. "Gross-receipts apportionment formula" refers to South Carolina's method of income apportionment prescribed under S.C. Code Ann. § 12-6-2290 and former S.C. Code Ann. § 12-7-1190.
2. "Multi-factor apportionment formula" refers to South Carolina's method of income apportionment prescribed under S.C. Code Ann. § 12-6-2250 and former S.C. Code Ann. § 12-7-1140.
3. "Petitioner" means Duke Energy Corporation (formerly known as Duke Power Company) and any predecessor or successor and any other entity owned by Duke Energy Corporation.
4. "Respondent" means the South Carolina Department of Revenue.
5. "1978-2001 tax periods" means the Petitioner's tax years 1978 through 2001, all of which were reported on a calendar-year basis.

The Parties

6. Respondent is an administrative Cabinet-level agency of the State of South Carolina responsible for administering and enforcing the State's revenue laws.

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[2] In my Amended Order Granting Summary Judgment in Part and Denying Summary Judgment in Part, I stated the issue presently before the Court as follows: "whether Duke Energy, based on its activities within the State, falls under Section 12-6-2250 as a "manufactur[er]," or whether Duke Energy is a seller of services, or otherwise falls under none of the above-categories, and is therefore required to apportion its income to South Carolina based on the single-factor gross-receipts apportionment formula . . . ." This statement of the issue contains the conclusory phrase "is a seller of services, or otherwise falls under none of the above categories." This phrase erroneously presupposes that a seller of services could not be included in Section 12-6-2250. However, as will be discussed in more detail later, sales of electricity, though considered a service for certain tax purposes, has also been considered "tangible personal property," for those same tax purposes. Therefore, electricity could be considered a service and still be tangible personal property under Section 12-6-2250. The error of excluding "seller of services" from Section 12-6-2250 in the statement of the issue, however, did not affect the need to have a hearing on the present issue because there is a genuine issue of material fact as to the nature of Duke Energy's status for purposes of Sections 12-6-2250, -2290 based on its business activities.

7. Petitioner is, and was during the 1978-2001 tax periods, engaged in the generation, transmission, distribution, and sale of electricity in portions of North Carolina and South Carolina.

8. The Parties stipulated to Petitioner's restated corporate charters filed with the North Carolina Secretary of State on July 26, 1977, October 6, 1993, and June 18, 1997.

9. The Parties stipulated to Petitioner's Form 10-Ks for the 1978-2001 tax periods.

10. During the 1978-2001 tax periods, Petitioner was regulated by the South Carolina Public Service Commission (Commission) as an "electric utility" pursuant to Title 58-27-10(7).

Procedural History

11. Petitioner timely filed its South Carolina corporate income tax returns (including license tax returns) for the 1978-2001 tax periods.

12. On its originally-filed South Carolina corporate income tax returns for the tax periods 1978-2001, Petitioner filed using the multi-factor apportionment formula.

13. On December 12, 2002, Petitioner filed South Carolina amended corporate income tax returns for the 1978-2001 tax periods seeking a refund of corporate income taxes plus applicable interest ("1978-2001 Refund Claims").

14. The Parties stipulated to Petitioner's South Carolina amended corporate income tax returns filed on December 12, 2002 for the 1978-2001 tax periods.

15. The 1978-2001 Refund Claims reflected use of the gross-receipts apportionment formula to apportion Petitioner's income to South Carolina.

16. On February 12, 2003, Respondent denied Petitioner's 1978-2001 Refund Claims.

17. On March 13, 2003, Petitioner timely appealed from the denial of its 1978-2001 Refund Claims.

18. On February 4, 2010, Respondent issued a Determination denying Petitioner's refund claims for tax periods 1978-2001.

19. On March 3, 2010, Petitioner timely filed a Request for Contested Case Hearing with the Clerk's Office of the South Carolina Administrative Law Court in Columbia, South Carolina contesting the Determination.

20. Petitioner and Respondent timely filed their Prehearing Statements and Amended Prehearing Statements.

FINDINGS OF FACT

Having observed the witnesses and exhibits presented at the hearing and taking into consideration the burden of persuasion and the credibility of the witnesses, I make the following additional findings of fact by a preponderance of the evidence:

Duke Energy Business Operations

Duke Energy is engaged in the business of generation, transmission, distribution, and sale of electricity in portions of both North Carolina and South Carolina. Clearly, providing electricity is Duke Energy's "primary business." Duke Energy also furthers its primary business by owning and operating transmission and distribution assets in South Carolina as well as in North Carolina.

Duke Energy sells electricity on both a metered and flat-fee basis. Under the flat-fee plan, Duke Energy provides electricity for outdoor lighting at a fixed price.[3] The metered service plan is based on usage, i.e., the electricity provided by Duke Energy is read by a meter and billed to the customer on the basis of usage during the billing period. Regardless of the service plan, a portion of each Duke Energy customer's service charge recovers Duke Energy's costs associated with maintaining the infrastructure that Duke Energy uses to provide electric service. This charge is known as a capacity charge and is billed to the customer as part of the monthly service charge,e ven if the customer does not use electricity in a given month. Nevertheless, however the profits from the flat-rate or capacity charges are perceived, those charges were not a significant portion of Duke Energy's profit from the sale of electricity during the Tax Periods at Issue.[4]

Production of Electricity

Duke Energy operates plants in both South Carolina and North Carolina to produce electricity. In South Carolina, Duke Energy has two nuclear power plants, four coal power

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[3] Although Duke Energy introduced evidence regarding the fact that it charges a flat fee for outdoor lighting, that does not negate the fact that the vast majority of the electricity delivered by Duke Energy is sold based on quantity consumed. Moreover, the time period for which outdoor lighting operates is controlled by use of a photocell, and Duke Energy has information to make estimates regarding variables in the timing to determine a pricing for the outdoor lighting.

[4] Mr.Dhiaa Jamil did testify that a portion of a customer's bill is a flat fee for a capacity charge, but he also testified that he did not know the rate or level at which that fee is imposed—other than that it is less than $100—and, in fact, ultimately testified "that's really not my area." The Court concludes that this testimony does not assist Duke Energy in meeting its burden of proof.

plants, three hydroelectric power plants, and several oil or gas power plants.[5] The electricity that is produced and consumed by its customers is created at Duke Energy generation facilities. A generator is a "mechanical device" that uses mechanical energy to produce electric energy or, as it is more commonly known, electricity. Generators have been used to produce electricity in substantially the same manner for over 100 years. Many, though not all, of Duke Energy's generation facilities use a turbine driven by steam power to turn the generator. Although the sources or inputs (e.g., coal, uranium, water) used at these different types of generation facilities may vary, all use a generator to produce electricity. The result, however, is the same: Duke Energy employs a mechanical device to produce and generate electricity using the same process employed since the early 20th century.

Duke Energy nonetheless offered evidence that the production of electricity does not create anything. Rather, Duke Energy avers it is doing nothing more than providing access to "the electromagnetic field." However, Duke Energy produces that electromagnetic field. Duke Energy's own witness testified that, "in layman's terms," electromagnetic field is electric current," and that any electromagnetic field results from the electric current created by the generator. No matter what moniker used to describe the product produced by Duke Energy, the electric current that generates that field, or even the field itself, is produced through a mechanical process run by Duke Energy.

Distribution and Sale of the Electricity

The process by which Duke Energy generates or produces electricity does not end at the generator. The generator is obviously connected to the transmission and distribution network. That network consists of transmission and distribution lines, which are conductors made of copper, towers and poles, and transformers. During the transmission and distribution process, the transformers process the electricity by "stepping up" and "stepping down" the voltage of the electricity. By "stepping up" the voltage, Duke Energy is able to transmit the electrical current at a low current. The "step up" process is done in order to efficiently deliver electricity by reducing line loss, which is the loss to Duke Energy of a quantity of electricity as heat during the transmission and distribution processes.

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[5] Duke Energy also produces electricity using natural gas, wind, and solar. Duke Energy also occasionally purchases electricity from other electric utilities. However, these methods of producing or acquiring electricity appear to be much less significant than the methods indicated above.

Ultimately, electricity must be delivered at the specified voltage so that it can be used by customers in their homes and businesses. Typically, electricity is not usable by a customer unless it is at 120 volts, although sometimes it is delivered at 220 volts. Whatever the required voltage, it is necessary to ensure that the electricity delivered to a customer is "stepped down" to the usable voltage, a process that is done close to where the electricity is eventually used by the customer.

Most customers of Duke Energy obtain the electricity after it passes through a meter. More specifically, by activating a switch, which creates a load and completes a circuit, the electricity passes through the customer's meter and operates the device. Duke Energy measures the amount of electricity consumed by each customer (usually in term of kilowatts) and then charges the consumer for the quantity used/consumed.[6] Moreover, electricity is not a useable product unless it is delivered to customers at precise specifications. Prior to delivery of the electricity to the consumer through the meter, the electric utility owns the electricity, which is not delivered for sale until it is processed into a form usable by a consumer. This typically occurs closer to the customer's business or home.

Duke Energy compared the provision of electricity to the provision of telecommunication services–both cellular and landline. However, unlike Duke Energy, telecommunication companies do not generate electricity but, instead, only use electricity purchased from electric utilities. Furthermore, Duke Energy delivers to its customers a quantifiable product that is produced by Duke Energy. In contrast, telecommunications companies transmit communications or intelligence produced or created by one customer to another through a system operated by electricity purchased from utilities like Duke Energy. Additionally, cellular telephone providers use radio technology to transfer information between two locations. The frequencies and strengths of telecommunications waves are vastly different than the frequencies and strengths of electricity.

In sum, the generation, transmission, and distribution processes are interconnected. Duke Energy cannot produce or deliver electricity to consumers in the absence of any one of these parts, each of which provide an essential aspect of Duke Energy's process for producing,

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[6] Aside from the fact that electricity is measured by quantity, the nature of electricity, as a product,is further demonstrated by the fact that electric current is a flow of charges or charged particles, the rate of which is measured in amperes.

transmitting, and delivering electricity to customers. Moreover, Duke Energy presented no evidence that supports separating its electric transmission and distribution processes from its generation processes and, in fact, described the whole process as a "very elaborate system." Indeed, Mr. Jamil testified that each of the processes employed by Duke Energy is "used to produce electricity."[7]

Physical Nature of Electricity

Electricity is a physical product with physical characteristics. Regarding whether electricity may be sensed by humans, I do not find that the testimony presented by either party was probative as expert testimony. In other words, there was no evidence that the witnesses possessed "knowledge, skill, experience, training, or education" regarding the effect of electrical stimulation upon the human physiology justifying this Court to accept their opinion as expert testimony. Nevertheless, based upon the evidence,I find that it is possible to feel electricity, and thus electricity can be touched. Though Duke Energy presented valid instances in which a person may not feel electricity, that does not discount the instances when it can be felt.

Moreover, even if I were to find Duke Energy's evidence regarding this matter to be probative, I am unconvinced. Duke Energy's expert witness, Mr. Ioannis Papapolymerou, explained that a human cannot feel electricity but only the impact of the electricity. Though I find the proposed nuances between the feeling of an object itself and the feeling of the impact from the object to be the makings of an interesting theoretical debate, I find no considerable distinction between the two and therefore find that electricity can be felt by humans.

Electricity can also be stored. Concerning this issue, Duke Energy characterized an electric charge as the source of electricity and as the physical property that is stored. The electrical charge is nonetheless a component of what is produced by Duke Energy.

In sum, Duke Energy takes raw materials (e.g., coal, uranium, water), uses those materials to power mechanical devices to produce a form of electricity that is usable and consumed by the public. Although electricity is unique, it is a tangible product with identifiable physical characteristics that may be created, measured, felt, stored, and consumed, and an electric utility may exercise ownership rights over it.

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[7] Additionally, Duke Energy introduced an exhibit listing the "Functions" of Duke Energy as "Production," "Transmissions," and "Distribution."

Department's Policy History

The Department and the Commission have a longstanding interpretation that electric utilities should be characterized as manufacturers for purposes of corporate income tax apportionment. Though the Department's policy was never set forth in any public document, it was memorialized in the foreign corporation training manual used by the Department's auditors. Joseph Southard, a retired auditor for the Department with over 25 years of experience, who conducted audits of several electric utilities, including Duke Energy, explained that the Department's policy was that electric utilities were manufacturers for purposes of the apportionment statutes.

The Department also applied this policy consistently, and Duke Energy offered nothing to show otherwise. No other electric utilities challenged that position before Duke Energy filed its amended returns. In fact, Duke Energy filed its returns using the multi-factor apportionment formula for at least 23 years before filing the amended returns and challenging the policy in 2002.

CONCLUSIONS OF LAW

In determining the income tax due from Duke Energy, the Department apportioned Duke Energy's South Carolina income using the multi-factor apportionment formula of Section 12-6-2250. The Department argues that Duke Energy's principal business in South Carolina is manufacturing and that Section 12-6-2250 should therefore apply. Duke Energy, however, contends that its principal business in South Carolina is the provision of service to customers and that Section 12-6-2290 should thus apply.

Burden of Proof

Because Duke Energy is challenging a determination by the Department that it must apportion its income under section 12-6-2250, it has the burden of proof. See SCALCR 29(B); Ford v. Atl. Coast Line R. Co., 169 S.C. 41, 168 S.E. 143, 167 (1932) ("The general rule is, in the absence of valid statutory enactment to the contrary, that the burden of proof rests upon him who has the affirmative of the issue and does not shift to the defendant even when aided, in the first instance, by a rebuttable presumption."); see also Anonymous v. State Bd. of Med. Exam'rs, 329 S.C. 371, 496 S.E.2d 17 (1998). This burden requires Duke Energy to prove that the Department's determination is wrong by a preponderance of the evidence. See, e.g., Janasik v. Fairway Oaks Villas Horizontal Prop. Regime, 307 S.C. 339, 346, 415 S.E.2d 384, 388 (1992)

("Findings of fact based upon a 'preponderance' of the evidence are those supported by the greatest 'weight, amount, credibility or truth' as reflected by the whole of the evidence before the court, or 'evidence which convinces as to its truth.'").

Apportionment of Income

The method of apportionment that a taxpayer must use depends upon the nature of the taxpayer's business in this State. Section 12-6-2250[8] requires a taxpayer to apportion its multi-state income using the property, payroll, and sales factors if the taxpayer falls within the following definition:

> A taxpayer 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 . . . .

S.C. Code Ann. § 12-6-2250.[9] On the other hand, "[i]f the principal profits or income of a taxpayer are derived from sources other than those described in Section 12-6-2250," the taxpayer is required to use the single-factor gross-receipts apportionment formula. S.C. Code Ann. § 12-6-2290.[10] Consequently, the issue that must be resolved for the Tax Periods at Issue is whether the Department erroneously determined that Duke Energy must apportion its income pursuant to Section 12-6-2250. After considering the evidence in the record and the pertinent legal authorities, I conclude that Duke Energy has failed to establish by the preponderance of the evidence that its principal business in South Carolina is not manufacturing or some other activity falling under Section 12-6-2250.

Agency Deference

The Department contends that in determining this issue the ALC must give its construction of Section 12-6-2250 deference. "An agency's long-standing interpretation of a statute is usually entitled to be given deference and should not be overruled by a reviewing court

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[8] Because the Tax Periods at Issue cover multiple years (1994-2001), a parenthetical date will not be used for the statutory citations.

[9] Section 12-6-2250 during the Tax Periods at Issue required that the sales factor be double-weighted in calculation of the apportionment formula. This section was previously designated as section 12-7-1140, which was repealed in 1995. Prior to June 12, 1995, section 12-7-1140 provided a three-factor formula without the double-weighted sales factor.

[10] Like section 12-6-2250, the predecessor of section 12-6-2290, S.C. Code § 12-7-1190, was repealed in 1995, but the language remained substantially the same. Section 12-6-2290 also excludes sources described in section 12-6-2310, but that statute references income earned by railroad companies, motor carriers, telephone service companies, pipeline companies, airline companies, and shipping lines, none of which are applicable in this case.

in the absence of cogent reasons. . . ." Media Gen. Commc'ns, Inc., and Media Gen.B road.of S.C. Holdings, Inc. v. S.C. Dep'tof Revenue, 388 S.C. 138, 149, 694 S.E.2d 525, 531 (2010) (citing Etiwan Fertilizer Co. v. S.C. Tax Comm'n, 217 S.C. 354, 360, 60 S.E.2d 682, 684 (1950). In Etiwan, the Court further explained that: "[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." Etiwan, 217 S.C. at 359, 60 S.E.2d at 684. If the Department is entitled to deference, it is Duke Energy's burden to prove that the Department's policy is "arbitrary, discriminatory or unreasonable." Colonial Life & Acc. Ins. Co. v. S. Carolina Tax Comm'n, 248 S.C. 334, 339, 149 S.E.2d 777, 780 (1966) ("The Commission has the power and duty . . . to prescribe a method for arriving at a tax base which reasonably represents the proportion of the trade or business carried on within this State...and its determination thereabout will not be overthrown by the courts except upon a showing, absent here, that it is arbitrary, discriminatory or unreasonable") (internal quotation marks omitted); see also Vulcan, 342 S.C. at 496 , 536 S.E.2d at 900; Etiwan, 217 S.C. at 359, 60 S.E.2d at 684. For the reasons set forth below, Duke Energy did not meet its burden in this regard.

The record shows that the Department and the Commission consistently have characterized electric utilities as manufacturers for purposes of corporate income tax apportionment.[11] Duke Energy filed its returns using the multi-factor apportionment formula for at least 23 years before filing the amended returns and challenging the policy in 2002, which reflects that Duke Energy was aware of the policy. And although a Duke Energy witness, Cooper Monroe,[12] testified that the original returns were filed in error, he also acknowledged that Duke Energy and accounting firms "in [his] experience" apply a review process before a tax return is filed. This long period of time in which Duke Energy filed returns using the multi-factor apportionment formula leads to the conclusion that the returns were filed in

[11] Duke Energy asserts that there is an inconsistency in the Department's audit manual in that service providers (those whose principal business is providing a service) have to apportion their income to South Carolina based on the single-factor gross-receipts apportionment method, while power companies must use the multi-factor apportionment formula. However, there is only an inconsistency if one adopts the premise that the generation, transmission, and distribution of electricity constitutes provision of service, or the premise that provision of service generates more profits or income than generation, transmission, and distribution of electricity, neither of which this Court adopts.

[12] Thomas Cooper Monroe, III is currently the Director of State and Local Tax for Duke Energy.

accordance with the policies and filing requirements promulgated by the Department and as understood by Duke Energy at the time the returns were originally filed.

Moreover, though the policy was not set forth in a publicly-issued advisory opinion, a decision of the Commission for property tax purposes supports the conclusion that the Department openly and consistently viewed electric utilities as manufacturers. In 1985, the 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 Ry. decision. S.C. Tax Comm'n Decision P-D-532, 1985 WL 192777 (Apr. 11, 1985) (citing Columbia Ry., Gas & Elec. Co. v. Query, 134 S.C. 319, 132 S.E. 611, 612 (1926)). Although this ruling was rendered in the context of property taxes, it reflects a public position that the Department consistently applied the Columbia Ry., supra, and Duke Power, infra, decisions and consistently determined that electric utilities are manufacturers. The consistency of this policy is further evidenced by the fact that in P-D-532, the Department gave the electric utility the benefit of being a manufacturer by determining that its property-tax assessment ratio should be 6% as opposed to the 10.5% applicable to the personal property of non-manufacturing entities.[13] More importantly, the South Carolina Supreme Court's decision in Columbia Ry., supra publicly reflects in the income-tax context the Department's position that those engaged sale of electricity are manufacturers. See also Duke Power Co. v. Bell, 156 S.C. 299, 152 S.E. 865 (1930) (recognizing the same position in the property-tax context). I find that though the notice to the General Assembly is traditionally given through a policy available to the public, the facts in this case meet the criteria envisioned in Etiwan. See also Whitner v. State, 328 S.C. 1, 6, 492 S.E.2d 777, 779 (1997) ("[T]here is a basic presumption that the legislature has knowledge of previous legislation **as well as of judicial decisions** construing that legislation when later statutes are enacted concerning related subjects.") (emphasis added). Nevertheless, whether or not the Department's position is given deference, I find that Duke Energy's principal business is manufacturing for the reasons given below.

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[13] Also, in 1970, the South Carolina Attorney General opined that the South Carolina Electric & Gas Company was a manufacturer and that any plant it used to produce electricity was a manufactory eligible for property tax exemptions. 1970 S.C. Op. Att'y Gen. 154, Op. No. 2909, 1970 WL 12192 (June 2, 1970). The basis for this ruling was the Columbia Ry. and Duke Power decisions.

Manufacturing

Duke Energy must apportion its multi-state income for the Periods at Issue pursuant to Section 12-6-2250 unless Duke Energy proves that its principal business within this State is not (1) "manufacturing"; or (2) "any form of collecting, buying, assembling, or processing goods and materials within this State"; or (3) "selling, distributing, or dealing in tangible personal property." Though Duke Energy suggests a contrary reading of this statute, the Legislature's use of the disjunction "or" following "manufacturing" in Section 12-6-2295(a)'s phrase "manufacturing or any form of collecting, buying, assembling, or processing goods and materials within this State" demonstrates that the term "manufacturing" is not dependent on, or modified by, the clause "any form of collecting, buying, assembling, or processing goods and materials within this State." Michau v. Georgetown County ex rel. S.C. Counties Workers Comp. Trust, 396 S.C. 589, 595, 723 S.E.2d 805, 808 (2012) ("[T]he 'use of the word 'or' in a statute 'is a disjunctive particle [sic] that marks an alternative.'") (citing K & A Acquisition Group, LLC v. Island Pointe, LLC, 383 S.C. 563, 580, 682 S.E.2d 252, 261 (2009)). This conclusion is supported by the statutory history, which reflects that the apportionment statute, when adopted, addressed only corporations "engaged in the business of manufacturing," 1927 S.C. Acts 1, No. 1, § 15(1),[14] and that the latter clause of subsection (a) was added in 1946, 1946 S.C. Acts 1491, No. 553, § 3 (amending apportionment statute, then found in section 2451 of the 1942 Code, 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.") (emphasis added). Thus, inclusion of the phrase "or any form of collecting, buying, assembling, or processing goods and materials" after "manufacturing" in Section 12-6-2250(a) reflects that the Legislature intended to cover not just manufacturing but all activities that a business could perform in regards to a product prior to making that product available to its customers. See Charleston County Sch. Dist. v. State Budget and Control Bd., 313 S.C. 1, 5, 437 S.E.2d 6, 8 (1993) ("The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature.").

Here, there is no dispute regarding several of the elements of Section 12-6-2250. It is undisputed that Duke Energy is a taxpayer required to file corporate income tax returns in this

[14] This language remained the same in the apportionment statute enacted as Section 2451 in both the 1932 South Carolina Code of Laws and the 1942 South Carolina Code of Laws.

State. Similarly, it is undisputed that Duke Energy has multi-state income that must be apportioned. See S.C. Code Ann. § 12-6-2210(b). There is also no disagreement that Duke Energy is engaged in the business of generation, transmission, distribution, and sale of electricity in portions of both North Carolina and South Carolina. Mr. Dhiaa Jamil[15] testified that providing electricity is Duke Energy's "primary business." To conduct its primary business, Duke Energy operates generation plants in both South Carolina and North Carolina.

Because "manufacturing" is not defined in the apportionment statutes, this Court must interpret it in accord with its usual and customary meaning. E.g., Travelscape, LLC v. S.C. Dept. of Revenue, 391 S.C. 89, 99-100, 705 S.E.2d 28, 33-34 (2011). Merriam-Webster's Dictionary presently defines "manufacture" as "the process of making wares by hand or by machinery especially when carried on systematically with division of labor." It further defines the term to include "productive industry using mechanical power and machinery" and "the act or process of **producing** something." See <http://www.merriam-webster.com/dictionary/manufacture> (accessed October 18, 2012); see also Jennings v. Jennings, No. 27177 (Oct. 18, 2012) (Hearn, J.) (referencing online Merriam-Webster's Dictionary for definition of a word). [16] And in 1939, in holding that the generation of electricity is manufacturing, the Iowa Supreme Court referenced Webster's definition of manufacturing, which was "'to make by hand, by machinery, or by other agency; to work raw materials into forms for use; to produce mechanically.'" Winterfield, 285 N.W. at 224-25. Applying this definition, the court held that generating electricity is manufacturing. Id.

Our Supreme Court has also held on two different occasions that an electric utility that generates electricity is engaged in manufacturing. In Columbia Ry., the South Carolina Supreme Court held that a company engaged in the business of generating electricity was properly

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[15] Dhiaa M. Jamil, P.E., currently is the Executive Vice President of Nuclear Generation and the Chief Nuclear Officer for Duke Energy.

[16] It is also worth noting that the current Merriam-Webster's definition of the term "ware," a term included in the definition of "manufacturing," includes manufactured goods. See <http://www.merriam-webster.com/dictionary/ware> (accessed October 18, 2012). Also, Merriam-Webster's current definition of "good" includes "something that has economic utility or satisfies an economic want" and "something manufactured or produced for sale." See <http://www.merriam-webster.com/dictionary/good> (accessed October 18, 2012). Thus, even if in Section 12-6-2250(a) "manufacturing" modified "goods," the electricity that Duke Energy generates, transmits, and distributes would be in accord with the common understanding of the term "manufactured good," and would therefore still satisfy Section 12-6-2250(a) under that alternative interpretation of the statute. Furthermore, Duke Energy has failed to prove by the preponderance of the evidence that the electricity it produces is not a good or that it is not manufactured.

considered a "manufacturer" for purposes of a statute that imposed a corporate income tax on "a corporation engaged in the business of manufacturing." 132 S.E. at 612 ("We do not think that there is any doubt that the appellant is engaged in the business of manufacturing gas and electricity ...."); see also State v. Broad River Power Co., 157 S.C. 1, 153 S.E. 537, 539 (1929) (noting that the Columbia Railway company built "a large plant for the **manufacture** of gas and **electricity** for sale to the public generally") (emphasis added).[17] In a later case, reviewing a different statute, the Supreme Court held that Duke Power Co., a predecessor of Duke Energy, was entitled to claim a property tax 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, supra. The Court held that, based on Columbia Ry., Duke Power was engaged in manufacturing. Id., 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, the plan or structure wherein the process of generating such electricity is carried on is a manufactory for the purposes of a tax exempting statute."). Thus, although Columbia Ry. considered the 1926 Manufacturer's Tax Act, the Duke Power decision reflects that the Court's holding that Duke Power was engaged in manufacturing was not limited to that statute.[18]

The Supreme Court's determination that two different electric utilities were engaged in manufacturing for purposes of two different tax statutes certainly supports the conclusion that electric utilities are engaged in manufacturing for purposes of other tax statutes, including the apportionment statute. This is especially so given the Supreme Court's holding that "the legislative classification [of the apportionment statute] ... should be liberally construed in favor of the inclusion of business to which the formula is appropriate." Hertz Corp. v. S. C. Tax Comm'n, 246 S.C. 92, 96, 142 S.E.2d 445, 447 (1965) (holding that taxpayer involved in renting

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[17] Notably, the 1927 Century Dictionary defined manufacture as "the making of goods or wares by ... machinery, esp. on a large scale . . . ."

[18] When the holding of Columbia Ry. is considered in light of the pertinent language from the Manufacturer's Tax Act at issue in that case, the application of that decision in this case becomes evident, especially in light of the absence of any distinction between Duke Energy's business in this State versus its business in North Carolina. Specifically, the Manufacturer's Tax Act provided 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 Ry. decision is based on a 1923 Act directed at manufacturers and uses the same 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").

tangible personal property came within the predecessor to section 12-6-2250).[19] The fact that the common definition of "manufacture" has remained constant from the time of the Columbia Railway and Duke Power decisions up to the present, and that definition is still applicable to Duke Energy's operations, further validates that Duke Energy is engaged in manufacturing electricity. In addition, Duke Energy generates, transmits, and distributes electricity in South Carolina using the same methods and principles employed during the era in which these cases were decided. Furthermore, Duke Energy's corporate charter for the Tax Periods at Issue retained the same language used in its original charter, which was considered pertinent by the Supreme Court. Compare Duke Power, 152 S.E. at 867 (referencing charter granting authorization to Duke Power Company to "manufacture, generate, buy, sell, accumulate, store, transmit, furnish, and distribute electric current for light, heat, and power") with Restated Arts. Inc. Duke Power Co. (October 6, 1993) (authorizing company "[t]o manufacture, generate, buy, sell, accumulate, store, transmit, furnish and distribute electric current for light, heat and power") and Restated Arts. Inc. Duke Energy Corp. (June 18, 1997) (same). If the processes of generating, transmitting, and distributing electricity are the same today as those employed in 1926 and 1930, and if those processes constituted manufacturing for purposes of a tax statute during those years, then the generation of electricity constitutes manufacturing for purposes of a tax statute during the Tax Periods at Issue. Duke Energy therefore is engaged in the business of manufacturing in this State for purposes of Section 12-6-2250.

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[19] Although not binding here, courts in other states have held that generating or producing electricity is manufacturing, reflecting that a position such as that taken by the Department is reasonable. Some of these cases have cited Columbia Ry. and Duke Power as support for that holding. Curry v. Ala. Power Co., 8 So.2d 521, 525 (Ala. 1942) (citing Columbia Ry. and Duke Power decisions in holding that generating electricity is manufacturing); State ex rel. Winterfield v. Hardin County Rural Elec. Co-op., 285 N.W. 219, 226 (Iowa 1939) (citing Columbia Ry. and Duke Power and stating: "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"). Other states simply have held that generating electricity is manufacturing. E.g., Pub. Serv. Co. v. Dep't of Rev., 10CA1026, 2011 WL 4089971 (Colo. Ct. App. Sept. 15, 2011) (generating electricity is manufacturing); Davis v. Gulf Power Corp., 799 So. 2d 298, 301 (Fla. Dist. Ct. App. 2001) (generation of electricity is a manufacturing process and electricity is tangible personal property); Minn. Power & Light Co. v. Pers. Prop. Tax, Taxing Dist., City of Fraser, Sch. Dist. No. 695, 182 N.W.2d 685, 692 (Minn. 1970) (producing electricity is manufacturing); Bd. of Assessors of Holyoke v. State Tax Comm'n, 244 N.E.2d 287, 289 (Mass. 1969) (same); *Morley v. Brown & Root*, 239 S.W.2d 1012, 1015 (Ark. 1951); (same); City of Louisville ex rel. v. Howard, 208 S.W.2d 522, 526 (Ky. 1947) ("The generation of electricity is manufacturing."); 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"); see also Comm'r of Revenue v. Houghton Mifflin Co., 666 N.E.2d 491, 495 (Mass. 1996) (rejecting contention that process does not involve manufacturing merely because its inputs are not tangible).

Moreover, the evidence in this case establishes that Duke Energy is a manufacturer. As explained above, "manufacturing" is defined as "the act or process of producing something." Duke Energy's witnesses repeatedly characterized its business as "producing" electricity. Duke Energy is thus engaged in the "act or process of producing [electricity]." Electricity that is produced by Duke Energy and consumed by its customers is created at a generation facility.[20] The process that occurs at a generation facility reflects that it is manufacturing. Each of these facilities contains at least one generator. A generator is a "fairly large machine" and "mechanical device" that uses mechanical energy to produce electric energy or, as it is more commonly known, electricity. The generator creates an electric current that is processed through the transmission and distribution systems. Generators have been used to produce electricity in substantially the same manner for over 100 years. Many, though not all, of Duke Energy's generation facilities use a turbine driven by steam power to turn the generator.[21] The result, however, is the same: Duke Energy employs a mechanical device to produce and generate electricity using the same process employed since the early 20th century. Thus, Duke Energy's generation facilities are, as recognized by our Supreme Court, locations at which manufacturing occurs. See Duke Power, 152 S.E. at 868.

Furthermore, though they disagree as to the ultimate characterization of electricity production, Duke Energy and the Department seem to agree that Duke Energy's generation, transmission, and distribution processes are interconnected. In other words, Duke Energy cannot produce or deliver electricity to consumers in the absence of any one of these parts, each of which provide an essential aspect of Duke Energy's process for producing, transmitting, and delivering electricity to customers. The generator is connected to the transmission system, which

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[20] Mr. Jamil testified that Duke Energy could provide electricity even without its generation assets. That is, Duke Energy apparently contends that it could sell electricity without producing it and, thus, that it is not a manufacturer for that reason. But the fact that an entity could resell a product to customers without actually manufacturing that product does not mean that the entity that did produce the product is not a manufacturer. And a determination of whether any entity that simply resells electricity is a manufacturer is beyond the scope of this proceeding.

In any event, the record does not support any characterization of Duke Energy as a mere reseller of electricity for the Periods at Issue. The evidence reflects that Duke Energy generated virtually all of the electricity it sold during the Periods at Issue. [Duke Energy 1994-2001 Forms 10-K (showing "Electric Energy Generated" as being nearly equal to "Electric Energy Sold" each year) [Pet'r Hr'g Exs. 49-B-17 through 49-B-24].] Mr. Monroe testified that Duke Energy generates most of the electricity that it sells. Thus, the fact that other utilities might simply resell electricity without generating it, and that Duke Energy **could** do the same thing, is immaterial because the record reflects that Duke Energy does generate electricity; and it is therefore a manufacturer.

[21] The design of a turbine used in these generation facilities has not significantly changed since the early 20th century.

is connected to the distribution system. As noted above, Duke Energy requires all three processes to provide electricity to its customers. Prior to distribution of the electricity to the consumer through the meter, the electric utility owns and continues to process the electricity, which is not in a form usable by a consumer prior to its distribution through the electric meter. Cf. Priest v. Brown, 302 S.C. 405, 411, 396 S.E.2d 638, 641 (Ct. App. 1990) (in affirming a trial court decision that strict liability was not applicable against electric utility for a person who was electrocuted and died after touching a downed distribution line, the court noted an affidavit that stating that "the electricity through these lines was of such a high voltage that it was not in a form immediately usable by a consumer" and held that the facts of this case alone suggest the electricity had not been placed into the stream of commerce . . . .").

In addition, though electricity is a unique product with unique characteristics required by consumers, it is clearly produced by Duke Energy and distributed in keeping the required needs of the customers. Although there was testimony in the record regarding other forms of energy, such as kinetic and mechanical energy, those other energy forms are different than electricity or electric energy and do not meet the vast majority of consumer needs in homes and businesses. And this conclusion is not changed by the fact that electricity may exist in nature (e.g., a lightning strike is the effect of an electromagnetic field on air molecules), because that electricity is not usable by electric utilities or consumers in that form. 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 . . . .") (internal citations omitted).

The nature of electricity as a product produced by Duke Energy is further evidenced by the fact that Duke Energy does not have access to unlimited quantities of electricity because its ability to generate electricity is limited by the capacity of its generators. The fact that Duke Energy charges for electricity based on quantity, and cannot provide unlimited electricity, further supports the conclusion that generating electricity is manufacturing. Measuring electricity by quantity is the same as measuring any product by quantity, and the limitation on the quantity of electricity that can be produced is analogous to the limitation imposed on any manufacturer by the capacity of the machines employed in the manufacturing process.

In sum, the electricity consumed by Duke Energy's customers is the product of Duke Energy's generation of that electricity. Duke Energy employs an interconnected process of producing and delivering electricity that 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 amount of the product sold. A generator is analogous to any machine used by a manufacturer to produce a product for sale; the transmission and distribution systems are like the assembly line process used by a manufacturer to further refine and develop the product; and the customer is charged by the quantity of the product consumed.[22] The fact that Duke Energy charges for electricity based on quantity, and cannot provide unlimited electricity, further supports the conclusion that generating electricity is manufacturing. Measuring electricity by quantity is the same as measuring any product by quantity, and the limitation on the quantity of electricity that can be produced is analogous to the limitation imposed on any manufacturer by the capacity of the machines employed in the manufacturing process.

Characterization of the Provision of Electricity as a Service

Duke Energy contends that its "principal business in South Carolina is the **provision** of electric service to its customers." (Emphasis added). At the outset, Duke Energy cannot "provide" electric service without the existence of electricity, and the electricity that Duke Energy provides cannot exist without first being produced, or manufactured. As to "electric service," the South Carolina Income Tax Act does not define the word "service." And the usage of the word "service" in the South Carolina Income Tax Act does not provide any guidance as to the term's meaning, as it is used in a variety of connotations.[23] Looking then to Merriam-

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[22] The Court recognizes that the transmission and distribution processes could be interpreted as being separate from manufacturing. Transmission of electricity, for instance, could fall under "processing" in Section 12-6-2250(a), because the electricity must be "stepped up" and "stepped down" in order to regulate the voltage so that line loss can be minimized. Also, for the electricity to be usable by the customers, it must be further manipulated to meet the specifications of the devices used by the customers. Likewise, distribution could be interpreted as "distributing . . . tangible personal property within this State," under Section 12-6-2250(b). This interpretation would require a determination of electricity's tangibility and whether electricity is "personal property." The Court will explain in more detail later in the decision why electricity is tangible personal property. At any rate, because the generation, transmission, and distribution of electricity are equally-necessary components of the business of providing electric power, Duke Energy's business activities seemingly could fall under Section 12-6-2250(a), or (a) and (b); but under either scenario, Duke Energy's principal business involves activities that are covered in Section 12-6-2250, which is the issue here.

[23] See, e.g., S.C. Code Ann. §§ 12-6-550 ("service" in the context of providing of water supply and sewage disposal); 12-6-1120 ("service" in the context of the National Guard and Armed Forces reserve components); 12-6-1720(1)(b) ("service" in the context of apportionment of nonresident individuals, trusts, estates, or beneficiaries); 12-6-2850 ("services" in the context of foreign trading receipts); and 12-6-3450 ("services" in the context of an

Webster's Dictionary, "service" is defined as "useful labor that does not produce a tangible commodity" or "a facility supplying some public demand." Merriam-Webster Online Dictionary, www.merriam-webster.com (last visited October 18, 2012). Because this Court, for reasons that will be discussed more fully below, finds electricity to be a tangible commodity, Duke Energy has failed to demonstrate that its "provision" of electricity to customers is a service under the first definition. As to the second definition, Duke Energy is doubtless a service because it is "a facility supplying some public demand." However, there is nothing in this definition of service that includes or excludes manufacturing. In this case, though, Duke Energy supplies to its customers electricity that it has already manufactured, thus demonstrating that the two activities are separate. Furthermore, a company need not be a manufacturer to be a provider of electric service. Indeed, Section 12-6-2250 itself draws the distinction between manufacturing, et. al., of goods and materials in (a) and selling, distributing, or dealing of tangible personal property in (b).

Duke Energy nevertheless contends that it is not manufacturing because it is not creating anything and is doing nothing more than "provid[ing] access to the electromagnetic field." However, Duke Energy fails to recognize that it produces/manufactures the product for which any service is provided. Electricity is a product that moves and is processed through the transmission and distribution systems and is delivered to the customer at the specifications required by that customer. Services typically are not measured by the quantity of the product consumed and are not delivered to or measured by mathematical calculations regarding the nature of the services.[24] In fact, even Duke Energy recognizes that it is producing something. Not even Duke Energy's own representations to the public refer to "providing access to the electromagnetic field." Moreover, Duke Energy's own witness testified that, "in layman's

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employee's services for an employer in determining qualification for an income tax credit for persons terminated from employment as a result of the closing or realignment of a federal military installation).

[24] Duke Energy further supported its services argument through testimony that it currently is classified as a utility, not a manufacturer, for purposes of the North American Industry Classification System (NAICS), and that it classifies itself as a utility when filing its federal income tax returns. However, the specific NAICS and federal income tax return instructions referenced by the witness pertained to years after the Periods at Issue and, thus, do not assist in determining Duke Energy's character for the Periods at Issue. In any event, neither the NAICS nor the federal classification for data purposes answers the question of whether Duke Energy is a manufacturer for purposes of Section 12-6-2250. Similarly, Duke Energy's references to itself as a provider of services in various publications do not resolve the question of whether it falls within Section 12-6-2250.

terms," electromagnetic field is electric current," and that any electromagnetic field results from the electric current created by the generator.

Duke Energy also offered evidence that it charges a flat fee for outdoor lighting. That evidence does not negate the fact that the vast majority of the electricity delivered by Duke Energy is sold based on quantity consumed. Moreover, as Mr. Jamil testified, the time period for which outdoor lighting operates is controlled by use of a photocell, and Duke Energy is able to estimate the variables in the timing to determine a pricing for the outdoor lighting. Rather, as Mr. Monroe testified, Duke Energy sells electricity on a metered basis involving electricity flowing through a meter and the company "read[ing] the meter periodically and send[ing] a bill to the customer." Thus, substantially all, if not all, of the electricity provided by Duke Energy is priced at some level based on quantity.

Duke Energy finally attempts to compare the above-described processes to the provision of telecommunication services–both cellular and landline–but that comparison is unconvincing. Unlike Duke Energy, telecommunication companies do not generate or produce electricity, but instead only use electricity purchased from electric utilities. Moreover, the evidence in the record demonstrates the differences between a telecommunication service and Duke Energy's production and sale of electricity. First, Duke Energy delivers to its customers a quantifiable product that is produced by Duke Energy. In contrast, telecommunication companies transmit communication or intelligence from one customer to another through a system operated by electricity purchased from utilities like Duke Energy. In essence, the telecommunications company simply transports intelligence produced or created by one of its customers. The purpose of Duke Energy's business is thus to generate and provide electric energy while the purpose of a telecommunication company's business is to convey information. Because Duke Energy produces electricity for use by its customers at an appropriate specification, and telecommunications companies transport intelligence produced by its customers using electricity produced by an electric utility, I find that the purported comparison to a telecommunications company does not undermine the reasonableness of the Department's policy that Duke Energy is a manufacturer.

Conclusion

In sum, to conclude that Duke Energy provides a service rather than manufactures electricity would require a determination that the term "manufacturing" in Section 12-6-2250

means something different than "producing" (or "generating," for that matter), a term generally used synonymously with "manufacturing." Moreover, a person or entity providing services is not commonly understood to be "producing" services, and it is not commonly said that a company which generates and sells electricity is merely providing a service by "provid[ing] access to the electromagnetic field." This is especially so given that the electric current that generates that field, or even the field itself, is generated through an asset-intensive process maintained and operated by Duke Energy. Finally, though it is conceivable that the processes of transmitting and distributing are not part of manufacturing, Duke Energy presented no evidence that would support separation of its electric transmission and distribution processes from its generation process and, in fact, described the whole process as a "very elaborate system." In short, as Mr. Jamil testified, "you need all three." In any event, even if the Court were to draw such a distinction, it would prove inconsequential to the outcome here because all three activities – generation, transmission, and distribution – fall under Section 12-6-2250.[25]

Processing Goods and Materials within this State

Alternatively, the evidence reflects that Duke Energy comes within Section 12-6-2250 because its generation, transmission, and distribution of electricity constitutes "**any form** of...processing goods and materials within this state." S.C. Code Ann. § 12-6-2250(a) (emphasis added). 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 Corp., 246 S.C. at 96, 142 S.E.2d at 447 (identifying "any form" in predecessor to section 12-6-2250 as "broad language"). The evidence introduced by both parties shows that generating electricity is a form of processing raw materials

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[25] Duke Energy also contends that electricity is not manufacturing because it is not tangible. Duke Energy's conclusion is based upon two premises: 1) electricity is an intangible material and 2) the term "manufacturing" in Section 12-6-2250 is limited solely to tangible goods or materials. As to the first premise, this Court, for reasons discussed later in the text, finds the that electricity Duke Energy produces is tangible. The Court, therefore, need not address the remaining premise. However, even if this Court found that electricity was intangible, this would not necessarily prevent electricity from being a manufactured product. Merriam-Webster's definition of "manufacture" includes "the process of making wares by machinery . . . ." See <http://www.merriam-webster.com/dictionary/manufacture> (accessed October 19, 2012). Merriam-Webster's definition of "wares" includes "intangible items" that are "marketable commodit[ies]." See <http://www.merriam-webster.com/dictionary/ware> (accessed October 19, 2012). Adopting this view of electricity, the Massachusetts Supreme Court, in Westinghouse Broad. Co., Inc. v. Comm'r of Revenue, noted that the proposition that an electric power company "'may not be denied manufacturing status merely because its end product is intangible' . . . "conformed to [its] view that the production of electricity may entail manufacture . . . ." 382 Mass. 354, 358, 416 N.E.2d 191, 193 (1981).

such as coal, water, or nuclear fuel. These items are goods and materials.[26] These goods are processed and used to create energy to turn a generator either directly or indirectly, which constitutes "any form" of processing of those inputs in the generation process and, thus, falls within the statute.

Selling, Distributing, or Dealing in Tangible Personal Property

Duke Energy also comes within Section 12-6-2250 because its business constitutes "selling, distributing, or dealing in tangible personal property." Duke Energy, however, argues that it is a seller of services and therefore cannot be a seller, distributor, or dealer of tangible personal property. The premise of this argument is that electric service is not tangible personal property. Duke Energy also argues that the definition of "tangible personal property" should not be taken from S.C. Code Ann. § 12-36-60, which sets forth the definition of "tangible personal property" for sales and use tax purposes. Rather, Duke Energy urges the Court to adopt the definition of "tangible property" set forth in the Income Tax Act, specifically S.C. Code Ann. § 12-6-30(11).

I agree that because "tangible personal property" in Section 12-6-2250(b) is part of the Income Tax Act, the definition for "tangible property" under the Income Tax Act must be used. S.C. Code Ann. § 12-6-30(11) defines "tangible property" as "includ[ing] . . . **corporeal personal property** but does not include money, bank deposits, shares of stock, bonds, credits, evidence of debt, chose in action, or evidence of an interest in property." (Emphasis added). However, the term "corporeal" is not defined in the statute. "Where the legislature elects not to define a term in a statute, the courts will interpret the term in accord with its usual and customary meaning. In construing a statute, a court may consider legislation which deals with the same subject matter." Adoptive Parents v. Biological Parents, 315 S.C. 535, 543, 446 S.E.2d 404, 409 (1994).

Because Section 12-36-60(11) also addresses "tangible personal property" for tax purposes, this Court may therefore look to it for guidance and clarity as to the meaning of "corporeal" for tangibility purposes. See Floyd v. Nationwide Mut. Ins. Co., 367 S.C. 253, 626 S.E.2d 6 (2005) ("The true guide to statutory construction is not the phraseology of an isolated

[26] Merriam-Webster's definition of a "good" is "something that has economic utility or satisfies an economic want." See <http://www.merriam-webster.com/dictionary/good> (accessed October 19, 2012). It defines "material" as "the elements, constituents, or substances of which something is composed or can be made." See <http://www.merriam-webster.com/dictionary/material> (accessed Octo ber 19, 2012).

section or provision, but the language of the statute as a whole considered in light of its manifest purpose."); TNS Mills, Inc. v. S.C. Dept. of Revenue, 331 S.C. 611, 620, 503 S.E.2d 471, 476 (1998) ("In construing statutory language, the statute must be read as a whole, and sections which are part of the same general statutory law must be construed together and each one given effect."). The Court recognizes that Sections 12-6-30(11) and 12-36-60 differ with respect to their treatment of intangible personal property. Specifically, Section 12-36-60 includes as tangible personal property services and intangibles, whereas Section 12-6-30(11) excludes intangibles altogether; indeed, "intangible property" is separately defined under Section 12-6-30(12). However, the specific exclusions from tangible personal property (which are not at issue here) are nearly identical in both definitions,[27] and Section 12-36-60 provides a more specific definition of tangible personal property that also coincides with the general understanding of the term "corporeal" used Section 12-6-30(11) – "personal property which may be seen, weighed, measured, felt, touched, or which is in any other manner perceptible to the senses."[28]

Applying to the facts of this case the definition of tangible property found in Section 12-6-30(11) together with the general definition of tangible personal property given in the first sentence of Section12-36-60, I conclude that electricity is tangible personal property. Electricity is a product delivered to customers at certain precise specifications. The evidence also established that electricity is a physical product with physical characteristics; that the electric charge associated with electricity is a physical property of matter; that it certainly is possible to feel electricity's impact in the body; that electricity can be moved, manipulated, and stored, characteristics further suggesting the tangible nature of electricity; that the electric charge, which Duke Energy witnesses testified is the source of electricity, can be stored; and that electricity is a fungible product that is sold in quantifiable amounts. Further, in South Carolina, it is something that can be stolen and, thus, is subject to ownership rights. See S.C. Code Ann. § 16-13-380

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[27] Section 12-6-30(11) excludes from tangible property the following: "money, bank deposits, shares of stock, bonds, credits, evidences of debt, choses in action, or evidences of an interest in property." Similarly, Section 12-36-60 excludes from tangible personal property the following: "stocks, notes, bonds, mortgages, or other evidences of debt . . . [, and] transmission of computer database information by a cooperative service when the database information has been assembled by and for the exclusive use of the members of the cooperative service."

[28] The American Heritage College Dictionary 311 (3d ed: 1993) defines "corporeal" as "[o]f a material nature; tangible." See also Black's Law Dictionary 394, 1336, 1592 (9th ed. 2009) (defining "corporeal" as "tangible"; "tangible" as "corporeal"; and "corporeal personal property" as "tangible personal property").

("Theft of electric current").[29] Also, because the electricity sold, distributed, or dealt by Duke Energy is used by its customers in amounts, duration, and purposes chosen by its customers, i.e., it is under the customers' control after it is distributed to them, the electricity becomes personal property of the customers.

On one hand, Duke Energy does not wish to apply the definition of "tangible personal property" under Section 12-36-60; but nonetheless, Duke Energy wishes to use Section 12-36-60 to establish its sales of electricity as a service. It argues that if Section 12-36-60 applied, "the Department's view on the characterization of electricity based on the sales and use tax definition was long ago rejected by this Court in [Consolidated Hyrdo S.E., Inc. v. S.C. Dep't of Revenue & Taxation, No. 95-ALJ-17-0634, 1996 WL 909155 (S.C. Admin. L.J. Div. May 13, 1996) (Lee, A.L.J.)]." In that case, the taxpayer owned and operated several hydro-electric power generation facilities in South Carolina and was engaged in the business of production and sale of electricity. Citing the definition of "tangible personal property" set forth in S.C. Code Ann. § 12-36-60, relating to sales and use taxes, the company argued that it did not provide or sell a "service" and was therefore not subject to additional license taxes. The court in that case disagreed, concluding that "while electricity is included in [12-36-60] discussing the application of sales tax on the sale of tangible personal property, the sale of electricity is specifically recognized and defined as a service."

First, that decision has **no precedential value** and is thus not binding on this Court. Secondly, that decision merely concluded that the taxpayer was providing a service and thus subject to a license fee under then-Section 12-19-110. However, Section 12-19-110 was imposed "[i]n addition to . . . all other license taxes and fees or taxes of whatever kind . . . ." Section 12-19-110 did not prevent the application to the taxpayer of any other tax laws, including those that implicated "tangible personal property." Thus, even if this Court were to adopt the position that the sale of electricity was merely a service, the sale of electricity would simply be a service that does not fall "within the meaning of the general definition" of "tangible personal property" set forth in the first sentence of Section 12-36-60, Consolidated Hydro *4. But that

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[29] Interestingly, this statute references the theft of electricity by any "person who ... has no contract, agreement, license, or permission with or from any person authorized to **manufacture**, sell, or use **electricity** for the purpose of light, heat, or power." S.C. Code Ann. § 16-13-380 (emphasis added); see also S.C. Code Ann. § 16-13-390 (prohibiting the wrongful use of electricity by a person who has a "contract, agreement, license or permission, oral or written, with or from any person authorized to **manufacture**, sell or use **electricity** for the purpose of light, heat or power.") (emphasis added).

service would still be considered tangible personal property, as set forth in the second sentence; and it would therefore be subject to tax laws imposed by other statutes upon tangible personal property, just as it was subject to license fees imposed by other statutes upon services. Thus, even under Duke Energy's theory, it would still be considered to be "selling, distributing, or dealing in tangible personal property within this State" for corporate income tax apportionment purposes under Section 12-6-2250.

Furthermore, as previously mentioned, Merriam-Webster's Dictionary defines "service" as "useful labor that does not produce a tangible commodity" or "a facility supplying some public demand." Merriam-Webster Online Dictionary, www.merriam-webster.com (last visited October 29, 2012). Because, for the reasons given above, I find that electricity is a tangible commodity manufactured by Duke Energy, Duke Energy has failed to demonstrate that its "provision" of electricity to customers is a service under the first definition. As to the second definition, Duke Energy is doubtless a service because it is "a facility supplying some public demand." However, there is nothing in this definition of service that is determinative of tangibility or intangibility. Indeed, the actual provision of a product may be intangible, while the product itself is tangible.[30] And, to reiterate, even if this Court were to look to the sales or use tax definition of "tangible personal property" under Section 12-36-60, sales of electricity, though considered services under that statute, are considered tangible personal property. See S.C. Code Ann. § 12-36-60 ("'Tangible personal property' . . . also includes . . . sales of electricity . . . ."). Thus, even looking to the sales or use tax definition, and considering the sale of electricity to be a service, the sale of electricity would still be tangible personal property for tax purposes.[31]

In sum, although it admittedly is unique, electricity is a tangible product with identifiable physical characteristics that may be created, measured, felt, stored, and consumed, and an electric utility may exercise ownership rights over it. And even if the Court were to consider the

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[30] See, e.g., Pub. Serv. Co. v. Dep't of Revenue, ---P.3d----, 2011 WL 4089971 (Colo. Ct. App. 2011) ("There is . . . Colorado authority that electricity is both a product and a service").

[31] Duke Energy points out that several other states have treated the provision of electricity as something other than tangible person property. These states would include: North Carolina, Oregon, California, and Massachusetts. However, this Court finds more persuasive the decisions of those states that hold that electricity is tangible personal property. See e.g. Exelon Corp. v. Dept't of Revenue, 234 Ill.2d 266, 917 N.E.2d 899 (2009); Tucson Elec. Power Co. v. Ariz. Dep't of Revenue, 170 Ariz. 145, 822 P.2d 498 (Ct. App. 1991). Moreover, Duke Energy acknowledges that other states, in contexts other than income tax, have ruled that the sale of electricity is the sale of tangible personal property. See, e.g., Davis v. Gulf Power Corp., 799 So. 2d 298, 301 (Fla. Dist. Ct. App. 2001) (property tax); Texas E. Transmission Corp. v. Benson, 480 S.W.2d 905, 908 (Tenn. 1972) (sales tax); S. Natural Gas Co. v. State, 261 Ala. 222, 73 So. 2d 731 (1953) (use tax).

sale of electricity merely a service, it would still be considered tangible personal property for tax purposes. Therefore, Duke Energy also falls within Section 12-6-2250(b).

More-than-50-percent Test

Though Duke Energy, as the taxpayer, may engage in activities falling under Section 12-6-2250, Duke Energy may still apply the single-factor gross receipts apportionment method under Section 12-6-2290 if the principal amount of its profits or income is derived from activities other than those covered in Section 12-6-2250. However, Duke Energy, which was engaged in more than one line of business during the Tax Periods at Issue, has the burden of proving that its principal business in this State was not from manufacturing, or any form of collecting, buying, assembling, or processing goods and materials within this State, or from selling, distributing, or dealing in tangible personal property within this State. In making this "principal business" determination, South Carolina adopts a more-than-50-percent test. The Department's longstanding policy provides:

> [W]hether a business is a service related industry can be made by comparing the gross receipts of the business derived from providing services to total gross receipts of the business. If over 50 percent of the gross receipts are from providing services, then the business would be service related. This method has been utilized by the [South Carolina Tax] [C]ommission in determining whether a multistate taxpayer is providing services and thus would utilize the gross receipts ratio to apportion its income.

Rev. Rul. No. RR-87-5 (S.C. Tax Comm'n Sept. 16, 1987). Thus, under the Department's policy, if more than 50 percent of a business's gross receipts are from providing services, then the business would be service-related and the taxpayer would be required to apportion its income to South Carolina using the single-factor gross-receipts apportionment method under S.C. Code Ann. § 12-6-2290. Otherwise, the business would have to apportion its income to South Carolina using the three-factor apportionment method under S.C. Code Ann. § 12-6-2250.

Here, Duke Energy presented testimony indicating that Duke Energy's principal business is the provision of electricity services because at all times during the Periods at Issue more than 50 percent Duke Energy's gross receipts were derived from the provision of electric services. However, in light of my findings that Duke Energy's generation, transmission, and distribution of electricity are activities falling within Section 12-6-2250, that electricity is tangible personal property, and that sales of electricity are sales of tangible personal property, I find Duke Energy's evidence insufficient to establish that more than 50 percent of Duke Energy's gross

receipts were derived from activities not covered in Section 12-6-2250. Indeed, Duke Energy introduced no evidence supporting any breakdown of its gross receipts from manufacturing, services, and/or any other activity.

Conclusion

After considering the evidence in the record and the pertinent legal authorities, I conclude that Duke Energy failed to establish by the preponderance of the evidence that its principal business in South Carolina is not manufacturing. This Court thus rejects Duke Energy's attempt to use the single-factor apportionment formula for tax years 1994-2001 instead of the multi-factor apportionment formula it used in its original corporate income tax returns.

ORDER

THEREFORE, IT IS HEREBY ORDERED that Duke Energy's claims for refunds with respect to its attempt to use the single-factor apportionment formula for the corporate income tax periods 1994-2001 are DENIED and the Department's Determination is AFFIRMED.

IT IS SO ORDERED.

Ralph K. Anderson, III
Chief Administrative Law Judge

November 2, 2012
Columbia, South Carolina

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Duke Energy Corporation, Petitioner, vs. South Carolina Department of Revenue, Respondent.	)	Docket No. 10-ALJ-17-0270-CC **AMENDED FINAL ORDER AND DECISION**

Appearances:

For the Petitioner: Burnet R. Maybank, III, Esq.; Eric S. Tresh, Esq.; Jeffrey A. Friedman, Esq.; and Maria M. Todorova, Esq.

For the Respondent: Tracey C. Green, Esq.; John W. Roberts, Esq.; Harry Hancock, Esq.; and J. Abraham Gutting, Esq.

STATEMENT OF THE CASE

This matter comes before the Administrative Law Court (ALC or Court) following Duke Energy Corporation's (Duke Energy) request for a contested case hearing under S.C. Code Ann. § 12-60-460 (Supp. 2006). Duke Energy is contesting the Determination of the South Carolina Department of Revenue (Department) denying Duke Energy's claim for a refund of South Carolina corporate income taxes for the tax years 1994 through 2001 (Tax Periods at Issue).[1] Duke Energy asserts that it is a service provider and thus is required to apportion its income to South Carolina on the basis of the single-factor gross-receipts apportionment formula. A hearing was held before this Court on September 5 and 6, 2012.

On November 2, 2012, this Court entered its Final Order and Decision denying Duke Energy's claims for refund of corporate income taxes for the Tax Periods at Issue and affirming the Department's Determination that Duke Energy cannot apportion its income based on the single-factor gross-receipts apportionment method. Duke Energy filed its Motion for Reconsideration of the Court's Final Order and Decision on November 13. On November 15,

[1] Duke Energy originally sought refunds for the tax years 1978 through 2001. On October 11, 2012, this Court ruled that Duke Energy's refund claims for the tax years 1978 through 1993 are untimely. Thus, Duke Energy's refund claims for 1978-1993 are not before the Court at this time.

FILED
December 4, 2012
SC ADMIN. LAW COURT

2012, the Department informed the Court that it was not going to file a response to Duke Energy's Motion for Reconsideration. After careful consideration of the arguments made by Duke Energy, the Court has amended its November 2, 2012 Final Order and Decision accordingly below.

LEGAL ISSUES RAISED

The following issue is raised in this proceeding: Whether Duke Energy, based on its activities within the State of South Carolina, falls under Section 12-6-2250 as a "manufactur[er]" or some other category listed in 12-6-2250, or whether Duke Energy is required to apportion its income to South Carolina based on the single-factor gross-receipts apportionment formula pursuant to Section 12-6-2290.[2]

STIPULATIONS OF FACT

At the hearing into this matter and pursuant to ALC Rule 25(C), the parties entered the following written stipulations of fact into the Record:

Preliminary Definitions

1. "Gross-receipts apportionment formula" refers to South Carolina's method of income apportionment prescribed under S.C. Code Ann. § 12-6-2290 and former S.C. Code Ann. § 12-7-1190.
2. "Multi-factor apportionment formula" refers to South Carolina's method of income apportionment prescribed under S.C. Code Ann. § 12-6-2250 and former S.C. Code Ann. § 12-7-1140.

[2] In my Amended Order Granting Summary Judgment in Part and Denying Summary Judgment in Part, I stated the issue presently before the Court as follows: "whether Duke Energy, based on its activities within the State, falls under Section 12-6-2250 as a "manufactur[er]," or whether Duke Energy is a seller of services, or otherwise falls under none of the above-categories, and is therefore required to apportion its income to South Carolina based on the single-factor gross-receipts apportionment formula . . . ." This statement of the issue contains the conclusory phrase "is a seller of services, or otherwise falls under none of the above categories." This phrase erroneously presupposes that a seller of services could not be included in Section 12-6-2250. However, as will be discussed in more detail later, sales of electricity, though considered a service for certain tax purposes, has also been considered "tangible personal property," for those same tax purposes. Therefore, electricity could be considered a service and still be tangible personal property under Section 12-6-2250. The error of excluding "seller of services" from Section 12-6-2250 in the statement of the issue, however, did not affect the need to have a hearing on the present issue because there is a genuine issue of material fact as to the nature of Duke Energy's status for purposes of Sections 12-6-2250, -2290 based on its business activities.

3. "Petitioner" means Duke Energy Corporation (formerly known as Duke Power Company) and any predecessor or successor and any other entity owned by Duke Energy Corporation.

4. "Respondent" means the South Carolina Department of Revenue.

5. "1978-2001 tax periods" means the Petitioner's tax years 1978 through 2001, all of which were reported on a calendar-year basis.

The Parties

6. Respondent is an administrative Cabinet-level agency of the State of South Carolina responsible for administering and enforcing the State's revenue laws.

7. Petitioner is, and was during the 1978-2001 tax periods, engaged in the generation, transmission, distribution, and sale of electricity in portions of North Carolina and South Carolina.

8. The Parties stipulated to Petitioner's restated corporate charters filed with the North Carolina Secretary of State on July 26, 1977, October 6, 1993, and June 18, 1997.

9. The Parties stipulated to Petitioner's Form 10-Ks for the 1978-2001 tax periods.

10. During the 1978-2001 tax periods, Petitioner was regulated by the South Carolina Public Service Commission (Commission) as an "electric utility" pursuant to Title 58-27-10(7).

Procedural History

11. Petitioner timely filed its South Carolina corporate income tax returns (including license tax returns) for the 1978-2001 tax periods.

12. On its originally-filed South Carolina corporate income tax returns for the tax periods 1978-2001, Petitioner filed using the multi-factor apportionment formula.

13. On December 12, 2002, Petitioner filed South Carolina amended corporate income tax returns for the 1978-2001 tax periods seeking a refund of corporate income taxes plus applicable interest ("1978-2001 Refund Claims").

14. The Parties stipulated to Petitioner's South Carolina amended corporate income tax returns filed on December 12, 2002 for the 1978-2001 tax periods.

15. The 1978-2001 Refund Claims reflected use of the gross-receipts apportionment formula to apportion Petitioner's income to South Carolina.

16. On February 12, 2003, Respondent denied Petitioner's 1978-2001 Refund Claims.

17. On March 13, 2003, Petitioner timely appealed from the denial of its 1978-2001 Refund Claims.

18. On February 4, 2010, Respondent issued a Determination denying Petitioner's refund claims for tax periods 1978-2001.

19. On March 3, 2010, Petitioner timely filed a Request for Contested Case Hearing with the Clerk's Office of the South Carolina Administrative Law Court in Columbia, South Carolina contesting the Determination.

20. Petitioner and Respondent timely filed their Prehearing Statements and Amended Prehearing Statements.

FINDINGS OF FACT

Having observed the witnesses and exhibits presented at the hearing and taking into consideration the burden of persuasion and the credibility of the witnesses, I make the following additional findings of fact by a preponderance of the evidence:

Duke Energy Business Operations

Duke Energy is engaged in the business of generation, transmission, distribution, and sale of electricity in portions of both North Carolina and South Carolina. Duke Energy owns and operates generation, transmission, and distribution assets in South Carolina and North Carolina Clearly, providing electricity is Duke Energy's "primary business." .

Duke Energy sells electricity on both a metered and flat-fee basis. Under the flat-fee plan, Duke Energy provides electricity for outdoor lighting at a fixed price.[3] The metered service plan is based on usage, i.e., the electricity provided by Duke Energy is read by a meter and billed to the customer on the basis of usage during the billing period. Regardless of the service plan, a portion of each Duke Energy customer's service charge recovers Duke Energy's costs associated with maintaining the infrastructure that Duke Energy uses to provide electric service. This charge is known as a capacity charge and is billed to the customer as part of the monthly service charge, even if the customer does not use electricity in a given month. Nevertheless, however the profits from the flat-rate or capacity charges are perceived, those

[3] Although Duke Energy introduced evidence regarding the fact that it charges a flat fee for outdoor lighting, that does not negate the fact that the vast majority of the electricity delivered by Duke Energy is sold based on quantity consumed. Moreover, the time period for which outdoor lighting operates is controlled by use of a photocell, and Duke Energy has information to make estimates regarding variables in the timing to determine a pricing for the outdoor lighting.

charges were not a significant portion of Duke Energy's profit from the sale of electricity during the Tax Periods at Issue.[4]

Production of Electricity

Duke Energy operates plants in both South Carolina and North Carolina to produce electricity. In South Carolina, Duke Energy has two nuclear power plants, four coal power plants, three hydroelectric power plants, and several oil or gas power plants.[5] The electricity that is produced and consumed by its customers is created at Duke Energy generation facilities. A generator is a "mechanical device" that uses mechanical energy to produce electric energy or, as it is more commonly known, electricity. Generators have been used to produce electricity in substantially the same manner for over 100 years. Many, though not all, of Duke Energy's generation facilities use a turbine driven by steam power to turn the generator. Although the sources or inputs (e.g., coal, uranium, water) used at these different types of generation facilities may vary, all use a generator to produce electricity. The result, however, is the same: Duke Energy employs a mechanical device to produce and generate electricity using a process that has not changed significantly since the early 20th century.

Duke Energy nonetheless offered evidence that the production of electricity does not create anything. Rather, Duke Energy avers it is doing nothing more than providing access to "the electromagnetic field." However, Duke Energy produces that electromagnetic field. Duke Energy's own witness testified that, "in layman's terms," electromagnetic field is electric current," and that any electromagnetic field results from the electric current created by the generator. No matter what moniker used to describe the product produced by Duke Energy, the electric current that generates that field, or even the field itself, is produced through a mechanical process run by Duke Energy.

Distribution and Sale of the Electricity

The process by which Duke Energy generates or produces electricity does not end at the generator. The generator is obviously connected to the transmission and distribution network.

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[4] Mr. Dhiaa Jamil did testify that a portion of a customer's bill is a flat fee for a capacity charge, but he also testified that he did not know the rate or level at which that fee is imposed—other than that it is less than $100—and, in fact, ultimately testified "that's really not my area." The Court concludes that this testimony does not assist Duke Energy in meeting its burden of proof.

[5] Duke Energy also produces electricity using natural gas; wind, and solar. Duke Energy also occasionally purchases electricity from other electric utilities. However, these methods of producing or acquiring electricity appear to be less significant than the methods indicated above.

That network consists of transmission and distribution lines, which are conductors made of copper, towers and poles, and transformers. During the transmission and distribution process, the transformers process the electricity by "stepping up" and "stepping down" the voltage of the electricity. By "stepping up" the voltage, Duke Energy is able to transmit the electrical current at a low current. The "step up" process is done in order to efficiently deliver electricity by reducing line loss, which is the loss to Duke Energy of a quantity of electricity as heat during the transmission and distribution processes.

Ultimately, electricity must be delivered at the specified voltage so that it can be used by customers in their homes and businesses. Typically, electricity is not usable by a customer unless it is at 120 volts, although sometimes it is delivered at 220 volts. Whatever the required voltage, it is necessary to ensure that the electricity delivered to a customer is "stepped down" to the usable voltage, a process that is done close to where the electricity is eventually used by the customer.

Most customers of Duke Energy obtain the electricity after it passes through a meter. More specifically, by activating a switch, which creates a load and completes a circuit, the electricity passes through the customer's meter and operates the device. Duke Energy measures the amount of electricity consumed by each customer (usually in term of kilowatts) and then charges the consumer for the quantity used/consumed.[6] Moreover, electricity is not a useable product unless it is delivered to customers at precise specifications. Prior to delivery of the electricity to the consumer through the meter, the electric utility owns the electricity, which is not delivered for sale until it is processed into a form usable by a consumer. This typically occurs closer to the customer's business or home.

Duke Energy compared the provision of electricity to the provision of telecommunication services–both cellular and landline. However, unlike Duke Energy, telecommunication companies do not generate electricity but, instead, only use electricity purchased from electric utilities. Furthermore, Duke Energy delivers to its customers a quantifiable product that is produced by Duke Energy. In contrast, telecommunications companies transmit communications or intelligence produced or created by one customer to another through a system operated by

[6] Aside from the fact that electricity is measured by quantity, the nature of electricity, as a product, is further demonstrated by the fact that electric current is a flow of charges or charged particles, the rate of which is measured in amperes.

electricity purchased from utilities like Duke Energy. Additionally, cellular telephone providers use radio technology to transfer information between two locations. The frequencies and strengths of telecommunications waves are vastly different than the frequencies and strengths of electricity.

In sum, the generation, transmission, and distribution processes are interconnected. Duke Energy cannot produce or deliver electricity to consumers in the absence of any one of these parts, each of which provide an essential aspect of Duke Energy's process for producing, transmitting, and delivering electricity to customers. Moreover, Duke Energy presented no evidence that supports separating its electric transmission and distribution processes from its generation processes and, in fact, described the whole process as a "very elaborate system." Indeed, Mr. Jamil testified that each of the processes employed by Duke Energy is "used to produce electricity."[7]

Physical Nature of Electricity

Electricity is a physical product with physical characteristics. Regarding whether electricity may be sensed by humans, I do not find that the testimony presented by either party was probative as expert testimony. In other words, there was no evidence that the witnesses possessed "knowledge, skill, experience, training, or education" regarding the effect of electrical stimulation upon the human physiology justifying this Court to accept their opinion as expert testimony. Nevertheless, based upon the evidence, I find that it is possible to feel electricity, and thus electricity can be touched. Though Duke Energy presented valid instances in which a person may not feel electricity, that does not discount the instances when it can be felt.

Moreover, even if I were to find Duke Energy's evidence regarding this matter to be probative, I am unconvinced. Duke Energy's expert witness, Mr. Ioannis Papapolymerou, explained that a human cannot feel electricity but only the impact of the electricity. Though I find the proposed nuances between the feeling of an object itself and the feeling of the impact from the object to be the makings of an interesting theoretical debate, I find no considerable distinction between the two and therefore find that electricity can be felt by humans.

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[7] Additionally, Duke Energy introduced an exhibit listing the "Functions" of Duke Energy as "Production," "Transmissions," and "Distribution."

Electricity can also be stored. Concerning this issue, Duke Energy characterized an electric charge as the source of electricity and as the physical property that is stored. The electrical charge is nonetheless a component of what is produced by Duke Energy.

In sum, Duke Energy takes raw materials (e.g., coal, uranium, water), uses those materials to power mechanical devices to produce a form of electricity that is usable and consumed by the public. Although electricity is unique, it is a tangible product with identifiable physical characteristics that may be created, measured, felt, stored, and consumed, and an electric utility may exercise ownership rights over it.

Department's Policy History

The Department and the Commission have a longstanding interpretation that electric utilities should be characterized as manufacturers for purposes of corporate income tax apportionment. Though the Department's policy was never set forth in any public document, it was memorialized in the foreign corporation training manual used by the Department's auditors. Joseph Southard, a retired auditor for the Department with over 25 years of experience, who conducted audits of several electric utilities, including Duke Energy, explained that the Department's policy was that electric utilities were manufacturers for purposes of the apportionment statutes.

The Department also applied this policy consistently, and Duke Energy offered nothing to show otherwise. No other electric utilities challenged that position before Duke Energy filed its amended returns. In fact, Duke Energy filed its returns using the multi-factor apportionment formula for at least 23 years before filing the amended returns and challenging the policy in 2002.

CONCLUSIONS OF LAW

In determining the income tax due from Duke Energy, the Department apportioned Duke Energy's South Carolina income using the multi-factor apportionment formula of Section 12-6-2250. The Department argues that Duke Energy's principal business in South Carolina is manufacturing and that Section 12-6-2250 should therefore apply. Duke Energy, however, contends that its principal business in South Carolina is the provision of service to customers and that Section 12-6-2290 should thus apply.

Burden of Proof

Because Duke Energy is challenging a determination by the Department that it must apportion its income under section 12-6-2250, it has the burden of proof. See SCALCR 29(B); Ford v. Atl. Coast Line R. Co., 169 S.C. 41, 168 S.E. 143, 167 (1932) ("The general rule is, in the absence of valid statutory enactment to the contrary, that the burden of proof rests upon him who has the affirmative of the issue and does not shift to the defendant even when aided, in the first instance, by a rebuttable presumption."); see also Anonymous v. State Bd. of Med. Exam'rs, 329 S.C. 371, 496 S.E.2d 17 (1998). This burden requires Duke Energy to prove that the Department's determination is wrong by a preponderance of the evidence. See, e.g., Janasik v. Fairway Oaks Villas Horizontal Prop. Regime, 307 S.C. 339, 346, 415 S.E.2d 384, 388 (1992) ("Findings of fact based upon a 'preponderance' of the evidence are those supported by the greatest 'weight, amount, credibility or truth' as reflected by the whole of the evidence before the court, or 'evidence which convinces as to its truth.'").

Apportionment of Income

The method of apportionment that a taxpayer must use depends upon the nature of the taxpayer's business in this State. Section 12-6-2250[8] requires a taxpayer to apportion its multi-state income using the property, payroll, and sales factors if the taxpayer falls within the following definition:

> A taxpayer 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 . . . .

S.C. Code Ann. § 12-6-2250.[9] On the other hand, "[i]f the principal profits or income of a taxpayer are derived from sources other than those described in Section 12-6-2250," the taxpayer is required to use the single-factor gross-receipts apportionment formula. S.C. Code Ann. § 12-6-2290.[10] Consequently, the issue that must be resolved for the Tax Periods at Issue is

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[8] Because the Tax Periods at Issue cover multiple years (1994-2001), a parenthetical date will not be used for the statutory citations.

[9] Section 12-6-2250 during the Tax Periods at Issue required that the sales factor be double-weighted in calculation of the apportionment formula. This section was previously designated as section 12-7-1140, which was repealed in 1995. Prior to June 12, 1995, section 12-7-1140 provided a three-factor formula without the double-weighted sales factor.

[10] Like section 12-6-2250, the predecessor of section 12-6-2290, S.C. Code § 12-7-1190, was repealed in 1995, but the language remained substantially the same. Section 12-6-2290 also excludes sources described in section

whether the Department erroneously determined that Duke Energy must apportion its income pursuant to Section 12-6-2250. After considering the evidence in the record and the pertinent legal authorities, I conclude that Duke Energy has failed to establish by the preponderance of the evidence that its principal business in South Carolina is not manufacturing or some other activity falling under Section 12-6-2250.

Agency Deference

The Department contends that in determining this issue the ALC must give its construction of Section 12-6-2250 deference. "An agency's long-standing interpretation of a statute is usually entitled to be given deference and should not be overruled by a reviewing court in the absence of cogent reasons. . . ." Media Gen. Commc'ns, Inc., and Media Gen. Broad. of S.C. Holdings, Inc. v. S.C. Dep'tof Revenue, 388 S.C. 138, 149, 694 S.E.2d 525, 531 (2010) (citing Etiwan Fertilizer Co. v. S.C. Tax Comm'n, 217 S.C. 354, 360, 60 S.E.2d 682, 684 (1950). In Etiwan, the Court further explained that: "[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." Etiwan, 217 S.C. at 359, 60 S.E.2d at 684. If the Department is entitled to deference, it is Duke Energy's burden to prove that the Department's policy is "arbitrary, discriminatory or unreasonable." Colonial Life & Acc. Ins. Co. v. S. Carolina Tax Comm'n, 248 S.C. 334, 339, 149 S.E.2d 777, 780 (1966) ("The Commission has the power and duty . . . to prescribe a method for arriving at a tax base which reasonably represents the proportion of the trade or business carried on within this State...and its determination thereabout will not be overthrown by the courts except upon a showing, absent here, that it is arbitrary, discriminatory or unreasonable") (internal quotation marks omitted); see also Vulcan, 342 S.C. at 496 , 536 S.E.2d at 900; Etiwan, 217 S.C. at 359, 60 S.E.2d at 684. For the reasons set forth below, Duke Energy did not meet its burden in this regard.

The record shows that the Department and the Commission consistently have characterized electric utilities as manufacturers for purposes of corporate income tax apportionment.[11] Duke Energy filed its returns using the multi-factor apportionment formula for

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12-6-2310, but that statute references income earned by railroad companies, motor carriers, telephone service companies, pipeline companies, airline companies, and shipping lines, none of which are applicable in this case.

[11] Duke Energy asserts that there is an inconsistency in the Department's audit manual in that service providers (those whose principal business is providing a service) have to apportion their income to South Carolina based on

at least 23 years before filing the amended returns and challenging the policy in 2002, which reflects that Duke Energy was aware of the policy. And although a Duke Energy witness, Cooper Monroe,[12] testified that the original returns were filed in error, he also acknowledged that Duke Energy and accounting firms "in [his] experience" apply a review process before a tax return is filed. This long period of time in which Duke Energy filed returns using the multi-factor apportionment formula leads to the conclusion that the returns were filed in accordance with the policies and filing requirements promulgated by the Department as understood by Duke Energy at the time the returns were originally filed.

Moreover, though the policy was not set forth in a publicly-issued advisory opinion, a decision of the Commission for property tax purposes supports the conclusion that the Department openly and consistently viewed electric utilities as manufacturers. In 1985, the 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 Ry. decision. S.C. Tax Comm'n Decision P-D-532, 1985 WL 192777 (Apr. 11, 1985) (citing Columbia Ry., Gas & Elec. Co. v. Query, 134 S.C. 319, 132 S.E. 611, 612 (1926)). Although this ruling was rendered in the context of property taxes, it reflects a public position that the Department consistently applied the Columbia Ry., supra, and Duke Power, infra, decisions and consistently determined that electric utilities are manufacturers. The consistency of this policy is further evidenced by the fact that in P-D-532, the Department gave the electric utility the benefit of being a manufacturer by determining that its property-tax assessment ratio should be 6% as opposed to the 10.5% applicable to the personal property of non-manufacturing entities.[13] More importantly, the South Carolina Supreme Court's decision in Columbia Ry., supra publicly reflects, in the context of a license tax imposed upon manufacturers' gross receipts, the Department's position that those engaged in the sale of electricity are manufacturers. See also

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the single-factor gross-receipts apportionment method, while power companies must use the multi-factor apportionment formula. However, there is only an inconsistency if one adopts the premise that the generation, transmission, and distribution of electricity constitutes provision of service, or the premise that provision of service generates more profits or income than generation, transmission, and distribution of electricity, neither of which this Court adopts.

[12] Thomas Cooper Monroe, III is currently the Director of State and Local Tax for Duke Energy.

[13] Also, in 1970, the South Carolina Attorney General opined that the South Carolina Electric & Gas Company was a manufacturer and that any plant it used to produce electricity was a manufactory eligible for property tax exemptions. 1970 S.C. Op. Att'y Gen. 154, Op. No. 2909, 1970 WL 12192 (June 2, 1970). The basis for this ruling was the Columbia Ry. and Duke Power decisions.

Duke Power Co. v. Bell, 156 S.C. 299, 152 S.E. 865 (1930) (recognizing the same position in the property-tax context). I find that though the notice to the General Assembly is traditionally given through a policy available to the public, the facts in this case meet the criteria envisioned in Etiwan. See also Whitner v. State, 328 S.C. 1, 6, 492 S.E.2d 777, 779 (1997) ("[T]here is a basic presumption that the legislature has knowledge of previous legislation **as well as of judicial decisions** construing that legislation when later statutes are enacted concerning related subjects.") (emphasis added). Nevertheless, whether or not the Department's position is given deference, I find that Duke Energy's principal business is manufacturing for the reasons given below.

Manufacturing

Duke Energy must apportion its multi-state income for the Periods at Issue pursuant to Section 12-6-2250 unless Duke Energy proves that its principal business within this State is not (1) "manufacturing"; or (2) "any form of collecting, buying, assembling, or processing goods and materials within this State"; or (3) "selling, distributing, or dealing in tangible personal property." Though Duke Energy suggests a contrary reading of this statute, the Legislature's use of the disjunction "or" following "manufacturing" in Section 12-6-2295(a)'s phrase "manufacturing or any form of collecting, buying, assembling, or processing goods and materials within this State" demonstrates that the term "manufacturing" is not dependent on, or modified by, the clause "any form of collecting, buying, assembling, or processing goods and materials within this State." Michau v. Georgetown County ex rel. S.C. Counties Workers Comp. Trust, 396 S.C. 589, 595, 723 S.E.2d 805, 808 (2012) ("[T]he 'use of the word 'or' in a statute 'is a disjunctive particle [sic] that marks an alternative.'") (citing K & A Acquisition Group, LLC v. Island Pointe, LLC, 383 S.C. 563, 580, 682 S.E.2d 252, 261 (2009)). This conclusion is supported by the statutory history, which reflects that the apportionment statute, when adopted, addressed only corporations "engaged in the business of manufacturing," 1927 S.C. Acts 1, No. 1, § 15(1),[14] and that the latter clause of subsection (a) was added in 1946, 1946 S.C. Acts 1491, No. 553, § 3 (amending apportionment statute, then found in section 2451 of the 1942 Code, 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

[14] This language remained the same in the apportionment statute enacted as Section 2451 in both the 1932 South Carolina Code of Laws and the 1942 South Carolina Code of Laws.

State.") (emphasis added). Thus, inclusion of the phrase "or any form of collecting, buying, assembling, or processing goods and materials" after "manufacturing" in Section 12-6-2250(a) reflects that the Legislature intended to cover not just manufacturing but all activities that a business could perform in regards to goods or materials prior to making those goods or materials available to its customers. See Charleston County Sch. Dist. v. State Budget and Control Bd., 313 S.C. 1, 5, 437 S.E.2d 6, 8 (1993) ("The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature.").

Here, there is no dispute regarding several of the elements of Section 12-6-2250. It is undisputed that Duke Energy is a taxpayer required to file corporate income tax returns in this State. Similarly, it is undisputed that Duke Energy has multi-state income that must be apportioned. See S.C. Code Ann. § 12-6-2210(b). There is also no disagreement that Duke Energy is engaged in the business of generation, transmission, distribution, and sale of electricity in portions of both North Carolina and South Carolina. Mr. Dhiaa Jamil[15] testified that providing electricity is Duke Energy's "primary business." To conduct its primary business, Duke Energy operates generation plants in both South Carolina and North Carolina.

Because "manufacturing" is not defined in the apportionment statutes, this Court must interpret it in accord with its usual and customary meaning. E.g., Travelscape, LLC v. S.C. Dept. of Revenue, 391 S.C. 89, 99-100, 705 S.E.2d 28, 33-34 (2011). Merriam-Webster's Dictionary presently defines "manufacture" as "the process of making wares by hand or by machinery especially when carried on systematically with division of labor." It further defines the term to include "productive industry using mechanical power and machinery" and "the act or process of producing something." See <http://www.merriam-webster.com/dictionary/manufacture> (accessed October 18, 2012); see also Jennings v. Jennings, No. 27177 (Oct. 18, 2012) (Hearn, J.) (referencing online Merriam-Webster's Dictionary for definition of a word). [16] And in 1939, in holding that the generation of

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[15] Dhiaa M. Jamil, P.E., currently is the Executive Vice President of Nuclear Generation and the Chief Nuclear Officer for Duke Energy.

[16] It is also worth noting that the current Merriam-Webster's definition of the term "ware," a term included in the definition of "manufacturing," includes manufactured goods. See <http://www.merriam-webster.com/dictionary/ware> (accessed October 18, 2012). Also, Merriam-Webster's current definition of "good" includes "something that has economic utility or satisfies an economic want" and "something manufactured or produced for sale." See <http://www.merriam-webster.com/dictionary/good> (accessed October 18, 2012). Thus, even if in Section 12-6-2250(a) "manufacturing" modified "goods," the electricity that Duke Energy generates, transmits, and distributes would be in accord with the common understanding of the term

electricity is manufacturing, the Iowa Supreme Court referenced Webster's definition of manufacturing, which was "'to make by hand, by machinery, or by other agency; to work raw materials into forms for use; to produce mechanically.'" Winterfield, 285 N.W. at 224-25. Applying this definition, the court held that generating electricity is manufacturing. Id.

Our Supreme Court has also held on two different occasions that an electric utility that generates electricity is engaged in manufacturing. In Columbia Ry., the South Carolina Supreme Court held that a company engaged in the business of generating electricity was properly considered a "manufacturer" for purposes of a statute that imposed a corporate license tax on the gross receipts of "a corporation engaged in the business of manufacturing." 132 S.E. at 612 ("We do not think that there is any doubt that the appellant is engaged in the business of manufacturing gas and electricity ...."); see also State v. Broad River Power Co., 157 S.C. 1, 153 S.E. 537, 539 (1929) (noting that the Columbia Railway company built "a large plant for the **manufacture** of gas and **electricity** for sale to the public generally") (emphasis added).[17] In a later case, reviewing a different statute, the Supreme Court held that Duke Power Co., a predecessor of Duke Energy, was entitled to claim a property tax 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, supra. The Court held that, based on Columbia Ry., Duke Power was engaged in manufacturing. Id., 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, the plan or structure wherein the process of generating such electricity is carried on is a manufactory for the purposes of a tax exempting statute."). Thus, although Columbia Ry. considered the 1926 Manufacturer's Tax Act, the Duke Power decision reflects that the Court's holding that Duke Power was engaged in manufacturing was not limited to that statute.[18]

"manufactured good," and would therefore still satisfy Section 12-6-2250(a) under that alternative interpretation of the statute. Furthermore, Duke Energy has failed to prove by the preponderance of the evidence that the electricity it produces is not a good or that it is not manufactured.

[17] Notably, the 1927 Century Dictionary defined manufacture as "the making of goods or wares by ... machinery, esp. on a large scale . . . ."

[18] When the holding of Columbia Ry. is considered in light of the pertinent language from the Manufacturer's Tax Act at issue in that case, the application of that decision in this case becomes evident, especially in light of the absence of any distinction between Duke Energy's business in this State versus its business in North Carolina. Specifically, the Manufacturer's Tax Act provided 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 Ry. decision is based on a 1923 Act directed at manufacturers and uses the

The Supreme Court's determination that two different electric utilities were engaged in manufacturing for purposes of two different tax statutes certainly supports the conclusion that electric utilities are engaged in manufacturing for purposes of other tax statutes, including the apportionment statute. This is especially so given the Supreme Court's holding that "the legislative classification [of the apportionment statute] ... should be liberally construed in favor of the inclusion of business to which the formula is appropriate." Hertz Corp. v. S. C. Tax Comm'n, 246 S.C. 92, 96, 142 S.E.2d 445, 447 (1965) (holding that taxpayer involved in renting tangible personal property came within the predecessor to section 12-6-2250).[19] The fact that the common definition of "manufacture" has remained constant from the time of the Columbia Railway and Duke Power decisions up to the present, and that definition is still applicable to Duke Energy's operations, further validates that Duke Energy is engaged in manufacturing electricity. In addition, Duke Energy generates, transmits, and distributes electricity in South Carolina using the same methods and principles employed during the era in which these cases were decided. Furthermore, Duke Energy's corporate charter for the Tax Periods at Issue retained the same language used in its original charter, which was considered pertinent by the Supreme Court. Compare Duke Power, 152 S.E. at 867 (referencing charter granting authorization to Duke Power Company to "manufacture, generate, buy, sell, accumulate, store,

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same 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").

[19] Although not binding here, courts in other states have held that generating or producing electricity is manufacturing, reflecting that a position such as that taken by the Department is reasonable. Some of these cases have cited Columbia Ry. and Duke Power as support for that holding. Curry v. Ala. Power Co., 8 So.2d 521, 525 (Ala. 1942) (citing Columbia Ry. and Duke Power decisions in holding that generating electricity is manufacturing); State ex rel. Winterfield v. Hardin County Rural Elec. Co-op., 285 N.W. 219, 226 (Iowa 1939) (citing Columbia Ry. and Duke Power and stating: "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"). Other states simply have held that generating electricity is manufacturing. E.g., Pub. Serv. Co. v. Dep't of Rev., 10CA1026, 2011 WL 4089971 (Colo. Ct. App. Sept. 15, 2011) (generating electricity is manufacturing); Davis v. Gulf Power Corp., 799 So. 2d 298, 301 (Fla. Dist. Ct. App. 2001) (generation of electricity is a manufacturing process and electricity is tangible personal property); Minn. Power & Light Co. v. Pers. Prop. Tax, Taxing Dist., City of Fraser, Sch. Dist. No. 695, 182 N.W.2d 685, 692 (Minn. 1970) (producing electricity is manufacturing); Bd. of Assessors of Holyoke v. State Tax Comm'n, 244 N.E.2d 287, 289 (Mass. 1969) (same); *Morley v. Brown & Root*, 239 S.W.2d 1012, 1015 (Ark. 1951); (same); City of Louisville ex rel. v. Howard, 208 S.W.2d 522, 526 (Ky. 1947) ("The generation of electricity is manufacturing."); 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"); see also Comm'r of Revenue v. Houghton Mifflin Co., 666 N.E.2d 491, 495 (Mass. 1996) (rejecting contention that process does not involve manufacturing merely because its inputs are not tangible).

transmit, furnish, and distribute electric current for light, heat, and power") with Restated Arts. Inc. Duke Power Co. (October 6, 1993) (authorizing company "[t]o manufacture, generate, buy, sell, accumulate, store, transmit, furnish and distribute electric current for light, heat and power") and Restated Arts. Inc. Duke Energy Corp. (June 18, 1997) (same). If the processes of generating, transmitting, and distributing electricity are, for the most part, the same today as those employed in 1926 and 1930, and if those processes constituted manufacturing for purposes of a tax statute during those years, then the generation of electricity constitutes manufacturing for purposes of a tax statute during the Tax Periods at Issue.[20] Duke Energy therefore is engaged in the business of manufacturing in this State for purposes of Section 12-6-2250.

Moreover, the evidence in this case establishes that Duke Energy is a manufacturer. As explained above, "manufacturing" is defined in Merriam-Webster's online dictionary as "the process of **making wares** by hand or **by machinery especially when carried on systematically with division of labor**." It further defines the term to include "**productive** industry using **mechanical power and machinery**" A "ware" is defined as "an "article of commerce." The American Heritage College Dictionary 1521 (3d ed. 1993). Duke Energy's witnesses repeatedly characterized its business as "producing" electricity.[21] Electricity that is produced by Duke Energy and consumed by its customers is created at a generation facility.[22] The process that

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[20] Mr. Papapolymerou testified that although for the most part the process of generating electricity has not changed in the last one hundred years ago, Duke Energy has added renewable energies, developed solar panels, and developed more efficient wind generators. However, there is no evidence that these developments were implemented during the Tax Periods at Issue (1994-2001); and even had they been implemented during those periods, electricity was still being generated for the most part by the same processes that the Supreme Court has considered to be manufacturing. Mr. Jamil also testified that the basic generation process is the same today as it was in the early 20th century.

[21] "Manufacturing," as discussed previously, also includes "the act or process of producing something." However, this definition, though accurate and applicable, describes manufacturing in its most general sense. The Court will use the other two definitions, as they are more specific.

[22] Mr. Jamil testified that Duke Energy could provide electricity even without its generation assets. That is, Duke Energy apparently contends that it could sell electricity without producing it and, thus, that it is not a manufacturer for that reason. But the fact that an entity could resell a product to customers without actually manufacturing that product does not mean that the entity that did produce the product is not a manufacturer. And a determination of whether any entity that simply resells electricity is a manufacturer is beyond the scope of this proceeding.

In any event, the record does not support any characterization of Duke Energy as a mere reseller of electricity for the Tax Periods at Issue. The evidence reflects that Duke Energy generated virtually all of the electricity it sold during the Tax Periods at Issue. [Duke Energy 1994-2001 Forms 10-K (showing "Electric Energy Generated" as being nearly equal to "Electric Energy Sold" each year) [Pet'r Hr'g Exs. 49-B-17 through 49-B-24].] Mr. Monroe testified that Duke Energy generates most of the electricity that it sells. Thus, the fact that other utilities might simply resell electricity without generating it, and that Duke Energy **could** do the same thing, is immaterial because the record reflects that Duke Energy does generate electricity; and it is therefore a manufacturer.

occurs at a generation facility reflects that it is manufacturing. Each of these facilities contains at least one generator. A generator is a "fairly large machine" and "mechanical device" that uses mechanical energy to produce electric energy or, as it is more commonly known, electricity. The generator creates an electric current that is processed through the transmission and distribution systems. Generators have been used to produce electricity in substantially the same manner for over 100 years. Many, though not all, of Duke Energy's generation facilities use a turbine driven by steam power to turn the generator.[23] The result, however, is the same: Duke Energy employs a mechanical device to produce and generate electricity using the same process employed since the early 20th century. Thus, Duke Energy's generation facilities are, as recognized by our Supreme Court, locations at which manufacturing occurs. See Duke Power, 152 S.E. at 868.

Furthermore, though they disagree as to the ultimate characterization of electricity production, Duke Energy and the Department seem to agree that Duke Energy's generation, transmission, and distribution processes are interconnected. In other words, Duke Energy cannot generate electricity to deliver to consumers in the absence of any one of these parts.[24] The generator is connected to the transmission system, which is connected to the distribution system. As noted above, Duke Energy requires all three processes to provide electricity to its customers. Prior to distribution of the electricity to the consumer through the meter, the electric utility owns and continues to process the electricity, which is not in a form usable by a consumer prior to its distribution through the electric meter. Cf. Priest v. Brown, 302 S.C. 405, 411, 396 S.E.2d 638, 641 (Ct. App. 1990) (in affirming a trial court decision that strict liability was not applicable against electric utility for a person who was electrocuted and died after touching a downed distribution line, the court noted an affidavit that stating that "the electricity through these lines was of such a high voltage that it was not in a form immediately usable by a consumer" and held that the facts of this case alone suggest the electricity had not been placed into the stream of commerce . . . .").

In addition, though electricity is a unique product with unique characteristics required by consumers, it is clearly produced by Duke Energy and distributed in keeping the required needs

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[23] The design of a turbine used in these generation facilities has not significantly changed since the early 20th century.

[24] Duke Energy sometimes provides to its customers electricity that it has purchased from other utilities. But most of the electricity that Duke Energy provides to its customers is generated by Duke Energy.

of the customers. Although there was testimony in the record regarding other forms of energy, such as kinetic and mechanical energy, those other energy forms are different than electricity or electric energy and do not meet the vast majority of consumer needs in homes and businesses. And this conclusion is not changed by the fact that electricity may exist in nature (e.g., a lightning strike is the effect of an electromagnetic field on air molecules), because that electricity is not usable by electric utilities or consumers in that form. 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 . . . .") (internal citations omitted).

The nature of electricity as a product produced by Duke Energy is further evidenced by the fact that Duke Energy does not have access to unlimited quantities of electricity because its ability to generate electricity is limited by the capacity of its generators. The fact that Duke Energy charges for electricity based on quantity, and cannot provide unlimited electricity, further supports the conclusion that generating electricity is manufacturing. Measuring electricity by quantity is the same as measuring any product by quantity, and the limitation on the quantity of electricity that can be produced is analogous to the limitation imposed on any manufacturer by the capacity of the machines employed in the manufacturing process.[25]

In sum, the electricity consumed by Duke Energy's customers is the product of Duke Energy's generation of that electricity. Duke Energy employs an interconnected process of producing and delivering electricity that 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 amount of the product sold. A generator is analogous to any machine used by a manufacturer to produce a product for sale; the transmission and distribution systems are like the assembly line process used by a manufacturer to further refine and develop the product; and the customer is

[25] Interestingly, S.C. Code Ann. § 16-13-380 references the theft of electricity by any "person who ... has no contract, agreement, license, or permission with or from any person authorized to **manufacture**, sell, or use **electricity** for the purpose of light, heat, or power." S.C. Code Ann. § 16-13-380 (emphasis added); see also S.C. Code Ann. § 16-13-390 (prohibiting the wrongful use of electricity by a person who has a "contract, agreement, license or permission, oral or written, with or from any person authorized to **manufacture**, sell or use **electricity** for the purpose of light, heat or power.") (emphasis added). Therefore, it is clear that the General Assembly understands that electricity can be manufactured.

charged by the quantity of the product consumed.[26] The fact that Duke Energy charges for electricity based on quantity, and cannot provide unlimited electricity, further supports the conclusion that generating electricity is manufacturing. Measuring electricity by quantity is the same as measuring any product by quantity, and the limitation on the quantity of electricity that can be produced is analogous to the limitation imposed on any manufacturer by the capacity of the machines employed in the manufacturing process.

Characterization of the Provision of Electricity as a Service

Duke Energy contends that its "principal business in South Carolina is the **provision** of electric service to its customers." (Emphasis added). At the outset, Duke Energy cannot "provide" electric service without the existence of electricity, and the electricity that Duke Energy provides cannot exist without first being produced, or manufactured. As to "electric service," the South Carolina Income Tax Act does not define the word "service." And the usage of the word "service" in the South Carolina Income Tax Act does not provide any guidance as to the term's meaning, as it is used in a variety of connotations.[27] Looking then to Merriam-Webster's Dictionary, "service" is defined as "useful labor that does not produce a tangible commodity" or "a facility supplying some public demand." Merriam-Webster Online Dictionary, www.merriam-webster.com (last visited October 18, 2012). Because this Court, for reasons that will be discussed more fully below, finds electricity to be a tangible commodity, Duke Energy has failed to demonstrate that its "provision" of electricity to customers is a service under the first definition. As to the second definition, Duke Energy is doubtless a service

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[26] The Court recognizes that the transmission and distribution processes could be interpreted as being separate from manufacturing. Transmission of electricity, for instance, could fall under "processing" in Section 12-6-2250(a), because the electricity must be "stepped up" and "stepped down" in order to regulate the voltage so that line loss can be minimized. Also, for the electricity to be usable by the customers, it must be further manipulated to meet the specifications of the devices used by the customers. Likewise, distribution could be interpreted as "distributing . . . tangible personal property within this State," under Section 12-6-2250(b). This interpretation would require a determination of electricity's tangibility and whether electricity is "personal property." The Court will explain in more detail later in the decision why electricity is tangible personal property. At any rate, because the generation, transmission, and distribution of electricity are equally-necessary components of the business of providing electric power, Duke Energy's business activities seemingly could fall under Section 12-6-2250(a) , or (a) and (b); but under either scenario, Duke Energy's principal business involves activities that are covered in Section 12-6-2250, which is the issue here.

[27] See, e.g., S.C. Code Ann. §§ 12-6-550 ("service" in the context of providing of water supply and sewage disposal); 12-6-1120 ("service" in the context of the National Guard and Armed Forces reserve components); 12-6-1720(1)(b) ("service" in the context of apportionment of nonresident individuals, trusts, estates, or beneficiaries); 12-6-2850 ("services" in the context of foreign trading receipts); and 12-6-3450 ("services" in the context of an employee's services for an employer in determining qualification for an income tax credit for persons terminated from employment as a result of the closing or realignment of a federal military installation).

because it is "a facility supplying some public demand." However, there is nothing in this definition of service that includes or excludes manufacturing. In this case, though, Duke Energy supplies to its customers electricity that it has already manufactured, thus demonstrating that the two activities are separate.

Duke Energy nevertheless contends that it is not manufacturing because it is not creating anything and is doing nothing more than "provid[ing] access to the electromagnetic field." However, Duke Energy fails to recognize that it produces/manufactures the product for which any service is provided. Electricity is a product that moves and is processed through the transmission and distribution systems and is delivered to the customer at the specifications required by that customer. Services are typically measured by the quantity of time provided, not by the quantity of the product consumed.[28] In fact, even Duke Energy recognizes that it is producing something. Not even Duke Energy's own representations to the public refer to "providing access to the electromagnetic field." Moreover, Duke Energy's own witness testified that, "in layman's terms," electromagnetic field is electric current," and that any electromagnetic field results from the oscillation of electrons caused by the electric charge created by the generator which moves in the form of a current.

Duke Energy also offered evidence that it charges a flat fee for outdoor lighting. That evidence does not negate the fact that the majority of the electricity delivered by Duke Energy is sold based on quantity consumed. Moreover, as Mr. Jamil testified, the time period for which outdoor lighting operates is controlled by use of a photocell, and Duke Energy is able to estimate the variables in the timing to determine a pricing for the outdoor lighting. Rather, as Mr. Monroe testified, Duke Energy sells electricity on a metered basis involving electricity flowing through a meter and the company "read[ing] the meter periodically and send[ing] a bill to the customer." Thus, the majority of the electricity provided by Duke Energy is priced at some level based on quantity.

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[28] Duke Energy further supported its services argument through testimony that it currently is classified as a utility, not a manufacturer, for purposes of the North American Industry Classification System (NAICS), and that it classifies itself as a utility when filing its federal income tax returns. However, the specific NAICS and federal income tax return instructions referenced by the witness pertained to years after the Tax Periods at Issue and, thus, do not assist in determining Duke Energy's character for the Tax Periods at Issue. In any event, neither the NAICS nor the federal classification for data purposes answers the question of whether Duke Energy is a manufacturer for purposes of Section 12-6-2250. Similarly, Duke Energy's references to itself as a provider of services in various publications do not resolve the question of whether it falls within Section 12-6-2250.

Duke Energy finally attempts to compare the above-described processes to the provision of telecommunication services–both cellular and landline–but that comparison is unconvincing. Unlike Duke Energy, telecommunication companies do not generate or produce electricity, but instead only use electricity purchased from electric utilities. Moreover, the evidence in the record demonstrates the differences between a telecommunication service and Duke Energy's production and sale of electricity. First, Duke Energy delivers to its customers a quantifiable product that is produced by Duke Energy. In contrast, telecommunication companies transmit communication or intelligence from one customer to another through a system operated by electricity purchased from utilities like Duke Energy. In essence, the telecommunications company simply transports intelligence produced or created by one of its customers. The purpose of Duke Energy's business is thus to generate and provide electric energy while the purpose of a telecommunication company's business is to convey information. Because Duke Energy produces electricity for use by its customers at an appropriate specification, and telecommunications companies transport intelligence produced by its customers using electricity produced by an electric utility, I find that the purported comparison to a telecommunications company does not undermine the reasonableness of the Department's policy that Duke Energy is a manufacturer.

Conclusion

In sum, to conclude that Duke Energy provides a service rather than manufactures electricity would require a determination that the term "manufacturing" in Section 12-6-2250 means something different than "producing" (or "generating," for that matter), a term generally used synonymously with "manufacturing." Moreover, a person or entity providing services is not commonly understood to be "producing" services, and it is not commonly said that a company which generates and sells electricity is merely providing a service by "provid[ing] access to the electromagnetic field." This is especially so given that the electric current that generates that field, or even the field itself, is generated through an asset-intensive process maintained and operated by Duke Energy. Finally, though it is conceivable that the processes of transmitting and distributing are not part of manufacturing, Duke Energy presented no evidence that would support separation of its electric transmission and distribution processes from its generation process and, in fact, described the whole process as a "very elaborate system." In short, as Mr. Jamil testified, "you need all three." In any event, even if the Court were to draw

such a distinction, it would prove inconsequential to the outcome here because all three activities – generation, transmission, and distribution – fall under Section 12-6-2250.[29]

Processing Goods and Materials within this State

Alternatively, the evidence reflects that Duke Energy comes within Section 12-6-2250 because its generation, transmission, and distribution of electricity constitutes "**any form** of...processing goods and materials within this state." S.C. Code Ann. § 12-6-2250(a) (emphasis added). 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 Corp., 246 S.C. at 96, 142 S.E.2d at 447 (identifying "any form" in predecessor to section 12-6-2250 as "broad language"). The evidence introduced by both parties shows that generating electricity is a form of processing raw materials such as coal, water, or nuclear fuel. These items are goods and materials.[30] These goods are processed and used to create energy to turn a generator either directly or indirectly, which constitutes "any form" of processing of those inputs in the generation process and, thus, falls within the statute.

Selling, Distributing, or Dealing in Tangible Personal Property

Duke Energy also comes within Section 12-6-2250 because its business constitutes "selling, distributing, or dealing in tangible personal property." Duke Energy, however, argues that it is a seller of services and therefore cannot be a seller, distributor, or dealer of tangible personal property. The premise of this argument is that electric service is not tangible personal

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[29] Duke Energy also contends that electricity is not manufacturing because it is not tangible. Duke Energy's conclusion is based upon two premises: 1) electricity is an intangible material and 2) the term "manufacturing" in Section 12-6-2250 is limited solely to tangible goods or materials. As to the first premise, this Court, for reasons discussed later in the text, finds that the electricity Duke Energy produces is tangible. The Court, therefore, need not address the remaining premise. However, even if this Court found that electricity was intangible, this would not necessarily prevent electricity from being a manufactured product. Merriam-Webster's definition of "manufacture" includes "the process of making wares by machinery . . . ." See <http://www.merriam-webster.com/dictionary/manufacture> (accessed October 19, 2012). Merriam-Webster's definition of "wares" includes "intangible items" that are "marketable commodit[ies]." See <http://www.merriam-webster.com/dictionary/ware> (accessed October 19, 2012). Adopting this view of electricity, the Massachusetts Supreme Court, in Westinghouse Broad. Co., Inc. v. Comm'r of Revenue, noted that the proposition that an electric power company "'may not be denied manufacturing status merely because its end product is intangible' . . . 'conformed to [its] view that the production of electricity may entail manufacture . . . .'" 382 Mass. 354, 358, 416 N.E.2d 191, 193 (1981).

[30] Merriam-Webster's definition of a "good" is "something that has economic utility or satisfies an economic want." See <http://www.merriam-webster.com/dictionary/good> (accessed October 19, 2012). It defines "material" as "the elements, constituents, or substances of which something is composed or can be made." See <http://www.merriam-webster.com/dictionary/material> (accessed October 19, 2012).

property. Duke Energy also argues that the definition of "tangible personal property" should not be taken from S.C. Code Ann. § 12-36-60, which sets forth the definition of "tangible personal property" for sales and use tax purposes. Rather, Duke Energy urges the Court to adopt the definition of "tangible property" set forth in the Income Tax Act, specifically S.C. Code Ann. § 12-6-30(11).

I agree that because "tangible personal property" in Section 12-6-2250(b) is part of the Income Tax Act, the definition for "tangible property" under the Income Tax Act must be used. S.C. Code Ann. § 12-6-30(11) defines "tangible property" as "includ[ing] . . . **corporeal personal property** but does not include money, bank deposits, shares of stock, bonds, credits, evidence of debt, chose in action, or evidence of an interest in property." (Emphasis added). The primary purpose in interpreting statutes is to ascertain the intent of the Legislature. Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). "[This Court] cannot construe a statute without regard to its plain and ordinary meaning, and this Court may not resort to subtle or forced construction in an attempt to limit or expand a statute's scope." Cain v. Nationwide Prop. And Cas. Ins. Co., 378 S.C. 25, 29, 661 S.E.2d 349, 352 (2008) (internal citation omitted). "Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning." Id. at 30, 661 S.E.2d at 352 (internal citation omitted).

In this case, it is clear that tangible personal property includes "corporeal personal property." "Corporeal" is not a legal term of art in this case, and it is generally understood to mean "[o]f a material nature; tangible."[31] In further support of this plain understanding of the definition of "tangible property," Section 12-36-60, which addresses "tangible personal property" for sales and use tax purposes, defines this term as "personal property which may be seen, weighed, measured, felt, touched, or which is in any other manner perceptible to the senses." This definition coincides with the general understanding of the term "corporeal" included in the definition of "tangible property" under Section 12-6-30(11).[32]

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[31] The American Heritage College Dictionary 311 (3d ed. 1993). See also Black's Law Dictionary 394, 1336, 1592 (9th ed. 2009) (defining "corporeal" as "tangible"; "tangible" as "corporeal"; and "corporeal personal property" as "tangible personal property").

[32] The Court recognizes that Sections 12-6-30(11) and 12-36-60 differ with respect to their treatment of intangible personal property. Specifically, Section 12-36-60 includes as tangible personal property services and intangibles, whereas Section 12-6-30(11) excludes intangibles altogether; indeed, "intangible property" is separately defined under Section 12-6-30(12). However, the specific exclusions from tangible personal property (which are not at issue

Applying to the facts of this case the definition of tangible property found in Section 12-6-30(11), according to its plain and ordinary meaning which is supported by the general definition of tangible personal property given in the first sentence of Section12-36-60, I conclude that electricity is tangible personal property. Electricity is a product delivered to customers at certain precise specifications. The evidence also established that electricity is a physical product with physical characteristics; that the electric charge associated with electricity is a physical property of matter; that it certainly is possible to feel electricity's impact in the body; that electricity can be moved, manipulated, and stored, characteristics further suggesting the tangible nature of electricity; that the electric charge, which Duke Energy witnesses testified is the source of electricity, can be stored; and that electricity is a fungible product that is sold in quantifiable amounts. Also, because the electricity sold, distributed, or dealt by Duke Energy is used by its customers in amounts, duration, and purposes chosen by its customers, i.e., it is under the customers' control after it is distributed to them, the electricity becomes personal property of the customers.

On one hand, Duke Energy does not wish to apply the definition of "tangible personal property" under Section 12-36-60; but nonetheless, Duke Energy wishes to use Section 12-36-60 to establish its sales of electricity as a service. It argues that if Section 12-36-60 applied, "the Department's view on the characterization of electricity based on the sales and use tax definition was long ago rejected by this Court in [Consolidated Hydro S.E., Inc. v. S.C. Dep't of Revenue & Taxation, No. 95-ALJ-17-0634, 1996 WL 909155 (S.C. Admin. L.J. Div. May 13, 1996) (Lee, A.L.J.)]." In that case, the taxpayer owned and operated several hydro-electric power generation facilities in South Carolina and was engaged in the business of production and sale of electricity. Citing the definition of "tangible personal property" set forth in S.C. Code Ann. § 12-36-60, relating to sales and use taxes, the company argued that it did not provide or sell a "service" and was therefore not subject to additional license taxes. The court in that case disagreed, concluding that "while electricity is included in [12-36-60] discussing the application of sales tax

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here) are nearly identical in both definitions. Section 12-6-30(11) excludes from tangible property the following: "money, bank deposits, shares of stock, bonds, credits, evidences of debt, choses in action, or evidences of an interest in property." Similarly, Section 12-36-60 excludes from tangible personal property the following: "stocks, notes, bonds, mortgages, or other evidences of debt . . . [, and] transmission of computer database information by a cooperative service when the database information has been assembled by and for the exclusive use of the members of the cooperative service." Also, as discussed above, Section 12-36-60 provides a specific definition of "tangible personal property" that coincides with the general understanding of "corporeal personal property" included in the definition of "tangible property" under Section 12-6-30(11).

on the sale of tangible personal property, the sale of electricity is specifically recognized and defined as a service."

First, that decision has **no precedential value** and is thus not binding on this Court.

Secondly, that decision merely concluded that the taxpayer was providing a service and was thus subject to a license fee under then-Section 12-19-110. However, Section 12-19-110 was imposed "[i]n addition to . . . all other license taxes and fees or taxes of whatever kind . . . ." Section 12-19-110 did not prevent the application to the taxpayer of any other tax laws, including those that implicated "tangible personal property." Thus, even if this Court were to adopt the position that the sale of electricity was merely a service under the Sales and Use Tax Act, the sale of electricity would simply be a service that does not fall "within the meaning of the general definition" of "tangible personal property" set forth in the first sentence of Section 12-36-60, Consolidated Hydro *4. But the inquiry does not end there in this case. The sale of electricity, though a service, would still be considered tangible personal property, as set forth in the second sentence. As such, it would be subject to tax laws imposed by other statutes upon tangible personal property, just as it was subject to license fees imposed by other statutes upon services. Thus, even under Duke Energy's theory, it would still be considered to be "selling, distributing, or dealing in tangible personal property within this State" for corporate income tax apportionment purposes under Section 12-6-2250.

Furthermore, as previously mentioned, Merriam-Webster's Dictionary defines "service" as "useful labor that does not produce a tangible commodity" or "a facility supplying some public demand." Merriam-Webster Online Dictionary, www.merriam-webster.com (last visited October 29, 2012). Because, for the reasons given above, I find that electricity is a tangible commodity manufactured by Duke Energy, Duke Energy has failed to demonstrate that its "provision" of electricity to customers is a service under the first definition. As to the second definition, Duke Energy is doubtless a service because it is "a facility supplying some public demand." However, there is nothing in this definition of service that is determinative of tangibility or intangibility. Indeed, the actual provision of a product may be intangible, while the product itself is tangible.[33] This is evident with the sales or use tax definition of "tangible personal property" under Section 12-36-60, in which sales of electricity, though considered

[33] See, e.g., Pub. Serv. Co. v. Dep't of Revenue, ---P.3d----, 2011 WL 4089971 (Colo. Ct. App. 2011) ("There is . . . Colorado authority that electricity is both a product and a service").

services under that statute, are considered tangible personal property. See S.C. Code Ann. § 12-36-60 ("'Tangible personal property' . . . also includes . . . sales of electricity . . . ."). Thus, even looking to the sales or use tax definition, and considering the sale of electricity to be a service, the sale of electricity would still be tangible personal property for tax purposes.[34]

In sum, although it admittedly is unique, electricity is a tangible product with identifiable physical characteristics that may be created, measured, felt, stored, and consumed, and an electric utility may exercise ownership rights over it. And even if the Court were to consider the sale of electricity merely a service, it would still be considered tangible personal property for tax purposes. Therefore, Duke Energy also falls within Section 12-6-2250(b).

More-than-50-percent Test

Though Duke Energy, as the taxpayer, may engage in activities falling under Section 12-6-2250, Duke Energy may still apply the single-factor gross receipts apportionment method under Section 12-6-2290 if the principal amount of its profits or income is derived from activities other than those covered in Section 12-6-2250. However, Duke Energy, which was engaged in more than one line of business during the Tax Periods at Issue, has the burden of proving that its principal business in this State was not from manufacturing, or any form of collecting, buying, assembling, or processing goods and materials within this State, or from selling, distributing, or dealing in tangible personal property within this State. In making this "principal business" determination, South Carolina adopts a more-than-50-percent test. The Department's longstanding policy provides:

> [W]hether a business is a service related industry can be made by comparing the gross receipts of the business derived from providing services to total gross receipts of the business. If over 50 percent of the gross receipts are from providing services, then the business would be service related. This method has been utilized by the [South Carolina Tax] [C]ommission in determining whether a multistate taxpayer is providing services and thus would utilize the gross receipts ratio to apportion its income.

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[34] Duke Energy points out that several other states have treated the provision of electricity as something other than tangible person property. These states would include: North Carolina, Oregon, California, and Massachusetts. However, this Court finds more persuasive the decisions of those states that hold that electricity is tangible personal property. See e.g. Exelon Corp. v. Dept't of Revenue, 234 Ill.2d 266, 917 N.E.2d 899 (2009); Tucson Elec. Power Co. v. Ariz. Dep't of Revenue, 170 Ariz. 145, 822 P.2d 498 (Ct. App. 1991). Moreover, Duke Energy acknowledges that other states, in contexts other than income tax, have ruled that the sale of electricity is the sale of tangible personal property. See, e.g., Davis v. Gulf Power Corp., 799 So. 2d 298, 301 (Fla. Dist. Ct. App. 2001) (property tax); Texas E. Transmission Corp. v. Benson, 480 S.W.2d 905, 908 (Tenn. 1972) (sales tax); S. Natural Gas Co. v. State, 261 Ala. 222, 73 So. 2d 731 (1953) (use tax).

Rev. Rul. No. RR-87-5 (S.C. Tax Comm'n Sept. 16, 1987). Thus, under the Department's policy, if more than 50 percent of a business's gross receipts are from providing services, then the business would be service-related and the taxpayer would be required to apportion its income to South Carolina using the single-factor gross-receipts apportionment method under S.C. Code Ann. § 12-6-2290. Otherwise, the business would have to apportion its income to South Carolina using the three-factor apportionment method under S.C. Code Ann. § 12-6-2250.

Here, Duke Energy presented testimony indicating that Duke Energy's principal business is the provision of electricity services because at all times during the Periods at Issue more than 50 percent Duke Energy's gross receipts were derived from the provision of electric services. However, in light of my findings that Duke Energy's generation, transmission, and distribution of electricity are activities falling within Section 12-6-2250, that electricity is tangible personal property, and that sales of electricity are sales of tangible personal property, I find Duke Energy's evidence insufficient to establish that more than 50 percent of Duke Energy's gross receipts were derived from activities not covered in Section 12-6-2250. Indeed, Duke Energy introduced no evidence supporting any breakdown of its gross receipts from manufacturing, services, and/or any other activity.

Conclusion

After considering the evidence in the record and the pertinent legal authorities, I conclude that Duke Energy failed to establish by the preponderance of the evidence that its principal business in South Carolina is not manufacturing. This Court thus rejects Duke Energy's attempt to use the single-factor apportionment formula for tax years 1994-2001 instead of the multi-factor apportionment formula it used in its original corporate income tax returns.

ORDER

THEREFORE, IT IS HEREBY ORDERED that Duke Energy's claims for refunds with respect to its attempt to use the single-factor apportionment formula for the corporate income tax periods 1994-2001 are DENIED and the Department's Determination is AFFIRMED.

IT IS SO ORDERED.

Ralph K. Anderson, III
Chief Administrative Law Judge

December 4, 2012
Columbia, South Carolina

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Duke Energy Corporation, Petitioner, vs. South Carolina Department of Revenue, Respondent.	)	Docket No. 10-ALJ-17-0270-CC **RECONSIDERATION ORDER**

Appearances:

For the Petitioner: Burnet R. Maybank, III, Esq.; Eric S. Tresh, Esq.; Jeffrey A. Friedman, Esq.; and Maria M. Todorova, Esq.

For the Respondent: Tracey C. Green, Esq.; John W. Roberts, Esq.; Harry Hancock, Esq.; and J. Abraham Gutting, Esq.

This matter came before the Administrative Law Court (ALC or Court) following Duke Energy Corporation's (Duke Energy) request for a contested case hearing under S.C. Code Ann. § 12-60-460 (Supp. 2006). Duke Energy is contesting the Determination of the South Carolina Department of Revenue (Department) denying Duke Energy's claim for a refund of South Carolina corporate income taxes for the tax years 1994 through 2001 (Tax Periods at Issue).[1] A hearing was held before this Court on September 5 and 6, 2012. On November 2, 2012, this Court entered its Final Order and Decision (Final Decision) denying Duke Energy's claims for refund of corporate income taxes for the Tax Periods at Issue and affirming the Department's Determination that Duke Energy cannot apportion its income based on the single-factor gross-receipts apportionment method. Afterwards, Duke Energy filed a Motion for Reconsideration of the Court's Final Decision on November 13.

Some of Duke Energy's arguments warrant clarification or amendment of the original Final Decision. Accordingly, I am issuing an Amended Final Decision in this case addressing

[1] Duke Energy originally sought refunds for the tax years 1978 through 2001. On October 11, 2012, this Court ruled that Duke Energy's refund claims for the tax years 1978 through 1993 are untimely. Thus, Duke Energy's refund claims for 1978-1993 were not before the Court.

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those issues of whether Duke Energy can apportion its income based on the single-factor gross-receipts apportionment method. The remaining arguments will be addressed below.

DISCUSSION

Duke Energy's' Motion for Reconsideration presented fifty instances in which they contend that this Court erred in the issuance of its Final Decision. Those arguments are addressed below in the numerical sequence in which they were presented.

1. Duke Energy contends that Court erred in finding that Duke Energy "**furthers** its primary business by owning and operating transmission and distribution assets in South Carolina and North Carolina." The Final Decision has been amended to address this issue.

2-4. Duke Energy contends that the Court improperly disregarded factual evidence that Duke Energy was subject to the regulation of its "rates and *services*" by the South Carolina Public Services Commission and the Federal Energy Regulatory Commission and its operations were characterized as a "franchise electric service business." The Court clearly acknowledged in the Stipulations of Fact (stipulation 10, p. 3) that Petitioner was regulated by the South Carolina Public Service Commission (Commission) as an "electric utility" pursuant to S.C. Code Ann. § 58-27-10 (7). Though Section 58-27-10(7) does not refer to an "electric utility" as providing a "service, Section 58-27-10 (8) does set forth that:

> The term "rate" means and includes every compensation, charge, toll, rental, and classification, or any of them, demanded, observed, charged, or collected by any electrical utility for any electric current or **service** offered by it to the public and any rules, regulations, practices, or contracts affecting any such compensation, charge, toll, rental, or classification.

The Court further recognizes that Duke Energy "services" are subject to the regulation of the Federal Energy Regulatory Commission. Nevertheless, as explained in the Court's Decision, this "service" is that of "a facility supplying some public demand." See e.g., Black River Elec. Co-op., Inc. v. Pub. Serv. Comm'n, 39 P.U.R.3d 232, 120 S.E.2d 6 (S.C. 1961) ("The purpose underlying Section 24-63 was to prevent competition between utilities rendering service of the same kind so as to eliminate waste incident to a duplication of facilities."). Therefore, citation to the regulation of those bodies did not support Duke Energy's contentions. It thus was not probative as to the nature of Duke Energy's primary activities and thus its classification for corporation income tax purposes under either Section 12-6-2250 or -2290.

5. Duke Energy contends that the Court erred in finding that the profits from the flat-rate and capacity charges were not a significant portion of Duke Energy's profit from the sale of electricity. As the finder of fact, the Court simply does not find that the evidence established that these charges were a significant portion of Duke Energy's business. In fact, I find the evidence established otherwise. For instance, Mr. Robinson testified that a majority of an electric utility's, and thus Duke Energy's, product is not provided on a flat-fee basis. Tr. p. 393, lines 5-18. And Duke Energy's expert witness, Mr. Jamil, testified that though not always, Duke Energy typically provides electric service on a metered basis. Id. at 106, lines 22-23. He testified that he could not testify as to whether a flat fee for lighting generated a significant amount of Duke Energy's revenues. Id. at 175, lines 10-21.

As to the capacity charge, Mr. Jamil did testify that the capacity charge was a significant part of a customer's bill. However, he also testified that the amount of the charge depends on the customer's usage. Id. at 178, lines 18-19. He also testified that the amount of the charge would depend on the customer class. Id. at 179, lines 20-25 to p. 180, line 1. When asked about the capacity charge for a residence per month, Mr. Jamil testified that he did not have that information. Id. at 180, lines 8-12. Duke Energy has the burden of proving its case by a preponderance, or greater weight of the evidence, and merely stating that a capacity charge is a significant portion of a customer's bill (he did not testify that this charge was a significant portion of Duke Energy's receipts), is insufficient, especially in light of the fact that the witness admitted that the charge in relation to the bill was variable.

6. Duke Energy contends that the Court erred in finding that the process of generating electricity is the same process employed since the early 20th century. Duke Energy failed to set forth facts in the record to support this claim. See e.g., Campbell v. Carr, 361 S.C. 258, 603 S.E.2d 625 (Ct. App. 2004). Moreover, Duke Energy failed to explain the implication of the purported error upon the decision in this case. Furthermore, there is no evidence that the introduction of renewable energies, the use of solar panels, and the development of more efficient wind generators occurred during the Periods at Issue (1994-2001). Nevertheless, the following facts are cited as supporting the amended finding regarding this issue:

Q: Now, a lot of your generation facilities use a turbine; is that correct?

A: (Nods head affirmatively.)

Q: Not all of them.

A: Many of them do.

Q: Many of them.

A: Yeah.

Q: And the design of a turbine used in one of these plants hasn't really changed since the early 20th century, has it?

A: Not significantly.

Q: And the generation process that we're discussing here today that Duke Energy makes available, that's not really changed much since the early 20th century, has it?

A: I mean, we've made it significantly more efficient, but

Q: Used technology --

A: Yeah.

Q: -- and things like that?

A: Different material --

Q: Is that correct?

A: Yeah.

Q: But the basic process is the same.

A: Basic process is the same

Tr. p. 169 line 25 to p. 170, line 24.

Q: And the process of generating electricity hasn't changed in the last hundred years.

A: For most of the part, no. However, we have added renewable energies. So in consideration of the environment, we have developed solar panels. We have also developed more efficient wind generators. Again, mainly to mitigate any environmental effects that we may have from traditional techniques.

Tr. p. 289 lines 11-19.

7-8. Duke Energy contends that the Court erred in finding that Duke Energy's generation and purchase of electricity using natural gas, wind and solar, "appear to be much less significant" than other methods. Duke Energy failed to explain the implication of the purported error upon the decision in this case. Furthermore, as the finder of fact, the Court is entitled to attribute as much or as little weight to evidence as it wishes. See MRI at Belfair, LLC v. S.C. Dep't of Health and Envtl. Control, 392 S.C. 314, 324, 709 S.E.2d 626, 631 (2011) ("[A]s the fact-finder, the ALC was free to make factual findings based on its view of the credibility and weight of the evidence"). Here, as the finder of fact, the Court simply does not find that the

evidence established that Duke Energy's generation of electricity based upon natural gas, wind, and solar was significant during the Tax Periods at Issue. See e.g., Tr. p. 117, line 10 to p. 118, line 1. Duke Energy also argues that the Court erred in finding that Duke Energy's purchase of electricity from other electric utilities "appear[s] to be much less significant." Duke Energy instead asserts that it presented evidence that purchasing electricity from other utilities is an integral and necessary part of its primary business. However, Duke Energy's own witness, Mr. Monroe, testified as follows:

Q: But Duke Energy generates most of its own electricity that it sells, doesn't it?

A: Yes.

Tr. p. 88, lines 9 -11.

9. Duke Energy contends that the Court improperly ignored that the Department had conceded, in its Determination denying Duke Energy's refund claims and in its Pre-Hearing Statement, that Duke Energy provides a service. The Administrative Law Court hears this case as the de novo finder of fact. Young v. S.C. Dept. of Health and Envtl. Control, 383 S.C. 452, 680 S.E.2d 784 (Ct. App. 2009); Risher v. S.C. Dept. of Health and Envtl. Control, 393 S.C. 198, 207, 712 S.E.2d 428, 433 (2011), reh'g denied (July 21, 2011) ("The ALC, as the ultimate finder of fact in this action, was free to visit the Lot and draw its own conclusions therefrom."). The Court therefore makes its determination based upon its reasonable view of the facts. Furthermore, the Court is free to reach its own conclusions of law. As such, the Court in this case found, as set forth in its Final Decision, that Duke Energy's primary business is manufacturing and not providing a "service."

10. Duke Energy contends that the Court failed to consider the legislative history of Sections 12-6-2250 (and its predecessor Section 12-7-1120) and 12-6-2290 (and its predecessor Section 12-7-1190), as well as guidance issued by the Department on the same topic that the multi-factor apportionment formula is designed for taxpayers dealing in tangible personal property (such as manufacturers) whereas the single-factor gross-receipts formula is designed for taxpayers who do not deal in tangible personal property, such as service businesses. The Court simply disagrees with that assertion. The Court certainly made clear, as finder of fact and in its conclusions of law, that electricity is tangible personal property. Furthermore, there is evidence in the record that electricity is tangible. See e.g., Tr. p. 335, lines 19-21; p. 363, lines 3-7; p. 376, lines 12-23.

11. Duke Energy contends that the Court erred in disregarding the testimony of Duke Energy's expert witness, Dr. Papapolymerou, regarding whether one can feel electricity. First, Duke Energy carries the burden of proving that a person can not feel electricity, and as the finder of fact, the Court can choose to accept in part or in whole the testimony of expert witnesses. MRI at Belfair, LLC, 392 S.C. at 324, 709 S.E. at 631 ("[A]s the fact-finder, the ALC was free to make factual findings based on its view of the credibility and weight of the evidence"). Second, there is evidence in the record that electricity can be touched and sensed. See e.g., Tr. p. 332, lines 19 - 25; p. 376, lines 12 - 23. Here, the Court did not find any of the witnesses credible as to the physiology of the human body with respect to the nervous system, but did determine that electricity can be sensed, touched, and therefore felt.

12-13. Duke Energy contends that the Court erred in finding that Duke Energy produces electrical charge. Duke Energy also contends that the Court failed to consider the parties' expert witnesses' testimony that Duke Energy does not create the electrons residing in the power lines, and that the provision of electricity is not the transfer of electrons to the customers. As the finder of fact, the Court can choose to accept in part or in whole the testimony of expert witnesses. See MRI at Belfair, LLC, 392 S.C. at 324, 709 S.E. at 631 ("[A]s the fact-finder, the ALC was free to make factual findings based on its view of the credibility and weight of the evidence"). Moreover, the Court found that an electrical charge is a component of what is produced by Duke Energy. Dr. Papapolymerou testified that Duke Energy generates the electromagnetic field that causes the electrons to oscillate and thus the charges to flow, providing energy. See e.g., Tr. p. 285, lines 13 - 23; p. 288, line 13 to p. 289, line 3. Thus, electrical charge is a component of the energy generated by Duke Energy because the charges are manipulated by the magnetic field that is created and controlled by Duke Energy, which creates the energy that Duke Energy provides.

14. Duke Energy contends that the Court erred in making a factual finding that electricity can be created, felt, stored, or consumed and is a tangible product with identifiable physical characteristics. Duke Energy carries the burden of proving that a person can not feel electricity, and as the finder of fact, the Court is entitled to attribute as much or as little weight to evidence as it wishes. See MRI at Belfair, LLC, 392 S.C. at 324, 709 S.E. at 631 ("[A]s the fact-finder, the ALC was free to make factual findings based on its view of the credibility and weight of the evidence"). Here, the answers above, and the Amended Final Decision on pp. 23-24, address the issues of whether electricity can be created, felt, or is tangible. Moreover,

"consumed," as utilized in the Final Decision and Amended Final Decision, refers to the utilization of electricity as a customer. See Merriam-Webster Online Dictionary, www.merriam-webster.com (defining "consumed" as "to utilize as a customer") (last visited November 20, 2012). The evidence also established that the source of electricity, an electrical charge, can be stored. See e.g., Tr. p. 121 line 24 to p. 122, line 10; p. 259 lines 19-25; p. 277, line 17 to p. 278, line 4; p. 299 lines 4-5.

15. Duke Energy contends that the Court erred in disregarding Duke Energy's expert witness's testimony regarding the nature of electricity. Duke Energy carries the burden of proof and as the finder of fact, the Court is entitled to attribute as much or as little weight to evidence as it wishes. See MRI at Belfair, LLC, 392 S.C. at 324, 709 S.E. at 631 ("[A]s the fact-finder, the ALC was free to make factual findings based on its view of the credibility and weight of the evidence"). Moreover, this overly-broad issue fails to sufficiently specify an error.

16. Duke Energy contends that the Court erred in disregarding the Department's expert witness's testimony that Duke Energy provides a service. Duke Energy carries the burden of proof and as the finder of fact, the Court is entitled to attribute as much or as little weight to evidence as it wishes. MRI at Belfair, LLC, 392 S.C. at 324, 709 S.E. at 631 ("[A]s the fact-finder, the ALC was free to make factual findings based on its view of the credibility and weight of the evidence"). In reaching my factual determinations, I gave this evidence little, if any, weight and therefore chose not to reference it, being unpersuasive. Nevertheless, I now specifically find this evidence was not persuasive.[2]

17. Duke Energy contends that the Court erred in holding that "No other electrical utilities challenged that position [that electric utilities were manufacturers]" Duke Energy carries the burden of proof and as the finder of fact, the Court is entitled to attribute as much or as little weight to evidence as it wishes. See MRI at Belfair, LLC, 392 S.C. at 324, 709 S.E. at 631 ("[A]s the fact-finder, the ALC was free to make factual findings based on its view of the credibility and weight of the evidence"). Here, the evidence reflected that Mr. Southard was not aware of any challenges to the Department's position, other than that posed by Duke Energy. See Tr. p. 203, lines 1-2. And Duke Energy presented no evidence to the contrary. Moreover,

[2] I further note that it is the Court's responsibility to make "findings of fact." However, I am not aware of any responsibility to make "non-findings of fact."

since Duke Energy did not challenge the legal implications of this determination, the Court will not address that issue.

18. Duke Energy contends that the Court erroneously concluded that the Department has a longstanding policy of treating electric utilities as manufacturers for purposes of corporate income tax apportionment. I find the law cited in the Court's Final Decision supports the conclusion reached by the Court. The Court did not give deference to the Department based on its audit manual. Rather, the Court relied on a 1985 S.C. Tax Commission determination and on earlier S.C. Supreme Court decisions in Columbia Ry. and Duke Power Co. v. Bell in concluding that the public, including the General Assembly, was given notice of the Department's policy of treating electric utilities as manufacturers for purposes of corporate income tax apportionment.

19-20. Duke Energy contends that the Court gave improper deference to the Department's alleged long-standing policy of treating electric utilities as manufacturers for South Carolina income tax purposes. As set forth above, the law cited in the Court's Final Decision supports the conclusion reached by the Court. Here, there were prior known interpretations regarding the Department's policy of treating electric utilities as manufacturers for South Carolina corporate income tax purposes, and those interpretations were not contrary to any statute or regulation. The Court's rejection of Duke Energy's position is not a failure to consider that position. Moreover, Duke Energy cited no law in its Motion for Reconsideration to support its reasoning regarding these issues. See e.g., Campbell v. Carr, 361 S.C. 258, 603 S.E.2d 625 (S.C. App. 2004).

21. Duke Energy contends that the Court erroneously concluded that because Duke Energy filed its tax returns using the multi-factor apportionment formula over the course of 23 years, "the returns were filed in accordance with the policies and filing requirements promulgated by the Department." The Court found that Duke's filing according to the multi-factor apportionment formula over the course of 23 years **"leads to the conclusion** that "the returns were filed in accordance with the policies and filing requirements promulgated by the Department and **as understood by Duke Energy at the time the returns were originally filed.**" (Emphasis added). The Final Decision has been amended to remove "and" from before "as understood" because it is unnecessary. Furthermore, Duke Energy failed to explain the implication of the purported error upon the decision in this case. Moreover, as the finder of fact, the Court is entitled to attribute as much or as little weight to evidence as it wishes. See MRI at

Belfair, LLC, 392 S.C. at 324, 709 S.E. at 631 ("[A]s the fact-finder, the ALC was free to make factual findings based on its view of the credibility and weight of the evidence"). Here, there was sufficient evidence from which the Court as the finder of fact could reasonably conclude that the Department had a longstanding policy of which Duke Energy should have been aware.

22. Duke Energy contends that the Court erroneously concluded that Columbia Ry., Gas & Elec. Co. v. Query, 134 S.C. 319, 132 S.E. 611 (1926), was decided in the income tax context. The Court's Final Decision has been amended to address this issue.

23. Duke Energy contends that the Court erred in holding that the Department, in S.C. Tax Comm'n Decision P-D-532, 1985 WL 192777 (Apr. 11, 1985), ruled that the property tax assessment ratio for electric utilities should be 6% (as opposed to 10.5% applicable to the personal property of non-manufacturing entities)." However, as the Tax Commission pointed out in S.C. Tax Comm'n Decision P-D-532, 1985 WL 192777 (Apr. 11, 1985), South Carolina, in Columbia Ry., "has recognized that certain utilities may also be manufacturers," and that utilities that generate electricity or any other power that they supply to their customers are such utilities and therefore manufacturers. The Commission also cited 17 A.L.R.3d, Taxes, "Manufacturing," § 44, 102. The Tax Commission thus concluded that "X" Electric and Gas was a manufacturer and that the tax assessment ratio that applied to it was only 6% - the rate that a manufacturer paid on real property owned by or leased to the manufacturer and used primarily as an office building that is not located on the premises of or contiguous to the plant site of the manufacturer, which was the situation in that case. As the Tax Commission also properly pointed out, the reference to "utilities" in 12-43-220(a)(1) is limited to utilities that merely supply light, water, power, heat, transportation or means of communication, but do not generate the power that they supply to their customers. Those that generate the power they supply, such as Duke Energy, are considered manufacturers, not mere utilities.

24. Duke Energy contends that the Court erred in concluding that the terms "goods and materials" contained in Section 12-6-2250(a) "reflect[] that the Legislature intended to cover not just manufacturing but all activities that a business could perform in regards to a *product* prior to making that *product* available to its customers." (Emphasis in original). The Final Decision has been amended to address this contention.

Duke Energy also asserts that both parties' experts agree that electricity is not a material. The Court never found that electricity is a material. Rather, the Court noted that raw materials,

such as coal, water, or nuclear fuel, are processed to generate or produce the electricity. Under the facts of this case, the Court considers "generation," "manufacturing," and "production," from which the term "product" is derived, to be synonymous. Duke Energy then argues that Duke Energy presented ample evidence showing that electricity is not tangible personal property or a good. First, as reflected in the Final Decision, tangible personal property is a separate consideration, under subsection (b), from the "goods and materials" discussed in subsection (a). Nevertheless, the evidence established that electricity is tangible. See, e.g., Tr. p. 335, lines 19-21; p. 363, lines 3-7; p. 376, lines 12-23; p. 378, lines 13-15. Finally, Duke Energy maintains that the Department has not presented any evidence to show that electricity is a good or material. On the contrary, there is more than sufficient evidence that the electricity that Duke Energy generated during the Tax Periods at Issue satisfied an economic want, which causes that electricity to fall under the definition of "good."[3]

25. Duke Energy contends that the Court improperly applied the Webster's definitions of "manufacturing" and erroneously concluded that Duke Energy "makes" or "produces" "something." Duke Energy has cited no law explaining what was improper about applying Webster's definitions of "manufacturing." "Manufacturing" is not defined in the applicable statutes, and it is not a legal term of art. Therefore, it is perfectly proper to refer to a dictionary to understand the common usage of a statutorily-undefined term, as our Supreme Court has often done. Again, this Court finds "make," "produce," and "manufacture" to be synonymous. As finder of fact recognizing the burden of proof, this Court finds that there was more than sufficient evidence to support its finding that Duke Energy generates, or manufactures, electricity. In fact, Duke Energy's own witness, Mr. Jamil, testified that Duke Energy generates electricity, and also affirmed that Duke Energy uses various generation processes to produce electricity. See, e.g., Tr. p. 101, line 13 to p. 102, line 48. Therefore, Duke Energy's own witness testified not only that electric energy is generated or produced by Duke Energy, but also, based on his responses, clearly viewed generation and production as synonymous, and naturally so.

26. Duke Energy contends that the Court erred in finding that "the evidence in this case establishes that Duke Energy is a manufacturer" based on the Court's definition of

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[3] The sum of money involved in this case, being just income taxes alone, reflects that Duke Energy's electricity satisfied a vast quantity of economic want.

"manufacturing" as "the act or process of producing something" when Duke Energy presented evidence that it does not produce anything because electricity cannot be created or destroyed. The Court adopts the conclusions stated in response (25) above and further notes that Duke Energy carries the burden of proof, and as the finder of fact, the Court is entitled to attribute as much or as little weight to evidence as it wishes. See MRI at Belfair, LLC, 392 S.C. at 324, 709 S.E. at 631 ("[A]s the fact-finder, the ALC was free to make factual findings based on its view of the credibility and weight of the evidence").

27. Duke Energy contends that the Court improperly considered cases from other states decided in tax contexts *other than income tax* holding that the generation of electricity is manufacturing, while, at the same time, the Court failed to consider *more recent* decisions from other jurisdictions decided in the *corporate income tax context* which hold that the provision of electricity is a service and not manufacturing. First, this Court finds that the cases cited properly supports the legal conclusions reached by the Court. Interestingly, one of the cases cited by the Court is dated September 15, 2011, which appears to this Court to be "recent." In addition, Duke Energy has not explained why the ages of cases discredit the legal holding of those courts. It is simply a reflection that in those states, as in South Carolina, the law on this issue was settled long ago. Moreover, the Court found cases cited in Footnote 19 to be more akin to South Carolina law and therefore more convincing.

28. Duke Energy contends that the Court erred in making a factual finding that Duke Energy "cannot produce or deliver electricity to consumers in the absence of any one of these parts [- generation, transmission, and distribution,]." At the outset, Duke Energy carries the burden of proof, and as the finder of fact, the Court is entitled to attribute as much or as little weight to evidence as it wishes. See MRI at Belfair, LLC, 392 S.C. at 324, 709 S.E. at 631 ("[A]s the fact-finder, the ALC was free to make factual findings based on its view of the credibility and weight of the evidence"). Nevertheless, in light of Duke Energy assertion, the disputed language has been modified in the Amended Final Decision.

As to the remaining language, there was evidence that Duke Energy **sometimes** purchases electricity from other electric utilities. See e.g., Tr. p. 117, line 10 to 119, line 8; Tr. p. 181, lines 8-11. However, the evidence did not establish that Duke Energy's purchasing of electricity from other electric utilities is a significant or necessary part of its business, or is "routinely" done. Mr. Jamil testified that it was "possible" to provide all of its electric service to

South Carolina without generating the electricity. Id. at 118, line 25 to 19, line 5. But he also admitted that he understands this would not be the most cost efficient. Id. at 119, line 6-8. More importantly, what Duke Energy could possibly do and what it actually did during the Taxable Periods at Issue are two different things. Duke Energy may sometimes purchase electricity from other electric utilities, but most of the electricity that Duke Energy provides to its customers is generated by Duke Energy. In addition, the evidence also clearly established that Duke Energy needs three components – generation, transmission and distribution – to provide electricity to its customers. See e.g., Id. at 104, lines 11-24.

29. Duke Energy contends that the Court erroneously reasoned that because electricity can be measured, generating electricity is manufacturing, when in fact, Duke Energy presented evidence that it also provides electricity on a fixed-fee basis. As to Duke Energy's provision of electricity on a fixed-fee basis, this was addressed in Footnote 3 and on p. 20 of the Final Decision; and need not be repeated here. As to measurability, this Court quite agrees that measurability **alone** is not an indication of manufacturing, which is why the Court noted measurability as "further evidence[]" and "further support[]" that generating electricity is manufacturing. All of the other reasons why generation is manufacturing were discussed prior to the paragraph on measurability. Together, all of these reasons led the Court to the conclusion that the generation of electricity was manufacturing.

30. Duke Energy contends that the Court erroneously concluded that Duke Energy cannot "provide" electric service "without the existence of electricity, and the electricity that Duke Energy provides cannot exist without first being produced, or manufactured." Quizzically, Duke Energy questions whether Duke Energy can provide electricity without its existence (it argues that electricity cannot be created or destroyed). The error of that objection is so obvious the Court need not comment further. Furthermore, as reflected in the record, electricity must be sold at a regulated voltage to be usable by the public. Duke Energy's expert testified that "[w]e drop the voltage down to a level that is usable to the customer – typically 120 volts; sometimes 220 volts. . . ." Tr. p. 115, lines 21-24. Since there was no evidence that electricity naturally exist at 120 volts, this Court found that "the electricity that Duke Energy provides cannot exist without first being produced, or manufactured." Additionally, see responses (25) and (26) above for additional explanation.

31. Duke Energy contends that the Court failed to consider testimony by Duke Energy's witness that the Standard Industry Classification System, which was in effect during the Periods at Issue, classified electric utilities and manufacturers in two separate categories, having two different codes, and that as an electric utility, Duke Energy was required to use the code applicable to the electric utilities classification. Footnote 24 in the Final Decision (Footnote 28 in the Amended Final Decision) adequately addresses this issue.

32. Duke Energy contends that the Court made an erroneous finding that "services typically are not measured by the quantity of the product consumed and are not delivered to or measured by mathematical calculations regarding the nature of the services." The Final Decision has been amended to address this issue.

33. Duke Energy contends that the Court made an erroneous finding when it concluded that "any electromagnetic field results from the electric current created by the generator." The Final Decision has been amended to clarify the Court's findings. However, Duke Energy's expert witness (Mr. Jamil), explained that in layman's terms the "electromagnetic field" is "current" or an "electric field:" Tr. p. 153, lines 1-3; 17-23. Nevertheless, it is a "charge." Id. Mr. Jamil also explained that an electromagnetic field does not exist unless there is a current. Tr. p. 154, lines 21-25. He further testified as follows:

Q: And you have generation facilities in South Carolina and North Carolina.

A: Yes, we do.

* * *

Q: And the generator turns by -- it's the – I assume it's a fairly large machine; is that correct?

A: Oh, yes.

Q: A mechanical device?

A: Yes.

Q: And then it creates a varying magnetic field?

A: Yes, it does.

Q: And then that generates the electricity?

A: That -- yes, that generates –

Tr. p. 157, lines 14-16; p. 159, lines 7-16. Therefore, ultimately, the electromagnetic field that is created by Duke Energy's generators results in the production of electricity that is sold by Duke Energy.

34. Duke Energy contends that the Court made an erroneous finding and failed to consider evidence presented by Duke Energy when it concluded that "substantially all, if not all, of the electricity provided by Duke Energy is priced at some level based on quantity." I agree. Therefore, the Final Decision has been amended to reflect the change. "Substantially all, if not all," will be replaced by "the majority."

35. Duke Energy contends that the Court improperly discounted the similarities between the electricity provided by a telecommunications company and the electricity provided by Duke Energy. Again, Duke Energy carries the burden of proof, and as the finder of fact, the Court is entitled to attribute as much or as little weight to evidence as it wishes. See MRI at Belfair, LLC, 392 S.C. at 324, 709 S.E. at 631 ("[A]s the fact-finder, the ALC was free to make factual findings based on its view of the credibility and weight of the evidence"). Here, telecommunications companies use electricity, but they are providers or conveyors of communications or intelligence produced or created by one customer to another. This finding is more thoroughly addressed on pp. 20-21 of the Amended Final Decision.

36. Duke Energy contends that the Court failed to consider the definition of "manufacturing" in other contexts of the South Carolina Income Tax, as brought to the Court's attention in Duke Energy's Pre-Trial Brief. To the contrary, the Court considered Duke Energy's definition as set forth on p. 16 of its pretrial brief in the other contexts of the South Carolina Income Tax Act. The first context cited by Duke Energy was the Renewable Tax Incentive Program under S.C. Code Ann. § 12-6-3588(B)(2). However, the Court rejected the definition of "manufacturing" under that statute because it became effective January 1, 2011, well after the Tax Periods at Issue in this case. As to the other provision cited by Duke Energy in its pretrial brief, Section 12-6-2260(M)(5), (6), the Court could not consider what it could not find. There was no subsection (M)(5) or (6) for Section 12-6-2260 during the Tax Periods at Issue. "Manufacture" is mentioned in (D)(5), the last provision of this statute, but this relates to unmanufactured tobacco stored in warehouses in this State for subsequent shipment to a manufacturer in another state. It provides no guidance as to the meaning of "manufacture" and is unrelated to the case at hand.

As to the definition of tangible personal property, in the Final Decision the Court agreed with Duke Energy that the "tangible property" definition under 12-6-30(11) should be used and did apply that definition. That definition included the term "corporeal," which is not a legal term

of art in this case, and which is generally understood to mean "of a material nature; tangible." The Final Decision has nonetheless been amended to clarify that the Court only looked to the other statutory definition of "tangible property" to further support the plain meaning of the definition under 12-6-30(11). Section 12-36-60's definition was perfectly consistent with the plain ordinary meaning of "tangible" as something corporeal (material/physical).

37. Duke Energy contends that the Court improperly ignored the definition of "manufacturing" contained in the Income Tax Act, Jobs Tax Credit provisions. Duke Energy avers that the Court should have applied Section 12-6-3360(M)(8), which defines a "manufacturing facility" as "an establishment where *tangible* personal property is produced or assembled." However, during the Periods at Issue, the term "manufacturing facility" was defined in Section 12-6-3360(M)(5), not (8). Nevertheless, the Court agrees with the definition of "manufacturing" contained therein; and because the Court finds that the electricity generated by Duke Energy is tangible personal property, this definition is consistent with the Court's definitions of "manufacturing" and thus there is no ambiguity as to the definition of the term "manufacturing."

38. Duke Energy contends that the Court erred in holding that "manufacturing" is defined as "'the act of processing or producing something.'" In light of this allegation, the Final Decision has been amended to include the more specific definitions for "manufacturing." Additionally, as to Duke Energy's arguments concerning the nature of the product produced by law firms, that is not at issue in this case. The Court notes, however, that law firms, like telecommunications, are in the business of conveying information, intelligence, and communications, and therefore do not appear to be manufacturers.

39. Duke Energy contends that the Court erred in holding that Duke Energy is a manufacturer because it charges its customers based on quantity and cannot produce unlimited quantities. To the contrary, all tangible items must be quantifiable, but not all quantifiable items are tangible.[4] Hours, though quantifiable, are not tangible.[5] And again, as mentioned in

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[4] Duke Energy argument is an example of the fallacy of denying the antecedent. See, Ruggero J. Aldisert, Logic for Lawyers: A Guide to Clear Legal Thinking 160 (National Institute for Trial Advocacy 3d ed. 1997); see also Irving M. Copi, Introduction to Logic 295 (5th ed. 1978).

[5] It is nonetheless notable that the computation of hours is not based upon a physical quantification, but a formulaic quantification. As explained above, electrical current is measured based upon the movement or charge of an electrons, which have mass. Tr. 285, line 21 to p. 283, line 2; p. 330, line 1 to 331, line 2.

response (29) above, the finding that Duke Energy is a manufacturer was not based solely on the fact that it charges customers based on quantity and cannot produce unlimited quantities.[6] Because tangible items must be quantifiable, showing that an item is quantifiable, though not itself conclusive, is a further indication that an item is tangible. At any rate, Duke Energy carries the burden of proving that electricity is not tangible, which it has failed to meet.

40. Duke Energy contends that the Court's construction of "manufacturer" was erroneous because "the statute's language is plain, unambiguous, and conveys a clear, definite meaning," and even if any ambiguities exist, "the taxpayer should receive the benefit in case of doubt." The soundness of the Court's decision regarding this issue is set forth in the Amended Final Decision and in responses (36) and (37) of this Order.

41. Duke Energy contends that the Court erred in finding that the generation of electricity is a form of processing raw materials used to create energy when Duke Energy presented uncontroverted evidence that electricity (or energy) cannot be created. That contention was controverted by Duke Energy's own witness. Mr. Jamil testified that Duke Energy's generators, which are turned by energy released by Duke Energy's processing of raw materials such as water, coal, or nuclear fuel, create an electric charge that travels in the form of a current and that oscillates electrons to produce an electromagnetic field, and that electromagnetic field generates electricity. Indeed, he testified that all of the generation processes that Duke Energy uses produce electricity. See response (33) above; Tr. p. 101, line 23 to p. 102, lines 1-24; p. 154, lines 11-18; p. 159, lines 7-16.

42. Duke Energy contends that the Court erred in considering Section 12-36-60 to interpret the term "corporeal" used in the definition of "tangible property" codified in Section 12-6-30(11). Though Section 12-36-60 does not mention the term "corporeal," at least in name, it does provide a specific definition of "tangible personal property" – "personal property which may be seen, weighed, measured, felt, touched, or which is in any manner perceptible to the sense" – which coincides with the general understanding of the term "corporeal," which is included as "tangible property under Section 12-6-30(11). The Final Decision has been amended to clarify this point.

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[6] This conclusion is reflected by the Court's finding in the Final Decision that Duke Energy is engaging in manufacturing uses the terms "further evidenced" and "further supports." See Page. 18 of Amended Final Decision.

43. Duke Energy contends that the Court erred in relying on the sales tax definition of "tangible personal property" in Section 12-36-60 in determining whether electricity is tangible or a service for income tax purposes. The Court's response (36) of this Order addresses this assertion. Furthermore, this Court found no conflict in the definitions of tangible property. Rather, it considered both provisions and found that both set forth the plain, ordinary meaning of "tangible." In addition, the term "corporeal" used in the first definition is well understood to be synonymous with "tangible." The Court's reason for citing the alternate definition of "tangible" was to further reflect this fact.

44. Duke Energy contends that the Court erred in concluding that electricity is tangible personal property based on the first sentence of the sales tax definition of "tangible personal property" in Section 12-36-60. To the contrary, a plain reading of the statute reflects that it clearly includes "intangibles or services" under the definition of "tangible personal property," as Duke Energy admits in its allegation (45).

45. Duke Energy contends that the Court misinterpreted the sales tax definition of "tangible personal property" in Section 12-36-60, because there the South Carolina Legislature specifically chose to define "services and intangibles, including ... sales of electricity" as tangible personal property, something the Legislature did not do in the income tax context. This issue is addressed in Footnote 32 of the Amended Final Decision. It is also notable that Duke Energy cited Consolidated Hydro, in which the court applied sales tax statutes, including Section 12-36-60, in a license fee context.

46. Duke Energy contends that the Court misinterpreted the nonbinding holding in Consolidated Hydro S.E., Inc. v. S.C. Dep't of Revenue & Taxation, No. 95-ALJ-17-0634, 1996 WL 909155 (S.C. Admin. L.J. Div. May 13, 1996). More specifically, Duke Energy submits that the court in Consolidated Hydro did not apply the sales tax definition of that term in the license tax context because the Legislature had not defined "services and intangibles, including ... sales of electricity" as "tangible personal property" for license tax purposes. I simply disagree. A license fee was at issue, yet the court in Consolidated Hydro applied sales tax statutes, devoting two paragraphs to consideration of its implications in that case.

47. Duke Energy contends that the Court erred in relying on Section 16-13-380, regarding the theft of electrical services. I agree that the Court erred, but only as to how the Court used that section. The Final Decision has been amended accordingly.

48. Duke Energy contends the Court erred in holding that electricity is a tangible product because it can be measured, felt, stored and consumed, when in fact intangibles such as sunlight, wind, and gravity are all subject to the same. Duke Energy carries the burden of proving that electricity is not tangible, which it has failed to meet. As to the implications of measuring a product, Duke Energy's argument is premised upon the contention that if intangible products can be measured, then the measurement of a product is irrelevant to the determination of whether a product is in fact tangible. It is true that just because something can be measured, felt, etc. does not necessarily mean that it is tangible. However, because that which is tangible must be measurable, demonstrating measurability, though not conclusive of tangibility, supports a showing of tangibility.[7]

As to of whether, electricity may be felt, stored or consumed, those issues are addressed above.

49. Duke Energy contends that the Court erroneously concluded that Duke Energy's evidence was insufficient to establish that more than 50 percent of its gross receipts were derived from activities not covered in Section 12-6-2250. Stated more correctly, the Court concluded that Duke Energy failed to meet its burden of proving that more than 50 percent of its gross receipts were derived from activities not covered in Section 12-6-2250. Duke Energy carries the burden of proof and as the finder of fact, the Court is entitled to attribute as much or as little weight to evidence as it wishes. See MRI at Belfair, LLC, 392 S.C. at 324, 709 S.E. at 631 ("[A]s the fact-finder, the ALC was free to make factual findings based on its view of the credibility and weight of the evidence"). Here, Duke Energy introduced no evidence supporting any breakdown of its gross receipts from manufacturing, services, and/or any other activity. In fact, there was evidence to the contrary. Mr. Robinson testified as follows:

> Q: Do you have any experience with respect to working in an electric utility that provided electricity on a flat-fee basis?
>
> A: I know that all electric utilities provide a minority of their product on a flat-fee basis, but the majority is charged for.

Tr. p. 393, lines 13-18.

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[7] Once again, Duke Energy tramples upon the fallacy of denying the antecedent. See, Ruggero J. Aldisert, Logic for Lawyers: A Guide to Clear Legal Thinking 160 (National Institute for Trial Advocacy 3d ed. 1997); see also Irving M. Copi, Introduction to Logic 295 (5th ed. 1978).

50. Duke Energy contends that the Court failed to consider Duke Energy's argument that Duke Energy's 1977 Restated Charter is of little use in deciding whether Duke Energy is engaged in manufacturing. This allegation is perplexing. The Court did not cite the Restated Charter in its factual finding or legal conclusion. The only reference to the Charter is in the Stipulations of Fact. Since the Court failed to address even the existence of the Charter in its Final Decision – thus giving it no weight – it is difficult to understand how the Court erred in giving "little" weight.

IT IS THEREFORE ORDERED that that the Petitioners' Motion for Reconsideration is denied, in part, and granted, in part, in keeping with this Order.

IT IS FURTHER ORDERED that all additional factual findings in this Order are incorporated into the Amended Final Order and Decision as findings of fact.

AND IT IS SO ORDERED.

Ralph King Anderson, III
Chief Administrative Law Judge

December 4, 2012
Columbia, South Carolina

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Duke Energy Corporation, Petitioner, vs. South Carolina Department of Revenue, Respondent,	)	Docket No. 10-ALJ-17-0270-CC

Motion for Summary Judgment by the Department of Revenue

The South Carolina Department of Revenue (the "Department" or "DOR") respectfully moves this Court for summary judgment against Duke Energy Corporation ("Duke Energy" or the "Company") pursuant to Rules of Procedure for the Administrative Law Court ("ALC") 19 and 68 and South Carolina Rule of Civil Procedure 56. The Department contends that it is entitled to judgment as a matter of law for the reasons more fully explained in the supporting memorandum filed with this motion.

[Signature Block on Next Page]

Respectfully submitted,

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Columbia, South Carolina
April 20, 2012

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Duke Energy Corporation,	)	Docket No. 10-ALJ-17-0270-CC
	)	
Petitioner,	)	
	)	
vs.	)	
	)	
South Carolina Department of Revenue,	)	
	)	
Respondent,	)	
	)	

Memorandum in Support of the Motion for Summary Judgment By the Department of Revenue

The South Carolina Department of Revenue (the "Department" or "DOR")[1] submits this memorandum supporting its motion for summary judgment against Duke Energy Corporation ("Duke Energy" or the "Company") pursuant to Rules of Procedure for the Administrative Law Court ("ALC") 19 and 68 and South Carolina Rule of Civil Procedure 56. As explained more fully below, Duke Energy has filed amended tax returns for the years 1978-2001 (the "Periods at Issue") seeking a total refund of $126,240,645 plus interest. [*See* Exhibit A.] After its refund claims were denied in whole by the Department, Duke Energy instituted this contested case hearing. However, as explained more fully below, the

[1] Because this case encompasses the years 1978-2001 (the "Periods at Issue"), the South Carolina Tax Commission was the governing authority for some of these years. But since the Department acceded to the duties and responsibilities of the Tax Commission, the terms Department or DOR also will be used to refer to the Commission unless a distinction between the specific names is appropriate.

Department is entitled to judgment as a matter of law against Duke Energy for the following reasons:

- Although it contends otherwise based on forms extending the period for assessing taxes, the pertinent refund statutes for the years 1978-1993 (the "Closed Periods at Issue") prohibit Duke Energy from filing a refund claim for those years. *See* discussion *infra* Part 1, pp.9-28.
- The taxpayer is not entitled to use the single-factor gross receipts apportionment formula in any of the Periods at Issue because the South Carolina Supreme Court has held that Duke Energy manufactures electricity. *See* discussion *infra* Part 2, pp.28-33.
- Neither the pertinent statutes nor long-standing Department policy permit Duke Energy to include the return of principal from short-term investment transactions in the calculation of its apportionment formula. *See* discussion *infra* Part 3, pp.33-39.

Background

Duke Energy is engaged in the generation, transmission, distribution, and sale of electricity in portions of North Carolina and South Carolina. Its predecessor entity, Duke Power Company, was incorporated, *inter alia*, "[t]o manufacture, generate, buy, sell, accumulate, store, transmit, furnish and distribute electric current for light, heat and power." [*E.g.*, Restated Arts. Inc. Duke Pwr. Co. (July 26, 1977) [Exhibit B].] During the Periods at Issue, Duke Energy timely filed its South Carolina corporation income tax returns, in which the Company calculated the income apportioned to South Carolina using the three-factor formula of property, payroll, and sales that must be applied 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." S.C. Code Ann. § 12-6-2250;[2] *see* Dep't Am. Prehr'g Stmt. § 5.b., p.2 (filed Nov. 30, 2010). Duke Energy also did not include the principal from transactions in short-term securities in either the numerator or denominator of its apportionment formula in its originally-filed returns. *See* Dep't Am. Prehr'g Stmt. § 5.b., p.2.

Duke Energy's Refund Claims

In December 2002, Duke Energy filed amended corporate income tax returns for the income tax years 1978-2001 seeking a substantial refund of income taxes. Dep't Det'n p.2 (Feb. 4, 2010).[3] Although many of these refund claims pertained to tax years ending as long ago as 23 years before the claims were filed, Duke Energy contended that the refund claims nevertheless were timely based on the execution of myriad Forms FS-43, entitled "Field Services Division--Consent to Extend the Time to Assess Tax."[4] The first Form FS-43 was executed in August 1988 and pertained to the income tax years ended December 31, 1983 and 1984. [Exhibits C & D.] Additional Forms FS-43 periodically were executed on subsequent dates and additional income tax years added until the execution of the

[2] Section 12-6-2250 as applicable during the Periods at Issue requires that the sales factor be double-weighted in calculation of the apportionment formula. This section was previously designated as section 12-7-1140, which was repealed in 1995. Prior to June 12, 1995, section 12-7-1140 provided a three factor formula without the double-weighted sales factor. *See also* discussion *infra* n.23.

[3] These amended returns followed the initial round of amended returns submitted to the Department on or about September 24, 2002.

[4] A schedule summarizing the Forms FS-43 is attached as Exhibit B. This schedule shows the expiration of the particular Form FS-43, the periods included in the separate forms, and the dates the forms were signed by Duke Energy and by the Department. The separate waiver forms are attached as Exhibit C

final Form FS-43 in June 2002. [Exhibits C & D.] However, as reflected in the attached schedule, the income tax years ended December 31, 1978 through December 31, 1982 were not incorporated into the executed Forms FS-43 until May 1996. [*Id.*]

The Department denied Duke Energy's refund claims in whole. Dep't Det'n p.1. Pertinent to the issue of whether Duke Energy's amended returns were timely, the Department explained that the Forms FS-43 were not intended to extend the time for filing a claim for refund and that the applicable limitations periods for the governing refund statutes had expired. *See* Dep't Det'n, pp.9-10. The Department further explained that it had no authority to extend the period for filing a refund until 1995. *Id.* p.9. The Department also stated that it cannot extend a time period that has already expired and, thus could not extend the time period for the tax years 1978-1983. *Id.* p.10. The requested refund for the Closed Periods at Issue is approximately $63,060,557. [*See* Exhibit A.] The refund for the remaining Periods at Issue is approximately $63,180,088. [*Id.*]

Manufacturing Electricity

When it filed the amended returns in December 2002, Duke Energy abandoned the method of apportioning income it had employed since at least 1978. In its amended returns, the Company seeks to apportion income to South Carolina using the single factor gross receipts formula that must be applied by 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.[5] Duke Energy asserts that this change is required because it "erroneously computed its South Carolina income tax liability by incorrectly apportioning business income to South Carolina using a three-factor apportionment formula ...." Duke Energy 2nd Am. Prehr'g Stmt., p.3. In other words, the Company contends that it "was not a 'manufacturer' of electric power during the tax periods 1978 through 2001 for South Carolina income tax purposes," *id.* pp.8-9, and therefore must use the single-factor gross receipts formula in lieu of the three-factor formula.

Pertinent to the issue of manufacturing electricity, the Department cited to and applied Supreme Court precedent holding that entities engaged in producing and generating electricity are manufacturers. *See* Dep't Det'n, pp.2-3. The Department thus determined that the Company is a manufacturer and is required to use the three-factor formula. *See id.* A determination that the Company is required to use the three-factor formula actually limits the sought-after refund for all years to approximately $35,403,324, excluding interest. [*See* Exhibit F.[6]] If considered

[5] The predecessor of section 12-6-2290, S.C. Code § 12-7-1190, was repealed in 1995, but the language remained substantially the same. [*See* Exhibit E (section 12-7-1190).] Section 12-6-2290 also excludes sources described in Section 12-6-2310, but that statute references income earned by railroad companies, motor carriers, telephone service companies, pipeline companies, airline companies, and shipping lines, none of which are applicable in this case.

[6] Exhibit F is a spreadsheet produced by Duke Energy during discovery that displays the refund amounts at issue based on certain amended returns filed by Duke Energy in September 2002. The spreadsheet is being submitted contemporaneously to the Court under seal with a request for confidential treatment. A brief explanation of the spreadsheet is included with Exhibit F.

solely for the Closed Periods at Issue, this determination would limit the sought-after refund to approximately $19,462,153.[7] [*Id.*]

Neither the Sales Factor nor the Gross Receipts Factor Include the Return of Principal

During the Periods at Issue and as part of its treasury and cash management program, Duke Energy regularly enters into short-term investment transactions using the excess cash generated by its primary operations. [*See* Dep. of Sherwood Love 17:4-10 [Exhibit G.].] Such investment transactions include the purchase of municipal bonds and commercial paper to either hold to maturity or sell prior to maturity, and loan repurchase agreements ("repos")[8]. [*See id.* 26:15-21;] Duke Energy's Req. for Contested Case H'rg, pp.1, 5. These transactions have little to no risk and generate a minimal amount of gain or interest relative to the principal invested. [*See* Love Dep. 58:5-7 [Exhibit G].] Moreover, these transactions typically were outstanding for less than 30 days. [*See id.* 53:21-25.] Duke Energy never suffered a loss on these types of investments. [*See id.* 58:2-7.] The activities concerning directing, placing, and making these transactions occur outside South Carolina–mainly in North Carolina and New York. [*See id.* 31:19-35:14.]

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[7] This is the sum of the amounts reflected on Exhibit F under the Pwc scenario for the years 1994-2001.

[8] "Q. What are 'loan repurchase agreements'? A. They're commonly called repos. These are where, in most cases, you make an overnight investment through a financial institution and that investment is secured by, typically, U.S. government and agency securities to secure that investment, typically overnight." [Love Dep. 26:22-27:3 [Exhibit G].]

On the original returns for years 1978-1999, Duke Energy accurately computed its apportionment formula by including only the net gain or interest from its short-term investment transactions in its sales factor. However, beginning in tax year 2000, the Company included not only the net gain or interest from these short-term investment transactions in its sales factor, but also the amount of the principal invested by and returned to the Company in each investment transaction. Because the activities related to these investment transactions occurred outside of South Carolina, the amount of the principal returned was only included in the denominator of the sales factor, resulting in a lower sales factor and, consequently, less income tax owed to South Carolina. Duke Energy continued the practice of including the return of principal in the sales factor for the 2001 tax period.

In its amended returns, the Company changed its method of apportionment for the Periods at Issue to the single factor gross receipts formula and, just had it had done for the sales factor in the original returns for 2000 and 2001, included the return of principal from its short-term investment transactions in its new gross receipts factor for each of the years. Duke Energy explains that these amended returns are required because on its original returns it "erroneously computed its South Carolina income tax liability by incorrectly apportioning business income to South Carolina using a three-factor apportionment formula and not including the gross receipts from the sale of securities in its gross receipts factor denominator." Duke Energy 2nd Am. Prehr'g Stmt., p.3.

The Department determined that Duke Energy's interpretation of the South Carolina apportionment statutes, which would allow the inclusion of the return of principal in the calculation of the sales or gross receipts factors, was directly counter 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 a result so plainly absurd that it could not have possibly been intended by the legislature. *See* Dep't Det'n, p 8. The Department thus determined that the return of principal from short-term investment transactions is not properly includable in the calculation of Duke Energy's apportionment formula. *Id.* Taken alone, a determination that Duke Energy's argument is incorrect would reduce the sought-after refund to approximately $36,984,969 for all Periods at Issue, and to approximately $21.747,291 for the Closed Periods at Issue. [Exhibit E (using "Single Sales (D&T)").]

Argument

Summary judgment is appropriate if there is "no genuine issue as to any material fact and ... the moving party is entitled to judgment as a matter of law." S.C. R. Civ. P. 56; *see, e.g., Henderson v. Allied Signal, Inc.*, 373 S.C. 179, 183, 644 S.E.2d 724, 726 (2007). The Supreme Court has recognized that motions for summary judgment are appropriate in matters before the ALC. *See, e.g., Media Gen. Communications, Inc. v. S. Carolina Dept. of Revenue*, 388 S.C. 138, 152, 694 S.E.2d 525, 532 (2010) (affirming grant of summary judgment by ALC).

1. Because the Forms FS-43 executed by the Department and by Duke Energy with respect to the Closed Periods at Issue were limited to an extension of time in which the Department could assess additional taxes, the amended returns for those years are not timely.

For the reasons that follow, the Department is entitled to summary judgment with respect to the refund claims filed by Duke Energy for all tax years ending prior to 1994.

A. Form FS-43 could not exceed the provisions of Section 12-54-80 for the Closed Periods at Issue, which authorized an extension only of the time in which a notice of assessment could be issued.

The Forms FS-43 executed by the Department and by Duke Energy were limited to extending the time in which the Department could issue an assessment of taxes against Duke Energy. Therefore, these forms do not make Duke Energy's untimely refund claims timely.

(1) ***The language of Form FS-43 reflects its limited purpose.***

The written provisions of Form FS-43 demonstrate that it is limited to extending the time in which the Department may issue an assessment and does not extend the time in which the taxpayer may file a claim for refund. As reflected above, the title of the Form is "Consent to Extend the Time to Assess Tax." The form further 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.[9]

[9] [Exhibit D (emphasis added).]

Because a notice of assessment is issued and mailed by the Department, it necessarily follows that Form FS-43 applies only to extend the time in which the Department may issue and mail a notice of assessment, not to extend the time in which the taxpayer may file a claim for refund.

The conclusion that the extension applied only to the time in which the Department could issue a notice of assessment not only is supported but also required by the statutory authority for the form: section 12-54-80.[10] As applicable during the Closed Periods at Issue and pertinent to this case,[11] section 12-54-80 required the Department to determine and assess taxes within 36 months from the date the return was filed or due to be filed, whichever occurred later. Section 12-54-80 further provided that if a taxpayer consented in writing to mailing the notice of assessment after the specified time, the notice could be mailed "at any time prior to the expiration of the period agreed upon." Section 12-54-80 also provided that the Department and the taxpayer could agree to additional extensions of the period in which the notice of assessment could be issued. In short, section 12-54-80 does authorize extensions of time, but only for the Department to issue a notice of assessment. Although this may appear one-sided at first glance, the taxpayer receives a benefit in that the Department would not issue a protect-the-revenue notice of assessment by disallowing all deductions and

[10] [Exhibit H (section 12-54-80 as applicable during the Closed Years at Issue.]

[11] Section 12-54-80 became effective on September 1, 1985, but does not retroactively apply to the years 1978-1984 despite the references in Form FS-43 to those tax periods. *See S. Carolina Nat. Bank v. S. Carolina Tax Comm'n*, 297 S.C. 279, 280-81, 376 S.E.2d 512, 513 (1989).

identifying all other transactions as income and force the taxpayer to shoulder the burden of proving that the assessment was inaccurate.

Section 12-54-80 therefore by its language applies only to the time period in which notices of assessment must be issued, and permits extension only of the mailing of those notices. Form FS-43 could grant no more rights than those permitted by section 12-54-80 because no employee or agent of the Department has any authority to exceed the authorization granted by this statute. *TNS Mills, Inc. v. S. Carolina Dept. of Rev.*, 331 S.C. 611, 621-22, 503 S.E.2d 471, 477 (1998) (holding that Department employee's erroneous interpretation of a statute was not binding on the courts or the Tax Commission). The Department also did not have the authority prior to 1995 to extend the time in which to file a claim for refund because the General Assembly did not generally authorize such extensions of time until 1995. *See* 1995 S.C. Acts No. 60 (enacting Section 12-60-40 effective August 1, 1995, which authorizes the Department to "extend time limitations provided by [Title 12] and for other taxes"). Therefore, the execution of any extension of the time for assessment under section 12-54-80 did not extend the periods of time for filing a refund claim under the statutes governing refunds until 1995.

The reference in Form FS-43 to the "mailing of notice of assessment or refund" does not change this conclusion. This reference is explained by

consideration of section 12-54-30. During the Closed Periods at Issue,[12] this statute permitted the Department to refund amounts discovered on examination of a return or otherwise even if a claim for refund would not be timely. The general three-year statute of limitations set forth in South Carolina Code section 15-3-530(2) applied to reviews under this statute (generally the same period as applicable under section 12-54-80). S.C. Tax Comm'n Decision 93-1, 1993 WL 403309 (Jan. 4, 1993) [Exhibit J, Tab 1.] Taxpayers could request a conference with the Department if they desired. *See* S.C. Rev. Rul. 91-10, 1991 WL 11666893 (May 29, 1991) [Exhibit J, Tab 2.] However, this statute did not grant greater rights than those otherwise available under the refund statutes. S.C. Tech. Adv. Mem. 89-3, 1989 WL 1109412 (Jan. 4, 1989) [Exhibit J, Tab 3.] Moreover, the taxpayer had no right to judicial review of any decision made by the Department under section 12-54-30. *See* S.C. Rev. Rul. 91-10 [Exhibit J, Tab 2] ("Since there is no right to appeal the Commissioners' decision under Code Section 12-54-30, a taxpayer should review Code Sections 12-47-210 and 12-47-220 (payment under protest) before paying taxes, other than license fees and license taxes, which he deems to be erroneously, improperly or illegally assessed."); *see also Argent Lumber Co. v. Query*, 178 S.C. 1, 182 S.E. 93 (1935) (holding no right to judicial review of similar statute), *overruled on other grounds by McCall by Andrews v. Batson*, 285 S.C. 243, 329 S.E.2d 741 (1985); S.C. Rev. Proc. 95-5, 1995 WL 17817640 *3 (1995) [Exhibit J, Tab 4] (noting same). In

[12] [Exhibit I (section 12-54-30 as applicable during the Closed Periods at Issue).]

other words, section 12-54-30 allowed the Department to grant relief to a taxpayer if it discovered an overpayment. It did not, however, change the fact that the taxpayer had to strictly comply with the provisions of the refund statutes if it wanted to file a claim for refund that would be subject to judicial review. S.C. Tax Comm'n Decision 88-162, 1988 WL 409374 (June 30, 1988) [Exhibit J, Tab 5] (concluding that section 12-54-30 did not modify the provisions of the applicable refund statutes).

Thus, properly understood, the refund language in Form FS-43 refers not to allowing a taxpayer additional time in which to file a claim for refund—which the statutory provisions did not permit—but to affording the Department additional time to review the taxpayer's records and issue a notice of assessment or refund, as it determines appropriate based on a review of the taxpayer's records. This process obviously provided an additional incentive for a taxpayer to execute Form FS-43 even if the taxpayer was not otherwise authorized to file a claim for refund. But Form FS-43 does not and could not prior to 1995 grant the taxpayer additional time in which to file its own claim for refund and is invalid to the extent that it purports to grant such an extension for the Closed Periods at Issue.

(2) ***The statutes cited by Duke Energy in its prehearing statement do not assist or support its claims with respect to the Closed Periods at Issue.***

The taxpayer contends in its prehearing statement that South Carolina Code sections 12-4-320, 12-6-20, and 12-58-60 all authorized the Department to grant extensions of time to file claims for refund. *See* Duke Energy 2nd Am. Prehr'g

Stmt. p.2 (filed Dec. 10, 2010). However, a review of these statutory provisions reflects that these statutes do not support Duke's contention, especially with respect to the Closed Periods at Issue.[13]

Section 12-4-320 first was enacted in 1991 and addresses the powers of the Department.[14] The statute has no provisions governing extensions of time for refund claims or the execution or adoption of waiver forms. The General Assembly amended the statute in 1994 and 1999 to authorize extensions of time for filing tax returns in the context of a disaster, but that language involves only the time for filing the initial tax return, not the time for filing the claim for refund. Moreover, that language was not adopted until 1994. Section 12-4-320 does not support Duke Energy's contention for the Closed Periods at Issue or otherwise and, in fact, supports the Department's contentions in that it addresses the Department's powers but does not reference the power to grant extensions.

The remaining two statutes cited by Duke Energy also do not support its argument because neither addresses extensions of time to file claims for refund and because both were enacted in 1995 as part of the Revenue Procedures Act ("RPA")—*after the Closed Periods at Issue*. *See* 1995 S.C. Acts No. 60. Section 12-6-20 directs the Department to "administer and enforce the taxes imposed by" Chapter 6 of the tax code involving income taxes. This statute does not address

[13] The contention actually is incorrect for all the Periods at Issue because extensions of time in which refund claims could be filed first were authorized by the enactment of South Carolina Code Section 12-60-470 in 1995. *See* discussion *infra* Part I.B.(2).

[14] [Exhibit K (section 12-4-320 applicable during the Closed Periods at Issue).]

extensions of time to file claims for refund, which are addressed in Chapter 60 and were adopted as part of the same RPA. And section 12-58-60 is part of the Taxpayer Bill of Rights and requires DOR to provide forms explaining procedures, remedies, and rights and obligations of the Department and taxpayers. The issue with respect to Form FS-43 is whether that form extends the time in which a judicially-reviewable claim for refund may be filed, either by the language of the form or by statute. Section 12-58-60 does not authorize the Department to exceed the powers otherwise granted by the General Assembly. Thus, neither of these statutes are applicable to the Closed Periods at Issue because they first were enacted in 1995 and because they address completely different topics.

(3) ***Summary.***

Form FS-43 did not extend the periods in which Duke Energy could file a claim for refund during the Closed Periods at Issue because section 12-54-80 did not authorize such extensions and because the Department was not authorized prior to 1995 to extend the periods in which any taxpayer could file claims for refund. It therefore is necessary to review the refund statutes applicable for the Closed Periods at Issue to determine what periods, if any, could be extended when section 12-60-470 was adopted in 1995 and, thus, what periods were open in and after 1995 for purposes of claiming a refund.

B. A review of the governing refund statutes for the Periods at Issue demonstrates that extensions of time for filing a refund claim were not permitted prior to 1995 and that the executed Forms FS-43 operated only to extend the periods of time for the income tax years 1994 and later.

In view of the fact that the Periods at Issue cover the years 1978 until 2001, the provisions governing claims for refund encompass two vastly different eras in South Carolina tax law. The modern era was ushered in with enactment of the Revenue Procedures Act in 1995. In contrast, the pre-1995 era operated under very different procedures from those in existence today. Consequently, it is necessary to review the applicable procedures during the different eras to evaluate the timeliness of Duke Energy's refund claims. First, however, it is appropriate to consider certain general principles applicable to both the modern era and the pre-1995 era.

(1) ***A review of the general principles governing refund claims demonstrates that Duke Energy must strictly comply with the provisions of the pertinent refund statutes.***

(a) *The refund of taxes is a matter of legislative grace.*

Any taxpayer seeking a tax refund must comply with the pertinent statute. *Asmer v. Livingston*, 225 S.C. 341, 82 S.E.2d 465, 466 (1954) ("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 the same ...") (internal citations omitted); *see also, e.g., Anon. Taxpayer v. S. Carolina Dep't of Rev.*, No. 01-ALJ-17-0105, 2001 WL 904045 (S.C. Admin. L.J. Div. June 29, 2001) (Geathers) (denying refund claim based upon allegedly erroneous

instructions); *Anon. Taxpayer v. S. Carolina Dep't of Rev.*, No. 98-ALJ-17-0426, 1999 WL 203341 (S.C. Admin. L.J. Div. Mar. 25, 1999) (Anderson) (citing *Asmer*). Stated another way, the right to recover improperly paid taxes is statutory in nature. *C. W. Matthews Contracting Co., Inc. v. S. Carolina Tax Comm'n*, 267 S.C. 548, 554, 230 S.E.2d 223, 226 (1976) (a tax refund claim is created by statute and is not in the nature of a debt collection claim).

Thus, refund claims must be made pursuant to the procedure set forth in the appropriate authorizing statute. *Guar. Bank & Trust Co. v. S. Carolina Tax Comm'n*, 254 S.C. 82, 90-91, 173 S.E.2d 367, 371 (1970) (holding that circuit court erred in extending the time periods under the statute because that is a legislative and not a judicial function). More specifically, the Department cannot make changes in the refund procedure established by the General Assembly. *See, e.g., TNS Mills, Inc.*, 331 S.C. at 623, 503 S.E.2d at 478 ("[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. And an employee of the Department has no authority to waive or extend a refund period except to the extent authorized by the governing statute. *See, e.g., Anon. Taxpayer*, No. 01-ALJ-17-0105, *4 n.7 (citing *U.S. v. Garbutt Oil Co.*, 302 U.S. 528, 534, 535 (1938) for proposition that "officer of the government has no power to waive statute of limitations and Commissioner cannot consider untimely filed returns"); *cf. Dickow v. United States*, 740 F. Supp. 2d 231, 237 (D. Mass. 2010) *aff'd*, 654 F.3d 144 (1st Cir. 2011) *cert. denied*, 132 S. Ct. 1046 (2012)

("The Executor cannot rely upon the IRS' failure to advise him of the denial to justify his purported conclusion that his second request had been granted where, as here, the IRS clearly did *not* have the authority to issue such extension.").

(b) *A new refund period cannot be applied to retroactively revive an expired period.*

Once a limitations period expires, it is closed and cannot be revived. *See, e.g., Yamshak v. S. Carolina Dep't of Rev.*, No. 96-ALJ-17-0086, 1996 WL 909349 (S.C. Admin. L.J. Div. June 7, 1996) (Geathers). This rule applies not only to claims for refund, but also to assessments that are not issued timely in accordance with the applicable statute. *S. Carolina Nat. Bank*, 297 S.C. at 282, 376 S.E.2d at 514 (holding that adoption of a new statute establishing a longer period of time for issuing a notice of assessment does not retroactively validate a previously untimely assessment). Thus, once a refund period expires under the terms set forth by the legislature, that period of time cannot be revived by the consent of the Department or otherwise.

(c) *The Department is not subject to estoppel or equitable tolling and neither the Courts nor the Department are bound by the erroneous interpretation of law espoused by an employee or agent of the Department.*

The Department is not subject to estoppel. *Texaco, Inc. v. Wasson*, 269 S.C. 255, 265, 237 S.E.2d 75, 79 (1977); *Heyward v. S. Carolina Tax Comm'n*, 240 S.C. 347, 352, 126 S.E.2d 15, 18 (1962). Thus, the Department is not bound by representations of its employees or agents that are inconsistent with the statutory language. *TNS Mills, Inc.*, 331 S.C. at 621-22, 503 S.E.2d at 477; *see also S.*

Carolina Coastal Council v. Vogel, 292 S.C. 449, 357 S.E.2d 187 (Ct. App. 1987). ("The public cannot be estopped ... by the unauthorized or erroneous conduct or statements of its officers or agents which have been relied on by a third party to his detriment."). Similarly, the Department is not subject to equitable tolling. *Anon. Taxpayer v S.C. Dep't Rev.*, No. 01-ALJ-17-0347, 2002 WL 385115 (S.C. Admin. L.J. Div. Feb. 13, 2002) (Anderson) ("Section 12-54-85(F)(1) provides for no hardship or equitable exceptions to its time limitations."); *Anon. Taxpayer v S. Carolina Dep't of Rev.*, No. 00-ALJ-17-0668, 2001 WL 855849 (S.C. Admin. L.J. Div. July 5, 2001) (Stevens) (determining that there are no equitable exceptions to refund statute and that estoppel is not applicable against the Department) (citing *Vogel*).

The policy supporting the conclusion that the Department should not be held subject to these equitable rules was explained by the United States Supreme Court in *United States v. Brockamp*, 519 U.S. 347 (1997):

> To read an "equitable tolling" provision into these provisions, one would have to assume an implied exception for tolling virtually every time a number appears. To do so would work a kind of linguistic havoc. Moreover, such an interpretation would require tolling, not only procedural limitations, but also substantive limitations on the amount of recovery—a kind of tolling for which we have found no direct precedent. Section 6511's detail, its technical language, the iteration of the limitations in both procedural and substantive forms, and the explicit listing of exceptions, taken together, indicate to us that Congress did not intend courts to read other unmentioned, open-ended, "equitable" exceptions into the statute that it wrote. There are no counterindications. Tax law, after all, is not normally characterized by case-specific exceptions reflecting individualized equities.

Id. at 352; *see also* S.C. Rev. Proc. 95-5 *1 [Exhibit J, Tab 4] ("Although the statute of limitations is arbitrary and can cause hardships, its application is designed to be neutral. As noted by the Supreme Court in *Rothensies v. Electric Storage Battery Co.*, 329 U.S. 296 (1946), the 'statute of limitation is an almost indispensable element of fairness as well as of practical administration of income tax policy.'"). More simply, allowing stale claims would tend to work havoc with the State's settled financial situation and create problems with the State's settled budgetary expectations many years after the fact. *See Danzie v S. Carolina Dep't of Rev.*, No. 7-ALJ-17-0327, 2008 WL 2127919 (S.C. Admin. Law Ct. Apr. 21, 2008) (Geathers). But policy aside, the fact is that the Department is subject neither to estoppel nor to equitable tolling by holding of the South Carolina Supreme Court. *See Texaco, Inc.*, 269 S.C. at 265, 237 S.E.2d at 79; *Heyward*, 240 S.C. at 352, 126 S.E.2d at 18.

(2) ***The refund procedures applicable to the modern era are less restrictive than those in effect prior to adoption of the Revenue Procedures Act of 1995.***

The procedures applicable to refund claims arising after August 1, 1995 are those enacted as part of the RPA. *See* 1995 S.C. Acts No. 60. Among these provisions was South Carolina Code Section 12-60-470, which states that "[a] taxpayer may seek a refund of any state tax by filing a written claim for refund with the Department" and that a "claim for refund is timely filed if filed within the

period specified in Section 12-54-85 ...." [15] The RPA also enacted South Carolina Code Section 12-60-40 that, as discussed above, permits extensions of time for any statutory period.

Section 12-54-85 provides that a refund claim is timely if it is filed within three years from the date the return is filed, or two years from the date of payment, whichever is later. S.C. Code Ann. § 12-54-85(F). The Department has issued Revenue Procedure 95-5 to set forth the parameters of filing appropriate and timely refund claims. S.C. Rev. Proc. 95-5 [Exhibit J, Tab 4.] And consistent with the extension power granted by the RPA, Revenue Procedure 95-5 explains that any extension of the time for assessment also extends the time in which a taxpayer may file a timely refund claim. *Id.* at *3. Revenue Procedure 95-5 also states that all periods that were open on the effective date of the RPA may be extended further by consent of the Department and the taxpayer. *Id.* at *1. But because extensions of time for assessing taxes did not extend the time for filing a refund claim prior to the RPA and because periods that were no longer open on the effective date of the RPA may not be revived, it is necessary to consider the law in effect prior to the RPA to determine what periods remained open on August 1, 1995 and, thus, which refund claims validly now may be considered by this Court.

[15] Section 12-60-470 also expressly provides that a refund claim may be amended prior to but not after the expiration of the time for filing the claim for refund under section 12-54-85(F), which supports the conclusion that the legislature intends that expired refund claims cannot be revived. *See* discussion *supra* Part 1.B.(1)(b).

(3) ***Because the procedures applicable prior to adoption of the Revenue Procedures Act were much more restrictive, Duke Energy's refund claims for all periods prior to the 1994 income tax year are barred.***

Especially by comparison to the modern era of refund statutes, the procedures applicable to the pre-1995 era were very limited and very narrow. The statutes conveyed limited authority to grant refunds, for many years under a very restrictive scheme, and the Department had no authority to extend any of those refund periods. A review of the particular statutes at issue reflects the accuracy of this assessment.

(a) *Section 12-47-440 applied to the income tax years 1990-1994.*

For tax years beginning in 1990 through 1994, South Carolina Code Section 12-47-440 permitted a taxpayer to file a claim for refund for a period of three years from the date the payment originally was due, without regard to extensions of time to file. *See, e.g., Anon. Taxpayer,* No. 98-ALJ-17-0426, *1 n.1 & accompanying text. In 1992, the South Carolina Supreme Court clarified that section 12-47-440 as it read at that time applied only to property taxes. *Bass v. State*, 307 S.C. 113, 116, 414 S.E.2d 110, 112 (1992) ("This Court has previously stated that the exclusive remedy for contesting an alleged erroneous assessment of *income taxes* [is] by payment under protest of the tax claimed as illegal and a suit at law for recovery of the sum so paid, in accordance with Sections 65-2661 and 65-2662 of the Code. [predecessors of §§ 12-47-210 and 12-47-220].") (internal quotation marks omitted), *cert. granted, judgment vacated on other grounds by Bass v. S. Carolina,* 509 U.S. 916 and *abrogated by Harper v. Virginia Dept. of*

Taxation, 509 U.S. 86 (1993); *see also 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) (same). The General Assembly thereafter amended section 12-47-440 to expressly apply to income tax refund claims, but only for tax years beginning in 1990 and later. *See Anon. Taxpayer*, No. 98-ALJ-17-0426, *1 n.1 ("Section 12-47-440 was amended in 1994 to insure its application to income taxes. Act No. 464, 1994 S.C. Acts, Section 3(B) made §12-47-440 applicable to previous tax years beginning with 1990.").

Therefore, for the 1990-1994 tax years, Duke Energy was required to file its claims for refund within three years after its corporate income tax return originally was due. Because Duke Energy filed its corporate income tax returns based on a calendar year, the returns and payment originally were due without regard to any extension on March 15th of the following year. S.C. Code Ann. § 12-6-4970(B) (effective for tax years beginning after 1995); S.C. Code Ann. § 12-7-1640 (effective for tax years prior to 1996); The refund periods applicable to Duke Energy under section 12-47-440 for the income tax years 1990-1994 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
1994	March 15, 1995	March 15, 1998

Consequently, Forms FS-43 executed for the years 1990-1994 after the date in the Refund Period Closed column were invalid to extend the refund period. Based on the dates the original returns were due, the refund periods for the 1990 and 1991 periods closed before the RPA became effective on August 1, 1995. And although the 1992-1993 periods were open on August 1, 1995, those years were not timely extended because a Form FS-43 was not executed prior to the expiration of the applicable three-year period.[16] However, the Form FS-43 for the year 1994 first was executed on December 19, 1997, which is several months before the three-year refund period closed on March 15, 1998. Thus, the extension for the year 1994 may be timely based on the governing statutes and Revenue Procedure 95-5.

(b) *Sections 12-47-210 and 12-47-220 applied to refund claims for income tax periods prior to 1990.*

The Supreme Court made clear in the *Bass* decision that South Carolina Code Sections 12-47-210 and 12-47-220 were the exclusive remedy for obtaining a refund of income taxes. *Bass*, 307 S.C. at 117, 414 S.E.2d at 112 ("In fact, this

[16] [*See* Exhibit C (reflecting that Form FS-43 for tax year 1992 was not executed until May 30, 1996, which is more than two months after the three-year period expired; Form FS-43 for the tax year 1993 was not executed until June 20, 1997, which is more than three months after the three-year period expired).]

Court has never awarded a taxpayer a refund of income taxes under Section 12-47-440."); *see also Perpetual Bldg. & Loan*, 255 S.C. at 527, 180 S.E.2d at 197. Although the General Assembly later changed this holding with respect to the income tax years 1990 and later, this rule remains effective for years prior to 1990. *See* discussion *supra* Part 1.B.(3)(a). Thus, the timeliness of Duke Energy's refund claims for the years 1978-1989 is governed by these two statutes.

Sections 12-47-210 and 12-47-220 required a taxpayer who sought to receive a refund of amounts paid to the state to expressly pay the taxes under protest and then institute an action in circuit court within 30 days after the payment of the taxes. *See S. Carolina Nat. Bank*, 297 S.C. at 282, 376 S.E.2d at 514 (1989). The failure to pay the taxes under protest was fatal to a refund claim. *See, e.g., City of Columbia v. Glens Falls Ins. Co.*, 245 S.C. 119, 139 S.E.2d 529 (1964); *see also Owings Mills, Inc. v. O.L. Brady, Jr.*, 246 S.C. 361, 143 S.E.2d 717 (1965) & 249 S.C. 371, 154 S.E.2d 560 (1967) (both holding that statutory property tax provisions similar to sections 12-47-210 and 12-47-220 did not give unlimited authority to refund property taxes). Thus, the refund procedures available under these statutes were very restrictive and limiting.

Applying these statutes to Duke Energy's 1978-1989 tax years reflects that none of refund claims filed for these periods are timely. There is no evidence that any of the payments for these years were made under protest. However, it is unnecessary for the Court to make that finding—and thus there is no genuine issue of material fact—because even if the payments were made under protest, no action

was filed in circuit court within 30 days after the payment was made. Rather, the refund claims were filed in the Administrative Law Court well after the 30-day period expired.[17] Consequently, the refund claims for the tax years 1978-1989 also are barred from consideration by this Court.

(3) *Summary of timeliness of refund claims prior to 1995.*

(a) *Tax periods ending prior to 1990.*

Because sections 12-47-210 and 12-47-220 were the exclusive avenues for making refund claims prior to 1990, the refund claims for the years 1978-1989 are not timely. None of the claims for the years prior to 1990 was filed in circuit court within 30 days after payment of the amounts as required by statute. Thus, those periods are closed as a matter of law and the refund claims for those periods may not be considered by this Court.

[17] There is an additional reason for concluding the purported extensions of the corporate income tax years 1978-1982 are untimely in any event. These years appeared for the first time on the face of the Forms FS-43 with the execution of the form effective May 30, 1996. [*See* Exhibits B & C.] Obviously, under either the modern era provisions or the pre-1995 provisions, these extensions were executed well after the refund periods had closed. *See* S.C. Code Ann. §12-54-85 (three years from date return filed or two years after date of payment); S.C. Code Ann. §§ 12-47-210, -220 (pay under protest and file claim for refund within 30 days). The only available avenue for reviewing the taxable income of the years 1978-1982 therefore would have been the statutory provisions regarding an assessment based on a determination issued by the IRS. *See* S.C. Code Ann. §12-54-85(D)(1); *cf.* S.C. Code Ann. § 12-54-80 (prior law). The taxpayer has not established that the IRS issued a final determination within 180 days of May 30, 1996. [*See* Dep. of Cooper Monroe 56:7 [Exhibit L] ("I believe there was a federal 870, and I think it was executed in '92."); Monroe Dep. 56:19-20 ("I believe there was a settlement during '92 with federal adjustments from form 870.").] Moreover, any extension attributable to an IRS determination in that circumstance would have been limited to the tax issues raised by the IRS. Because the allocation and apportionment issues raised by the taxpayers could not have been at issue in an IRS determination, the purported extensions of the 1978-1982 tax years are untimely in any event for purposes of the issues before this Court.

(b) *Tax periods from 1990 to 1994.*

As noted above, section 12-47-440 applied a three-year refund window that could not be extended for the years 1990-1994. Based on the dates the original returns were due, the refund periods for the 1990 and 1991 periods closed before the RPA became effective on August 1, 1995. And although the 1992-1993 periods were open on August 1, 1995, those years were not timely extended because a Form FS-43 was not executed prior to the expiration of the applicable three-year period.[18] However, the Form FS-43 for the year 1994 first was executed on December 19, 1997, which is several months before the three-year refund period closed on March 15, 1998. Thus, the years 1990-1993 as a matter of law are closed for refund claims, but the 1994 tax year may be open for refund claims based on the statutory language and Department precedent. As further discussed below, however, Duke Energy is not entitled to recover on its refund claims. *See* discussion *infra* Parts 2 & 3.

C. Conclusion

The refund claims filed by Duke Energy for periods prior to the 1994 tax year are untimely. Therefore, this Court may consider only the refund claims for the periods 1994-2001. The remaining refund claims are barred and may not be considered by this Court. The Department therefore is entitled to summary

[18] [*See* Exhibits C & D (Form FS-43 for tax year 1992 not executed until May 30, 1996, which is more than two months after the three-year period expired; Form FS-43 for the tax year 1993 was not executed until June 20, 1997, which is more than three months after the three-year period expired).]

judgment against Duke Energy for the refund claims pertaining to the income tax years prior to 1994.

2. Because the Supreme Court has held that the production and generation of electricity is manufacturing, Duke Energy is a manufacturer and, thus, is required to use the three-factor apportionment formula as applied on its originally-filed returns for 1978-1999.

In 1926, the South Carolina Supreme Court held that a corporation engaged in the business of generating electricity was engaged in the business of manufacturing and thereby subject to a tax imposed on manufacturers. *Columbia Ry., Gas & Elec. Co. v. Query*, 134 S.C. 319, 132 S.E. 611 (1926) ("We do not think that there is any doubt that the appellant is engaged in the business of manufacturing gas and electricity ...."). Subsequently, the Supreme Court held in 1930 that Duke Power Co., a predecessor of Duke Energy, was entitled to claim 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, 152 S.E. 865 (1930) (citing *Columbia Ry., Gas & Elec. Co.*).

Thus, it has been the law of this State since at least 1926 that a corporation engaged in generating or producing electricity—and, indeed, Duke Energy specifically—is a manufacturer of electricity. For example, recognizing the Supreme Court precedent, the South Carolina Attorney General opined in 1970 that South Carolina Electric & Gas Company was a manufacturer and any plant it

used to produce electricity was a manufactory eligible for property tax exemptions. 1970 S.C. Op. Att'y Gen. 154, Op. No. 2909, 1970 WL 12192 (June 2, 1970) [Exhibit M.] And 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) [Exhibit J, Tab 6.][19]

Thus, the plain holdings of the Supreme Court in *Columbia Ry.* and, perhaps more to the point in this particular case, *Duke Power*, do provide specific guidance that is binding upon Duke Energy in this case. The Company's omission of either of these cases from its Amended Prehearing Statement is consistent with its discussion of this issue in its Request for Contested Case Hearing. Instead of discussing this Supreme Court precedent, Duke Energy referenced a decision of this Court regarding the corporate license tax. *See Consolidated Hydro Southeast, Inc. v. Department of Revenue*, No. 95-ALJ-17-0634, 1996 WL 909155 (S.C. Admin. Law J. Div. May 13, 1996) (Lee) and cases from other jurisdictions. Therefore, the decisions cited by Duke Energy in support of its argument simply do not withstand scrutiny in light of the Supreme Court precedent on this very issue.

[19] Contrary to Duke Energy's suggestion, there is "guidance, judicial or administrative, specifically interpreting the meaning of the term [manufacturing] for South Carolina corporate income tax purposes." Duke Energy 2nd Am. Prehr'g Stmt., p.9.

Consolidated Hydro was a case involving the corporate **license tax** imposed upon public utilities under South Carolina Code Sections 12-19-100 and 12-19-110.[20] At issue was whether a company that owned and operated "several small hydro-electric power generation facilities in South Carolina" received "gross receipts derived from services rendered from regulated business within the State." *Consolidated Hydro*, No. 95-ALJ-17-0634 at **1, 2. The taxpayer contended that it was neither a regulated business nor a service provider. *Id.* at *2. In pertinent part, Judge Lee found that the "sale of hydro-electric power to the electric utilities is the sale of services" for purposes of the corporate license tax imposed upon public utilities under then section 12-19-110. *Id.* at *4. The taxpayer did not raise, and the Court's decision did not address, the issue of whether it was a manufacturer in the context of that corporate license tax case.

Furthermore, *Consolidated Hydro* involved application of the corporate license tax on public utilities, which is a license tax based on the gross receipts of the entities in question. *See Duke Power Co. v. S. Carolina Tax Comm'n*, 292 S.C. 64, 66, 354 S.E.2d 902, 903 (1987). License taxes are directed at the privilege of doing business within the state, whereas income taxes are directed toward accessions to wealth, and thus the two types of statutes are interpreted differently. *Cf. Sloan v. S. Carolina Bd. of Physical Therapy Examiners*, 370 S.C. 452, 470, 636 S.E.2d 598, 607 (2006) (noting that only "statutes dealing with the same

[20] These statutes now are codified together as South Carolina Code Section 12-20-100.

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").

The taxation of all electric utilities, those that generate and sell electricity and those that only sell electricity, for license tax purposes is not directly relevant to how those entities are treated for income tax purposes. *See, e.g.,* S.C. Tax Comm'n Decision P-D-532 [Exhibit J, Tab 6] (finding that an electric utility that generates the power it supplies to its customers is a manufacturer). In finding that the taxpayer in *Consolidated Hydro* was engaged in the sale of services for purposes of the corporate license tax, the Court was simply applying the language of the statute specifically directed toward the portion of the license fee based on charges for providing electricity to customers. *See* S.C. Code Ann. § 12-20-100(A)(2)(a). In contrast, the apportionment statute is directed in pertinent part toward entities that are manufacturers—i.e., the process of generating and producing electricity—and the Supreme Court already has held that an entity engaged in the generation of electricity is a manufacturer. *See Duke Power* (1930), 156 S.C. at 299, 152 S.E. at 868 ("[A] company engaged in the business of generating electricity is a 'manufacturer' within the meaning of a [s]tatute imposing a tax upon a 'corporation engaged in the business of manufacturing.'") (citing *Columbia Ry., Gas & Elec. Co.*).

Contrary to Duke Energy's suggestion, South Carolina is not unique in this view that generating or producing electricity is manufacturing. The Supreme Court recognized in *Duke Power* that a number of other states at that time had concluded that generating and producing electricity is manufacturing. *See Duke Power* (1930), 156 S.C. at 299, 152 S.E. at 865 (citing cases from New Jersey, Kentucky, and New York). More recently, other states have concluded that the production of electricity is manufacturing. *E.g.*, *Pub. Serv. Co. v. Dep't of Rev.*, 10CA1026, 2011 WL 4089971 (Colo. Ct. App. Sept. 15, 2011) (generating electricity is manufacturing); *Davis v. Gulf Power Corp.*, 799 So. 2d 298, 301 (Fla. Dist. Ct. App. 2001) (generation of electricity is a manufacturing process); *Bd. of Assessors of Holyoke v. State Tax Comm'n*, 244 N.E.2d 287, 289 (1969) (same); *City of Ames v. State Tax Comm'n*, 71 N.W.2d 15, 22 (1955) (same). Although the position of the various states on this issue admittedly varies by jurisdiction, there certainly is no clear weight of authority that generating and producing electricity is not manufacturing. And in any event, decisions from the courts of other states do not bear upon or alter the decision of the Supreme Court of this state.[21] Rather, the

[21] *See, e.g., Silva v. Silva*, 333 S.C. 387, 390, 509 S.E.2d 483, 485 (Ct. App. 1998) ("***When there is no case on point in South Carolina***, our courts may look to other states to determine if the issue has been decided and if the decision is persuasive authority.") (emphasis added); *Stone v. Salley*, 244 S.C. 531, 540-41, 137 S.E.2d 788, 792 (1964) ("We are fully cognizant that the right of a State to control the prices at which milk may be sold has been sustained by the Courts of many States and by the United States Supreme Court. However persuasive these decisions may be they are not binding upon and do not control us in the interpretation of our own Constitution, under which the issue here arises."), *overruled on other grounds by R.L. Jordan Co., Inc. v. Boardman Petroleum, Inc.*, 338 S.C. 475, 527 S.E.2d 763 (2000).

question is what the Supreme Court has held, and that question is answered by reference to the Court's *Columbia Railway, Gas, & Electric Co.* and *Duke Power* (1930) decisions.

Duke Energy therefore is a manufacturer required by section 12-6-2250 to use the three-factor apportionment formula just as the Company reported on its originally filed returns for the Periods at Issue. Because the Department Determination correctly applies Supreme Court precedent in determining that Duke Energy is a manufacturer, the Department is entitled to partial summary judgment on this issue.

3. Because the Department's long-standing administrative policy excluding the return of principal from short-term investment transactions in the calculation of a taxpayer's apportionment formula is a reasonable application of the legislative intent and the allocation and apportionment statutes, Duke Energy is prohibited from including the return of principal from short-term investment transactions in the calculation of its sales factor or gross receipts factor.

It has been the long-standing administrative policy of the Department to require only the inclusion of the net gain or interest from short-term investment transactions in the calculation of the apportionment formula regardless of whether a taxpayer files using the three-factor formula or the single factor gross receipts formula. *See* S.C. Tax Comm'n Decision I-D-309, 1982 WL 176318 (June 30, 1982) [Exhibit J, Tab 7] (deciding that sales of intangible property are included in the sales factor only to the extent the sale resulted in a gain because to include the

gross sales price would distort the sales factor); S.C. Tax Comm'n Decision 88-11, 1988 WL 409328 (Jan. 22, 1988) [Exhibit J, Tab 8] (deciding that it has been the policy of the Department since 1977 to include only the gain from the sale of foreign exchange contracts in the sales factor). Because the return of principal from these short-term investment transactions is nothing more than the return of a taxpayer's own money, its inclusion does nothing more than artificially inflate the denominator of either the sales factor or gross receipts factor and thereby decrease the amount of income subject to tax in South Carolina. *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. The bulk of funds flowing back to [the taxpayer] was simply its own money"); *see Walgreen Arizona Drug Co. v. Arizona Dept. of Revenue*, 209 Ariz. 71, 77, 97 P.3d 896, 902 (Ct. App. 2004) (agreeing with comparison of return of principal from short-term investment transactions to money deposited into and withdrawn from an interest-bearing account); *Sherwin-Williams Co. v. Indiana Dept. of State Revenue*, 673 N.E.2d 849, 853 (Ind. T.C. 1996) (holding that "'gross receipts' for the purpose of the sales factor includes only the interest income, and not the rolled over capital or return of principal, realized from the sale of investment securities"); *see also Gen. Motors Corp. v. Franchise Tax Bd.*, 139 P.3d 1183, 1192 (2006) ("Thus, we hold that only the interest from repo transactions should be included as gross receipts.")

Consequently, since at least 1977, the Department has interpreted the allocation and apportionment statutes, and the terms "sales" and "gross receipts," as excluding the return of principal from short-term investment transactions. *See* S.C. Tax Comm'n Decision I-D-309 [Exhibit J, Tab 7;] S.C. Tax Comm'n Decision 88-11 [Exhibit J, Tab 8;] *see also* Br. Appellant at pp.10-11 filed in *Duke Power* (1987) [Exhibit N] (stating that "[t]here is nothing in the record to indicate that the [Department] would consider both the principal and interest of a redeemed bond as being gross receipts" and that "the [Department] would only consider the income of the bond as gross receipts"). This interpretative policy is entirely consistent with and furthers the purpose of the apportionment statutes. *Colonial Life & Acc. Ins. Co. v. S. Carolina Tax Comm'n*, 248 S.C. 334, 339, 149 S.E.2d 777, 780 (1966) (stating that "the [Department] has the power and duty...to prescribe a method for arriving at a tax base which reasonably represents the proportion of the trade or business carried on within this State; and its determination thereabout will not be overthrown by the courts except upon a showing...that it is arbitrary, discriminatory or unreasonable") (internal quotations omitted). As such, the Department's policy is entitled to deference by this Court. *Ryder Truck Lines, Inc. v. S. Carolina Tax Comm'n*, 248 S.C. 148, 152-53, 149 S.E.2d 435, 437 (1966) (holding that the Court would not be justified in overturning the Department's long continued application of a taxing statute to which the legislature had given at least implied assent and approval).

The necessity of deferring to the Department's interpretive policy is supported by the fact that, since 1977, the allocation and apportionment statutes have been amended numerous times. In fact, the statutes were completely reenacted in 1995 under a new chapter of the South Carolina Code of Laws. *See* 1995 S.C. Act 76 ("An Act to amend Title 12, Code of Laws South Carolina, 1976, Relating to Taxation"). Nonetheless, the General Assembly did not amend or alter the statutes to change the Department's policy with respect to short-term investment transactions. In view of this fact, a greater weight attaches to the Department's policy. *Etiwan Fertilizer Co. v. South 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."). If the General Assembly disagreed with the Department's interpretation or believed that the Department was misapplying the allocation and apportionment statutes, it had ample opportunity to amend the statutes to change that interpretation. Instead, for over thirty years, the legislature maintained the Department's interpretation. As such, a greater weight attaches to the Department's policy.[22]

[22] In fact, when the legislature did address the issue in 2007—well after the Periods at Issue in this case—it adopted legislation affirming the Department's position. *See* S.C. Code Ann. §12-6-2295 (adopted by 2007 S.C. Act 110, § 51. Section 12-6-2295 states in pertinent part that "[t]he terms 'sales' as used in Section 12-6-2280 and 'gross

The Department's interpretative policy and the General Assembly's affirmance of that policy are consistent with the legislative intent reflected in the allocation and apportionment statutes. Those statutes "provide for the imposition of the South Carolina income tax, where the taxpayer is also subject to income tax in other states, 'upon a base which reasonably represents the proportion of the trade or business carried on within this State.'" *Hertz Corp. v. S. Carolina Tax Comm'n*, 246 S.C. 92, 94-95, 142 S.E.2d 445, 446 (1965) (quoting the predecessor of sections 12-6-2210 and 12-7-250); *see Lockwood Greene Eng'rs, Inc. v. S. Carolina Tax Comm'n*, 293 S.C. 447, 449, 361 S.E.2d 346, 347 (Ct. Apps. 1987) (interpreting the gross receipts factor in accordance with the purpose of the allocation and apportionment statutes); S.C. Code Ann. § 12-6-2210 (2001)[23]; S.C. Code Ann. § 12-7-250 (statute with substantially same provisions as § 12-6-2210) (repealed 1995). Thus, the Department's policy is consistent with both the specific statutes addressing gross receipts and sales as well as the allocation and apportionment statutes as a whole. *Colonial Life*, 248 S.C. at 339, 149 S.E.2d at

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receipts' as used in Section 12-6-2290 ***do not include***: (1) repayment, maturity, or redemption of the principal of a loan, bond, or mutual fund or certificate of deposit or similar marketable instrument; (2) the principal amount received under a repurchase agreement or other transaction properly characterized as a loan..." S.C. Code Ann. § 12-6-2295(B)(1)-(2) (2011) (emphasis added).

[23] In 2006, the General Assembly enacted South Carolina Code section 12-6-2252, which changes the three-factor apportionment method provided in section 12-6-2250 to a single-factor apportionment factor based solely on sales for entities "whose principal business in this State is ... manufacturing." *See* 2007 S.C. Acts. No. 110, § 50A; 2007 S.C. Acts. No. 116, § 55A. Section 12-6-2250 was further amended to provide for a four-year phase-in of the single factor. See S.C. Code Ann. § 12-6-2250(B). Thus, the provisions of section 12-6-2250 existing prior to amendment in 2006 must be referenced for consideration of the Periods at Issue.

780 (citing predecessor of sections 12-6-2210 and 12-7-250 and holding that other income tax provisions must be considered together with such section); *see also Kiriakides v. United Artists Communications, Inc.*, 312 S.C. 271, 275, 440 S.E.2d 364, 366 (1994) ("All rules of statutory construction are subservient to the one that the legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in the light of the intended purpose of the statute.").

Furthermore, the Department's interpretation avoids the absurdity that would result from allowing taxpayers to include the return of principal from short-term investment transactions in the calculation of their apportionment formulas. *Kiriakides*, 344 at 275, 440 S.E.2d at 366 (holding that a statutory interpretation should be rejected if 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"). Allowing a taxpayer to include the return of principal from short-term investment transactions that are in substance the equivalent of loans and/or withdrawals from interest-bearing bank accounts in the calculation of its apportionment formula would cause a fallacious representation of the a taxpayer's proportion of business done in South Carolina and, as such, is plainly absurd.[24] *Am. Tel. & Tel. Co.*, 476 A.2d at 802; *see Walgreen Arizona Drug Co.*,

[24] Although Duke Energy has now apparently switched positions, in its brief submitted to the South Carolina Supreme Court with respect to the 1987 *Duke Power* decision, the entity's predecessor contended that an interpretation of the term "gross receipts" that would require the inclusion of the "repayment of loans" or the "liquidation

97 P.3d at 902; *Sherwin-Williams Co.*, 673 N.E.2d at 853; *see also Gen. Motors Corp.*, 139 P.3d at 1192. In contrast, the Department's long-standing administrative policy to exclude the return of principal from short-term investment transactions in the calculation of the sales factor and the gross receipts factor is a reasonable interpretation and application of legislative intent, confirmed by the legislature's acquiescence to the policy for at least 30 years and subsequent express approval of that position.

Conclusion

As explained more fully above, the Department is entitled to judgment against Duke Energy as a matter of law. Because the refund claims filed by Duke Energy for periods prior to the 1994 tax year are untimely, this Court may consider only the refund claims for the periods 1994-2001. The remaining refund claims are barred and may not be considered by this Court. However, even for the years 1994-2001, the Department is entitled to judgment as a matter of law because the Supreme Court has held that Duke Energy is a manufacturer of electricity and because Duke Energy is prohibited from including the return of principal from short-term investment transactions in the calculation of its apportionment formula. Because these are all of the issues raised by Duke

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of a short-term investment" for the purpose of imposing a tax "would be absurd." Br. Resp't at p.15, *Duke Power* (1987) [Exhibit M.]. An interpretation that would only impose a tax on the gain or use the gain alone in the apportionment factor avoids this absurdity. [*Id.* at p.16.]

Energy[25] and affecting the amended returns for the Periods at Issue, this Court should grant the motion for summary judgment and dismiss this action.

Respectfully submitted,

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Attorneys for South Carolina Department of Revenue

Columbia, South Carolina
April 20, 2012

[25] Except for matters involving Crescent Resources, which the parties have agreed to hold in abeyance pending the resolution of these matters.

EXHIBIT A

Requested Refund Amounts By Year[1]

Year	Tax	Interest[2]	Total
1978	2,133,065	8,799,598	10,932,663
1979	2,004,545	8,148,808	10,153,353
1980	712,254	2,852,695	3,564,949
1981	1,874,164	7,393,887	9,268,051
1982	1,681,780	6,533,993	8,215,773
1983	0	0	0
1984	11,689,532	44,011,097	55,700,629
1985	6,026,358	20,939,201	26,965,559
1986	4,968,971	15,292,291	20,261,262
1987	6,290,399	16,992,532	23,282,931
1988	4,504,902	10,511,107	15,016,009
1989	1,940,315	3,824,687	5,765,002
1990	1,382,692	2,297,644	3,680,336
1991	2,973,641	4,198,219	7,171,860
1992	6,535,081	8,077,000	14,612,081
1993	8,342,858	9,050,292	17,393,150
1994	5,510,252	5,077,245	10,587,497
1995	6,344,512	4,766,939	11,111,451
1996	9,678,257	5,854,648	15,532,905
1997	5,169,951	2,413,385	7,583,336
1998	13,050,354	4,648,552	17,698,906
1999	13,013,930	3,283,065	16,296,995
2000	5,846,071	849,018	6,695,089
2001	4,566,761	303,138	4,869,899
Total	**$126,240,645**	**$196,119,041**	**$322,359,686**

[1] Per Department Appeals Report
[2] Interest was calculated to April 30, 2003.

EXHIBIT B

NORTH CAROLINA
Department of the Secretary of State

To all whom these presents shall come, Greetings:

I, Elaine F. Marshall, Secretary of State of the State of North Carolina, do hereby certify the following and hereto attached to be a true copy of

ARTICLES OF RESTATEMENT

OF

DUKE ENERGY CAROLINAS, LLC

the original of which was filed in this office on the 26th day of July, 1977.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal at the City of Raleigh, this 30th day of August, 2011.

Elaine F. Marshall

Secretary of State

Certification# 91904446-1 Reference# 10697908-lg Page: 1 of 31
Verify this certificate online at www.secretary.state.nc.us/verification

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THAD EURE
SECRETARY OF STATE
SOUTH CAROLINA

RESTATED CHARTER

OF

DUKE POWER COMPANY

Dated July 25, 1977

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Exhibit B—Statement of Classification of Shares, 5.72% Cumulative Preferred Stock, Series D

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Exhibit G—Statement of Classification of Shares, 7.80% Cumulative Preferred Stock, Series H

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Exhibit I—Statement of Classification of Shares, 10.76% Preferred Stock A, 1975 Series

Exhibit J—Statement of Classification of Shares, 8.20% Cumulative Preferred Stock, Series J

This page is not part of the Restated Charter.

RESTATED CHARTER
OF
DUKE POWER COMPANY
(Dated July 25, 1977)

The undersigned Corporation, pursuant to the action of its Board of Directors, hereby executes this Restated Charter for the purpose of integrating into one document its original Articles of Incorporation and all amendments thereto; as well as, by exhibit, the Statement of Classification of Shares as filed with respect to each series of the classes of shares outstanding as of the date hereof:

ARTICLE I

The name of the Corporation is Duke Power Company.

ARTICLE II

The period of duration of the Corporation is perpetual.

ARTICLE III

The purposes for which the Corporation is organized are:

(a) To purchase, acquire, lease, manage, control and operate, and to sell, lease and dispose of to such person, or persons, corporation or corporations, and for such price or prices, and on such terms and conditions as to this Corporation may seem proper, water, water rights, power, privileges and appropriations for mining, milling, agriculture and other uses and purposes; and to develop, control, generally deal in and dispose of to such person or persons, corporation or corporations, and for such price or prices, and on such terms and conditions as to the Corporation may seem proper, electrical and other power for the generation, distribution and supply of electricity for light, heat and power, and for any other uses and purposes to which the same are adapted;

(b) To manufacture, generate, buy, sell, accumulate, store, transmit, furnish and distribute electric current for light, heat and power;

(c) To manufacture, buy, sell, lease, let or operate any or all machinery or appliances for the manufacture, generation, storage, accumulation, transmission or distribution of any or all types of electric current, and any or all manner of electric machinery, apparatus or supplies of any nature or kind whatsoever;

(d) To erect, buy, sell, operate, lease, and let power plants and generating stations for the manufacture, generation, accumulation, storage, transmission and distribution of electric current and any or all machinery used therein or in connection therewith;

(e) To manufacture, buy, sell, lease and let fixtures, chandeliers, electroliers, brackets, lamps, globes, and other supplies and appurtenances used for or in connection with the manufacture, generation, accumulation, storage, transmission, distribution or use of electric current for light, heat or power, or otherwise, and to carry on a general business of electricians, mechanical engineers, suppliers of electricity for the purpose of light, heat, or power and otherwise and install, erect, and operate, sell or lease wires, cables and fixtures, both interior and exterior, for the transmission and use of electric current; and to manufacture and deal in all apparatus and things required for or capable of being used in connection with the generation, distribution, supply, accumulation and employment of electricity;

(f) To buy, sell, operate or lease pole lines, erect poles, string wires thereon, or on poles of other individuals or corporations, on any and all streets, avenues, highways and roads of counties, townships, towns, villages and cities, and over and under all canals and other waterways, and across any and all bridges, and to use the same either for the transmission of electric current for delivery to consumers on such lines or for transmission of current to independent vendors thereof, and to sell or

EXHIBIT C

DUKE ENERGY CORPORATION
SOUTH CAROLINA WAIVERS SCHEDULE
INCOME/ LICENSE TAX

WAIVER EXPIRATION	WAIVER PERIODS	TAXPAYER'S EFFECTIVE DATE	STATE'S EFFECTIVE DATE
12/31/02	INCOME: 12/31/78 - 12/31/99 LICENSE: 12/31/84 - 12/31/00	06/21/02	06/21/02
06/30/02	INCOME: 12/31/78 - 12/31/98 LICENSE: 12/31/84 - 12/31/99	12/11/01	12/07/01
12/31/01	INCOME: 12/31/78 - 12/31/97 LICENSE: 12/31/84 - 12/31/98	12/15/00	12/15/00
12/31/00	INCOME: 12/31/78 - 12/31/96 LICENSE: 12/31/84 - 12/31/97	12/30/99	12/17/99
12/31/99	INCOME: 12/31/78 - 12/31/95 LICENSE: 12/31/84 - 12/31/96	12/22/98	12/07/98
12/31/98	INCOME: 12/31/78 - 12/31/94 LICENSE: 12/31/84 - 12/31/95	06/19/98	06/15/98
06/30/98	INCOME: 12/31/78 - 12/31/94 LICENSE: 12/31/84 - 12/31/95	12/22/97	12/19/97
12/31/97	INCOME: 12/31/78 - 12/31/93 LICENSE: 12/31/84 - 12/31/94	06/25/97	06/20/97
06/30/97	INCOME: 12/31/78 - 12/31/92 LICENSE: 12/31/84 - 12/31/93	06/03/96	05/30/96
06/30/96	INCOME: 12/31/83 - 12/31/91 LICENSE: 12/31/84 - 12/31/92	08/23/95	08/09/95
11/30/95	INCOME: 12/31/83 - 12/31/90 LICENSE: 12/31/84 - 12/31/91	05/07/95	05/02/95
05/30/95	INCOME: 12/31/83 - 12/31/90 LICENSE: 12/31/84 - 12/31/91	08/29/94	08/24/94
12/31/94	INCOME: 12/31/83 - 12/31/89 LICENSE: 12/31/84 - 12/31/90	11/16/93	10/19/93
12/31/93	INCOME: 12/31/83 - 12/31/89 LICENSE: 12/31/84 - 12/31/90	12/23/92	12/14/92
12/31/92	INCOME: 12/31/83 - 12/31/88 LICENSE: 12/31/84 - 12/31/89	12/14/91	12/13/91
12/31/91	INCOME: 12/31/83 - 12/31/87 LICENSE: 12/31/84 - 12/31/88	12/17/90	12/10/90
12/31/90	INCOME: 12/31/83 - 12/31/86 LICENSE: 12/31/84 - 12/31/87	11/08/89	11/01/89
12/31/89	INCOME: 12/31/83 - 12/31/85 LICENSE: 12/31/84 - 12/31/86	06/19/89	05/25/89
06/30/89	INCOME: 12/31/83 - 12/31/84 LICENSE: 12/31/84 - 12/31/85	03/07/89	03/03/89
03/31/89	INCOME: 12/31/83 - 12/31/84 LICENSE: 12/31/84 - 12/31/85	12/27/88	12/28/88
12/31/88	INCOME: 12/31/83 - 12/31/84 LICENSE: 12/31/84 - 12/31/85	08/16/88	08/09/88

EXHIBIT D

COPY

SOUTH CAROLINA TAX COMMISSION
FIELD SERVICES DIVISION
CONSENT TO EXTEND THE TIME TO ASSESS TAX

File No. 20090024-9

Duke Power Company
Name of Taxpayer(s) SSN

PO Box 33189 Charlotte NC 28242
Address (Number, Street, City or Town, State, Zip Code)

and the SOUTH CAROLINA TAX COMMISSION consent and agree to the following:

(1) The amount of any STATE Income Tax / License Fee tax due on any return(s) made by or for the above taxpayer(s) for the period(s) ended December 31, 1983/84 and December 31, 1984/85

may be assessed at any time on or before December 31, 1988
(Expiration Date)

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.

Duke Power Company
(Name of Taxpayer)

By: John D. Kuhl
(Taxpayer, Partner, Officer of Corp., etc.,)

V.P. Taxes
(Title)

8/16/88
(Date)

SOUTH CAROLINA TAX COMMISSION

By: Marvin N. Davant plw
(Director, Field Services Division)

August 9, 1988
(Date)

If this waiver is executed on behalf of a corporation, it will be signed by such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition, to which the seal, if any, of the corporation must be affixed.

FS-43 (11/85)

DE00007290

COPY

SOUTH CAROLINA TAX COMMISSION
FIELD SERVICES DIVISION
CONSENT TO EXTEND THE TIME TO ASSESS TAX

File No. 20090024-9

Duke Power Company — SSN
Name of Taxpayer(s)

PO Box 33189 Charlotte NC 28242
Address (Number, Street, City or Town, State, Zip Code)

and the SOUTH CAROLINA TAX COMMISSION consent and agree to the following:

(1) The amount of any STATE Income Tax / License Fee tax due on any return(s) made by or for the above taxpayer(s) for the period(s) ended December 31, 1983/84 and December 31, 1984/85

may be assessed at any time on or before March 31, 1989
(Expiration Date)

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.

Duke Power Company
(Name of Taxpayer)

By: John P. O. Kale
(Taxpayer, Partner, Officer of Corp., etc.)

Vice President, Taxes
(Title)

December 27, 1988
(Date)

SOUTH CAROLINA TAX COMMISSION

By: _____
(Director, Field Services Division)

12/28/88
(Date)

If this waiver is executed on behalf of a corporation, it will be signed by such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition, to which the seal, if any, of the corporation must be affixed.

FS-43 (11/85)

DE00007289

COPY

SOUTH CAROLINA TAX COMMISSION
FIELD SERVICES DIVISION
CONSENT TO EXTEND THE TIME TO ASSESS TAX

File No. 20090024-9

Duke Power Company
Name of Taxpayer(s) SSN

P O Box 33189 Charlotte, N.C. 28242
Address (Number, Street, City or Town, State, Zip Code)

and the SOUTH CAROLINA TAX COMMISSION consent and agree to the following:

(1) The amount of any STATE Income Tax / License Fee tax due on any return(s) made by or for the above taxpayer(s) for the period(s) ended December 31, 1983/84 and December 31, 1984/85

may be assessed at any time on or before June 30, 1989
(Expiration Date)

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.

Duke Power Co
(Name of Taxpayer)

By: John D. Kuyk
(Taxpayer, Partner, Officer of Corp., etc.)

V P, Taxes
(Title)

3/7/89
(Date)

SOUTH CAROLINA TAX COMMISSION

By: Marion M. Lavant RW
(Director, Field Services Division)

3/3/89
(Date)

If this waiver is executed on behalf of a corporation, it will be signed by such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition, to which the seal, if any, of the corporation must be affixed.

FS-43 (11/85)

DE00007319

COPY

SOUTH CAROLINA TAX COMMISSION
FIELD SERVICES DIVISION
CONSENT TO EXTEND THE TIME TO ASSESS TAX

File No. 2009 0024-9

Duke Power Company
Name of Taxpayer(s)

SSN

Po Box 33189, Charlotte, N.C. 28242
Address (Number, Street, City or Town, State, Zip Code)

and the SOUTH CAROLINA TAX COMMISSION consent and agree to the following:

(1) The amount of any STATE Income Tax / License Fee tax due on any return(s) made by or for the above taxpayer(s) for the period(s) ended December 31, 1983/84, December 31, 1984/85 and December 31, 1985/86

may be assessed at any time on or before December 31, 1989
(Expiration Date)

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.

Duke Power Co
(Name of Taxpayer)

By: [signature] V.P. & Treas.
(Taxpayer, Partner, Officer of Corp., etc.)

(Title)

6/19/89
(Date)

SOUTH CAROLINA TAX COMMISSION

By: Marvin N. Durant Jr.
(Director, Field Services Division)

5/25/89
(Date)

If this waiver is executed on behalf of a corporation, it will be signed by such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition, to which the seal, if any, of the corporation must be affixed.

FS-43 (11/85)

DE00007318

SOUTH CAROLINA TAX COMMISSION
FIELD SERVICES DIVISION
CONSENT TO EXTEND THE TIME TO ASSESS TAX

COPY

File No. 20090024-9

Duke Power Company
Name of Taxpayer(s)

SSN

PO Box 33189, Charlotte N.C. 28242
Address (Number, Street, City or Town, State, Zip Code)

and the SOUTH CAROLINA TAX COMMISSION consent and agree to the following:

(1) The amount of any STATE Income Tax / License Fee tax due on any return(s) made by or for the above taxpayer(s) for the period(s) ended December 31, 1983/84, December 31, 1984/85, December 31, 1985/86 and December 31, 1986/87 may be assessed at any time on or before December 31, 1990
(Expiration Date)

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.

(Name of Taxpayer)

By: John P. O'Neill
(Taxpayer, Partner, Officer of Corp., etc.,)

VP Taxes
(Title)

11/8/89
(Date)

SOUTH CAROLINA TAX COMMISSION

By: Marvin N. Davant Randy Wilson
(Director, Field Services Division)

11/1/89
(Date)

If this waiver is executed on behalf of a corporation, it will be signed by such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition, to which the seal, if any, of the corporation must be affixed.

FS-43 (11/85)

DE00007317

CC. 11

SOUTH CAROLINA TAX COMMISSION
FIELD SERVICES DIVISION
CONSENT TO EXTEND THE TIME TO ASSESS TAX

File No. 20090024-9

Duke Power Company — SSN
Name of Taxpayer(s)

P O Box 33189, Charlotte, NC 28242 / Attn: Mr. Wilson R. Taylor
Address (Number, Street, City or Town, State, Zip Code)

and the SOUTH CAROLINA TAX COMMISSION consent and agree to the following:

(1) The amount of any STATE Income Tax/License Fee tax due on any return(s) made by or for the above taxpayer(s) for the period(s) ended December 31, 1983/84, December 31, 1984/85, December 31, 1985/86, December 31, 1986/87 & December 31, 1987/88 may be assessed at any time on or before December 31, 1991
(Expiration Date)

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.

Duke Power Company
(Name of Taxpayer)

By: [signature]
(Taxpayer, Partner, Officer of Corp., etc.,)

V P Taxes
(Title)

12/17/90
(Date)

SOUTH CAROLINA TAX COMMISSION

By: [signature]
(Director, Field Services Division)

December 10, 1990
(Date)

If this waiver is executed on behalf of a corporation, it will be signed by such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition, to which the seal, if any, of the corporation must be affixed.

FS-43 (11/85)

DE00007285

SOUTH CAROLINA TAX COMMISSION
FIELD SERVICES DIVISION
CONSENT TO EXTEND THE TIME TO ASSESS TAX

COPY

File No. 20090024-9

Duke Power Company — SSN
Name of Taxpayer(s)

P O Box 33189, Charlotte, NC 28242 Attn: Mr. Wilson R. Taylor
Address (Number, Street, City or Town, State, Zip Code)

and the SOUTH CAROLINA TAX COMMISSION consent and agree to the following:

(1) The amount of any STATE Income Tax/License Fee tax due on any return(s) made by or for the above taxpayer(s) for the period(s) ended December 31, 1983/84, December 31, 1984/85 December 31, 1985/86, December 31, 1986/87, December 31, 1987/88 & December 31, 1988/89 may be assessed at any time on or before December 31, 1992
(Expiration Date)

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.

Duke Power Co
(Name of Taxpayer)

By: [signature]
(Taxpayer, Partner, Officer of Corp., etc.,)

V P Taxes — 12/19/91
(Title) (Date)

SOUTH CAROLINA TAX COMMISSION

By: Marvin N. Davant /by Randy Wilson — 12/13/91
(Director, Field Services Division) (Date)

If this waiver is executed on behalf of a corporation, it will be signed by such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition, to which the seal, if any, of the corporation must be affixed.

FS-43 (11/85)

DE00007284

COPY

STATE OF SOUTH CAROLINA
SOUTH CAROLINA TAX COMMISSION
FIELD SERVICES DIVISION
CONSENT TO EXTEND THE TIME TO ASSESS TAX

FS-43
Rev. (7/90)
2024

File No. 20090024-9

Duke Power Company
Name of Taxpayer(s)

SSN

P O Box 33189 Charlotte, NC 28242 Attn: Mr. Wilson R. Taylor
Address (Number, Street, City or Town, State, Zip Code)

and the SOUTH CAROLINA TAX COMMISSION consent and agree to the following:

(1) The amount of any STATE Income/License Fee tax due on any return(s) made by or for the above taxpayer(s) for the period(s) ended December 31, 1983/84, December 31, 1984/85, December 31, 1985/86, December 31, 1986/87, December 31, 1987/88, December 31, 1988/89 and December 31, 1989/90 may be assessed at any time on or before December 31, 1993
(Expiration Date)

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.

(Name of Taxpayer)

By: John W. O'Kelley
(Taxpayer, Partner, Officer of Corp., etc.,)

V P Taxes
(Title)

12/23/92
(Date)

OUTH CAROLINA TAX COMMISSION

y: Marvin N. Davant by Randy Wilson
(Director, Field Services Division)

12/14/92
(Date)

this waiver is executed on behalf of a corporation, it will be signed by such officer or officers of the corporation as are npowered under the laws of the State in which the corporation is located to sign for the corporation, in addition, to nich the seal, if any, of the corporation must be affixed.

DE00007261

COPY

SOUTH CAROLINA TAX COMMISSION
FIELD SERVICES DIVISION
CONSENT TO EXTEND THE TIME TO ASSESS TAX

File No. 20090024-9

Duke Power Company
Name of Taxpayer(s)

SSN

422 South Church Street Charlotte, NC 28242-0001
Address (Number, Street, City or Town, State, Zip Code)

and the SOUTH CAROLINA TAX COMMISSION consent and agree to the following:

(1) The amount of any STATE Corp. Income/License Fee tax due on any return(s) made by or for the above taxpayer(s) for the period(s) ended December 31, 1983/84, December 31, 1984/85, December 31, 1985/86, December 31, 1986/87, December 31, 1987/88, December 31, 1988/89 and December 31, 1989/90
may be assessed at any time on or before December 31, 1994
(Expiration Date)

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.

Duke Power Company
(Name of Taxpayer)

By: Robert A. Tobin VP & Tax Counsel
(Taxpayer, Partner, Officer of Corp., etc.,)

VP. & Tax Counsel
(Title)

11-16-93
(Date)

SOUTH CAROLINA TAX COMMISSION

By: Marvin N. Dawant by Randy Wilson
(Director, Field Services Division)

10/19/93
(Date)

If this waiver is executed on behalf of a corporation, it will be signed by such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition, to which the seal, if any, of the corporation must be affixed.

FS-43 (11/85)

DE00007282

STATE OF SOUTH CAROLINA
DEPARTMENT OF REVENUE AND TAXATION
FIELD SERVICES DIVISION
CONSENT TO EXTEND THE TIME TO ASSESS TAX

COPY

FS-48
Rev. (10/93)
2024

File No. 20090024-9

Duke Power Company — SSN
Name of Taxpayer(s)

422 South Church St. Charlotte, NC 28242-0001
Address (Number, Street, City or Town, State, Zip Code)

and the SOUTH CAROLINA DEPARTMENT OF REVENUE AND TAXATION consent and agree to the following:

(1) The amount of any STATE Corp. Income/License Fee tax due on any return(s) made by or for the above taxpayer(s) for the period(s) ended December 31, 1983/84, December 31, 1984/85, December 31, 1985/86, December 31, 1986/87, December 31, 1987/88, December 31, 1988/89, December 31, 1989/90 and December 31, 1990/91

may be assessed at any time on or before May 30, 1995
(Expiration Date)

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.

Duke Power Company
(Name of Taxpayer)

By: Robert A. Likins, Vice Pres.
(Taxpayer, Partner, Officer of Corp., etc.)

Vice President — 8.29.94
(Title) (Date)

SOUTH CAROLINA DEPARTMENT OF REVENUE AND TAXATION

By: Marvin N. Davant Jr. — 8/24/94
(Director, Field Services Division) (Date)

If this waiver is executed on behalf of a corporation, it will be signed by such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition, to which the seal, if any, of the corporation must be affixed.

DE00007281
SO

STATE OF SOUTH CAROLINA
DEPARTMENT OF REVENUE AND TAXATION
FIELD SERVICES DIVISION
CONSENT TO EXTEND THE TIME TO ASSESS TAX

COPY

FS-13
Rev. (10/93)
2024

File No. 20090024-9

Duke Power Company — SSN FEI #56-0205520
Name of Taxpayer(s)

422 South Church St. Charlotte, NC 28242-0001
Address (Number, Street, City or Town, State, Zip Code)

and the SOUTH CAROLINA DEPARTMENT OF REVENUE AND TAXATION consent and agree to the following:

(1) The amount of any STATE Corp. Income/License Fee tax due on any return(s) made by or for the above taxpayer(s) for the period(s) ended December 31, 1983 through December 31, 1990 (Income)
December 31, 1984 through December 31, 1991 (License)
may be assessed at any time on or before November 30, 1995
(Expiration Date)

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.

DUKE POWER COMPANY
(Name of Taxpayer)

By: Robert A. Jobin
(Taxpayer, Partner, Officer of Corp., etc.,)

V.P. & TAX COUNSEL — (Title)

5-7-95 — (Date)

SOUTH CAROLINA DEPARTMENT OF REVENUE AND TAXATION

By: Joseph P. Southard for Marvin Pevant — (Director, Field Services Division)

2 May 1995 — (Date)

If this waiver is executed on behalf of a corporation, it will be signed by such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition, to which the seal, if any, of the corporation must be affixed.

DE00007280

STATE OF SOUTH CAROLINA
DEPARTMENT OF REVENUE AND TAXATION
FIELD SERVICES DIVISION
CONSENT TO EXTEND THE TIME TO ASSESS TAX

COPY

FS-43
Rev. (10/93)
2024

File No. 20090024-9

Duke Power Co. SSN FEI# 56-0205520
Name of Taxpayer(s)

422 South Church Street Charlotte, NC 28242-0001
Address (Number, Street, City or Town, State, Zip Code)

and the SOUTH CAROLINA DEPARTMENT OF REVENUE AND TAXATION consent and agree to the following:

(1) The amount of any STATE Corp. Income/License Fee tax due on any return(s) made by or for the above taxpayer(s) for the period(s) ended December 31, 1983 through December 31, 1991 (Income)
December 31, 1984 through December 31, 1992 (License)

may be assessed at any time on or before June 30,1996
(Expiration Date)

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.

Duke Power Company
(Name of Taxpayer)

By: Robert A. Lukas
(Taxpayer, Partner, Officer of Corp., etc.,)

V.P. & Tax Counsel — 8-21-95
(Title) (Date)

SOUTH CAROLINA DEPARTMENT OF REVENUE AND TAXATION

By: Marvin H. Durant by RW — 8/9/95
(Director, Field Services Division) (Date)

If this waiver is executed on behalf of a corporation, it will be signed by such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition, to which the seal, if any, of the corporation must be affixed.

DE00007279

SOUTH CAROLINA TAX COMMISSION
FIELD SERVICES DIVISION
CONSENT TO EXTEND THE TIME TO ASSESS TAX

COPY

File No. 20090024-9

Duke Power Co. SSN FEI #56-0205520
Name of Taxpayer(s)

422 South Church St. Charlotte, NC 28242-0001
Address (Number, Street, City or Town, State, Zip Code)

and the SOUTH CAROLINA TAX COMMISSION consent and agree to the following:

(1) The amount of any STATE Corp. Income/License Fee tax due on any return(s) made by or for the above taxpayer(s) for the period(s) ended December 31, 1978 through December 31, 1992 (Income)
December 31, 1984 through December 31, 1993 (License)

may be assessed at any time on or before June 30, 1997
(Expiration Date)

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.

DUKE POWER COMPANY
(Name of Taxpayer)

By: Robert A. Jakubin
(Taxpayer, Partner, Officer of Corp., etc.)

V.P. (Title)

6-3-96 (Date)

SOUTH CAROLINA TAX COMMISSION

By: Marvin A. Daniel RW
(Director, Field Services Division)

5/30/96 (Date)

If this waiver is executed on behalf of a corporation, it will be signed by such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition, to which the seal, if any, of the corporation must be affixed.

FS-43 (11/85)

DE00007278

STATE OF SOUTH CAROLINA
DEPARTMENT OF REVENUE AND TAXATION
FIELD SERVICES DIVISION
CONSENT TO EXTEND THE TIME TO ASSESS TAX

COPY

FS-43
Rev. (10/93)
2024

File No. 20090024-9

Duke Power Co. (Now renamed Duke Energy Corporation) FEI #56-0205520
Name of Taxpayer(s)

422 South Church St. Charlotte, NC 28242-0001
Address (Number, Street, City or Town, State, Zip Code)

and the SOUTH CAROLINA DEPARTMENT OF REVENUE AND TAXATION consent and agree to the following:

(1) The amount of any STATE Corp. Income/License Fee tax due on any return(s) made by or for the above taxpayer(s) for the period(s) ended December 31, 1978 through December 31, 1993 (Income)
December 31, 1984 through December 31, 1994 (License)
may be assessed at any time on or before December 31, 1997
(Expiration Date)

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.

Duke Power Co. (Now renamed Duke Energy Corporation)
(Name of Taxpayer)

By: Robert A. Jelenic
(Taxpayer, Partner, Officer of Corp., etc.,)

Vice President and General Counsel-Corporate and Energy Services (Title)

6-25-97 (Date)

SOUTH CAROLINA DEPARTMENT OF REVENUE AND TAXATION

By: Marion M. Davant by RW
(Director, Field Services Division)

6/20/97 (Date)

If this waiver is executed on behalf of a corporation, it will be signed by such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition, to which the seal, if any, of the corporation must be affixed.

DE00007308

STATE OF SOUTH CAROLINA
DEPARTMENT OF REVENUE AND TAXATION
FIELD SERVICES DIVISION
CONSENT TO EXTEND THE TIME TO ASSESS TAX

COPY

FS-43
Rev. (10/93)
2024

File No. 20090024-9

Duke Power Co. (Now renamed Duke Energy Corp.) SSN FEI# 56-0205520
Name of Taxpayer(s)

422 South Church St. Charlotte, NC 28242-0001
Address (Number, Street, City or Town, State, Zip Code)

and the SOUTH CAROLINA DEPARTMENT OF REVENUE AND TAXATION consent and agree to the following:

(1) The amount of any STATE Corp. Income/License Fee tax due on any return(s) made by or for the above taxpayer(s) for the period(s) ended Dec. 31, 1978 through Dec. 31, 1994 (Income)
Dec. 31, 1984 through Dec. 31, 1995 (License)

may be assessed at any time on or before June 30, 1998
(Expiration Date)

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.

DUKE POWER CO. (Now renamed Duke Energy Corp.)
(Name of Taxpayer)

By: E. G. Ruff
(Taxpayer, Partner, Officer of Corp., etc.,)
Ellen T. Ruff
Vice President and General Counsel, Electric Operations 12/22/97
(Title) (Date)

SOUTH CAROLINA DEPARTMENT OF REVENUE AND TAXATION

By: Marvin N. Lavant/tb 12/19/97
(Director, Field Services Division) (Date)

If this waiver is executed on behalf of a corporation, it will be signed by such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition, to which the seal, if any, of the corporation must be affixed.

STATE OF SOUTH CAROLINA
DEPARTMENT OF REVENUE AND TAXATION
FIELD SERVICES DIVISION

COPY

FS-43
Rev. (10/93)
2024

CONSENT TO EXTEND THE TIME TO ASSESS TAX

File No. 20090024-9

Duke Power Co. (Now renamed: Duke Power Corporation) ~~SSN~~ FEI #56-0205520

Name of Taxpayer(s)

422 South Church St. Charlotte, NC 28242-0001

Address (Number, Street, City or Town, State, Zip Code)

and the SOUTH CAROLINA DEPARTMENT OF REVENUE AND TAXATION consent and agree to the following:

(1). The amount of any STATE Corp. Income/License Fee tax due on any return(s) made by or for the above taxpayer(s) for the period(s) ended December 31, 1978 through December 31, 1994 (Income)
December 31, 1984 through December 31, 1995 (License)

may be assessed at any time on or before December 31, 1998
(Expiration Date)

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.

DUKE POWER CO. (Now renamed Duke Energy Corp.)
(Name of Taxpayer)

By: _____
(Taxpayer, Partner, Officer of Corp., etc.,)

Cary Flynn, Vice President Corporate Tax
(Title)

6/19/98
(Date)

SOUTH CAROLINA DEPARTMENT OF REVENUE AND TAXATION

By: Marvin N. Durant by Randy Wilson
(Director, Field Services Division)

6/15/98
(Date)

If this waiver is executed on behalf of a corporation, it will be signed by such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition, to which the seal, if any, of the corporation must be affixed.

STATE OF SOUTH CAROLINA
DEPARTMENT OF REVENUE

CONSENT TO EXTEND THE TIME TO ASSESS TAX

COPY

FS-43
(Rev. 12/97)
2024

File No. 20090024-9

Duke Power Co. (Now Renamed: Duke Power Corporation) SSN/FEI 56-0205520
Name of Taxpayer(s)

422 South Church St. Charlotte, NC 28242-0001
Address (Number, Street, City or Town, State, ZIP Code)

and the SOUTH CAROLINA DEPARTMENT OF REVENUE consent and agree to the following:

(1) The amount of any STATE Corp. Income/License Fee tax due on any return(s) made by or for the above taxpayer(s) for the period(s) ended December 31, 1978 to December 31, 1995 (Income)
December 31, 1984 to December 31, 1996 (License)
may be assessed at any time on or before December 31, 1998
(Expiration Date)

This agreement extends the time for mailing the notice of assessment or refund of the above tax pursuant to the provisions of Section 12-54-85(C)(5) of the 1976 South Carolina Code of Laws, as amended.

DUKE ENERGY CORPORATION
(formerly Duke Power Co.)
(Name of Taxpayer)

By: _____
(Taxpayer, Partner, Officer of Corp., etc.) Cary Flynn

Vice President, Tax
(Title)

(Date)

SOUTH CAROLINA DEPARTMENT OF REVENUE

By: Marvin N. Davant by Randy Wilson
(Administrator, Field Services Division)

12/7/98
(Date)

If this waiver is executed on behalf of a corporation, it will be signed by such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition, to which the seal, if any, of the corporation must be affixed.

original
sealed
12/22/98
JA

DE00007305

COPY

SOUTH CAROLINA TAX COMMISSION
FIELD SERVICES DIVISION
CONSENT TO EXTEND THE TIME TO ASSESS TAX

File No. 20090024-9

Duke Energy Corp. (Formerly : Duke Power Co.) ~~SSN~~ FEI #56-0205520
Name of Taxpayer(s)

422 S Church St Charlotte, NC 28242-0001
Address (Number, Street, City or Town, State, Zip Code)

and the SOUTH CAROLINA TAX COMMISSION consent and agree to the following:

(1) The amount of any STATE Corp. Income/License tax due on any return(s) made by or for the above taxpayer(s) for the period(s) ended December 31, 1978 - December 31, 1996 (Income)
December 31, 1984 - December 31, 1997 (License)

may be assessed at any time on or before December 31, 2000
(Expiration Date)

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.

Duke Energy Corporation (Formerly Duke Power Company)
(Name of Taxpayer)

By: C. Flynn
(Taxpayer, Partner, Officer of Corp., etc.,) C. Flynn

Vice President, Tax
(Title)

December 30, 1999
(Date)

SOUTH CAROLINA TAX COMMISSION

By: Robert K. Anderson
(Director, Field Services Division)

December 17, 1999
(Date)

If this waiver is executed on behalf of a corporation, it will be signed by such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition, to which the seal, if any, of the corporation must be affixed.

FS-43 (11/85)

COPY

FS-43
Rev 1/99
2024

State of South Carolina
DEPARTMENT OF REVENUE
FIELD SERVICES DIVISION
CONSENT TO EXTEND THE TIME TO ASSESS TAX

File No. 20090024-9

Duke Energy Corporation — SSN/FEI 56-0205520
Name of Taxpayer

422 South Church Street, Charlotte, NC 28202-1904
Address (Number, Street, City or Town, State, Zip Code)

and the SOUTH CAROLINA DEPARTMENT OF REVENUE consent and agree to the following:

(1) The amount of any STATE Corporate Income/License tax due on any return(s) made by or for the above taxpayer(s) for the period(s) ended December 31, 1978 - December 31, 1997 (Income)
December 31, 1984 - December 31, 1998 (License)
may be assessed at anytime on or before December 31, 2001
(Expiration Date)

This agreements extends the time for mailing the notice of assessment or refund of the above tax pursuant to the provisions of Section 12-54-85(C)(5) of the 1976 South Carolina Code of Laws, as amended.

Duke Energy Corporation
(Name of Taxpayer)

By: _____
(Taxpayer, Partner, Officer of Corp., etc.,)

Senior Vice President Corporate Tax — December 15, 2000
(Title) (Date)

SOUTH CAROLINA DEPARTMENT OF REVENUE
By: Robert Anderson/ By:

Robert Anderson /BY _____ — 12/15/00
(Administrator, Field Services Division) (Date)

If this waiver is executed on behalf of a corporation, it will be signed by such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition, to which the seal, if any, of the corporation must be affixed.

State of South Carolina
Department of Revenue
Field Services Division

FS-43

Consent to extend the time to Assess Tax

File#20090024-9
FEI#56-0205520

Duke Energy Corp. (Formerly: Duke Power Co.) & Combined Affiliates
Name of Taxpayer(s)

422 S Church St Charlotte, NC 28242-0001
Address

and the SOUTH CAROLINA DEPARTMENT OF REVENUE consent and agree to the following:

The amount of any STATE Corp. Income/License Fee tax due on any return(s) made by or for the period(s) ended:

December 31, 1978 - December 31, 1997 (Income)

December 31, 1984 - December 31, 1998 (License Fee)

may be assessed at any time on or before December 31, 2001.
(Expiration Date)

This agreement extends the time for mailing the notice of assessment or refund of the above tax pursuant to the provisions of Section 12-54-85(c)(5) of the 1976 South Carolina Code of Laws, as amended.

Duke Energy Corporation
(Name of Taxpayer)

By: _____
(Taxpayer, Partner, Corp. Officer, etc.)

Senior Vice President Corporate Tax
(Title)

12/18/2000
(Date)

SOUTH CAROLINA DEPARTMENT OF REVENUE

By: Robert K. Anderson by TRW
(Director, Field Services Div.)

12/15/00
(Date)

If this waiver is executed on behalf of a corporation, it will be signed by such officer of officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition, to which the seal, if any, of the corporation must be affixed.

DE00007172

COPY

State of South Carolina
Department of Revenue
Field Services Division
Consent to extend the time to Assess Tax

FS-43

File#20090024-9
FEI#56-0205520

Duke Energy Corp. (Formerly: Duke Power Co.) & Combined Affiliates
Name of Taxpayer(s)
422 S Church St. Charlotte, NC 28242-0001
Address

and the SOUTH CAROLINA DEPARTMENT OF REVENUE consent and agree to the following:

The amount of any STATE Corp. Income/License Fee tax due on any return(s) made by or for the period(s) ended:

December 31, 1978 - December 31, 1998 (Income)

December 31, 1984 - December 31, 1999 (License Fee)

may be assessed at any time on or before June 30, 2002.
(Expiration Date)

This agreement extends the time for mailing the notice of assessment or refund of the above tax pursuant to the provisions of Section 12-54-85(c)(5) of the 1976 South Carolina Code of Laws, as amended.

Duke Energy Corporation
(Name of Taxpayer)

By: _____
(Taxpayer, Partner, Corp.Officer,etc.)

Senior Vice President Corporate Tax — 12-11-01
(Title) — (Date)

SOUTH CAROLINA DEPARTMENT OF REVENUE

By: Robert K. Anderson by TRW — 12/7/01
(Director, Field Services Div.) — (Date)

If this waiver is executed on behalf of a corporation, it will be signed by such officer of officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition, to which the seal, if any, of the corporation must be affixed.

COPY

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Rev 1/99
2024

State of South Carolina
DEPARTMENT OF REVENUE
FIELD SERVICES DIVISION
CONSENT TO EXTEND THE TIME TO ASSESS TAX

File No. 20090024-9

Duke Energy Corp.(Formerly Duke Power Co.)&Combined Affiliates SSN/FEI 56-0205520
Name of Taxpayer

422 S. Church St., Charlotte, NC 28242-0001
Address (Number, Street, City or Town, State, Zip Code)

and the SOUTH CAROLINA DEPARTMENT OF REVENUE consent and agree to the following:

(1) The amount of any STATE Income/License Fee tax due on any return(s) made by or for the above taxpayer(s) for the period(s) ended December 31, 1978 - December 31, 1999 (Income) December 31, 1984 - December 31, 2000 (License Fee) may be assessed at anytime on or before December 31, 2002
(Expiration Date)

This agreements extends the time for mailing the notice of assessment or refund of the above tax pursuant to the provisions of Section 12-54-85(C)(5) of the 1976 South Carolina Code of Laws, as amended.

Duke Energy Corporation
(Name of Taxpayer)

By: _____
(Taxpayer, Partner, Officer of Corp., etc.)

Senior Vice President Corporate Tax
(Title)

6-21-02
(Date)

SOUTH CAROLINA DEPARTMENT OF REVENUE
By: Robert Anderson/ By:

Robert Anderson by Sandy Wilson
(Administrator, Field Services Division)

6/21/02
(Date)

If this waiver is executed on behalf of a corporation, it will be signed by such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition, to which the seal, if any, of the corporation must be affixed.

COPY

FS-43
Rev 1/99
2024

State of South Carolina
DEPARTMENT OF REVENUE
FIELD SERVICES DIVISION
CONSENT TO EXTEND THE TIME TO ASSESS TAX

File No. 20090024-9

Duke Energy Corp.(Formerly:Duke Power Co.)&Combined Affiliates SSN/FEI 56-0205520
Name of Taxpayer

422 S. Church St., Charlotte, NC 28242-0001
Address (Number, Street, City or Town, State, Zip Code)

and the SOUTH CAROLINA DEPARTMENT OF REVENUE consent and agree to the following:

(1) The amount of any STATE Income/License Fee tax due on any return(s) made by or for the above taxpayer(s) for the period(s) ended December 31, 1978 - December 31, 1999 (Income) December 31, 1984 - December 31, 2000 (License Fee) may be assessed at anytime on or before December 31, 2002 (Expiration Date)

This agreement extends the time for mailing the notice of assessment or refund of the above tax pursuant to the provisions of Section 12-54-85(C)(5) of the 1976 South Carolina Code of Laws, as amended.

Duke Energy Corporation
(Name of Taxpayer)

By: _____
(Taxpayer, Partner, Officer of Corp., etc.,)

Senior Vice President Corporate Tax
(Title)

6-21-02
(Date)

SOUTH CAROLINA DEPARTMENT OF REVENUE
By: Robert Anderson/ By:

Robert Anderson by Sandy Wilson
(Administrator, Field Services Division)

6/21/02
(Date)

If this waiver is executed on behalf of a corporation, it will be signed by such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition, to which the seal, if any, of the corporation must be affixed.

DE00007178

EXHIBIT E

Code 1976 § 12-7-1190
CODE OF LAWS OF SOUTH CAROLINA 1976 ANNOTATED
TITLE 12. TAXATION
CHAPTER 7. INCOME TAX ACT OF 1926
ARTICLE 9. ALLOCATION OR APPORTIONMENT OF INCOME

§ 12-7-1190. Computations in regards to remaining income of other taxpayers.

If the principal profits or income of a taxpayer, other than those described in former 1962 Code § 65-256 or § 12-19-100, are derived from sources other than manufacturing, producing, collecting, buying, assembling, processing or selling, distributing or dealing in tangible personal property such taxpayer shall make returns and pay annually an income tax upon a proportion of its remaining net income computed on the basis of the ratio of gross receipts from within this State during the income year to the total gross receipts of such year within and without the State.

HISTORY: 1962 Code § 65-279.10; 1958 (50) 1574; 1959 (51) 363; 1972 (57) 2358.

HISTORICAL NOTES

EDITORS NOTES:

As to provisions of the Internal Revenue Code (26 USCS §§ 1 et seq.) which are specifically not adopted for the purposes of Chapter 7 of Title 12, see the editor's note to § 12-7-10.

REFERENCES

CROSS REFERENCES

Limits on depletion deduction based upon 50% of net income apportioned to state, see § 12-7-130.
For provisions relating to deductions which are allowable in computing net income, see § 12-7-700.

RESEARCH AND PRACTICE REFERENCES

Annual survey of South Carolina law, tax law. 40 SC L Rev 231 (Autumn 1988).

ANNOTATIONS

CASE NOTES

Engineering firm's business carried on in a state is reasonably measured by services rendered by its personnel in that state; amendment of statute changing its original reading of "gross receipts in this State" to "gross receipts from within this State" was designed to clarify later reference in statute to phrase "total gross receipts of such year within and without the State." Amendment makes clear that "receipts from within this State" is identical to "receipts of such year within . . . this State." Lockwood Greene Engineers, Inc. v South Carolina Tax Com. (1987, App) 293 SC 447, 361 SE2d 346.

Quoted in Hertz Corp. v South Carolina Tax Comm., 246 SC 92, 142 SE2d 445 (1965).

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EXHIBIT F

Brief Explanation of Exhibit F

The attached spreadsheet reflects a breakdown of the refund amounts sought by Duke Energy Corporation under various scenarios. The first scenario ("Per Amended D&T") reflects the amended returns filed with the Department in 2002 and seeks a total refund of approximately $4,301,925. The second scenario("Single Sales (D&T)") reflects the refund due if the single-factor gross receipts non-manufacturing method is followed and seeks a total refund of $36,984,969. The third scenario ("Pwc") reflects the refund due if investment principal is included in the sales factor and seeks a total refund of $35,403,324. The fourth scenario ("Pwc and D&T" reflects the requested refund if both methods are combined and seeks a total refund of $125,142,489. The total refund of $125,142,489 using the combined methods is less than the total refund sought on the returns actually filed [see Exhibit A,] but the differences—which appear to pertain primarily to the years 1998 and 1999—are immaterial given the multi-million dollar refund claims at issue and constitute information provided by the taxpayer that illustrates the amounts at issue.

Duke Energy Corp
Summary of SC Refunds
Per Amended D&T

	2001	2000	1999	1998	1997	1996	1995	1994	1993	1992	1991	1990	1989	1988	1987
Federal Taxable Income per Federal Form 1120							984,707,531	821,732,788	792,823,257	631,940,828	542,320,893	555,468,874	519,987,536	554,436,594	646,559,980
Total Net Income as Reconciled	848,107,901	888,978,801	1,388,424,529	1,376,373,813	913,949,040	1,160,104,881	1,057,278,026	839,545,200	822,845,790	612,834,284	517,524,028	544,003,484	576,174,426	576,560,224	692,140,788
Less: Income subject to direct allocation	(1,831,950)	(3,894,274)	(10,957,847)	(2,877,337)	2,099,828	(1,309,715)	2,808,352	2,312,429	(10,953,458)	(315,909)	(4,280,928)	(186,184)	(587,875)	(365,187)	(191,613)
Total Net Income Subject to Apportionment	844,276,551	885,084,527	1,388,466,682	1,373,496,476	916,048,868	1,158,794,946	1,060,086,378	841,857,719	811,892,332	612,518,375	513,243,092	543,810,320	577,586,551	576,175,037	691,949,173
SC Apportionment Ratio	19.5316%	22.2408%	29.1527%	30.4974%	29.9584%	30.8248%	31.7270%	32.5948%	-33.4032%	34.0765%	33.5297%	33.1908%	33.4330%	33.4741%	33.2871%
Income Apportioned to SC (combined 1998-01)	125,837,519	196,849,879	398,331,933	418,880,714	274,442,745	357,169,841	336,333,805	209,212,882	271,131,213	208,724,824	172,095,575	180,493,908	193,104,512	192,889,408	230,191,877
Add: Income subject to direct allocation to SC	132,593	119,766	1,269,985	401,196	(4,409,845)	(234,819)	(469,327)	(369,925)	10,878,721	10,881	84,827	11,222	26,483	-	28,166
Total SC Net Income	125,970,412	196,969,645	399,601,917	419,281,910	270,032,900	356,935,022	335,864,278	208,822,957	282,009,934	208,735,685	172,180,402	180,505,130	193,130,975	192,889,408	230,219,843
Less: SC net operating loss carryover	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Less: Allowable Contributions	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
SC Net Income Subject to Tax	125,970,412	196,969,645	399,601,917	419,281,910	270,032,900	356,935,022	335,864,278	208,822,957	282,009,934	208,735,685	172,180,402	180,505,130	193,130,975	192,889,408	230,219,843
Tax	6,298,521	9,848,482	19,981,596	20,964,096	13,501,645	17,846,751	16,793,214	10,441,148	14,100,497	10,436,784	8,609,020	9,025,257	9,656,549	10,607,817	13,813,191
Less: Non-refundable credits							536,073	422,400	460,000	300,000	136,800	203,400	175,500	0	0
TOTAL TAX AS CALCULATED	6,298,521	9,848,482	19,981,596	20,964,096	13,501,645	17,846,751	16,257,141	10,018,748	13,620,497	10,136,784	8,472,220	8,821,857	9,481,049	10,607,817	13,813,191
Adjustment															
TOTAL TAX AS REPORTED	6,298,521	9,848,482	19,981,596	20,964,096	13,501,645	17,846,751	16,793,214	10,441,148	14,100,497	10,436,784	8,609,020	9,025,257	9,656,549	10,607,817	13,813,191
Refund	(0)	0	(0)	0	(0)	(0)	(536,073)	(422,400)	(460,000)	(300,000)	(136,800)	(203,399)	(175,500)	(50,630)	380,271
Interest on Refund (through 12/31/02)															
TOTAL REFUND DUE DUKE ENERGY	(0)	0	(0)	0	(0)	(0)	(536,073)	(422,400)	(460,000)	(300,000)	(136,800)	(203,399)	(175,500)	(50,630)	380,271
Tax Rate	5.00%	5.00%	5.00%	5.00%	5.00%	5.00%	5.00%	5.00%	5.00%	5.00%	5.00%	5.00%	5.00%	5.50%	6.00%

Duke Energy Corp
Summary of SC Refunds
Single Sales (D&T)

	2001	2000	1999	1998	1997	1996	1995	1994	1993	1992	1991	1990	1989	1988	1987
Federal Taxable Income per Federal Form 1120							984,707,531	821,732,788	792,823,257	631,940,828	542,320,893	555,468,874	519,987,536	554,436,594	646,559,980
Total Net Income as Reconciled	848,107,901	888,978,801	1,388,424,529	1,376,373,813	913,949,040	1,160,104,881	1,057,278,026	839,545,200	822,845,790	612,834,284	517,524,028	544,003,484	576,174,426	576,560,224	692,140,788
Less: Income subject to direct allocation	(1,831,950)	(3,894,274)	(10,957,847)	(2,877,337)	2,099,828	(1,309,715)	2,808,352	2,312,429	(10,953,458)	(315,909)	(4,280,928)	(186,184)	(587,875)	(365,187)	(191,613)
Total Net Income Subject to Apportionment	844,276,551	885,084,527	1,388,466,682	1,373,496,476	916,048,868	1,158,794,946	1,060,086,378	841,857,719	811,892,332	612,518,375	513,243,092	543,810,320	577,586,551	576,175,037	691,949,173
SC Apportionment Ratio	5.3552%	9.0306%	25.0745%	26.8966%	26.9154%	27.7460%	28.8741%	28.6093%	28.7842%	29.8038%	29.6874%	30.0207%	30.1251%	30.1520%	30.4456%
Income Apportioned to SC (combined 1998-01)	34,502,466	79,928,712	342,634,098	369,424,347	246,557,881	321,494,101	303,970,258	183,631,237	233,638,881	182,553,924	152,974,441	183,265,712	173,998,648	173,728,197	210,875,312
Add: Income subject to direct allocation to SC	132,893	119,766	1,269,985	401,196	(4,409,845)	(234,819)	(469,327)	(369,925)	10,878,721	10,881	84,827	11,222	26,483	-	28,166
Total SC Net Income	34,635,359	80,048,478	343,904,083	369,825,543	242,148,036	321,259,482	303,500,909	183,241,312	244,517,582	182,564,785	152,459,268	183,286,934	174,025,111	173,728,197	210,703,478
Less: SC net operating loss carryover	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Less: Allowable Contributions							0	0	0	0	0	0	0	0	0
SC Net Income Subject to Tax	34,635,359	80,048,478	343,904,083	369,825,543	242,148,036	321,259,482	303,500,909	183,241,312	244,517,582	182,564,785	152,459,268	183,286,934	174,025,111	173,728,197	210,703,478
Tax	1,731,768	4,002,424	17,195,204	18,491,277	12,107,402	16,062,974	15,175,045	9,162,066	12,225,879	9,128,239	7,622,963	8,183,347	8,701,256	9,555,051	12,642,209
Less: Non-refundable credits	0	0	0	0	0	0	536,073	422,400	460,000	300,000	136,800	203,400	175,500	0	0
TOTAL TAX AS CALCULATED	1,731,768	4,002,424	17,195,204	18,491,277	12,107,402	16,062,974	14,638,972	8,739,666	11,765,879	8,827,239	7,486,163	7,979,947	8,525,756	9,555,051	12,042,209
Adjustment														1,052,767	1,170,982
TOTAL TAX AS REPORTED	6,298,521	9,848,482	19,981,596	20,964,096	13,501,645	17,846,751	16,257,141	10,018,748	13,620,497	10,136,184	8,472,220	8,821,857	9,481,049	10,607,817	13,813,191
Refund	(4,568,753)	(5,846,058)	(2,786,392)	(2,472,816)	(1,394,243)	(1,783,777)	(1,618,168)	(1,279,082)	(1,674,618)	(1,308,545)	(986,057)	(861,910)	(955,293)	(1,052,767)	(1,170,982)
Interest on Refund (through 12/31/02)															
TOTAL REFUND DUE DUKE ENERGY	(4,568,753)	(5,846,058)	(2,786,392)	(2,472,816)	(1,394,243)	(1,783,777)	(1,618,168)	(1,279,082)	(1,674,618)	(1,308,545)	(986,057)	(861,910)	(955,293)	(1,052,767)	(1,170,982)
Tax Rate	5.00%	5.00%	5.00%	5.00%	5.00%	5.00%	5.00%	5.00%	5.00%	5.00%	5.00%	5.00%	5.00%	5.50%	6.00%

Consolidated SC Returns were filed for 1998 - 2001 Only Duke Energy Corp's numbers changed

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DE0000962

Duke Energy Corp
Summary of SC Refunds
Per Amended D&T

	1986	1985	1984	1983	1982	1981	1980	1979	1978	TOTAL
Federal Taxable Income per Federal Form 1120	482,398,556	520,431,722	826,883,978	(71,825,958)	213,698,512	189,539,232	67,504,522	182,404,940	232,983,127	
Total Net Income as Reconciled	493,678,084	568,613,468	933,156,772	(63,565,953)	171,671,444	200,844,723	67,504,522	182,404,940	232 983,127	
Less: Income subject to direct allocation	(845,793)	27,729,770	(8,247,883)	(3,221,027)	(2,348,124)	(13,616,268)	(722 190)	2,481,061	(14 508,511)	
Total Net Income Subject to Apportionment	492,830,271	616,343,238	924,908,889	(66,787,880)	169,308 320	186,826,435	66 782,332	184,886,001	218,454,616	
SC Apportionment Ratio	32 9720%	33 5170%	34 3710%	35 9000%	33 4050%	34 5600%	35 2350%	35 3600%	33 7910%	
Income Apportioned to SC (combined 1998-01)	162,495,897	206,579,762	317,900,434	(23,982,880)	56 656 778	64,567,210	23,530,755	65,388,783	73,817,909	
Add: Income subject to direct allocation to SC	16,348	(29,979,288)	5,832,235	191 345	87,198	4,023,699	18,699	8,273	13,264,190	
Total SC Net Income	162,512,345	176,600,476	323,532,669	(23,791,515)	56,623,974	68,590,915	23,549,454	65,395,056	87 082,189	
Less: SC net operating loss carryover	0	0	(23,791,515)	0	0	0	0	0	0	
Less: Allowable Contributions	0	0	0	0	(732,250)	0	0	(140 769)	(113,874)	
SC Net Income Subject to Tax	162,512,345	176 600,476	299,741,154	(23,791,515)	55,891,718	68,590,915	23,549,054	65,254,287	86 968,315	
Tax	9,750,741	10,596,029	17,984,469	-	3,353,503	4,115,455	1 412,979	3,915,256	5,218,099	
Less: Non-refundable credits	0			0	0	0	0	0	0	
TOTAL TAX AS CALCULATED	9,750,741	10,596,029	17,984,469	-	3 353,503	4,115,455	1,412,979	3,915 256	5,218,099	
Adjustment				0			583,536			
TOTAL TAX AS REPORTED	9,515,034	11,944,316	17,508,007	0	3,662 448	3,422,985	1 906,515	4,439,126	6,264,302	
Refund	235,707	(1,348,287)	476,462	-	(278,945)	692,470	(583,536)	(523,870)	(1,046,793)	(4 301 925)
Interest on Refund (through 12/31/02)										
TOTAL REFUND DUE DUKE ENERGY	235,707	(1,348,287)	476,462	-	(278,945)	692,470	(583,536)	(523,870)	(1,046,793)	
Tax Rate	6.00%	6.00%	6.00%	6.00%	6.00%	6.00%	6.00%	6.00%	6.00%	

Duke Energy Corp
Summary of SC Refunds
Single Sales (D&T)

	1986	1985	1984	1983	1982	1981	1980	1979	1978	TOTAL
Federal Taxable Income per Federal Form 1120	482,398,556	520,431,722	826,883,978	(71,825,958)	213,698 512	189,539 232	122,798,737	182,404,940	203,752,611	
Total Net Income as Reconciled	493,678,084	585,613,468	933,156,772	(63,565,953)	171,971,444	200,844,723	67,504,522	182,404,940	232,983,127	
Less: Income subject to direct allocation	(845,793)	27,729,770	(8,247,883)	(3,221,027)	(2,348 124)	(13,616,268)	(722 190)	2,481,061	(14 508,511)	
Total Net Income Subject to Apportionment	492,830,271	616,343,238	924,908,889	(66,787,880)	169,308 320	186,826,435	66,782,332	184,886,001	218,454,616	
SC Apportionment Ratio	30.3291%	29 8529%	29 0405%	27 9254%	29 0130%	30 7198%	30.0035%	29 7820%	30.1627%	
Income Apportioned to SC (combined 1998-01)	149,471,013	182,763,527	268,596,571	(18,650,770)	49,120,924	57,392,745	20,077,093	55,082,749	65 891,909	
Add: Income subject to direct allocation to SC	16,348	(29,979,288)	5,832,235	191,345	87,198	4,023,699	18,699	8,273	13,264,190	
Total SC Net Income	149,487,361	152,784,241	274,230,806	(18,459,425)	49,188,122	61,416 444	20,095 992	55,071,022	79,156,099	
Less: SC net operating loss carryover	0	0	(18,459,425)	0	0	0	0	0	0	
Less: Allowable Contributions	0	0	0	0	(732,250)	0	0	(140,769)	(113,874)	
SC Net Income Subject to Tax	149,487,361	152,784 241	255,771,381	(18,459,425)	48,955,872	61,416,444	20 095 992	54,930,253	79,042,225	
Tax	8,969,242	9,167,054	15,346,283	-	2,937,352	3,684,987	1,205,760	3,295,814	4,742,533	
Less: Non-refundable credits	0			0	0	0	0	0	0	
TOTAL TAX AS CALCULATED	8,969,242	9,167,054	15,346,283	-	2,937,352	3,684,987	1,205,760	3,295 814	4,742,533	
Adjustment	781,499	1,428,974	2,838,186	0	448,151	430,468	207,220	819,442	475,565	
TOTAL TAX AS REPORTED	9,750,741	10,596,029	17,984,469	0	3,383,503	4,115,455	1,412,979	3,915,256	5,218,099	
Refund	(781,499)	(1,428,974)	(2,838,186)	-	(448,151)	(430,468)	(207,220)	(819,442)	(475,565)	(38,984,969)
Interest on Refund (through 12/31/02)										(47 983,001)
TOTAL REFUND DUE DUKE ENERGY	(781,499)	(1,428,974)	(2,838,186)	-	(448,151)	(430,468)	(207,220)	(819,442)	(475,565)	(84,968,970)
Tax Rate	6.00%	6.00%	6.00%	6.00%	6.00%	6.00%	6.00%	6.00%	6.00%	

Consolidated SC Returns were filed for 1998 - 2001

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DE00009624

Duke Energy Corp
Summary of SC Refunds
Pwc

	2001	2000	1999	1998	1997	1996	1995	1994	1993	1992	1991	1990	1989	1988	1987
Federal Taxable Income per Federal Form 1120							984,707,531	621,732,766	792,623,257	831,940,828	542,320,893	555,468,874	519,967,538	554,433,594	648,559,980
Total Net Income as Reconciled	648,107,901	888,978,801	1,388,424,529	1,378,373,813	913,949,040	1,160,104,681	1,057,278,026	630,545,290	822,645,700	812,834,284	517,524,028	544,003,484	578,174,426	578,560,224	692,140,786
Less. Income subject to direct allocation	(1,831,350)	(3,894,274)	(19,957,847)	(2,877,337)	2,099,828	(1,399,715)	2,808,352	2,312,429	(10,953,456)	(315,000)	(4,250,936)	(193,184)	(587,875)	(385,187)	(181,810)
Total Net Income Subject to Apportionment	644,276,551	885,084,527	1,368,466,682	1,373,496,476	916,048,868	1,158,704,946	1,060,086,378	641,857,719	811,692,332	812,519,375	513,273,092	543,810,320	577,586,551	578,175,037	691,949,173
SC Apportionment Ratio	19.5316%	22.2408%	22.1907%	23.0758%	26.8377%	24.0117%	27.2665%	28.2002%	28.0907%	28.3676%	30.9480%	32.5522%	32.2961%	29.8420%	29.1568%
Income Apportioned to SC (combined 1998-01)	125,837,519	196,849,879	303,226,917	316,944,682	238,883,800	278,224,207	289,069,785	181,005,100	228,009,774	173,881,128	158,844,835	177,022,121	186,537,777	171,947,014	201,750,385
Add: Income subject to direct allocation to SC	132,893	119,766	1,269,985	401,196	(4,409,645)	(234,619)	(489,327)	(369,925)	10,676,721	10,861	84,827	11,222	26,463	-	28,188
Total SC Net Income	125,970,412	196,969,645	304,496,902	317,345,858	232,275,955	277,989,588	288,600,458	180,635,175	238,686,495	173,891,989	158,929,662	177,033,343	186,564,240	171,947,014	201,778,551
Less: SC net operating loss carryover	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Less: Allowable Contributions							0	0	0	0	0	0	0	0	0
SC Net Income Subject to Tax	125,970,412	196,969,645	304,496,902	317,345,858	232,275,955	277,989,588	288,600,458	180,635,175	238,686,495	173,891,989	158,929,662	177,033,343	186,564,240	171,947,014	201,778,551
Tax	6,298,521	9,848,482	15,224,945	15,867,293	11,613,798	13,899,479	14,430,023	9,030,759	11,944,425	8,694,599	7,946,483	8,851,667	9,328,212	9,457,086	12,106,713
Less: Non-refundable credits	0	0	0	0	0	0	536,073	422,400	480,000	300,800	136,800	203,400	175,500	0	0
TOTAL TAX AS CALCULATED	6,298,521	9,848,482	15,224,945	15,867,293	11,613,798	13,899,479	13,893,950	8,608,359	11,464,425	8,393,999	7,809,683	8,648,267	9,152,712	9,457,086	12,106,713
Adjustment															
TOTAL TAX AS REPORTED	6,298,521	9,848,482	19,981,596	20,954,096	13,501,645	17,846,751	16,257,141	10,018,748	13,620,497	10,138,184	8,472,220	8,821,657	9,481,049	10,607,817	13,813,191
Refund			(4,756,651)	(5,086,803)	(1,887,847)	(3,947,272)	(2,363,191)	(1,410,389)	(2,156,072)	(1,742,185)	(662,537)	(173,389)	(328,337)	(1,150,732)	(1,706,478)
Interest on Refund (through 12/31/02)															
TOTAL REFUND DUE DUKE ENERGY			(4,756,651)	(5,086,803)	(1,887,847)	(3,947,272)	(2,363,191)	(1,410,389)	(2,156,072)	(1,742,185)	(662,537)	(173,589)	(328,337)	(1,150,732)	(1,706,478)
Tax Rate	5.00%	5.00%	5.00%	5.00%	5.00%	5.00%	5.00%	5.00%	5.00%	5.00%	5.00%	5.00%	5.00%	5.50%	6.00%

Duke Energy Corp
Summary of SC Refunds
Pwc and D&T

	2001	2000	1999	1998	1997	1996	1995	1994	1993	1992	1991	1990	1989	1988	1987
Federal Taxable Income per Federal Form 1120							984,707,531	621,732,766	792,623,257	831,940,828	542,320,893	555,468,874	519,967,538	554,433,594	648,559,980
Total Net Income as Reconciled	648,107,901	888,978,801	1,388,424,529	1,378,373,813	913,949,040	1,160,104,681	1,057,278,026	630,545,290	822,645,700	812,834,284	517,524,028	544,003,484	578,174,426	578,560,224	692,140,786
Less. Income subject to direct allocation	(1,831,350)	(3,894,274)	(19,957,847)	(2,877,337)	2,099,828	(1,399,715)	2,808,352	2,312,429	(10,953,456)	(315,000)	(4,250,936)	(193,184)	(587,875)	(385,187)	(181,810)
Total Net Income Subject to Apportionment	644,276,551	885,084,527	1,368,466,682	1,373,496,476	916,048,868	1,158,704,946	1,060,086,378	641,857,719	811,692,332	812,519,375	513,273,092	543,810,320	577,586,551	578,175,037	691,949,173
SC Apportionment Ratio	5.3552%	9.0308%	11.1506%	12.0533%	18.8719%	14.1199%	18.7572%	15.4252%	12.8465%	12.7581%	21.9425%	28.1054%	29.7143%	19.2584%	18.1157%
Income Apportioned to SC (combined 1998-01)	34,502,466	79,926,712	152,569,340	185,561,062	171,043,869	163,603,985	209,443,118	99,007,654	104,274,015	78,023,275	112,672,759	152,840,204	154,296,323	110,982,093	125,351,436
Add: Income subject to direct allocation to SC	132,893	119,763	1,269,985	401,196	(4,409,645)	(234,619)	(489,327)	(369,925)	10,676,721	10,861	84,827	11,222	26,463	-	28,188
Total SC Net Income	34,635,359	80,046,476	153,839,325	185,962,258	166,634,024	163,369,366	208,973,791	98,617,729	115,152,736	78,034,136	112,707,586	152,851,526	154,324,786	110,982,093	125,379,602
Less: SC net operating loss carryover	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Less: Allowable Contributions							0	0	0	0	0	0	0	0	0
SC Net Income Subject to Tax	34,635,359	80,046,476	153,839,325	185,962,258	166,634,024	163,369,366	208,973,791	98,617,729	115,152,736	78,034,136	112,707,586	152,851,526	154,324,786	110,982,093	125,379,602
Tax	1,731,768	4,002,424	7,681,966	8,297,613	8,331,701	8,168,468	10,448,690	4,930,886	5,757,637	3,901,707	5,635,379	7,642,576	7,716,239	6,102,915	7,522,778
Less: Non-refundable credits	0	0	0	0	0	0	536,073	422,400	480,000	300,600	136,800	203,400	175,500	0	0
TOTAL TAX AS CALCULATED	1,731,768	4,002,424	7,681,966	8,297,613	8,331,701	8,168,468	9,912,617	4,508,486	5,277,637	3,601,107	5,498,579	7,439,176	7,540,739	6,102,915	7,522,778
Adjustment															
TOTAL TAX AS REPORTED	6,298,521	9,848,482	19,981,596	20,954,096	13,501,645	17,846,751	16,257,141	10,018,748	13,620,497	10,138,184	8,472,220	8,821,657	9,481,049	10,607,817	13,813,191
Refund	(4,566,753)	(5,848,058)	(12,299,630)	(12,868,483)	(5,169,944)	(9,678,283)	(8,344,524)	(5,510,261)	(8,342,860)	(6,535,077)	(2,973,641)	(1,382,680)	(1,940,309)	(4,504,902)	(6,290,414)
Interest on Refund (through 12/31/02)															
TOTAL REFUND DUE DUKE ENERGY	(4,566,753)	(5,848,058)	(12,299,630)	(12,868,483)	(5,169,944)	(9,678,283)	(8,344,524)	(5,510,261)	(8,342,860)	(6,535,077)	(2,973,641)	(1,382,680)	(1,940,309)	(4,504,902)	(6,290,414)
Tax Rate	5.00%	5.00%	5.00%	5.00%	5.00%	5.00%	5.00%	5.00%	5.00%	5.00%	5.00%	5.00%	5.00%	5.50%	6.00%

Consolidated SC Returns were filed for 1998 - 2001 Only Duke Energy Corp's numbers changed

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DE00009625

Duke Energy Corp
Summary of SC Refunds
Pwc

	1986	1985	1984	1983	1982	1981	1980	1979	1978	
Federal Taxable Income per Federal Form 1120	482,398,556	520,431,722	826,583,978	(71,825,958)	213,696,512	189,539,232	122,798,737	182,404,940	203,752,611	
Total Net Income as Reconciled	493,678,084	568,613,466	933,156,772	(83,565,953)	171,671,444	200,844,723	67,504,522	182,404,940	232,993,127	
Less: Income subject to direct allocation	(945,793)	27,729,770	(8,247,863)	(9,221,027)	(2,365,124)	(13,818,288)	(722,180)	2,481,081	(14,508,511)	
Total Net Income Subject to Apportionment	492,830,271	616,343,236	924,908,889	(66,787,680)	189,308,320	188,826,435	66,782,332	184,886,001	218,484,616	
SC Apportionment Ratio	28.2517%	29.3732%	28.6520%	32.0067%	29.3511%	30.2663%	31.0334%	31.2038%	29.5757%	
Income Apportioned to SC (combined 1998-01)	139,232,975	181,039,891	265,005,005	(21,376,803)	49,693,201	58,545,485	20,724,828	57,691,160	64,609,556	
Add Income subject to direct allocation to SC	16,348	(29,979,258)	5,632,235	191,345	67,198	4,023,699	18,899	8,273	13,264,190	
Total SC Net Income	139,249,323	151,060,605	270,637,240	(21,185,258)	49,760,399	60,569,184	20,743,727	57,699,423	77,873,745	
Less: SC net operating loss carryover	0	0	(21,185,258)	0	0	0	0	0	0	
Less: Allowable Contributions	0	0	0	0	(232,250)	0	0	(140,760)	(113,874)	
SC Net Income Subject to Tax	139,249,323	151,060,605	249,451,981	(21,185,258)	49,528,149	60,569,184	20,743,727	57,558,634	77,759,871	
Tax	8,354,959	9,063,636	14,967,119	-	2,971,689	3,634,151	1,244,624	3,453,518	4,665,592	
Less: Non-refundable credits	0			0	0	0	0	0	0	
TOTAL TAX AS CALCULATED	8,354,959	9,063,636	14,967,119	-	2,971,689	3,634,151	1,244,624	3,453,518	4,665,592	
Adjustment										
TOTAL TAX AS REPORTED	9,750,741	10,596,029	17,984,469	0	3,383,503	4,115,455	1,412,979	3,915,259	5,218,099	
Refund	(1,395,781)	(1,532,392)	(3,017,350)	-	(411,814)	(481,304)	(168,356)	(461,738)	(552,507)	(35,403,324)
Interest on Refund (through 12/31/02)										(53,305,733)
TOTAL REFUND DUE DUKE ENERGY	(1,395,781)	(1,532,392)	(3,017,350)	-	(411,814)	(481,304)	(168,356)	(461,738)	(552,507)	(88,709,056)
Tax Rate	6.00%	6.00%	6.00%	6.00%	6.00%	6.00%	6.00%	6.00%	6.00%	

Duke Energy Corp
Summary of SC Refunds
Pwc and D&T

	1986	1985	1984	1983	1982	1981	1980	1979	1978	
Federal Taxable Income per Federal Form 1120	482,398,556	520,431,722	826,583,978	(71,825,958)	213,696,512	189,539,232	122,798,737	-	203,752,611	
Total Net Income as Reconciled	493,678,084	568,613,466	933,156,772	(83,565,953)	171,671,444	200,844,723	67,504,522	182,404,940	232,993,127	
Less: Income subject to direct allocation	(945,793)	27,729,770	(8,247,863)	(9,221,027)	(2,365,124)	(13,818,288)	(722,180)	2,481,081	(14,508,511)	
Total Net Income Subject to Apportionment	492,830,271	616,343,236	924,908,889	(66,787,680)	189,308,320	188,826,435	66,782,332	184,886,001	218,484,616	
SC Apportionment Ratio	16.1675%	17.2210%	11.8848%	16.2178%	18.8494%	17.8407%	17.4595%	17.2959%	17.5171%	
Income Apportioned to SC (combined 1998-01)	79,679,613	106,140,469	109,923,572	(10,831,525)	35,527,099	33,331,144	11,659,851	31,977,698	38,268,014	
Add Income subject to direct allocation to SC	16,348	(29,979,258)	5,632,235	191,345	67,198	4,023,699	18,899	8,273	13,264,190	
Total SC Net Income	79,696,161	76,161,163	115,555,807	(10,640,180)	35,594,297	37,354,843	11,678,750	31,985,971	51,531,104	
Less: SC net operating loss carryover	0	0	(10,640,180)	0	0	0	0	0	0	
Less: Allowable Contributions	0	0	0	0	(232,250)	0	0	(140,760)	(113,874)	
SC Net Income Subject to Tax	79,696,161	76,161,163	104,915,627	(10,640,180)	35,362,047	37,354,843	11,678,750	31,845,182	51,417,230	
Tax	4,781,770	4,569,671	6,294,938	-	1,701,723	2,241,291	700,725	1,910,711	3,085,034	
Less: Non-refundable credits	0			0	0	0	0	0	0	
TOTAL TAX AS CALCULATED	4,781,770	4,569,671	6,294,938	-	1,701,723	2,241,291	700,725	1,910,711	3,085,034	
Adjustment										
TOTAL TAX AS REPORTED	9,750,741	10,596,029	17,984,469	0	3,383,503	4,115,455	1,412,979	3,915,259	5,218,099	
Refund	(4,968,971)	(8,026,358)	(11,689,532)	-	(1,681,780)	(1,874,164)	(712,254)	(2,004,545)	(2,133,065)	(125,142,480)
Interest on Refund (through 12/31/02)										(200,263,573)
TOTAL REFUND DUE DUKE ENERGY	(4,968,971)	(8,026,358)	(11,689,532)	-	(1,681,780)	(1,874,164)	(712,254)	(2,004,545)	(2,133,065)	(325,406,052)
Tax Rate	6.00%	6.00%	6.00%	6.00%	6.00%	6.00%	6.00%	6.00%	6.00%	

Consolidated SC Returns were filed for 1998 - 2001

EXHIBIT G

STATE OF SOUTH CAROLINA

ADMINISTRATIVE LAW COURT

Duke Energy Corporation, Petitioner, vs. South Carolina Department of Revenue, Respondent.	Docket No. 10-ALJ-17-0270-CC

D E P O S I T I O N

WITNESS: SHERWOOD LEE LOVE

DATE: Tuesday, November 22, 2011

TIME: 10:37 a.m.

LOCATION: Nexsen Pruet, LLC
227 West Trade Street, Suite 1550
Charlotte, North Carolina

TAKEN BY: Attorneys for the Respondent

REPORTED BY: NANCY J. MARTIN, CSR, RPR

- -

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of the affidavit. I believe it says, "When conditions allowed, negotiated investment rates." What does "when conditions allowed" mean?

A. When you're making -- when you have excess funds to invest, we worked with several different investment firms to find out what investment products, what securities, short-term securities to invest our cash in. Depending on the market on any given day, there might be a substantial value of those securities available for investment.

On those days, any time you contact an investment dealer, they indicate what's available and what the interest rate would be and what the terms would be. If the value of that particular product was somewhat significant, we might declare an interest in the product, but only if we could get an extra basis point, or three, better than they were offering.

There might be other days that the volume of that product appeared to be somewhat limited. We were interested in the product. So there wouldn't be the opportunity to bargain, so to speak, the interest rate.

Q. Okay. So is it correct that the short-term liquidity group dealt with investments, short-term investments that Duke Energy would purchase, but also,

Do you know if this is referencing the securities transactions conducted by the cash management group?

A. I believe it included the funds raised through the sale of commercial paper. But I believe it also included sales of longer term securities and -- as well as any stock, preferred or common, that might have been issued.

Q. Did you -- as part of the cash management group, did you assist -- strike that.

As part of the cash management group, did you provide reports projecting how much interest and investment income cash management group would earn during a quarter or a year? Did you ever project those amounts?

A. I don't recall that we did.

Q. In Paragraph 13 of your affidavit you indicated that the cash management group "invested in various short-term marketable securities including municipal bonds, loan repurchase agreements, and commercial paper"; is that correct?

A. Yes.

Q. What are "loan repurchase agreements"?

A. They're commonly called repos. These are where, in most cases, you make an overnight investment through a financial institution and that investment is

secured by, typically, U.S. government and agency securities to secure that investment, typically overnight.

Q. And municipal bonds are just bond obligations issued by municipalities?

A. Correct.

Q. And we have discussed commercial paper before. Did you invest in any other type of short-term marketable securities?

A. I believe we may have from time to time invested in U.S. Treasury and agency securities directly.

Q. Did you ever invest in corporate stocks?

A. No.

Q. In Paragraph 22 of your affidavit, you indicated that "Cash Management Group makes investment decisions in accordance with established investment guidelines approved by Board's Finance and Risk Management Committee, which defines the type, term and ratings of permitted investment securities." Do these guidelines, do they change much during the time you were over the cash management group?

A. No.

Q. What did they require of the cash management group as far as -- in other words, the type, term and

Energy -- were its financial statements on an annual basis? In other words, was it fiscal year January 1 to December 31?

A. Yes.

Q. So at the end of the year, I would presume there would be some amount of cash, at least short-term marketable securities outstanding at the end of the year?

A. Correct.

Q. How would those be reported on the balance sheet?

A. I believe it's short-term borrower.

Q. And is that the same for the municipal bonds? It would all be shown as short-term borrower?

A. Municipal bonds would be investments.

Q. Okay. And you would show that as short-term investments?

A. I believe so.

Q. Okay. I think you said in Paragraph 14 of your affidavit that "all transactions were conducted, and all investment accounts located, outside of South Carolina"; is that correct?

A. Yes.

Q. Let me break that down a little bit. Where were the transactions conducted? It says, "outside of

South Carolina" but what state, what area were they conducted?

A. I'm sorry. Which paragraph?

Q. Paragraph 14.

A. Well, on our -- again, our short-term borrowings, we had an issuing and paying agent. Our issuing and paying agent was a New York bank. So, again, all of the transactions and settlements on both borrowings and paying off of maturities flowed through that financial institution.

With regard to our investments, we again used a New York bank as our main cash bank to concentrate the flow of funds through so as we made investments, we would initiate wire transfers out of that New York bank. Maturities of those investments would come back into that same account.

Q. And you would -- is it correct you would wire transfer the money to your investment agent or broker?

A. Correct.

Q. Who decided what the excess money should be invested in?

A. Members of our team.

Q. Okay. So did you -- for instance, let's say you determined you had 10 million excess cash on one day. Did you decide what that 10 million should be

invested in?

A. No.

Q. You just decided there was 10 million in excess cash?

A. Within cash management, we decided it was 10 million.

Q. Right. It was 10 million.

A. And then we decided what it would be invested in.

Q. And you decided what it would be invested in too?

A. Yeah.

Q. Okay.

A. You're saying, "you," and I'm saying, "we."

Q. I'm sorry. I apologize. I was trying to use "you" as cash management, not you individually.

A. I understand.

Q. Thank you for clearing it up because I'm certainly not purposely trying to be unclear. Okay. So cash management group would decide what investment to make, and then it would wire transfer the excess cash to your investment broker who would then execute that investment?

A. In effect, yes.

Q. Okay. You say, "in effect." Tell me where I

may be wrong.

A. Well, we would make the investment decision sometime in the a.m. Those funds might not be wire transferred until sometime in the p.m.

Q. Did the cash management group always make the decision of what to invest in?

A. Yes.

Q. And that was based upon the investment guidelines?

A. Correct.

Q. When the short-term investments were sold or redeemed, what happened to the money once it came back into the investment agent?

A. Those funds were used to meet our obligations for the day.

Q. Would the investment agent wire transfer the funds back to the cash management group?

A. They would be wire transferred into one of our corporate accounts.

Q. You said the cash management group always made the decision of what to invest in?

A. Correct.

Q. Was that always done by -- was it ever done by computer modeling, or was it always done by people within the group making the decision?

A. People within the group.

Q. And these investment transactions were always placed by investment agents outside of North Carolina and South Carolina?

A. Most were -- almost all -- I'd say most were placed outside of the Carolinas.

Q. And I think you said in Paragraph 14 "all transactions were conducted outside of South Carolina"?

A. Correct.

Q. So most of them were outside of North Carolina, and all of them were outside of South Carolina?

A. Correct.

Q. You said in Paragraph 11 of your affidavit that cash management group was also responsible for funding or managing cash "from significant transaction settlements." Would you define what you meant by "significant transaction settlements"?

A. Significant transaction settlements could be the maturity of a long-term bond issue. It could be significant coal payments. Significant payments on equipment associated with new or replacement generation transmission distribution facilities. Nuclear fuel payments, dividend payments, payroll.

"PRINCIPAL, $14,982,900." Do you see where I'm referencing?

A. Yes.

Q. Is that the same 14.9 million plus investment we were discussing earlier?

A. I believe it is.

Q. Okay. And a little bit over there is a column that has number of days. That appears to be the number of days the investment was outstanding; is that correct?

A. I believe that's correct.

Q. And it looks like these range from 1 day outstanding to 21 days outstanding?

A. Correct.

Q. In your experience, is that fairly typical for the times that investments like these were outstanding?

A. I believe so.

Q. Were investments like these typically -- strike that.

Did Duke Energy typically leave investments like this outstanding for more than 30 days?

A. Typically, no.

Q. It was typically less than 30 days?

A. Correct.

those typically result in interest income or a gain? I guess what I'm asking is do you ever suffer a loss on these investments?

A. It results in a gain.

Q. Do you ever suffer a loss on these investments?

A. I don't recall that we did.

Q. Do you know what happened with any of these investments, I guess, during the -- I guess I'll generically refer to it as the market crash in 2008? Do you know what -- if the cash management group had any problems recovering gains or returns on its investments during that period of time?

A. I don't know.

MR. GREEN: Okay. Why don't you let us take a little break now. Let us go talk, and we'll come back in just a few minutes.

THE WITNESS: All right. Sounds good.

(A recess was taken from 12:58 p.m. to 1:02 p.m.)

BY MR. GREEN:

Q. I think you said earlier in the deposition, I believe you said that you did not know really anything about the tax reporting of the investment activities of your group; is that correct?

EXHIBIT H

ATTACHMENT 1

Code 1976 § 12-54-80
CODE OF LAWS OF SOUTH CAROLINA 1976 ANNOTATED
TITLE 12. TAXATION
CHAPTER 54
ARTICLE 1. UNIFORM METHOD OF COLLECTION AND ENFORCEMENT OF TAXES LEVIED AND ASSESSED BY SOUTH CAROLINA TAX COMMISSION

§ 12-54-80. Time within which amount of tax due must be determined and assessed.

Except as otherwise provided in this section, the amount of taxes due on any return which has been filed as required by provisions of law administered by the Commission must be determined and assessed within thirty-six months from the date the return was filed or due to be filed, whichever occurs later.

If, before the expiration of the time prescribed in this section for the mailing of a notice of any assessment, the taxpayer has consented in writing to the mailing of the notice after the time, notice of assessment may be mailed at any time prior to the expiration of the period agreed upon. The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon.

(1) When a fraudulent return with the intent to evade tax has been filed, or in the case of failure to file a return, the tax may be assessed and collected and suit or proceedings for the collection of the tax may begin at any time.

(2) In the case of any tax administered by the Commission, if the taxpayer omits twenty-five percent of gross income, sales price, gross receipts, gross proceeds of sale, or gross estate properly includable therein on any tax return due to be filed under provisions of law administered by the Commission, the tax may be assessed within six years after the return was filed.

HISTORY: 1985 Act No. 201, Part II, § 32A, eff September 1, 1985.

HISTORICAL NOTES

EDITOR'S NOTE--

This section is comparable to provisions appearing in former Section 12-35-1370.

ANNOTATIONS

CASE NOTES

Section 12-54-80 would not be applied retroactively to validate an assessment which was untimely under § 12-35-1370. South Carolina Nat. Bank v South Carolina Tax Com. (1989) 297 SC 279, 376 SE2d 512C.

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ATTACHMENT 2

Code 1976 § 12-54-80
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§ 12-54-80. Time within which amount of tax due must be determined and assessed.

Except as otherwise provided in this section, the amount of taxes due on a return which has been filed as required by provisions of law administered by the commission must be determined and assessed within thirty-six months from the date the return was filed or due to be filed, whichever occurs later. In the case of income taxes, the commission may determine and assess income taxes after the thirty-six months limitation if it makes the determination and assessment within one hundred eighty days of receiving notice from the Internal Revenue Service of a final determination of an income adjustment made by the Internal Revenue Service.

If, before the expiration of the time prescribed in this section for the mailing of a notice of any assessment, the taxpayer has consented in writing to the mailing of the notice after the time, notice of assessment may be mailed at any time prior to the expiration of the period agreed upon. The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon.

(1) When a fraudulent return with the intent to evade tax has been filed, or in the case of failure to file a return, the tax may be assessed and collected and suit or proceedings for the collection of the tax may begin at any time.

(2) In the case of any tax administered by the commission, if the taxpayer omits at least twenty-five percent of gross amount stated in any tax return or document (for example, gross proceeds of sales, sales price, gross receipts, gross income, gross kilowatt hours, appraised value, gross capitalized cost, and similar factors) under provisions of law administered by the commission, the tax may be assessed within six years after the return was filed.

HISTORY: 1985 Act No. 201, Part II, § 32A, eff September 1, 1985; 1991 Act No. 109, § 5, eff May 30, 1991; 1991 Act No. 171, Part II, § 5, eff June 12, 1991; 1992 Act No. 361, § 26, eff May 4, 1992.

HISTORICAL NOTES

EDITORS NOTES:

This section is comparable to provisions appearing in former § 12-35-1370.

The 1991 amendment by Act Nos. 109 and 171, in the first paragraph, added the last sentence, relative to income taxes.

The 1992 amendment rewrote item (2) of the second paragraph.

REFERENCES

CROSS REFERENCES

This section inapplicable to certain provisions governing fee in lieu of taxes, see § 4-29-67.

ANNOTATIONS

CASE NOTES

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Section 12-54-80 would not be applied retroactively to validate an assessment which was untimely under § 12-35-1370. South Carolina Nat. Bank v South Carolina Tax Com. (1989) 297 SC 279, 376 SE2d 512.

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ATTACHMENT 3

Code 1976 § 12-54-80
CODE OF LAWS OF SOUTH CAROLINA 1976 ANNOTATED
TITLE 12. TAXATION
CHAPTER 54. UNIFORM METHOD OF COLLECTION AND ENFORCEMENT OF TAXES LEVIED AND ASSESSED BY SOUTH CAROLINA TAX COMMISSION
ARTICLE 1. UNIFORM METHOD OF COLLECTION AND ENFORCEMENT OF TAXES LEVIED AND ASSESSED BY SOUTH CAROLINA TAX COMMISSION

§ 12-54-80. (Repealed)

HISTORY: [1985 Act No. 201, Part II, § 32A, eff September 1, 1985; 1991 Act No. 109, § 5, eff May 30, 1991; 1991 Act No. 171, Part II, § 5, eff June 12, 1991; 1992 Act No. 361, § 26, eff May 4, 1992] Repealed by 1995 Act No. 60, § 4I, eff Aug 1, 1995.

EDITOR'S NOTE

This section is comparable to provisions appearing in former § 12-35-1370.

Former § 12-54-80 was entitled: Time within which amount of tax due must be determined and assessed.

CASE NOTES

Section 12-54-80 would not be applied retroactively to validate an assessment which was untimely under § 12-35-1370. South Carolina Nat. Bank v South Carolina Tax Com. (1989) 297 SC 279, 376 SE2d 512.

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EXHIBIT I

ATTACHMENT 1

Code 1976 § 12-54-30
CODE OF LAWS OF SOUTH CAROLINA 1976 ANNOTATED
TITLE 12. TAXATION
CHAPTER 54. UNIFORM METHOD OF COLLECTION AND ENFORCEMENT OF TAXES LEVIED AND ASSESSED BY SOUTH CAROLINA TAX COMMISSION
ARTICLE 1. UNIFORM METHOD OF COLLECTION AND ENFORCEMENT OF TAXES LEVIED AND ASSESSED BY SOUTH CAROLINA TAX COMMISSION

§ 12-54-30. Refund or credit in event of overpayment; interest on amount of credit or refund.

If the commission discovers on examination of a return or otherwise that the tax, penalty, or interest paid by any person is in excess of the amount legally due, the commission may order a refund or give credit for the overpayment. Upon the allowance of a credit or refund of any tax, penalty, or interest paid, interest is allowed and paid on the amount of the credit or refund at the rate provided for in Section 12-54-20 from the date the tax, penalty, or interest was paid to the date the order for refund or credit was issued. No interest may be paid on income tax refunds provided for under Sections 12-9-380 and 12-7-1980 during the first seventy-five days following the due date for the filing of the return or the date the return was filed, whichever occurs later.

HISTORY: 1985 Act No. 201, Part II, § 32A, eff September 1, 1985; 1988 Act No. 660, § 2, eff January 1, 1989.

HISTORICAL NOTES

EDITORS NOTES:

This section is comparable to provisions appearing in former § 12-35-1340.

The 1988 amendment replaced "credit of refund" with "credit or refund", in the last sentence inserted "income tax" preceding "refunds", and replaced " § 12-9-380" with "Sections 12-9-380 and 12-7-1980".

REFERENCES

RESEARCH AND PRACTICE REFERENCES

72 Am Jur 2d, State and Local Taxation §§ 1059-1114.

84 CJS, Taxation §§ 630-632.

ANNOTATIONS

ATTORNEY GENERAL OPINIONS

1. [Reserved for future use]

2. Under former law

1. [Reserved for future use]

2. Under former law

The Tax Commission has the duty to examine a taxpayer's records to establish a sales or use tax payment before authorizing the refund thereof under § 83 of Act 644, Acts of 1978. 1979 Op Att'y Gen. No 79-46, p 63.

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ATTACHMENT 2

Code 1976 § 12-54-30
CODE OF LAWS OF SOUTH CAROLINA 1976 ANNOTATED
TITLE 12. TAXATION
CHAPTER 54. UNIFORM METHOD OF COLLECTION AND ENFORCEMENT OF TAXES LEVIED AND ASSESSED BY SOUTH CAROLINA TAX COMMISSION
ARTICLE 1. UNIFORM METHOD OF COLLECTION AND ENFORCEMENT OF TAXES LEVIED AND ASSESSED BY SOUTH CAROLINA TAX COMMISSION

§ 12-54-30. (Repealed)

HISTORY: [1985 Act No. 201, Part II, § 32A, eff September 1, 1985; 1988 Act No. 660, § 2, eff January 1, 1989] Repealed by 1995 Act No. 60, § 4I, eff Aug 1, 1995.

EDITOR'S NOTE

This section is comparable to provisions appearing in former § 12-35-1340.

Former § 12-54-30 was entitled: Refund or credit in event of overpayment; interest on amount of credit or refund.

Former § 12-54-30 was purportedly amended by 1995 Act No. 76, § 11, eff for taxable years beginning after 1995. However, this section had already been repealed by 1995 Act No. 60, § 4I, eff Aug 1, 1995.

ATTORNEY GENERAL'S OPINIONS

1. [Reserved for future use]

2. Under former law

The Tax Commission has the duty to examine a taxpayer's records to establish a sales or use tax payment before authorizing the refund thereof under § 83 of Act 644, Acts of 1978. 1979 Op Att'y Gen. No 79-46, p 63.

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EXHIBIT J

ATTACHMENT 1

1993 WL 403309 (S.C.Tax.Com.)

Tax Commission

State of South Carolina

IN RE: A FINDING CONCERNING THE FIDUCIARY
INCOME TAX LIABILITY OF THE ESTATE OF JOHN DOE

Commission Decision 93-1
January 4, 1993

***1 Income Tax**

FINDINGS OF FACT

John Doe died on May 14, 1986. His estate's South Carolina Fiduciary Income Tax Return was due on August 15, 1987. An extension request was filed on August 13, 1987, and the Fiduciary Income Tax Return was filed on August 4, 1988.

On August 2, 1991, the Estate, as a result of an audit, increasing the value of an estate asset, filed an amended South Carolina Fiduciary Income Tax Return. The amended return was due to the mathematical requirement of changing the basis in an asset sold so as to reflect the increased value on the Estate Tax Return. The Estate sought a refund of $00,000.00, plus interest of $0,000.00. The asset adjusted on the Estate Tax Return was the taxpayer's interest in his law partnership.

The refund resulting from the audit adjustment was requested under S.C.Code Ann. § 12–54–30 (Supp.1991). The refund was disallowed by the Office Services Division because they stated that it was not filed within three (3) years of the due date of the return.

CONCLUSIONS

Section 12–54–30 states the following:

> If the Commission discovers on examination of a return or otherwise that the tax, penalty, or interest paid by any person is in excess of the amount legally due, the commission may order a refund or give credit for the overpayment. Upon the allowance of a credit or refund of any tax, penalty, or interest paid, interest is allowed and paid on the amount of the credit or refund at the rate provided for in Section 12–54–20 from the date the tax, penalty, or interest was paid to the date the order for refund or credit was issued. No interest may be paid on income tax refunds provided for under Section 12–9–380 and 12–7–1980 during the first seventy-five days following the due date for the filing of the return or the date the return was filed, whichever occurs later.

In the instant matter, there is no disagreement that a mathematical correction in the basis is appropriate. Rather, the question is whether the refund claim is timely. The Office Services Division asserts that the refund claim must be filed within three years of the due date of the return. Thus, the return was due August 15, 1987 and a refund claim would have been proper only if filed by August 15, 1990. Here the refund claim was filed August 2, 1991 and under the Office Services Division's view, was almost one year too late.

The taxpayer takes a different view. The taxpayer asserts that since S.C.Code Ann. § 12–54–80 (Supp.1991) allows the Commission to assess taxes within thirty-six months from the date the return was filed or due to be filed, whichever occurs later, then the same time period should be allowed for filing a refund claim. Under this view, since the return was filed August 4, 1988, the time period for a refund claim would not expire until thirty-six months later on August 4, 1991. Since the refund claim was filed August 2, 1991, the refund claim, in the taxpayer's view, would be timely.

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*2 In short, the Office Services Division looks to a refund period of three years from the due date (August 15, 1987). The taxpayer looks to a refund period of three years from the filing date (August 4, 1988). If the Division is correct, there is no refund. If the taxpayer is correct, the refund is proper.

We believe the answer lies in determining the intent of the General Assembly, since the statute which grants the refund is silent as to the period of limitations. [1] We have held in property tax disputes under S.C.Code Ann. § 12–47–420 (1976) that where no statute of limitations is stated on a refund claim, it is proper to rely upon the general statute of limitations set by the General Assembly in S.C.Code Ann. § 15–3–530 (1991). Under that statute, the closest applicable limitation is that dealing with "an action upon a liability created by statute" found in § 15–3–530(2).

... In the absence of a specific applicable limitation, the general rule seems to be that the ordinary period of limitation applicable to "an action upon a liability created by statute" applies to an action for the collection of taxes and assessments, ... 53 C.J.S. Limitations of Actions § 83b, p. 1054 ...

State v. Life Insurance Company of Georgia, 175 S.E.2d 203 (1970).

Section 15–3–530(2) allows a three year period for bringing an action created upon a statutory liability. Under S.C.Code Ann. § 15–3–20 (1976), the three year period begins on the date the "cause of action shall have accrued." The cause of action accrues on the date upon which the legal wrong was committed. State v. Piedmont & N.R. Co., 186 S.C. 49, 194 S.E. 631 (1938). For purposes of an administrative matter, the legal wrong was committed on August 4, 1988 since it was on that date the taxpayer filed its return. At the filing date, the taxpayer first gave written evidence of its liability. Due to audit adjustments, the Estate later found it had misstated its liability. On August 2, 1991, it gave notice to the Tax Commission of its demand for a refund. This request date of August 2, 1991, was within three years of the date the "legal wrong was committed", i.e. August 4, 1988. Accordingly, we find the refund claim is timely and should be granted. .

AND IT IS SO FOUND AND ORDERED.

SOUTH CAROLINA TAX COMMISSION

A. Crawford Clarkson, Jr.
Chairman
T.R. McConnell
Commissioner
James M. Waddell, Jr.
Commissioner

Footnotes

1 While S.C.Code Ann. § 12–47–440's (1976) refund limitation has been applied to refunds of income tax under § 12–54–30 (see Commission Decision 88–162), it is now clear § 12–47–440 is unavailable for refunds of income tax. Bass v. State of South Carolina, 395 S.E.2d 171 (1990), and Bass v. State of South Carolina, 414 S.E.2d 110 (1992).

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ATTACHMENT 2

1991 WL 11666893 (S.C.Tax.Com.)

Tax Commission

State of South Carolina

SUBJECT: CLAIMS FOR REFUND (ALL TAXES OTHER THAN PROPERTY TAXES)

SC Revenue Ruling No. 91-10
May 29, 1991

*1 **MODIFIES AND SUPERCEDES:**

All previous documents and any oral directives in conflict herewith.

REFERENCES:

S.C. Code Ann. Section 12-47-440 (1976)

S.C. Code Ann. Section 12-54-30 (Supp. 1990)

AUTHORITY:

S.C. Code Ann. Section 12-3-170 (1976)

SC Revenue Procedure # 87-3

SCOPE:

A Revenue Ruling is the Commission's official interpretation of how tax law is to be applied to a specific set of facts. A Revenue Ruling is public information and remains a permanent document until superceded by a Regulation or rescinded by a subsequent Revenue Ruling.

Question:

Does a taxpayer have a right to a conference before the Commissioners in connection with a refund request?

Discussion:

Prior to answering the question presented, we must first determine the Commission's authority to issue refunds.

Code Section 12-54-30 provides:

> If the commission discovers on examination of a return or otherwise that the tax, penalty, or interest paid by any person is in excess of the amount legally due, the commission may order a refund or give credit for the overpayment. Upon the allowance of a credit or refund of any tax, penalty, or interest paid, interest is allowed and paid on the amount of the credit or refund at the rate provided for in Section 12-54-20 from the date the tax, penalty, or interest was paid to the date the order for refund or credit was issued. No interest may be paid on income tax refunds provided for under Sections 12-9-380 and 12-7-1980 during the first seventy-five days following the due date for the filing of the return or the date the return was filed, whichever occurs later.

This statute provides authority for the Commission to grant a refund of any taxes it believes have been paid in excess of what is legally due.

Code Section 12-47-440 provides:

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> Notwithstanding any other provisions of this Title, whenever it shall appear to any taxpayer that any license fee or tax imposed under this Title has been erroneously, improperly or illegally assessed, collected or otherwise paid over to the Commission, the taxpayer, by whom or on whose behalf the license fee or tax was paid, may make application to the Commission to abate or refund in whole or in part such license fee or tax. Should the Commission, after having given such taxpayer a reasonable opportunity to be heard, decline to make such abatement or refund, the taxpayer may, within thirty days of the date of receipt of notice of the Commission's action declining the abatement or refund, bring an action against the Commission for recovery of the license fee or tax. The provisions of this section shall apply whether or not the license fee or tax in question was paid under protest, but shall only be available where the application provided for here is made in writing to the Commission within a period of three years from the date the license fee or tax was due to have been paid, without regard to extensions of time for payment, or if a later date would result, within one year of payment where an additional license fee or tax is assessed and paid. Such action shall be brought in the court of common pleas for Richland County except that a resident of this State may elect to bring said action in the court of common pleas for the county of his residence. A taxpayer or licensee who brings an action provided for in Sections 12-47-210 and 12-47-220 shall be considered as having elected his remedy and is denied the benefits of this section.

*2 The South Carolina Supreme Court in Bass v. State of South Carolina, 395 S.E.2d 171 (1990), pet. for cert. filed October 24, 1990, held that Code Section 12-47-440 applies only to claims for refunds of license fees and license taxes and cannot be used to claim a refund of other taxes. The Commission will only issue refunds under Code Section 12-47-440 for license fees and license taxes.

Under Code Section 12-47-440, in the case of license fees or license taxes, a taxpayer may request a refund from the Commission. The Commission is required under this section to give the taxpayer reasonable opportunity to be heard. In order to provide the taxpayer with an opportunity to be heard, the Commissioners will grant a conference to a taxpayer whose claim for refund has been denied by one of the operating divisions of the commission. If, following a conference, the Commissioners refuse to issue a refund, the taxpayer may bring an action within thirty days against the commission for recovery of license fees or license taxes.

Under Section 12-54-30, the Commission may grant the refund or may hold a conference with the taxpayer to determine if a refund should be granted. It is the policy of the Commission to grant a conference before the Commissioners when a tax refund claim is initially denied provided the refund request is made in writing to the Commission within three years from the date the tax was due to have been paid, without regard to extensions of time for payment, or if a later date would result, within one year of payment where an additional tax is assessed and paid.

It should be noted that the statute does not grant the taxpayer the right to appeal to the court of common pleas a denial of a refund by the Commission pursuant to Code Section 12-54-30. See, Argent Lumber Co. v. Query, 178 S.C. 1, 182 S.E. 93 (1935).

Conclusion:

License Fees and License Taxes:

In the case of license fees and license taxes, a taxpayer is entitled to a conference before the Commissioners under Code Section 12-47-440 if a timely filed refund claim is denied by one of the Commission's operating divisions. If after the conference the Commissioners still deny the claim for refund, the taxpayer can bring an action in the court of common pleas for recovery of the license fee or license tax.

Other Taxes:

Under Code Section 12-54-30, the Commissioners will grant a conference to taxpayers whose tax refund claims have been denied by one of the Commission's operating divisions, provided the claim is filed with the Commission within the time period outlined in the discussion. There is no right to appeal the Commissioners' decision following a conference regarding a refund for taxes under Code Section 12-54-30.

Since there is no right to appeal the Commissioners' decision under Code Section 12-54-30, a taxpayer should review Code Sections 12-47-210 and 12-47-220 (payment under protest) before paying taxes, other than license fees and license taxes, which he deems to be erroneously, improperly or illegally assessed. Taxpayers should consult with their tax advisors before paying any tax with which they may disagree.

*3 For questions concerning this document, contact the Tax Policy Division at 737-4440.

S. Hunter Howard, Jr.
Chairman
A. Crawford Clarkson, Jr.
Commissioner

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ATTACHMENT 3

1989 WL 1109412 (S.C.Tax.Com.)

Tax Commission

State of South Carolina

SUBJECT: INCOME TAX REFUNDS - STATUTE OF LIMITATIONS PROVISION

SC Technical Advice Memorandum No. 89-3
DATE: January 4, 1989

*1 TO: Mr. William F. Bray, Director

Field Services Division

FROM: John Swearingen, Manager

Tax Policy and Procedures Department

REFERENCE:

S.C. Code Ann. Section 12-54-30 (1976 Supp.)

S.C. Code Ann. Section 12-47-410 (1976)

S.C. Code Ann. Section 12-47-440 (1976)

S.C. Code Ann. Section 12-7-2240 (1976)

AUTHORITY:

S.C. Code Ann. Section 12-3-170(1976)

SC Revenue Procedure # 87-3

SCOPE:

A Technical Advice Memorandum is a temporary document issued to an individual within the Commission, upon request, and it applies only to the specific facts or circumstances related in the request. Technical Advice Memoranda have no precedential value and are not intended for general distribution.

Question:

When a taxpayer advises that incorrect information was given by the S.C. Tax Commission through oral communication, may the limitations of S.C. Code Section 12-47-440 be waived to allow the taxpayer recovery of taxes erroneously paid more than three years ago?

Facts:

In October of 1981, Mr. and Mrs. Y moved from another state to South Carolina where they resided until June, 1987. During such time Mrs. Y, a retired school teacher, collected her annual pension from the the other State Teacher's Retirement Fund. Although such pension funds were not taxable in the other state, Mrs. Y allegedly contacted the South Carolina Tax Commission to ascertain whether such funds were considered taxable income in South Carolina.

Mrs. Y has stated that she was informed by a Tax Commission employee that her annual pension was considered taxable income in South Carolina. As a result, Mrs. Y included the pension funds as taxable income in her 1982 thru 1986 state tax returns.

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Mrs. Y states that she contacted the Tax Commission several times during 1982-1986 and was consistently given the same incorrect information upon which she relied.

After moving to another state and while preparing her 1987 tax return, Mrs. Y was informed by H that the Tax Commission's advice was incorrect and that her pension funds were not taxable income. Mrs. Y filed an amended return for the years 1984-1986 to recover the taxes "erroneously, improperly or illegally assessed, collected or otherwise paid over to the Commission." However, recovery of such taxes paid on pension funds for 1982 and 1983 is precluded by S.C. Code Section 12-47-440 which contains a three year statute of limitations provision.

Mrs. Y requests that the three year statute of limitations be waived since it was the Tax Commission's incorrect advice which caused her hardship. Mrs. Y claims that but for the Tax Commission's incorrect advice, she would not have paid taxes on her annual pension.

Discussion:

Title 12 of the S.C. Code contains several sections which provide for the recovery of taxes "erroneously, improperly or illegally assessed, collected or otherwise paid over to the Commission" by a taxpayer. A careful examination of these sections in conjunction with the prior findings of the Tax Commission indicates that the three year statute of limitations may not be waived as requested by Mrs. Y. The S.C. Tax Commission applied several of these sections in their June 30, 1988 finding which denied a refund requested by X Corp. (See, S.C. Tax Commission Findings of Fact, June 30, 1988).

*2 Like Mrs. Y, X Corp. sought to recover taxes "erroneously ... paid over to the Commission" more than three years prior to their request for a refund. X Corp. relied primarily upon the provisions of S.C. Code Section 12-7-2240, now superseded by S.C. Code Section 12-54-30 which provides:

> "If the Commission discovers on examination of a return or otherwise that the tax, penalty, or interest paid by any person is in excess of the amount legally due, the Commission may order a refund or give credit for the overpayment. Upon the allowance of a credit or refund of any tax, penalty, or interest paid, interest is allowed and paid on the amount of the credit or refund at the rate provided for in Section 12-54-20 from the date the tax, penalty, or interest was paid to the date the order for refund or credit was issued. No interest may be paid on refunds provided for under Section 12-9-380 during the first seventy-five days following the due date for the filing of the return or the date the return was filed, whichever occurs later."

Thus, S.C. Code Sections 12-7-2240 and 12-54-30 do not contain a statute of limitations provisions and would therefore support X Corp's. refund request.

The Tax Commission, however, cited S.C. Code Section 12-47-440 which provides:

> "Notwithstanding any other provisions of this Title, whenever it shall appear to any taxpayer that any license fee or tax imposed under this Title has been erroneously, improperly or illegally assessed, collected or otherwise paid over to the Commission, the taxpayer, by whom or on whose behalf the license fee or tax was paid, may make application to the Commission to abate or refund in whole or in part such license fee or tax. Should the Commission, after having given such taxpayer a reasonable opportunity to be heard, decline to make such abatement or refund, the taxpayer may, within thirty days of the date of receipt of notice of the Commission's action declining the abatement or refund, bring an action against the Commission for recovery of the license fee or tax. The provisions of this section shall apply whether or not the license fee or tax in question was paid under protest, but shall only be available where the application provided for here is made in writing to the Commission within a period of three years from the date the license fee or tax was due to have been paid, without regard to extensions of time for payment, or if a later date would result, within one year of payment where an additional license fee or tax is assessed and paid."

The Commissioners gave considerable weight to the statute of limitations provision and denied X Corp's. refund since their request was not filed within three years from the date the tax was due to be paid.

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X Corp. argued that S.C. Code Section 12-54-30 modified S.C. Code Section 12-47-440 and, as well, its statute of limitations provisions. Noting a difference between the requirements of the two sections, the Commissioners mitigated the difference through a well settled rule which holds that "all statutes relating to the same subject should be considered together and whenever possible, harmonized." Thus, when both sections were considered together, S.C. Code Section 12-47-440's statute of limitations provision was not modified by S.C. Code Section 12-54-30 and the provision was applied in its full force. S.C. Tax Commission Findings of Fact, June 30, 1988, p.2.

*3 The Commissioners were also quick to point out that,

"it would be illogical to find and conclude that the General Assembly intended the Tax Commission to have the power to grant refunds a three period from beyond the date of payment. A person, as a matter of right, may pursue a refund claim timely instituted under Section 12-47-440. Section 12-54-30 confers no greater rights. In our view, the limitation applies, otherwise there would be an irreconcilable conflict between the statutes and perhaps unequal treatment of the state's taxpayers." Id., at 3

Thus, the Commissioners held that a taxpayer's right to a refund and any limitations imposed upon that right are matters which rest in the powers of the General Assembly. Therefore, as with X Corp., Mrs. Y must be bound by the provisions of the statutes enacted by the General Assembly, for the Tax Commission does not have the power to infringe upon their authority or stated intentions. See also, S.C. Tax Commission Finding of Fact, April 1, 1988.

S.C. Code Section 12-47-410 may also be used as a vehicle for the recovery of taxes. This section provides:

> Whenever it shall appear to the satisfaction of the Commission that any tax has been erroneously, improperly or illegally assessed against any person within this State, the Commission may order any officer having authority to assess or collect taxes to abate the whole or any part of such taxes that may have been erroneously, improperly or illegally assessed.

However, the S.C. Supreme Court has held that the provision applies only to the rebate or refund of property taxes. See Columbia v. Glen Falls Ins. Co., 245 S.C. 119, 139 S.E. 2d 529 (1964); Vance v. S.C. Tax Commission, 249 S.C. 214, 153 S.E. 2d 841 (1967); and American Hardware Supply v. Whitmore, 278 S.C. 607, 300 S.E. 2d 289 (1983). Since the tax refund requested by Mrs. Y does not regard property taxes, S.C. Code Section 12-47-410 may not be relied upon.

Mrs. Y's request stresses that the Tax Commission supplied her with incorrect information on several different occasions. However, Mrs. Y's letter indicates that this advice was obtained from the Commission via the telephone. S.C. Code Section 12-3-170, however, provides in part:

> "... The Commission may, upon written application, determine in advance the tax effects of other transactions and the tax liability of taxpayers other than those referred to herein, and it may revoke or modify such advance ruling if the facts later should develop differently. The Commission may publish such of the above rulings as, in its discretion, may be of assistance in administering the laws of this state."

Thus, the language of the above section implies that the Commission may be held liable only for information given in response to a taxpayer's written application for such. Since the alleged information given by the Commission to Mrs. Y was not in response to a written application for such, the Commission may not be held liable.

*4 The fact that Mrs. Y relied to her detriment upon the Commission's apparent advice does not create a remedy for recovery under the doctrine of estoppel. The common law of South Carolina has long held the Tax Commission free from liability under the estoppel doctrine. See Heyward v. Tax Commission, 240 S.C. 347, 126 S.E. 2d 15 (1962) and Texaco v. Wasson, 269 S.C. 255, 237 S.E. 2d 75 (1977).

Conclusion:

Based upon the above discussion, Mrs. Y's request for recovery of taxes paid to the Tax Commission in 1982 and 1983 must be denied.

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ATTACHMENT 4

1995 WL 17817640 (S.C.Tax.Com.)

Tax Commission

State of South Carolina

SUBJECT: CLAIMS FOR REFUND AND CORRECTION OF ERRORS IN TAX YEARS BARRED BY THE STATUTE OF LIMITATIONS

SC Revenue Procedure No. 95-5 (Tax)

October 19, 1995

EFFECTIVE DATE: Applies to all periods open under the statute. Except Commission Decision # 93-1 is not superseded for claims filed prior to the amendment of Code Section 12-47-440 on June 29, 1994.

*1 **SUPERSEDES:**

SC Revenue Procedure # 89-1

SC Revenue Ruling # 89-9

SC Revenue Ruling # 91-10

Commission Decision # 93-1

Commission Decision # 92-75

Commission Decision # 91-33

Commission Decision # 90-17

Commission Decision # 88-257

All other previous documents and any oral directives in conflict herewith.

REFERENCES:

S. C. Code Section 12-60-470 (1995)

S. C. Code Section 12-60-2150 (1995)

S. C. Code Section 12-54-85 (1995)

AUTHORITY:

SC Code Section 12-4-320 (Supp. 1994)

SC Revenue Procedure # 94-1

SCOPE:

A Revenue Procedure is a statement which provides information of a procedural nature. It is valid and remains in effect until superseded or modified by a change in the statute or regulations or a subsequent court decision, Revenue Procedure or Revenue Ruling.

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INTRODUCTION

The South Carolina Code of Laws sets forth time limits within which the Department of Revenue must assess and collect taxes and within which taxpayers must file claims for refunds. In some instances, the taxpayer may benefit where the Department of Revenue does not act within the required time and in other instances, the taxpayer may be disadvantaged where he does not take action within the required time.

Although the statute of limitations is arbitrary and can cause hardships, its application is designed to be neutral. As noted by the Supreme Court in Rothensies v. Electric Storage Battery Co., 329 U.S. 296 (1946), the "statute of limitation is an almost indispensable element of fairness as well as of practical administration of income tax policy."

The purpose of this document is twofold. First, this document sets forth the Department of Revenue's authority for granting refunds. Second, this document briefly describes the remedies available to taxpayers and the Department of Revenue, where appropriate, that allow correction of errors that are barred by the statute of limitations.

The principles outlined in this document are intended to replace the principles in effect under Code Section 12-47-440 (the general statutory rule for filing a claim for refund prior to the repeal of Chapter 47 in 1995), Code Section 12-54-30 (repealed in 1995), SC Revenue Procedure # 89-1, SC Revenue Ruling # 89-9, SC Revenue Ruling # 91-10, CommissionDecisions # 93-1, # 92-75, # 91-33, # 90-17, # 88-257, and all other previous documents and any oral directives in conflict herewith.

GENERAL RULE FOR CLAIM FOR REFUND - CODE SECTION 12-54-85

Code Section 12-60-470 contains the general rule applicable to claims for refunds of taxes, other than property taxes. The section provides, in part:

*2 (A) A taxpayer may seek a refund of any state tax by filing a written claim for refund with the department. A claim for refund is timely filed if filed within the period specified in Section 12-54-85 even though the time for filing a protest under Section 12-60-450 has expired and no protest was filed.

Code Section 12-60-2150 contains the general rule applicable to claims for refunds of property taxes administered by the Department. The section provides, in part:

(A) Subject to the time limitations in Section 12-60-1750, [1] and within the time limitation of Section 12-54-85(F), a property taxpayer may seek a refund of property taxes paid and assessed by the department by filing a claim for refund with the department if it originally assessed the property or the taxpayer believes the property is exempt, other than from the homestead exemption, from property taxes.

Code Section 12-54-85, the general statutory rule for filing a claim for refund for all fees and all taxes administered and collected by the Department of Revenue, provides for the time periods within which to timely file a claim for refund. The section provides, in part:

(F)(1) Except as provided in subsection (D) [2] above, claims for credit or refund must be filed within three years of the time the return was filed, or two years from the date of payment, whichever is later. If no return was filed, a claim for refund must be filed within two years from the date of payment.

(2) If the claim was filed by the taxpayer during the three-year period prescribed in item (1), the amount of the credit or refund may not exceed the portion of the tax paid within the period, immediately preceding the filing of the claim, equal to three years plus the period of any extension of time for filing the return.

(3) If the claim was not filed within the three-year period, the amount of the credit or refund may not exceed the portion of the tax paid during the two years immediately preceding the filing of the claim.

(4) If no claim was filed, the credit or refund may not exceed the amount which would be allowable under items (2) or (3), as the case may be, as if a claim were filed on the date the credit or refund is allowed.

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ADDITIONAL AUTHORITY FOR CLAIM FOR REFUND OR CREDIT OF TAXES OTHER THAN PROPERTY TAXES

1. CODE SECTION 12-60-40(A)

Code Section 12-60-40(A) provides for the extension of the statute of limitations and reads:

The department and a taxpayer may agree to extend any time limitations or waive any requirements provided in Article 5 [State Revenue Appeals Procedure] or Article 9 [Property Tax Protest, Appeal, and Refund Procedure] of this chapter.

2. CODE SECTION 12-60-40(B)

Code Section 12-60-40(B) provides for time limitations to be suspensed and reads:

Time limitations provided under this chapter [Chapter 60 - The South Carolina Revenue Procedures Act] and Chapter 54 are suspended during a stay ordered by the Taxpayers Rights Advocate.

3. CODE SECTION 12-60-470(G)

*3 In addition to Code Sections 12-54-85 and 12-60-40, Code Section 12-60-470(G) also provides for a refund or credit of taxes, other than property taxes, administered by the Department of Revenue. The statute provides that:

Even if a taxpayer has not filed a claim for refund, if the department determines that money has been erroneously or illegally collected from a taxpayer or other person, the department, in its discretion, may, upon making a record in writing of its reasons, grant a refund to the taxpayer or other person.

This statute gives the Department the authority to grant a refund of any taxes, other than property taxes, it believes to have been paid in excess of what was due.

This provision was previously contained in Code Section 12-54-30 which was repealed in 1995. Under Code Section 12-54-30, a taxpayer was not entitled to a hearing; there was no appeal granted from an adverse decision; nor was there any reference to a statute of limitations. See ArgentLumber Co. v. Query, 178 SC 1, 182 S.E. 2d 93 (1935) where, in a similarly worded statute, the court determined that "under the terms of this act the tax commission is clothed with the power and authority to make such refunds for valid reasons, but no corresponding right is conferred upon the taxpayer to compel by suit the exercise of this authority; so that if such legislation enacted subsequent to the time of the payment of the taxes now sought to be recovered, should be held applicable, the petitioner has no legal right of redress under the specific terms of this section, for the recovery of taxes paid ...."

Therefore, a taxpayer filing a request for refund under Code Section 12-60-470(G), rather than under Code Section 12-54-85, should be aware that (1) he is not entitled to ahearing; (2) there is no appeal granted from an adverse decision; and, (3) there is no reference to a statute of limitations.

PRINCIPLES REPLACED

This revenue procedure replaces the principles set forth in SC Revenue Procedure # 89-1, SC Revenue Ruling # 89-9, SC Revenue Ruling # 91-10, CommissionDecisions # 93-1, # 92-75, # 91-33, # 90-17, # 88-257, and all other previous documents and any oral directives in conflict herewith.

EXCEPTIONS TO GENERAL RULE FOR CLAIM FOR REFUND FOR TAXES OTHER THAN PROPERTY TAXES

Refunds will be granted in accordance with Code Section 12-54-85. For taxes, other than property taxes, the Department will allow under Code Section 12-60-470(G) correction of errors that may otherwise be barred by the statute of limitations in the following circumstances:

1. If the taxpayer agrees to the Department of Revenue's request that a waiver of the period of statute of limitations on assessments be extended, then the time the Department may mail a notice of assessment pursuant to Code Section 12-54-85

will be extended. In so doing, the time within which a taxpayer may file a claim for refund will also be extended until the agreed upon date, however, if the Department's extension is limited in any way, such as to a particular issue, then the extension for a refund by a taxpayer will be limited in the same way. This exception only applies to effective extensions agreed to in writing by the Department.

*4 2. For sales and use tax purposes, if a retailer: (1) erroneously pays sales or use tax to the person from whom he purchases property, (2) subsequently sells the property to others, (3) erroneously fails to collect sales tax and, (4) is found liable for sales tax on his sales of the property when audited by the Department of Revenue, then the retailer will be allowed to use the sales or use tax he paid to the person from whom he purchased the property as a credit against the sales tax determined to be due upon audit. This exception will allow the Department to offset the sales or use tax paid up to the amount of the assessment; it will not result in a refund to the retailer. In applying this exception, the retailer must: (1) provide verification that taxes were paid, and (2) obtain a written assignment of rights to a refund of sales tax from the seller from whom the property was purchased for the entire examination period.

3. A corporation must file a claim for refund with the Department of Revenue within 30 days after a final determination is received from the Internal Revenue Service. For tax years beginning after 1990, the adjustment of income by the Internal Revenue Service upon audit extends the time the taxpayer, other than a corporation, may file a claim for refund with the Department of Revenue to 180 days after the date a final determination of adjustment is received from the Internal Revenue Service. These extensions apply only when it results from an audit by the Internal Revenue Service; they do not apply to refunds of overpayments reported on the taxpayer's original return, or when the taxpayer's refund was the result of a claim for refund filed with the Internal Revenue Service. (See Code Sections 12-54-85 and 12-54-140.)

4. After filing a timely claim for refund, the taxpayer discovers that a refund greater than the amount originally requested is due. The Department will consider such claims only if the adjustment is based upon issues raised in the timely filed claim for refund. No additional refund will be allowed if a taxpayer raises new issues after the statute of limitations has expired.

5. Setoff, the doctrine of equitable recoupment, or the mitigation provisions provided in Internal Revenue Code Sections 1311 - 1314 apply to the situation, as briefly described below.

NOTE: The Department will not allow correction of errors that are otherwise barred by the statute of limitations for any other reasons including the following:

1. A mistake is made calculating the expiration date of the statute of limitations.

2. A taxpayer failed to file a timely claim for refund when another state assessed a tax on the same income taxed in South Carolina. Taxpayers in situations where it is undetermined which state is due the tax should file a protective claim with the South Carolina Department of Revenue while the statute of limitations is open. The protective claim should include the time period and issues involved, even if specific dollar amounts are not known.

SETOFF

*5 In general, setoff permits all items involving the same tax and the same taxable period to be considered for adjustment in determining whether there has been an overpayment or underpayment of tax. Setoff does not permit recovery of an underpayment or overpayment in and of itself, instead it operates to decrease the recovery claimed by the other party.

Setoff may be used by the Department of Revenue to reduce or eliminate a refund claimed by a taxpayer. For example, a taxpayer files a claim for refund for erroneously paid tax. Although the statute of limitations on assessments is closed, the Department of Revenue is permitted to review the return for other errors. Setoff allows the Department to reduce the amount of the taxpayer's claim for refund by the amount of any error, the correction of which would result in additional tax being due. The refund may be reduced to zero, however, the Department may not make an additional assessment.

Setoff is also available as a remedy to taxpayers. For example, a taxpayer under audit is subject to a longer statute of limitations on assessments under Code Section 12-54-85(C). The taxpayer discovers an error, the correction of which would result in a

refund, forthe period under audit. Since the statute of limitations on claims for refund has expired, the taxpayer cannot obtain a refund. Setoff may be used by the taxpayer to setoff the potential refund amount against the amount of an assessment by the Department. The assessment may be reduced to zero, however, the taxpayer may not receive a refund.

For an interpretation of setoff by the courts see, Lewis v. Reynolds, 284 U.S. 281 (1932).

The following general principles are applicable to the doctrine of setoff:

1. The claim arises from the same tax.

2. The claim arises from the same taxpayer.

3. The claim arises from the same taxable period.

THE DOCTRINE OF EQUITABLE RECOUPMENT

In general, the doctrine of equitable recoupment permits a taxpayer or a taxing authority to make up for a mistake in the tax treatment of a transaction in a closed tax period by adjusting an amount involving the same transaction in an open tax period. The doctrine, however, may only be raised in conjunction with a tax dispute that is not barred by the statute of limitations. Like setoff, the doctrine of equitable recoupment permits a refund claimed by a taxpayer or an assessment made by the Department to be reduced to zero, and does not permit the taxpayer to receive a refund or allow the Department to make an additional assessment.

The application of the doctrine of equitable recoupment to tax law was analyzed in the following four U. S. Supreme Court decisions: Bull v. United States, 295 U.S. 247 (1935); Stone v. White, 310 U.S. 269 (1937); Rothensies v. Electric Storage Battery, 320 U.S. 296 (1946); and McEachern v. Rose, 302 U.S. 56 (1937).

Bull describes how recoupment applies to a situation involving double taxation (income tax and estate tax) of a single item of income. An estate received income from a partnership following the death of a partner. Estate tax was erroneously paid on the income. After the statute of limitations on filing a claim for refund for estate taxes had run, the Internal Revenue Service determined that the partnership income was subject to federal income tax. Since the statute was open on the income tax issue, the executor paid the tax, but sued to recoup the barred overpayment of estate taxes. The court ruled that the estate should have been entitled to credit the estate tax overpayment against the income tax deficiency.

*6 In Stone, the Internal Revenue Service used the doctrine of equitable recoupment to recoup a barred deficiency from a refund due to a related person. The trustee paid income tax on trust income. The beneficiary erroneously excluded the trust income from her individual income tax. The IRS erroneously assessed an income tax deficiency against the trust, after the statute of limitations was closed with respect to the beneficiary. The trustee paid the tax and sued for a refund. The Court ruled that the trustees and the sole beneficiary must be considered as one and allowed the Internal Revenue Service to recoup the deficiency of the beneficiary against the overpayment of the trust.

The following general principles are applicable to the doctrine of equitable recoupment:

1. The taxable event claimed upon and the one considered in recoupment arise from a single item or transaction occurring in different years.

2. The single transaction must be subject to two taxes based upon inconsistent legal theories.

3. The amount claimed in recoupment must be barred by the statute of limitations while the disputed amount must be timely.

4. If more than one taxpayer is involved, there is an identity of interest between the taxpayers.

5. It applies in situations not covered by the mitigation provisions.

THE MITIGATION PROVISIONS

The mitigation provisions are set forth in Internal Revenue Code Sections 1311-1314. South Carolina has adopted these Internal Revenue Code provisions, and the Department will apply them to determinations made under South Carolina income tax laws only, where applicable.

In general, the mitigation provisions permit an error to be corrected even though correction of the error in a closed year is prevented by some provision or rule of law. Unlike setoff and the doctrine of equitable recoupment, the taxpayer may receive a refund under the mitigation provisions, and the Department may make an additional assessment.

Many factors must be present in order for the mitigation provisions to be used to correct an error in a year closed under the statute of limitations. Some of the factors include:

1. A "determination" for an open period must establish that the same item has been treated erroneously in a prior, closed year. "Determination" is defined in Internal Revenue Code Section 1313 and generally includes a court decision or administrative action.

2. On the date of the determination, the correction of the error in the closed period must be barred by the operation of law, such as the statute of limitations, or rule of law, such as estoppel or res judicata. Operation of law, however, does not include the mitigation provisions or offers-in-compromise.

3. The determination creates a "circumstance of adjustment" that includes one of the following conditions defined in Internal Revenue Code Section 1312:

a. Double inclusion of item of gross income,

*7 b. Double allowance of deduction or credit,

c. Double exclusion of item of gross income,

d. Double disallowance of deduction or credit,

e. Correlative deductions or inclusions for trusts or estates or for legatees, beneficiaries, or heirs,

f. Correlative deductions and credits for related corporations, or

g. Basis of property after erroneous treatment of prior transaction in certain circumstances.

If all of the required conditions are met, then the mitigation provisions apply and the error period is reopened for a limited period of time. The adjustment may be made to correct errors that relate to a single item or to an affected item. No other items are reopened. Internal Revenue Code Section 1314 sets forth the rules concerning the amount and method of adjustment.

CONCLUSION

It is the Department's policy to allow claims for refund as provided in Code Sections 12-54-85, 12-60-40, and 12-60-470(G), as provided in this document.

Be advised that this revenue procedure is intended to provide only a brief overview of setoff, the doctrine of equitable recoupment and the mitigation provisions. There are numerous court cases and articles available that discuss these three remedies in detail. Questions concerning the specific applicability of setoff, the doctrine of equitable recoupment and the mitigation provisions should be directed to your tax advisor.

Burnet R. Maybank, III
Director

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Footnotes

1 Notwithstanding any other provision of law, Code Section 12-60-1750 provides that no refund of property taxes must be given: (1) for a property tax exemption requiring an application, unless the application was timely filed; or (2) for errors in valuation, unless the assessment was appealed in accordance with Section 12-60-2110, 12-60-2510, or 12-60-2910, as appropriate. For purposes of this item, the taxation of exempt property is not an error in valuation.

2 Notwithstanding any restrictions on filing a claim for refund provided in subsection (F), subsection (D) allows a corporation to file a claim for refund resulting from an overpayment due to changes in taxable income made by the Internal Revenue Service within thirty days from the date the Internal Revenue Service changes the taxable income.

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ATTACHMENT 5

1988 WL 409374 (S.C.Tax.Com.)

Tax Commission

State of South Carolina

IN RE: A FINDING AND ORDER ON THE REFUND REQUEST OF XYZ.

Commission Decision 88-162
June 30, 1988

*1 Income

FINDINGS OF FACT

XYZ is a Delaware corporation having its principal place of business in Atlanta, Georgia. It is a general partner in a limited partnership with ABC of South Carolina. In 1983, ABC was liquidated. The total gain from the sale of ABC's assets was allocated to South Carolina and the income tax paid thereon. Subsequently, the Georgia Revenue Department reviewed the matter and included an apportionable part of the gain in the Georgia tax base.

XYZ thereafter filed an amended return for 1983 seeking to recover the sum of Y. This amount presumably is the proportion of the gain upon its apportionment rather than allocation. The company relies primarily on the provisions of Section 12–7–2240, now superseded by Section 12–54–30 that provides:

> If the Commission discovers on examination of a return or otherwise that the tax, penalty, or interest paid by any person is in excess of the amount legally due, the Commission may order a refund or give credit for the overpayment. Upon the allowance of a credit or refund of any tax, penalty, or interest paid, interest is allowed and paid on the amount of the credit or refund at the rate provided for in § 12–54–20 from the date the tax, penalty, or interest was paid to the date the order for refund or credit was issued. No interest may be paid on refunds provided for under § 12–9–380 during the first seventy-five days following the due date for the filing of the return or the date the return was filed, whichever occurs later.

The Section does not prescribe a specific time limitation and the company argues that because the Tax Commission could audit through the period when the return was filed, it has authority to refund through such period.

The 1983 tax was due on March 15, 1984, however, because of an extension, was not paid until September 14, 1984. The refund request was postmarked April 25, 1987.

The refund was denied under Section 12–47–440 because the language of that statute requires that the claim be filed within three years from the date the tax was due to have been paid. The specific language is that

... The provisions of this section shall apply whether or not the license fee or tax in question was paid under protest, but shall only be available where the application provided for here is made in writing to the commission within a period of three years from the date the license fee or tax was due to have been paid, without regard to extensions of time for payment, or if a later date would result, within one year of payment where an additional license fee or tax is assessed and paid....

Clearly, the refund request was not made within three years of March 15, 1984. Does Section 12–54–30 modify this limitation? Section 12–54–80, however, provides that the Commission may ordinarily assess additional taxes

... within thirty-six months from the date the return was filed or due to be filed, whichever occurs later.

*2 The return here involved was filed on September 15, 1984 and the Commission could have assessed additional taxes within three years of that date. Because of this authority, it is argued that the Commission can also refund the tax when the claim is

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made within that period but beyond three years from the date the tax was due. In our view, such cannot be done. In Asmer v. Livingston, 225 S.C. 341, 82 S.E.2d 465, our Court held that

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.

The conditions of Section 12–47–440 are not met, however, as stated, Section 12–54–30 provides no limitation. It is a well settled rule that all statutes relating to the same subject should be considered together and whenever possible, harmonized. (For cases see 17 S.C.D., Statutes, Key 233.2.)

Here, it would be illogical to find and conclude that the General Assembly intended the Tax Commission to have the power to grant refunds beyond a three year period from the date of payment. A person, as a matter of right, may pursue a refund claim timely instituted under Section 12–47–440. Section 12–54–30 confers no greater rights. In our view, the limitation applies, otherwise there would be an irreconcilable conflict between the statutes and perhaps unequal treatment of the state's taxpayers.

Both the refund of a tax payment and the limitation in which to claim the same are matters that rest with the General Assembly. Asmer v. Livingston, supra; 51 Am.Jur.2d, Limitations, Section 12. Here the General Assembly has limited the period in which the refund may be made to three years from the date the tax was due. For purposes of assessing additional taxes, the time is extended to three years from which a delinquent return was filed. Both appear to be reasonable. A delinquent return could be filed at any time including periods that are more than three years after the date the tax was due to have been paid. It thus appears that an obvious need existed for the different limitation periods.

CONCLUSION

We conclude that a claim for refund must be filed within three years from the date of payment of the tax before the same can be granted under Section 12–54–30 or Section 12–47–440.

AND IT IS SO FOUND AND ORDERED.

SOUTH CAROLINA TAX COMMISSION

S. Hunter Howard, Jr.
Chairman
John M. Rucker
Commissioner
A. Crawford Clarkson, Jr.
Commissioner

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ATTACHMENT 6

1985 WL 192777 (S.C.Tax.Com.)

Tax Commission

State of South Carolina

RE: PROPERTY TAX

P-D-532
April 11, 1985

FINDINGS OF FACTS

*1 The issue presented is the assessment ratio to be applied to a commercial office building leased to "X" Electric and Gas (hereinafter referred to as "X"). This property is commonly referred to as the "Y" Office Building and is further identified on the Richland County Tax Map as TMS 9014–08–01.

Although "X" is the owner and operator of various plants whereat it produces electricity, the above-mentioned property is not located on the premises of or contiguous to any of these sites. Rather, such property is located in downtown Columbia where it is primarily used by "X" as office space in connection with its electric and gas business.

Pursuant to § 12–3–140(17), the Property Division of the Tax Commission is required to value the subject property for ad valorem tax purposes. Upon completing the valuation, the Division must then apply the appropriate assessemnt ratio as mandated by § 12–43–220. When the Division did this for the 1984 tax year, it applied a 10½% assessment ratio to the said property's estimated value.

While "X" did not take exception to the Division's 1984 estimated value, it nonetheless objected to the assessment ratio applied thereto by maintaining that such ratio should only be 6%. Accordingly, "X" is now appealing that matter to us by way of Tax Regulation 117–111.

Section 12–43–220(a) sets forth the appropriate assessment ratios in the instant situation. The relevant portion of that provision states:

"All real and personal property owned by or leased to manufacturers and utilities and used by the manufacturer or utility in the conduct of the business, must be taxed on an assessment equal to ten and one-half percent of the fair market value of the property....

Real property owned by or leased to a manufacturer and used primarily as an office building is not considered used by a manufacturer in the conduct of the business of the manufacturer for purposes of classification of property under Item (a) of this Section if the office building is not located on the premises of or contiguous to the plant site of the manufacturer." Those office buildings not considered used by a manufacturer in the conduct of the manufacturer's business are assessed at 6% pursuant to § 12–43–220(e).

The position of the Division is that the exclusion to the 10½% assessment ratio afforded to certain office buildings by § 12–43–220(a) is restricted to those buildings owned by or leased to manufacturers. The Division reasons that inasmuch as "X" is a utility the subject property does not qualify for the exclusion and must therefore be assessed at 10½%.

"X" agrees with the Division that the exclusion afforded office buildings in § 12–43–220(a) only applies to manufacturers. However, "X" further submits that the subject property nevertheless qualifies for the exclusion since "X" itself is a manufacturer as well as a utility. In support of such a conclusion, it notes that it takes raw materials such as coal, gas, and nuclear fuel and changes the same into a finished product, electricity.

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CONCLUSION

*2 In view of the foregoing arguments, it would appear that the assessment ratio of the subject property turns to the question of whether "X" can be considered a manufacturer. If "X" is in fact a manufacturer, then such property should be assessed at 6%. If it is only a utility, the assessed ratio must remain at 10½%.

Utilities have generally been defined as agencies in the business of supplying light, water, power, heat, transportation or means of communication. Glenbrook Development Co. v. City of Brea, 61 Cal.Rptr. 189, 253 C.A.2d 267 (1967). In certain instances, however, utilities such as power companies go beyond this definition and actually generate the power they supply to their customers. When this occurs, many courts have held that these power companies are manufacturers. 17 A.L.R.3rd Taxes —"Manufacturing", sec. 44, p. 102.

We also note that South Carolina itself has recognized that certain utilities may also be manufacturers. In Columbia Ry., Gas & Electric Co. v. Query, 134 S.C. 319, 132 S.E. 611 (1926), the Supreme Court specifically held that Columbia Railway, Gas and Electric Company, the predecessor of "X", was a manufacturer and thus subject to a tax levied upon manufacturers' gross receipts. A similar result was reached in Duke Power Co. v. Bell, 156 S.C. 299, 152 S.E. 865 (1930).

Based on these authorities and the undisputed fact that "X" generates electricity, we find that "X" is a manufacturer for purposes of § 12–43–220. We thus conclude that the subject property should be assessed at 6%.

AND IT IS SO FOUND AND ORDERED. (April 11, 1985)

Note: Commission Decisions dated before 1987 are from Volume 1 of the South Carolina Tax Commission Decisions. These decisions do not have specific page references, therefore, citations are not available.

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ATTACHMENT 7

1982 WL 176318 (S.C.Tax.Com.)

Tax Commission

State of South Carolina

RE: INCOME TAX

I-D-309
June 30, 1982

FINDINGS OF FACT

*1 The taxpayer, 'X' Corporation, was incorporated in another state, and qualified to do business in South Carolina. 'X' is a multinational corporation engaged in the manufacture and sale of business machines and related products worldwide. It is not disputed that 'X' and its subsidiaries constitute a unitary enterprise. An audit was performed by the Tax Commission on 'X's tax returns for three (3) years. Pursuant to § 12–7–2220, the Commission made a proposed assessment in additional taxes, plus interest, for these periods.

Several items are at issue. The first concerns whether royalty income received by 'X' is subject to apportionment. As an integral part of its unitary operations, 'X' maintains an ongoing research and development department in South Carolina. When this department perfects a new product and patent, 'X' usually either produces the product domestically or licenses a wholly-owned foreign subsidiary to manufacture the product in such foreign country. The foreign subsidiary in turn pays 'X' a royalty for the license. This royalty amounts to a percentage of the sales price of a product sold in a foreign country by the 'X' subsidiary.

The second issue concerns whether a loss on the sale of stock and a worthless receivable should be allocated. 'X' sustained a loss on stock of a foreign subsidiary and also a loss on worthless receivables. Taxpayer deducted these losses from income subject to apportionment.

The third issue relates to 'X's sale of its 'Y' Division and whether the gain from such is subject to being apportioned. 'X' allocated the entire gain from the sale outside this State. The Income Tax Division, however, broke down the sale into items which were allowable and apportionable. An audit adjustment was made to include in income subject to apportionment the portion of gain applicable to the sale of tangible personal property and business connected intangible assests.

The fourth issue deals with whether or not 'X' is to allocate overhead expenses to directly allocated income. 'X' has other investments which are not a part of the unitary business conducted within and without this State. These investments consist of United States and foreign subsidiaries, marketable securities, certificates of deposit, short term investments, long term securities and other miscellaneous investments.

The fifth and final issue concerns whether the gross sales price of business assets should be excluded from the sales ratio for purposes of apportionment. 'X' had sales of business connected tangible and intangible property, the net gains of which were allocated outside of this State. Adjustments were made to include these net gains in apportionable income. The adjustment was to the denominator of the sales factor of the apportionment ratio to include the gains in the sales total. Loss items were not included.

The taxpayer, 'X', seeks to have the proposed assessment reviewed by the Tax Commission pursuant to § 12–7–2220.

CONCLUSION

*2 As to the first issue, § 12–7–1120(3) requires that royalties connected with the trade or business of the taxpayer be apportioned. The royalty income is income earned by 'X' Corporation as a part of its unitary operation and thus subject to apportionment, Texaco v. Wasson, 269 S.C. 255, 237 S.E.2d 75 (1977). See also Mobil Oil Corporation v. Commissioner of Taxes of Vermont, 100 S.Ct. 1223 (1980).

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'X' would argue, in the alternative, if this income is apportionable, then the sales that generated that income should be included in the sales denominator. However, South Carolina does not use the combined reporting approach for determining the income attributable to this State of each corporate member of a multinational affiliated group conducting a unitary business. But instead, the allocation and apportionment provisions apply to each taxpayer as provided by §§ 12–7–240 and 12–7–250, South Carolina Code of Laws 1976. 'X's foreign subsidiary would be a separate taxpayer.

'X's lossess on the sale of its stock and its write-off of a receivable from this foreign subsidiary are items subject to direct allocation. Section 12–7–1120(2), South Carolina Code of Laws 1976, provides for the allocation of dividends from corporate stocks less related expenses to the State in which the principal business of a corporation is located. This Section thus identifies corporate stocks as a nonbusiness asset. Subsection (5) of § 12–7–1120, supra, provides for the allocation of gains and losses from the sale of intangible personal property not connected with the business of the taxpayer less all related expenses. Therefore, since the stock is a nonbusiness asset, the loss from such would be allocated outside this State. For similar reasoning, see Avco Corp. v. Wasson, 267 S.C. 581, 230 S.E.2d 614 (1976).

The 'Y' Division operated as part of the unitary business of 'X' Corporation. The gains and losses from sales of both tangible and intangible business assets of taxpayer which where connected with the business of the taxpayer are to be apportioned, exclusive of real estate, per § 12–7–1120(5), supra. Therefore, the gains and losses from the sale of the 'Y' Division should be apportioned, Exxon v. South Carolina Tax Commission, 273 S.C. 594, 258 S.E.2d 93 (1979).

As to the fourth issue, § 12–7–1120, supra, provides for the allocation of certain types of nonbusiness connected income, such as interest income and dividend income. In all cases, it provides for the allocation of income, less all related expenses. See Avco Corporation v. Wasson, supra. 'X' incurs interest expense in the operation of its total business. A portion of this interest expense is incurred in the carrying of these investment assets. The ratio of investment assets to total assets was applied to interest expense to arrive at the cost of carrying these assets. The method used in this computation is known as the "D.C. Formula" and is widely used. The formula is a practical method and it is incumbent upon the Commission to arrive at a method of determining this expense. Colonial Life and Accident Insurance Co. v. South Carolina Tax Commission, 248 S.C. 334, 149 S.E.2d 777 (1966).

*3 As to the final issue, § 12–7–1170 sets forth the sales factor of the apportionment ratio. The Commission has included royalties and sales of business connected tangible and intangible property in the sales factor. However, sales of tangible and intangible business connected property have been included only to the extent that the sale resulted in a gain. To include the gross sales price tends to distort the sales factor. Thus, through prudent administrative practice, this procedure has been developed.

All that is required of an apportionment formula is that it provide a reasonable approximation, Covington Fabrics v. South Carolina Tax Commission, 264 S.C. 59, 212 S.E.2d 574 (1975). The Income Tax Division's computation provides a reasonable basis for apportioning income and is thus valid.

Based on the foregoing, we uphold the Income Tax Division.

AND IT IS SO FOUND AND ORDERED. (June 30, 1982)

Note: Commission Decisions dated before 1987 are from Volume 1 of the South Carolina Tax Commission Decisions. These decisions do not have specific page references, therefore, citations are not available.

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ATTACHMENT 8

1988 WL 409328 (S.C.Tax.Com.)

Tax Commission

State of South Carolina

IN RE: A FINDING CONCERNING THE INCOME TAX LIABILITY OF XYZ CORPORATION FOR TAX YEARS 1981, 1982 AND 1983 AND LICENSE FEE LIABILITY FOR 1982, 1983 AND 1984.

Commission Decision 88-11
January 22, 1988

***1 Income**

FINDINGS OF FACT

XYZ manufactures and sells business machines, equipment and related supplies. It has its principal place of business and corporate headquarters in Dayton, Ohio. XYZ has sales and service offices in South Carolina as well as a substantial manufacturing plant located in the state.

XYZ has developed a worldwide market for its products by use of foreign subsidiaries. Each subsidiary enters into a licensing agreement whereby XYZ allows each subsidiary the right to manufacture and sell business machines and equipment patented by XYZ. XYZ provides the subsidiaries with all research, engineering, patentable and unpatentable know-how and trade secrets. XYZ also makes substantial loans to the subsidiary. In return the subsidiaries pay interest on the loans and pay as a royalty a percentage of the gross sales by the subsidiary of licensed XYZ products. After an audit the matter has been presented to us.

CONCLUSION

Four issues are present. First, since South Carolina has taxed XYZ's royalty and interest income, must South Carolina include the subsidiaries' payroll, property and sales in the denominator when computing the three factor formula for apportioning XYZ's income? Second, is the interest income from loans and investments subject to being apportioned or is such allocated? Third, are gains on the sales of foreign exchange contracts part of the denominator in computing the sales ratio? Finally, did the Field Services Division improperly deny a deduction for taxes paid by XYZ? Each of these issues is addressed below. We are unable to agree with XYZ's positions.

1. Subsidiaries' Payroll, Property & Sales

The apportionment statutes in South Carolina tax only the taxpayer's income "which reasonably represents the proportion of the trade or business carried on within this state." Section 12–7–250. See also Hertz Corp. v. South Carolina Tax Com'n., 246 S.C. 92, 142 S.E.2d 445 (1965). That base is found by applying Article 9 of Chapter 7 in Title 12. Under that Article a taxpayer's royalty income is apportioned for a taxpayer conducting a business like XYZ's based upon "the arithmetical average of the three ratios stated in Sections 12–7–1150 to 12–7–1170." Section 12–7–1140. The ratios are based upon the taxpayer's property, payroll and sales in this state compared to the taxpayer's property, payroll and sales everywhere. The statute the taxpayer is concerned with is the single corporation, not the corporation plus its subsidiaries. Here South Carolina is taxing only XYZ's income and is not taxing the income of XYZ's subsidiaries. XYZ is a separate taxpayer from its subsidiaries and thus only XYZ's property, payroll and sales are considered. We thus find and conclude the payroll, property and sales of XYZ's subsidiaries do not enter into the ratios for computing XYZ's South Carolina income.

***2** We further find and conclude that not including the property, payroll and sales of XYZ's subsidiaries does not violate due process requirements. Due process requires that there be a minimal connection between the interstate activities and the taxing state and that there exist a rational relationship between the income attributed to the state and the intrastate values of the enterprise. Mobil Oil Corp. v. Commissioner of Taxes, 445 U.S. 425, 436–437 (1980). The nexus with South Carolina is readily found from XYZ's sales, service and manufacturing activities in South Carolina. The rational relationship between the income

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taxed and the intrastate values of XYZ are satisfied by application of South Carolina's three factor formula. This formula does not violate due process so long as it does not attribute income to South Carolina out of all appropriate proportions and is not a grossly distorted result. Moorman Manufacturing Co. v. Bair, 437 U.S. 267, 274 (1978). We find there is no gross distortion from South Carolina's application of the three factor formula.

2. Interest Income Apportioned.

The question here is whether the interest income in dispute is allocated under Section 12–7–1120(1) or apportionable under Section 12–7–1140. Section 12–7–1120(1) provides as follows:

> "(1) Interest received by the taxpayer from intangible property not connected with the business of the taxpayer and all interest from intangible property of domestic insurance companies less all related expenses shall be allocated to the state in which the principal place of business of a corporation taxpayer is located or in which the domicile of an individual taxpayer is located."

Section 12–7–1120(1) allocates interest income only if the intangible property that produced the interest income is "not connected with the business of the taxpayer." The assets that generated the interest income are connected to XYZ's business. The funds used to produce the interest income were from the sale of business machines. The funds are in the nature of short term investments readily available for use in XYZ's business. Much of the interest income resulted from loans to subsidiaries that enable the subsidiaries to sell business machines produced by XYZ. It appears that XYZ did not segregate the interest income from its general revenue from the sale of business machines but rather commingled the income. In short, the proceeds of the investments were available for the business needs of XYZ. We find the loans that generated the interest are connected with XYZ's business and thus the interest income in dispute is properly apportioned and may not be allocated. See Texaco v. Wasson, 269 S.C. 255, 237 S.E.2d 75, 80 (1977) and Lone Star Steel Company v. Dolan, 668 P.2d 916 (1983).

3. Sales of Foreign Exchange Contracts

The Division has included in the denominator of the sales factor gain resulting from the disposition of the exchange contracts. We find such to be proper. This position has been the practice of the Tax Commission since 1977 and is a longstanding administrative position. Such should not be overturned unless cogent reasons for doing so are found. Emerson Electric Co. v. Wasson, 287 S.C. 394, 339 S.E.2d 118 (1986). We find no cogent reasons to change the practice. It must be noted that the apportionment formula need not be an exact measure of the taxpayer's business activity but rather must only provide a reasonable approximation. Covington Fabrics v. South Carolina Tax Commission, 264 S.C. 59, 212 S.E.2d 574 (1975). Here inclusion of the gain from the foreign exchange contracts provides a reasonable apportionment approach.

4. Deductibility of Withholding Taxes

*3 XYZ receives royalty payments and interest payments from its foreign subsidiaries. The foreign countries in which the subsidiaries operate require that a withholding of tax be made on the subsidiaries' payments to the parent. The tax withheld is based upon the fact that the subsidiaries generated income. We find the deduction of this tax is prohibited by Section 12–7–700(4). That section denies a deduction for taxes paid based upon a taxpayer's income. Since the tax here is with respect to income, no deduction is proper.

AND IT IS SO FOUND AND ORDERED.

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EXHIBIT K

ATTACHMENT 1

Code 1976 § 12-4-320
CODE OF LAWS OF SOUTH CAROLINA 1976 ANNOTATED
TITLE 12. TAXATION
CHAPTER 4. THE SOUTH CAROLINA TAX COMMISSION
ARTICLE 3. GENERAL POWERS AND DUTIES

§ 12-4-320. Permissive powers and duties; rules, regulations, rulings, decisions; agreement or compromise as to taxpayer liabilities.

The commission may:

(1) make rules and promulgate regulations, not inconsistent with law, to aid in the performance of its duties. The commission may prescribe the extent, if any, to which these rules and regulations must be applied without retroactive effect;

(2) upon written application, determine the tax effects of transactions and the tax liability of taxpayers, upon facts furnished to it, and it may revoke or modify the rulings if the facts should develop differently later. The commission, in its discretion, may publish these rulings. This publication may be in brief hypothetical form so as to give all pertinent facts and decisions without violating the provisions of Section 12-54-240;

(3) compromise any tax, interest, or penalty imposed by this title or other law assigned to it and may return to the owner, in whole or in part, any goods seized or confiscated;

(4) enter into a written agreement with a person with regard to a tax liability. If the agreement is approved by a majority of the commissioners, it is final and conclusive and the case may not be reopened by administrative or judicial action or otherwise, except in cases of fraud, malfeasance, or misrepresentation;

(5) publish its findings and decisions in all controversies resolved by it. This publication may be in brief hypothetical form so as to give all pertinent facts, decisions, and reasons without violating the provisions of Section 12-54-240.

HISTORY: 1991 Act No. 50, § 2, eff July 1, 1991.

ANNOTATIONS

CASE NOTES

While Tax Commission is vested with rulemaking for purposes of carrying out legislative will expressed in statutory term, it has no authority to enact new laws in nature of regulations to satisfy its own theory of income tax. Hay v South Carolina Tax Com. (1979) 273 SC 269, 255 SE2d 837.

ATTORNEY GENERAL'S OPINIONS

When agricultural land values within counties with soil maps change by reason of the modification of elements within the statute that sets forth the procedure to determine those values, then in such cases, the agricultural land values in counties without soil maps must be equalized to insure that all agricultural lands are equally and uniformly assessed. 1985 Op. Att'y Gen, No. 86-34, p 111.

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ATTACHMENT 2

Code 1976 § 12-4-320
CODE OF LAWS OF SOUTH CAROLINA 1976 ANNOTATED
TITLE 12. TAXATION
CHAPTER 4. THE SOUTH CAROLINA TAX COMMISSION
ARTICLE 3. GENERAL POWERS AND DUTIES

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(3) compromise any tax, interest, or penalty imposed by this title or other law assigned to it and may return to the owner, in whole or in part, any goods seized or confiscated;

(4) enter into a written agreement with a person with regard to a tax liability. If the agreement is approved by a majority of the commissioners, it is final and conclusive and the case may not be reopened by administrative or judicial action or otherwise, except in cases of fraud, malfeasance, or misrepresentation;

(5) publish its findings and decisions in all controversies resolved by it. This publication may be in brief hypothetical form so as to give all pertinent facts, decisions, and reasons without violating the provisions of Section 12-54-240.

(6) if damage by natural forces occurs as defined in Section 12-9-310, prescribe temporary rules including, but not limited to, the filing of returns, payment of taxes, and extensions of due dates.

HISTORY: 1991 Act No. 50, § 2, eff July 1, 1991; 1994 Act No. 516, § 26, eff August 31, 1994.

EFFECT OF AMENDMENT

The 1994 amendment added paragraph (6).

ATTORNEY GENERAL'S OPINIONS

When agricultural land values within counties with soil maps change by reason of the modification of elements within the statute that sets forth the procedure to determine those values, then in such cases, the agricultural land values in counties without soil maps must be equalized to insure that all agricultural lands are equally and uniformly assessed. 1985 Op. Att'y Gen, No. 86-34, p 111.

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EXHIBIT L

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

DUKE ENERGY CORPORATION,

Petitioner,

vs. DOCKET NO. 10-ALJ-17-0270-CC

SOUTH CAROLINA DEPARTMENT OF REVENUE,

Respondent.

D E P O S I T I O N

WITNESS:	T. COOPER MONROE, III
DATE:	December 5, 2011
TIME:	10:19 a.m.
LOCATION:	Law Offices of Nexsen Pruet 227 West Trade Street Charlotte, North Carolina
TAKEN BY:	Attorneys for the Defendants
REPORTED BY:	Carolyn M. Beam Court Reporter

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1978 to '83 with the IRS, correct?

A. Correct.

Q. All right. And the letter represents that those years have been accepted by the joint committee, apparently as of on or around March 12th, 1991, correct?

A. Correct.

Q. Okay. Now, do you know when -- do tab two.

(DFT. EXH. 17, Letter dated April 19, 1991, Bates Stamp DES00000418, marked for identification.)

BY MR. GREEN:

Q. And I'm -- I'm not going to ask you about the whole document. This is Duke Energy's request for contested case hearing in this case; would you agree with that?

A. Yes.

Q. Okay. On the top of page 2 of that, it states that on December 30th, 1991, petitioner timely filed South Carolina amended corporate income tax returns for the tax periods 1978 through 1983 reflecting federal audit adjustments for the tax years 1978 through '83, as required under South Carolina law, correct?

A. Correct, it says that.

Q. Okay. And do you know whether that is accurate?

A. I believe it is accurate.

Q. Okay. Now, I think we talked a little earlier where we addressed the waivers. And if you need to refer back to those, you can. And I think what we referred to is the fact that the years 1978 to 1982 were first added to the waivers, added to the one dated June 3rd, '96. Let me give you some time to find it.

A. Okay, I've got it.

Q. Now, those amended tax returns filed in '78 to '83, it says they reflected the federal audit adjustments, correct?

A. It reflects federal audit adjustments, yes.

Q. And those audit adjustments, if I understood you correctly, related, by dollar amount, the primary issue was the Catawba sale; is that correct?

A. That was, yes, that was a large issue during that time.

Q. Now, is it your position, Duke's position, that filing the amended returns in 1991

kept the statute of limitations open for addressing issues beyond those addressed in the federal audit adjustment?

MR. TRESH: Objection.

THE WITNESS: That is our position because that's what we did.

BY MR. GREEN:

Q. Okay. Do you know -- it looks like, let's see, if the returns were filed December 30th, '91, but the years 1978 to 1982 were not added till June '96, do you know if there were any other extensions open during that time regarding those years?

A. Extension --

Q. In other words -- in other words, the -- the -- the -- the amended returns for '78 until, I think, '83 -- let me make sure -- '78, '83 were filed on December 30th, 1991, correct?

A. Correct.

Q. Okay. And we've discussed earlier, in the context of the 12-54-80, a three-year or 36-month limitations period, correct?

A. Correct.

Q. This June 3rd, '96 date is roughly four-and-a-half years after the 12/30/9 -- the

return for filing 12/30/91. Do you agree that, based on what we've seen here, that is correct?

A. That is correct.

Q. Do you know -- is there any other document regarding extensions pertaining to the '78 to '83 year, other than what we've seen here today?

A. I believe there was a federal 870, and I think it was executed in '92.

Q. And it would be Duke's position that that held -- well, that impacted the, I guess, period of time in which amended returns could be filed for the '78 to '82 years?

A. It was another federal item or set of adjustments that had to be reported to South Carolina.

Q. Okay. And when you say another federal item or set of adjustments, what -- what do you mean by that?

A. I believe there was a settlement during '92 with federal adjustments from form 870.

Q. Were they the same -- we were talking earlier about the Catawba sale being the primary issue and some other -- primary dollar amount and some others. Were they the same as those issues or were they different issues?

A. I'm not sure.

Q. Okay. But is your -- is it your recollections that that form 870, did it deal with all issues on the federal return or just certain issues?

A. I don't know which items it dealt with.

MR. GREEN: Okay. All right. We actually shouldn't have a whole lot longer. Do tab 22.

(DFT. EXH. 18, Document entitled Statement of the Case, marked for identification.)

(DFT. EXH. 19, Letter dated March 20, 2002, marked for identification.)

BY MR. GREEN:

Q. Have you seen that letter before?

A. Yes.

Q. And does that accurately depict what DOR -- I mean, excuse me, Duke's position was at the time?

A. Position relative to?

Q. To the proposal for resolving the issues outstanding, as of March 20th, 2002?

MR. TRESH: Objection as to form.

THE WITNESS: This was a proposal to net amounts assessed under licensed tax and sales

and use tax against amounts due for income tax in partial settlement of number of years. That's -- that's my understanding.

BY MR. GREEN:

Q. Okay. All right. I didn't mean to interrupt you, I apologize. Now, on page 2, it says at the top, Duke is examining the possibility of filing amended returns for the purposes of claiming tax incentives as well as, possibly, other adjustments, correct?

A. Correct.

Q. And it proposes the execution of an 870 AD for sales tax, but an 870 for income tax, correct?

A. Correct.

Q. Did Duke and DOR, to your knowledge, ever execute a form 870, in income tax?

A. No.

Q. Was there a decision, to your knowledge, made not to execute a form 870 by Duke?

A. It's my understanding Duke was willing to execute an 870 with certain wording to it.

MR. GREEN: Okay. Okay. Let me ask you this in this context. Do tab 31.

(DFT. EXH. 20, Fax cover sheet and

Offer of Waiver of restrictions on Assessment and Collection of Additional Tax or Acceptance of Overassessment, marked for identification.)

BY MR. GREEN:

Q. Show you what's marked Exhibit 20. And I believe attached to that is a -- is a memorandum from Bernie Maybank. And then there is a form 870 AD; is that correct?

A. That's correct.

Q. And that AD -- form 870 AD pertains to sales and use taxes, correct?

A. Correct.

Q. And -- but now no -- no form 870 was signed, to your knowledge, for the income tax issue?

A. That's correct.

MR. GREEN: Tab 26.

(DFT. EXH. 21, Email String regarding Form SC870, marked for identification.)

BY MR. GREEN:

Q. It's a series of emails. Have you seen these before?

A. Yes.

Q. I'm going to refer you to page -- I guess 2 of that. And there -- correct me if I'm

wrong, there is an email from Harley Priesmeyer regarding certain language proposed to be added to a form SC 870; is that correct?

A. Correct.

Q. Is that the additional language that you were -- you mentioned a few moments ago in your testimony?

A. Correct.

Q. And Harley Priesmeyer, at this time, was director of state and local taxes?

A. That's correct.

Q. And then on the next page, it looks like there's an email from Mr. Priesmeyer to Jan Crangle saying: Alternatively, we could do without the SC 870 for income license fees if you guys are agreeable to pay us the net amount, approximately three million, and we get FAD for the interest calculation. If you are in agreement with this arrangement, let me know and we'll devise a settlement letter.

Is that accurate?

A. Yes.

Q. And is that what your understanding has happened?

A. That appears to be what happened.

MR. GREEN: 32.

(DEF. EXH. 22, Copy of check dated 8/16/2002, marked for identification.)

BY MR. GREEN:

Q. Have you seen that document before?

A. Yes.

Q. And that appears -- is that a check for the net of the sale's tax and income tax that was paid to Duke Energy?

A. And the license tax, yes.

Q. And license tax. And it was deposited into Duke Power's -- it looks like cash management account; is that correct?

A. Correct.

Q. And is it your position that that was not a full settlement of the outstanding years, correct? Well, as far as your ability to file, it did not eliminate your ability to file future income tax -- amended income tax returns, correct?

A. Correct. Income and license tax.

Q. Okay. It just -- it just -- it just resolved the issues in the audit that DOR had -- had performed following the IRS determinations?

A. Correct.

MR. OLIVER: Okay. All right. Let's

take another little break if we can, please.

(Off-the-record conference.)

BY MR. GREEN:

Q. I think you said that no form 870 was ever signed, and so that you would agree that means then that there's no form 870 with that language that Mr. Priesmeyer had referenced in this email. There's no form 870 contained in that language of which you are aware, correct?

A. Correct.

Q. Is it Duke's position that the Department of Revenue agrees that it could file amended returns after it accepted the check, after Duke Energy accepted the check?

A. I don't know of any such agreement.

MR. GREEN: Okay. Okay. I think that's all I have.

EXAMINATION

BY MR. TRESH:

Q. I just have a couple of quick questions. Cooper, you're still under oath. Cooper, earlier in the deposition you referenced -- or Mr. Green referenced two forms, referenced an IRS waiver form, form 872, and also we talked about several South Carolina waiver forms. If I can take

you back to those forms for a minute, and I don't have the exhibit numbers here, I'm sorry, but it's form 872. And the first waiver, which was executed on August 16, 1988.

A. So 872 is Exhibit 8.

Q. And the waiver executed on 8/16/88 is Exhibit 7. If I can direct your line -- your attention, first, to form 872, middle of the page, number two. That says the taxpayer may file a claim for a credit or a refund. And the service may credit or refund the tax within six months after this agreement ends, correct?

A. Correct.

Q. And does the South Carolina form also mention the ability of the taxpayer to file a refund claim?

A. Yes.

Q. Okay. Thank you. Mr. Green also referenced -- asked you a few questions about whether it would take time or extra resources for Duke if South Carolina Department of Revenue had audit -- to go through two audits. When a South Carolina auditor comes on site, typically, are they generally working on other matters or are they generally focussed on the -- the Duke audit while

they're sitting at your facility?

A. While they're sitting at our facility, they're concentrating on Duke matters.

Q. So that auditor, if he was on site for a week, as I think was referenced in one of the prior letters, you -- that auditor would be tied up for the full week and that would take his attention 100 percent away from other matters, correct?

A. Yes.

Q. And you mentioned that Duke employs individuals in their tax department that are responsible for dealing with federal and state tax audits, correct?

A. Correct.

Q. And if the South Carolina auditor were on site, would that person be required to spend 100 percent of their time on the South Carolina audit for the week that the South Carolina auditor was on site?

A. Most likely.

Q. Okay. With regard to the settlement questions we just spoke about, what's your understanding of the difference between an 870, a South Carolina form 870 and a South Carolina form 870 AD?

A. My understanding is an 870 AD closes the years for whatever tax that's applicable to, except for fraud or malfeasance or something like a gross miscalculations. But an 870 is -- closes the matter at hand, it does not close the years.

Q. And for the years at issue in the settlement proposal, or for the years at issue in the case, did Duke Energy execute a form 870 AD for sales taxes?

A. Yes.

Q. And did Duke Energy execute an 880 AD for income taxes?

A. No.

Q. Are you aware of any agreement that Duke Energy executed that would have closed the years 1978 through 2002 for income taxes with the Department of Revenue?

A. No.

MR. TRESH: That's all I have.

MR. GREEN: Okay. I have no follow-up.

(The deposition concluded at 12:57 p.m.)

EXHIBIT M

1970 S.C. Op. Atty. Gen. 154 (S.C.A.G.), 1970 S.C. Op. Atty. Gen. No. 2909 (S.C.A.G.), 1970 WL 12192 (S.C.A.G.)

Office of the Attorney General

State of South Carolina
Opinion No. 2909
June 2, 1970

***1 A plant wherein electricity is produced is a manufactory within the provisions of Section 65–1569 of the Code.**

Richland County Auditor
Columbia, South Carolina

You request the opinion of this office whether or not two gas turbine generating units installed in Richland County by the South Carolina Electric & Gas Company are exempt from property taxes by the provisions of Section 65–1569 of the South Carolina Code of Laws. The applicable part of such section provides:

'* * *. Any manufactory now existing in Richland County which shall construct additions or improvements to existing plants or additional plants, which shall cost one hundred thousand dollars, or more, and which is first taxable for the year 1957 or thereafter, shall be exempt from all property taxes on such additions, or improvements, or additional plants, except State taxes and taxes for school purposes, for five years from the date of the first taxable year.'

In the case of *Columbia Ry., Gas & Electric Co. vs. South Carolina Tax Commission*, 134 S. C. 319, 132 S.E. 611, the Supreme Court stated that a company engaged in the business of generating electricity is a 'manufacturer' within the meaning of a statute imposing a tax upon 'corporations engaged in the business of manufacturing.' Later, relying on this case, the Court in the case of *Duke Power Co. vs. Bell*, 156 S. C. 299, 152 S.E. 865, stated that a plant used to generate electricity is a manufactory for the purpose of a tax-exempting statute.

From the above it is clear that South Carolina Electric & Gas Company is a manufacturer and a plant wherein electricity is produced is a manufactory. The South Carolina Electric & Gas Company has capital in excess of the $100,000 limitation and the cost of the improvements is in excess of $100,000. Furthermore, South Carolina Electric & Gas Aompany employs a number of employees in its business of generating and selling electricity, therefore, the two generating units qualify for the exemption created by Section 65–1569.

You also ask this office to express its views as to the ad valorem taxes on land upon which there is an easement for the construction of power lines. Section 65–1613 provides for the taxation of structures upon land as personalty to the owners thereof when it is determined that the ownership of the land is separate and distinct from the ownership of the structure. Consequently, a power line owned by a utility company constructed on property subject to an easement is to be taxed as personality when actually owned by the utility.

The remaining question would be 'how should the land subject to such easement be taxed?' It remains as real estate and is to be taxed as such, taking into consideration the decrease in value because of the restricted use created because of the easement.

G. Lewis Argoe, Jr.
Assistant Attorney General

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EXHIBIT N

Brief of Appellant

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QUESTIONS

1. Did the lower court err in limiting the application of § 12-19-110 solely to customer charges and thereby precluding from taxation the receipts derived from the sale of the nuclear facility?

2. Does § 12-19-110, as applied to the respondent, violate the Equal Protection Clauses of the South Carolina and United States Constitutions?

3. Did the lower court err in awarding costs to the respondent?

STATEMENT

The matter before the court arises out of a transaction whereby the respondent sold to various parties a portion of its nuclear generating facility located in York County, South Carolina. The appellant took the position that the gross receipts derived from this sale should be included within the respondent's tax base for purposes of calculating its corporate license tax liability under § 12-19-110. The respondent excepted to such and the matter proceeded to the lower court.

At the lower court there was a disagreement as to what issues were actually raised by the respondent's Complaint.[1] It would now appear that this disagreement is irrelevant in that the lower court's decision was based solely on an issue that was properly before it. Since the respondent prevailed on this particular point, the court found it unnecessary to address the other issues. (See Tr., p. 24.)

The substance of the lower court's decision was that § 12-19-110 was limited to imposing a license tax on receipts from customer charges. (See Tr., p. 24.) Accordingly, the court determined the receipts from the sale

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[1] See the Statement (Tr., pp. 2 and 3), the respondent's Complaint (Tr., pp. 6 and 7) and the appellant's Exceptions #15 and #16 (Tr., pp. 27 and 28).

of the nuclear facility should not be included in the respondent's license tax base.

The appeal now before this court presents two major issues. The first is whether § 12-19-110 is limited in its application to customer charges thus precluding from taxation the receipts derived from the sale of the nuclear facility.

The second issue is raised by the respondent's additional sustaining ground. That issue is whether § 12-19-110 is unconstitutional under the Equal Protection Clauses of the State and Federal Constitutions.[2]

A lesser issue is also presented regarding the lower court awarding costs to the respondent. That issue is simply whether such an award was proper.

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[2]Although properly before the lower court, this issue was one that the court declined to address.

ARGUMENT

I

THE LOWER COURT ERRED IN LIMITING THE APPLICATION OF § 12-19-110 SOLELY TO CUSTOMER CHARGES AND THEREBY PRECLUDING FROM TAXATION THE RECEIPTS DERIVED FROM THE SALE OF THE NUCLEAR FACILITY. (Exceptions 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 17 and 18)

Chapter 19 of Title 12 sets forth a taxing scheme that imposes a franchise tax upon the privilege of doing business as a corporation in South Carolina. United States Rubber Co. v. Query, 19 F.Supp. 191 (1937). Included within that Chapter are §§ 12-19-100 and 12-19-110, both of which levy a license tax on regulated corporations such as the respondent. In the instant situation, it is the provisions of § 12-19-110 that are in question. During the relevant tax year,[3] those provisions provided as follows:

> "In addition to the license fee provided by § 12-19-100 and any and all other license taxes and fees or taxes of whatever kind, there is hereby levied an annual license fee of three mills upon the entire gross receipts from business within this State during the calendar year next preceding by every railroad company, express company, street railway company, navigation company, waterworks company, power company, distribution electric cooperative, light company, gas company, telegraph company, telephone company, parlor, dining or sleeping car company, tank car company, refrigerating car company, fruit growers' express car company, and all other privately operated car lines. The license fee provided for by this section shall be paid at the time of filing the reports required by this chapter.

[3] Section 12-19-110 was amended in 1985.

> Electric cooperatives subject to the license fee imposed by § 12-19-100 and distribution electric cooperatives subject to the license fee provided by this section shall file reports pursuant to the provisions of §§ 12-19-20 and 12-19-130. Provided, however, that the first report of electric cooperatives, together with the payment of the fee, shall be made between March 15, 1970 and June 30, 1970." (Emphasis added)

The above language clearly indicates that the license tax on corporations, such as the respondent, is based on entire gross receipts and not just receipts from customer charges. Accordingly, the lower court's attempt to apply such a limitation here was improper. Where a statute is clear and unambiguous, there is no room for construction and the terms of the statute must be given their literal meaning. Southeastern Fire Ins. Co. v. South Carolina Tax Commission, 253 S.C. 407, 171 S.E.2d 355 (1969); Green v. Zimmerman, 269 S.C. 535, 238 S.E.2d 323 (1977).

The broad import of the words "entire gross receipts" was not lost on the Ohio Supreme Court in Sandusky Gas and Electric Co. v. State, 114 O.S. 479, 151 N.E. 685, 71 A.L.R. 260 (1926). When reviewing a statute similar to § 12-19-110, the court there commented that a tax based on such words would go beyond customer charges.

> "The levy of an excise tax upon the gross receipts of public utility companies is made pursuant to the provisions of sections 5417, 5474, 5475, and 5483, General Code, and the words 'entire gross receipts,' as there employed, mean and include the entire

> receipts of such company from the intrastate business done by it, under the exercise of its corporate powers, whether from the operation of the utility itself or from any other business done by it."

Moreover, contrary to the lower court's conclusion, the language "from business in this state" does not necessarily limit § 12-19-110's application to customer charges. This is similar to the argument made by the taxpayer in State v. United Electric Light & Water Co., 90 Ct. 452, 97 A. 857 (1916). There, Connecticut levied a corporation license tax on gross earnings from operations in that state. The taxpayer attempted to exclude from such tax the earnings received from the sale of various residual products by claiming that the only earnings subject to taxation were those earnings received by it from the sale of electricity to its customers. The court rejected this argument by noting that the statutory language of the tax statute was broad enough to include gross earnings from all sources.

Although there is no South Carolina case law directly on point, it should be noted that for purposes of allocating and apportioning income, the word "business" has been interpreted as including income derived from the sale of property connected with a taxpayer's business. In Texaco, Inc. v. Wasson, 269 S.C. 255, 237 S.E.2d 75 (1977), the court held that royalties received by Texaco from its sulfur and salt mines in Texas must be apportioned to South

Carolina because such were derived from properties connected with Texaco's oil business.

The appellant's Regulation 117-89.1 also requires that the receipts from the sale of the nuclear facility should be included within the measure of the tax levied by § 12-19-110. That Regulation states:

> "Gross receipts, as used in § 12-19-110 of the South Carolina Income Tax Act of 1926, as amended, shall include all receipts from operations within the State, and also other profit and loss items with a local situs. Intangible income from intangibles used in the conduct of the business within this State shall be included in gross receipts."

This Regulation, along with the appellant's Finding (Tr., p. 12), demonstrate that the appellant has long interpreted § 12-19-110 as applying to more than the mere receipts from customer charges. Such a construction of § 12-19-110, by the agency charged with executing it, is entitled to the most respectful consideration and should not be overruled without cogent reasons. Faile v. S. C. Employment Security Commission, 267 S.C. 536, 230 S.E.2d 219 (1976); Stephenson Finance Company v. South Carolina Tax Commission, 242 S.C. 98, 130 S.E.2d 72 (1963).

Additionally, the fact that Tax Regulation 117-89.1 makes reference to "other profit and loss items" does not imply that the appellant interprets § 12-19-110 as being limited to taxing the gain on the sale of an asset,

The appellant's Finding clearly states that such term "is used to identify certain items and does not relate to the manner of taxation". (Tr., p. 13) In this instance, such would identify the nuclear facility.

It is also noteworthy that § 12-19-110 was amended in 1985. A review of this amended version and an application of the rules of statutory construction lend support to the appellant's position that prior to its amendment § 12-19-110 was not limited to customer charges. The relevant provision of § 12-19-110 now reads:

> "In addition to the license fee provided by § 12-19-100 and any and all other license taxes and fees or taxes of whatever kind, there is levied an annual license fee of three mills upon the gross receipts derived from services rendered from regulated business within this State during the calendar year next preceding by every railroad company, express company, street railway company, navigation company, waterworks company, power company, distribution electric cooperative, light company, gas company, telegraph company, telephone company, parlor, dining or sleeping car company, tank car company, refrigerating car company, fruit growers' express car company, and all other privately operated car line. * * *."

The new language of § 12-19-110 now states that the tax levied therein is restricted to "receipts derived from services rendered". This indicates that the prior language of § 12-19-110 was not limited in this respect. Where the General Assembly has adopted an amendment to a

statute, it is presumed that it intended to change the existing law. Vernon v. Harleyville Mutual Casualty Company, 244 S.C. 152, 135 S.E.2d 841 (1964); North River Insurance Company v. Gibson, 244 S.C. 393, 137 S.E.2d 264 (1964).

For the most part, the lower court relied upon the original enactment of § 12-19-110[4] to arrive at its decision. The court reasoned that the use of the word "operations" therein indicated that the corporate license tax is limited to customer charges. This reasoning is incorrect for two reasons.

First, a reading of that Act in its entirety reveals that the term "gross earnings from operations" applies only to railroads. Section 1 of the Act requires various corporations to report differing items of information to the Comptroller General for purposes of levying the subject tax. At subsection 12 of § 1, it is stated that each railroad must report the "gross earnings from its operation". On the other hand, subsection 13 of that same section requires power companies such as Duke to report their "entire gross receipts". From that point on, all regulated corporations, to include railroads and power companies, are addressed together in the same sections with the phrases "gross earnings from operations" and "entire

[4]See Act No. 269, Acts of 1904.

gross receipts" both appearing therein. It stands to reason that each of these phrases must be applied only to those corporations to which they relate. To do otherwise would make the reporting system of § 1 of no value. It must be remembered that in construing legislation, it is a rule that the General Assembly did not intend to do a futile thing. Gaffney v. Mallory, 186 S.C. 337, 195 S.E. 840 (1938); McLeod v. Montgomery, 244 S.C. 308, 136 S.E.2d 778 (1964).

Second, even if the word "operation" does apply to utilities, such does not necessarily imply that the tax here is restricted to customer charges. As previously stated, the court in State v. United Electric Light and Water Co., supra, refused to apply such an interpretation even though the tax there was levied "on gross earnings from operations" (emphasis added). Similarly, the appellant's Finding also points out that "operations" usually relate to the whole process of planning for and operating a business. Liller v. Logsdon, 261 Md. 367, 275 A.2d 469 (1971). In view of such, it is foreseeable that the operations of a corporation would include the buying and selling of assets either used or anticipated for use by that corporation in the conduct of its business.

Finally, the appellant's interpretation of § 12-19-110 does not lead to absurd results.[5] There is

[5] See the lower court's Order at Tr., p. 21.

nothing in the record to indicate that the appellant would consider both the principal and interest of a redeemed bond as being gross receipts under § 12-19-110. In point of fact, the appellant's own Regulation, 117-89.1, shows a different result. It states that "Intangible income from intangibles used in the conduct of the business within this state shall be included in gross receipts", thus inferring the appellant would only consider the income of the bond as gross receipts. A similar result would also be reached with regard to any loans made by the respondent.

Likewise, the appellant's interpretation of § 12-19-110 does not have the effect of taxing the same subject matter twice.[6] The subject matter of the tax levied by § 12-19-110 is gross receipts while that of § 12-19-100 is the fair market value of all property owned by a corporation such as the respondent. This same situation arises with telephone companies. They are also subject to both §§ 12-19-100 and 12-19-110. Naturally, any receipts received from the sale or renting of telephones would be included within the measure of the tax levied by § 12-19-110, while at the same time the fair market value of such phones would be included within § 12-19-100.

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[6]See the lower court's Order at Tr., p. 22.

ARGUMENT
II

SECTION 12-19-110, AS APPLIED TO THE RESPONDENT, DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSES OF THE SOUTH CAROLINA AND UNITED STATES CONSTITUTIONS. (Respondent's Additional Sustaining Ground)

The respondent raises the additional sustaining ground that § 12-19-110 is unconstitutional under the Equal Protection Clauses of the Federal and State Constitutions. As a basis for such, the respondent argued before the lower court that utilities have to pay more license tax than other corporations thus creating an unconstitutional situation.

The fact the respondent is classified differently than certain other corporations and must pay a higher license tax as a result of this classification does not necessarily indicate that § 12-19-110 is unconstitutional. It is a basic fundamental of taxation that the Equal Protection Clause does not prohibit states from drawing lines that treat one class of taxpayers differently from others. Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 93 S.Ct. 1001 (1973). This principle applies likewise to corporations. 71 Am.Jur.2d, State and Local Taxation, § 186, p. 505.

In the instant situation, the General Assembly has chosen to divide all corporations into two classes for purposes of levying its corporate license tax. The first class is unregulated corporations[7] while the second, of

[7]See § 12-19-70 for the tax rate imposed on this class.

which the respondent is a member, is composed of those corporations regulated by the South Carolina Public Service Commission. Such a classification scheme is presumed constitutional with the burden being on the respondent to show that there is no conceivable basis supporting the same.

> " * * *. There is a presumption of constitutionality which can be overcome 'only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes.' * * *. 'The burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it.' * * *." Lehnhausen v. Lake Shore Auto Parts Co, supra.
>
> "An ordinance is a legislative enactment and is presumed to be constitutional. The burden is upon the taxpayer to prove unconstitutionality beyond a reasonable doubt. The burden requires the attacker to ' . . . negative every conceivable basis which might support it.'" North Charleston Land Corp. v. The City of North Charleston, et al., South Carolina Supreme Court's Opinion No. 22079, April 9, 1984.

Moreover, the courts have long recognized that there is a rational basis for taxing regulated corporations at a higher rate than unregulated corporations. In so doing, they have justified such upon the grounds that these corporations enjoy the right of eminent domain, exercises relative freedom from competition and have other advantages over the general business community. New York Rapid Transit Corp. v. City of New York, 303 U.S. 573, 82 L.Ed. 1024, 58

S.Ct. 721, reh. den., 304 U.S. 588, 82 L.Ed. 1548, 58 S.Ct. 939 (1938); New York Steam Corp. v. New York, 268 N.Y. 137, 197 N.E. 172, 172 A.L.R. 1157 (1935). A review of Title 57 of the South Carolina Code of Laws indicates that corporations such as the respondent receive similar benefits.[8]

Contrary to the argument made by the respondent before the lower court, Southern Bell Tel. & Tel. Co. v. City of Aiken, 279 S.C. 269, 306 S.E.2d 220 (1983), is not applicable. In that case, the taxpayer was taxed at 24 times the average rate. Although the lower court there upheld the ordinance imposing this tax, the matter was reversed on appeal because the lower court's Order failed to state a rational basis for taxing the taxpayer at a higher rate.

Here, unlike the situation in Southern Bell Tel. & Tel. Co., not only is there a rational basis for supporting the classification in question but the respondent itself has failed to meet its burden of proof. All the respondent has done is allege that it pays more taxes under § 12-19-110 than it would if it were paying taxes under § 12-19-70. Certainly, this does not meet the burden of negating every conceivable basis which might support South Carolina's corporate license tax classification scheme.

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[8] See for example § 58-27-130 (condemnation powers) and § 58-27-1230 (limiting establishment of new utilities).

ARGUMENT
III

THE LOWER COURT ERRED IN AWARDING COSTS TO THE RESPONDENT. (Exception 19)

Pursuant to Rule 54(d), South Carolina Rules of Civil Procedure, costs against the appellant can be imposed only to the extent provided for by law. In the instant situation, the respondent's action was brought under § 12-47-440. (Tr., pp. 1 and 2) As to those remedies found in Chapter 47 of Title 12, § 12-47-270 controls the awarding of costs.[9] That provision states:

> "In any action brought under the provisions of § 12-47-220 or 12-47- 230, no costs or disbursements shall be taxed or allowed in favor of either party, except for the service of process and procuring the attendance of witnesses."

The above indicates that costs are only appropriate when actions are brought under § 12-47-220 or § 12-47-230. Inasmuch as the action here is by way of § 12-47-440, the awarding of costs was improper.

However, even if § 12-47-270 could be construed as applying to § 12-47-440, the costs recoverable would be limited to those for service of process and the procurement of witnesses. Pendarvis v. S. C. Tax Commission, Davis Advance Sheets, Opinion No. 2239. This would afford the

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[9] None of the remedies found in Chapter 47 of Title 12 provide for costs. It is only by way of § 12-47-270 that such is afforded.

respondent very little since there were no witnesses (Tr., p. 15) and the cost of service was minimal.

CONCLUSION

It is respectfully submitted that the Order of the lower court should be reversed and the proceeds derived from the sale of the nuclear facility included within the respondent's corporate license tax base. Such is premised upon the language of § 12-19-110, Tax Regulation 89.1, the rules of statutory construction and relevant case law.

It is additionally submitted that § 12-19-110 does not violate the Equal Protection provisions of either the Federal or State Constitutions. As shown above, there is a rational basis for taxing the respondent at a higher rate.

Finally, the lower court erred in awarding costs to the respondent. An award of costs against a state agency is permissible only when provided for by law. Here the law does not make such a provision.

T. Travis Medlock
T. TRAVIS MEDLOCK
Attorney General of South Carolina

Joe L. Allen, Jr.
JOE L. ALLEN, JR.
Chief Deputy Attorney General

Ronald W. Urban
RONALD W. URBAN
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Attorneys for Appellant

Columbia, South Carolina
June 11, 1986

CERTIFICATE OF SERVICE BY MAIL

I, Ronald W. Urban, hereby certify that I have mailed, postage prepaid, three copies of the Brief of Appellant in re Duke Power Company v. South Carolina Tax Commission, Case No. 86-344, to William E. Booth, III, Esq., Griffith, Mays, Foster & Kittrell, 2512 Devine Street, Columbia, South Carolina 29205, this 12 day of June, 1986.

Ronald W. Urban

RONALD W. URBAN
Assistant Attorney General

RECEIVED
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EXHIBIT O

Brief of Respondent

COUNTER-STATEMENT OF QUESTIONS PRESENTED

I. Whether under S.C. Code §12-47-110 (1976) (before a 1985 amendment), corporate annual license fees of almost $900,000 were lawfully and legally imposed on a corporation engaged in the business of generating, transmitting and distributing electrical power in this State in view of the fact that the fees were assessed on proceeds received by the electrical utility from the sale of a portion of a partially constructed nuclear power plant for which the utility received a minimal amount above its actual costs?

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STATEMENT OF FACTS

This is an action under S.C. Code §12-47-440 (1976) for the recovery of corporate license fees paid by Respondent, Duke Power Company ("Duke"), a North Carolina corporation engaged in the business of generating, transmitting and distributing electrical power in both North and South Carolina (Tr. 1). The Circuit Judge, the Honorable David F. McInnis, ordered the Appellant, South Carolina Tax Commission ("Commission"), to refund Duke the sum of $1,143,863 with interest as allowed by law.

This action arose from an assessment made by the Commission on July 12, 1984, assessing Duke for additional fees and interest for the 1982 corporate license fee tax year. The additional liability arising from the assessment was as follows:

License Tax	$ 886,722.00
Interest	257,141.00
TOTAL	$ 1,143,863.00

(Tr. 10)[1]

During 1981, Duke consummated the sale of a partial interest in a nuclear power plant and its support facilities which are located in York County, South Carolina (Tr. 1).

[1]References are to page numbers in the Transcript of Record.

At the time of sale, the Catawba Nuclear Station was under construction and had not produced any electrical power (Tr. 16). While Duke received proceeds in excess of one half billion dollars from the sale, the amount received by Duke in excess of its actual costs was minimal (Tr. 13).

Duke did not report any of the proceeds received from the sale of the unfinished Catawba Nuclear Station on the tax return for the payment of its 1982 corporate license fees. The only gross receipts reported on the return were from customer charges for the furnishing of electrical power (Tr. 9-10). After an audit by the Field Services Division of the Commission, Duke was notified that a proposed assessment of additional license fees would be considered by the Commission. The proposed assessment was based upon the amount attributable to the sale of real property and improvements related to the Catawba Nuclear Station situated in the State of South Carolina (Tr. 10). This amount was $295,205,499 on which the license fee of three mills was assessed by the Commission under S.C. Code §12-19-110 (1976). Duke paid the additional assessment on July 31, 1984,[2] without protest.

After payment of the assessment, Duke requested a conference before the Commission to consider Duke's objections to the additional assessment. After the conference, a

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[2]The Circuit Court's Order incorrectly states that the payment was made on July 31, 1985. The parties have agreed in the Statement that the correct year of payment was 1984 (Tr. 3).

Finding was issued by the Commission on May 17, 1985, rejecting all objections made by Duke and affirming the proposed assessment made by the Field Services Division. On June 20, 1985, §12-19-110 was amended by the Legislature expressly limiting its scope to gross receipts derived from services rendered.[3]

On June 14, 1985, Duke filed an application under S.C. Code §12-47-440 (1976), for refund of the additional assessment, and was subsequently notified by the Commission that the application had been denied (Tr. 5-6). On September 26, 1985, Duke commenced this action upon the filing and service of a summons and complaint. The Commission filed an Answer attaching a copy of its Finding issued on May 17, 1985, and the action was tried as a non-jury case on February 6, 1986, before Judge McInnis in the Court of Common Pleas for Richland County.

After considering the pleadings, oral arguments and briefs of the parties, Judge McInnis was convinced that the Commission misinterpreted §12-19-110 prior to the 1985 amendment. The Circuit Court held that §12-19-110 was limited in its scope to the imposition of license fees on receipts from customer charges for the regulated business of an electrical utility.

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[3]§41 of Act No. 9 of the 1985 Acts and Joint Resolutions.

ARGUMENT

I. Under S.C. Code §12-47-110 (1976) (before a 1985 amendment), corporate annual license fees of almost $900,000 were unlawfully and illegally imposed on a corporation engaged in the business of generating, transmitting and distributing electrical power in this State in view of the fact that the fees were assessed on proceeds received by the electrical utility from the sale of a portion of a partially constructed nuclear power plant for which the utility received a minimal amount above its actual costs. (Question I.)

The facts surrounding this action are undisputed. The essential fact is that the assessment for additional corporate license fees paid by Duke was based upon a portion of the proceeds received from the sale of an unfinished nuclear power station. The Catawba Nuclear Station, at the time of the sale, had not produced any electricity for customers of Duke.

At the time of the assessment, Duke was required to pay annually a license fee of (1) one mill upon each dollar of the fair market value of its property (§12-19-100), and (2) three mills upon "the entire gross receipts from business within this State" (§12-19-110). One month after the

Commission issued its Finding that a portion of the proceeds received by Duke from the sale of the unfinished Catawba Nuclear Station was subject to the corporate license fee tax, the Legislature amended §12-19-110 to read, in pertinent part, as follows:

> "In addition to the license fee provided by §12-19-100 and any and all other license taxes and fees or taxes of whatever kind, there is levied an annual license fee of three mills upon the gross receipts derived from services rendered from regulated business within this State . . . ."

(emphasis on added language).

The Circuit Court gave six (6) separate reasons for being convinced that the Commission had misinterpreted the scope of §12-19-110 prior to the 1985 amendment. Those reasons as summarized are as follows:

1. The construction borne by the original enactment of §12-19-110 indicates that the license fee tax was only to be imposed on gross receipts from customers of a utility.

2. The selling of a partially constructed generating facility does not constitute business done by an electrical utility.

3. An absurd result can be illustrated from the Commission's interpretation of §12-19-110.

4. Commission Regulation 117-89.1 limits the scope of §12-19-110.

5. An electrical utility pays annual license fees based on the value of its property under another statute and such property was not intended to be taxed again under §12-19-110.

6. The 1985 amendment to §12-19-110 was intended to change the Commission's interpretation of that statute.

The concept of assessing an annual license fee on regulated businesses for the privilege of carrying on business in this State based on their volume of business was introduced in 1904. The pertinent portion of the original enactment of §12-19-110 is as follows:

> "That the said State Board of Assessors shall, after ascertaining the gross receipts for business done in South Carolina, or the gross receipts from its operations within South Carolina of any . . . power company . . . notify the State Treasurer of the amount thereof on or before the first day of May of each year, and the State Treasurer shall thereupon proceed to charge and collect from such company and such company shall pay to said State Treasurer an annual license fee of three mills on the gross income of such company for business done within South Carolina for the preceding fiscal year . . ."
>
> Section 9 of Act No. 269 of the 1904 Acts and Joint Resolutions.

The measure of taxation under the original enactment of §12-19-110 specifically included gross receipts from its operations as well as gross receipts for business done. The phrase "gross receipts from its operations" was eliminated in a 1953 amendment.[4] The previous existence of that phrase was found by the Circuit Court to indicate that the Legislature intended for license fees to be assessed only upon gross receipts from customers of an electrical utility for the furnishing of electrical service.

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[4]Act No. 48 of the 1953 Acts and Joint Resolutions.

The construction borne by the original statute must be considered when determining the meaning of a statute, South Carolina Elec., etc. v. Public Serv., 272 S.C. 316, 251 S.E.2d 753 (1979). In determining that the time computation under S.C. Code §15-1-20 (1976) was only applicable to civil cases and not applicable to administrative law cases, the Supreme Court found controlling the fact that the original enactment of §15-1-20 contained the phrase "as herein provided". Id., 251 S.E.2d at 756. The Court found that the subsequent elimination of that phrase was intended only to clarify the law without changing the meaning borne by the original enactment. In that case, the Supreme Court stated the following:

> "The revised or consolidated statute will be construed as bearing the same meaning as the original statute or section unless the language of the revision or consolidation plainly requires a change of construction to conform to the manifest intent of the Legislature."

Id., 251 S.E.2d at 756.

The Commission argues, however, that assuming the eliminated phrase limits the scope of §12-19-110 to customer receipts, other sections of the original enactment dealing with reporting requirements indicate that the eliminated language was only applicable to railroad companies. Brief of Appellant at 9. No reason is given by the Commission as to why the Legislature would have intended for the scope of

§12-19-110 to be different in the case of railroad companies. Obviously, there is no logical reason for railroad companies to be taxed differently from other businesses subject to §12-19-110. This is evident from the fact that the 1953 amendment did not eliminate railroad companies from the application of the volume measured license fee tax. Even Commission Regulation 117-89.1, adopted prior to 1936,[5] defines gross receipts as including "all receipts from operations within the State" and is applicable to all companies subject to the volume measured license fee tax.

The language of the statutory scheme used in the State of Washington for imposing excise taxes upon various regulated businesses has also changed. At one time, the excise tax was imposed on gross operating revenues. Later, the statute was amended so that the tax was measured by the gross income of the regulated business. The Court of Appeals of Washington held that this change in phraseology was not material and "the definition of these two terms (gross operating revenues vs. gross income) are identical." The City of Seattle v. The State, 12 Wash.App. 91, 527 P.2d 1404, 1406 (n.3) (1974).

In a previous case, the Supreme Court of Washington held that revenues received by a water district as reimbur-

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[5]The Regulation refers to §12-19-110 of the 1926 Code of Laws and the next codification of the Code of Laws was in 1936.

sement for the cost of constructing, installing, and inspecting new facilities necessary to operate a water distribution system to serve prospective customers were not gross operating revenues subject to the excise tax. King County Water Dist. 68 v. Tax Commission, 362 P.2d 244 (Wash. 1941). "Gross operating revenue" was defined by statute as meaning the value proceeding or accruing from the performance of the particular public service or transportation business involved, including operations incidental thereto. Id. at 245.

Similarly, the proceeds from the sale of a partially constructed nuclear generating facility are not operating revenues accruing from the performance of the business of generating, transmitting, and distributing electrical power. Although this State has no statutory definition of gross receipts, the definition found in the State of Washington is clearly reasonable considering the purpose and intent of a volume measured license fee tax. A tax statute must be construed reasonably as a whole with the view of carrying out its purpose and intent. Hay v. Leonard, 212 S.C. 81, 46 S.E.2d 653 (1948). As stated in that case,

> "Where the language relied upon to bring the particular person or subject within the law is ambiguous or is reasonably susceptible of an interpretation that would exclude the person or subject sought to be taxed, the well-established general rule requires that any substantial doubt should be resolved against the government and in favor of the taxpayer."

Id., 46 S.E.2d at 245; accord, Commonwealth Natural Resources, Inc. v. Com., 219 Va. 529, 248 S.E.2d 791, 796 (1978).

The case relied upon by the Commission as to the meaning of "operations" defines that word as being the whole process of planning for and operating a business or other organized unit. Liller v. Logsdon, 261 Md. 367, 275 A.2d 469 (1971). The issue in Liller was whether mining operations had ceased terminating certain easement rights. In the instant case, revenues or receipts from operations of Duke constitute consideration received for electricity distributed, supplied, furnished or sold to persons for use or consumption. It is not foreseeable that the operations of an electrical utility would include the selling of generating facilities used or anticipated for use by that utility in the conduct of its business. Such a course or procedure of productive activity would actually be unproductive since the assets sold produce the product sold by the utility.

Likewise, the word "business" in §12-19-110 indicates that the proceeds from the sale of a generating facility by an electrical utility are not subject to the license fee tax. The business of Duke is generating, transmitting, and distributing electrical power to its customers. S.C. Code §58-27-10 (1976). This presupposes the existence of electrical generating facilities to operate. See, King

County Water District No. 68 v. Tax Commission, supra at 245. The construction of the Catawba Nuclear Station cannot constitute operations of such a facility. Again, an electrical utility is in the business of operating generating facilities not selling them. Duke could not continue to carry on its business very long if it regularly sold its electrical generating facilities. This would be contrary to the legal obligation of Duke to provide electrical service to its customers within its service area. Clearly, therefore, the proceeds from the sale of a generating facility are not gross receipts accruing from the performance of the business done by an electrical utility.

The gross receipts received by a telephone company for the rental of telephone poles by other utilities are not subject to the franchise tax imposed by the State of North Carolina. Southern Bell Telephone & Telegraph Co. v. Clayton, 266 N.C. 687, 147 S.E.2d 195 (1966). The term gross receipts was defined by statute as follows:

> "Such gross receipts shall include all rentals, other similar charges, and all tolls received from business which both originates and terminates in the State of North Carolina, whether such business in the course of transmission goes outside of the State or not . . . ."

Id., 147 S.E.2d at 196.

The Supreme Court of North Carolina looked at the purpose of the franchise tax and the fact that telephone

companies are not engaged in the business of renting either real estate or utility poles in affirming the lower court's order requiring the Commissioner of Revenue to refund the franchise taxes imposed on the receipts from such rentals. The court stated the following:

> "Such rentals, when they occur, are purely incidental arrangements. The income of a telephone company comes from service charges for the transmission of messages by telephones which remain the property of the company."

Id., 147 S.E.2d at 197.

In conclusion, the court stated the obvious. The scope of a tax imposed on a regulated company for the privilege of engaging in business is limited to receipts obtained from the services the utility is obligated to furnish the public unless the statute specifically defines gross receipts as being "from any and all sources whatsoever except those expressly exempted." Id., 147 S.E. at 198. The North Carolina statute applicable to electrical utilities is identical in substance to §12-19-110 prior to the 1985 amendment, and imposes a franchise tax on gross receipts from business done by the utility. N.C. G.S. §105-116.

The 1916 case of State v. United Electric Light and Power Company, 90 Ct. 452, 97 A. 857, is distinguishable. In that case, a company, apparently as a regular part of its business operations, sold apples grown upon its land and ice

produced from its ponds. Duke does not, as a regular part of its business operations, sell its electrical generating facilities.

The case of Sandusky Gas and Electric Co. v. State, 114 Ohio St. 479, 151 N.E. 685 (1926), is also distinguishable. The court, in that case, defined gross receipts as receipts from business done by the company, whether from the operation of the utility itself or from any other business done by it. The utility failed to report, as gross receipts, the sums paid by it to a natural gas supplier claiming it was engaged in a joint enterprise with the supplier. It had purchased the gas from the supplier and distributed it through its main lines for sale to its customers. Only the amount received from its customers in excess of the price paid to the supplier was reported on the utility's excise tax returns for the tax years in question. The principal issue involved in that case was whether the excise tax should be apportioned between the two utilities. The Supreme Court of Ohio held that under the circumstances no joint enterprise existed. Id., 151 N.E.2d at 687.

Patently, the Sandusky Gas and Electric Co. case involved revenues obtained from services the utility was obligated to furnish the public; i.e. gross receipts from business done by the utility. Moreover, a subsequent Ohio judicial decision refused to extend the scope of the excise

tax to include receipts from the sale of merchandise and electrical appliances by a utility company. Haefner v. City of Youngstown, 147 Ohio St. 58, 68 N.E.2d 64 (1946). It is evident, therefore, that the Ohio Supreme Court would hold that excise taxes cannot be imposed on the proceeds from the sale of a generating facility by an electrical utility.

Moreover, there is no doubt that the broad definition used by the Commission for the measure of tax under §12-19-110 prior to the 1985 amendment will produce absurd results. The imposition of tax under §12-19-110 as construed by the Commission does not appear to have any exceptions. The repayment of loans made by an electrical utility or the liquidation of a short-term investment would produce receipts for the utility. An electrical utility may loan money to an employee or sell the employee safety equipment at cost. An electrical utility will often make a short-term investment of funds not needed for the operation of its business. The receipts from those sources should be subject to taxation under the Commission's interpretation of the scope of §12-19-110. However, to impose taxation in such cases would be absurd. A Court will reject the plain and ordinary meaning of the words in a statute when to accept it would lead to a result so plainly absurd that it would not possibly have been intended by the Legislature. Boyd v. State Farm Mutual Automobile Insurance Co., 260 S.C.

386, 195 S.E.2d 706 (1973); 73 Am.Jur.2d, Statutes (1974).

In addition, the broad interpretation given by the Commission to §12-19-110 prior to the 1985 amendment is inconsistent with its own regulations. Regulation 117-89.1 provides as follows:

> "Gross receipts, as used in Section 12-19-110 of the South Carolina Income Tax Act of 1926, as amended, shall include all receipts from operations within the State, and also other profit and loss items with a local situs. Intangible income from intangibles used in the conduct of the business within this State shall be included in gross receipts."

While the above Regulation is extremely unclear, the Circuit Court interpreted its language as indicating that the measure of taxation for the sale of property is the gain, if any. Such an interpretation would avoid the unfairness and absurdity resulting from the imposition of the license fee tax on the entire receipts from the repayment of loans or the sale of safety equipment at cost. In the instant case, only a minimal amount of fees would have been imposed under the interpretation given the above Regulation by the Circuit Court since Duke sold a portion of the Catawba Nuclear Station for almost its costs. Nevertheless, the Regulation is invalid as to imposing any license fees on the proceeds from the sale of assets by an electrical utility because the underlying statute does not impose fees in such cases. See, Hayward vs South Carolina

Tax Commission, 240 S.C. 347, 126 S.E.2d 15 (1962).

As a fifth reason for concluding that the Commission had misinterpreted §12-19-110 prior to the 1985 amendment, the Circuit Court found that the property of an electrical utility was taxed under §12-19-100. The annual license fee under that Section is based upon the fair market value of the utility's property. Since both of these statutes were enacted at the same time, the imposition of a license fee tax twice upon the same subject matter could not have been intended by the Legislature.

The final reason given by the Circuit Court for its decision was based on the 1985 amendment to §12-19-110. There is no doubt that the present language of §12-19-110 does not impose a license fee tax on the proceeds of the sale of an asset by an electrical utility. The Commission concedes this result. Brief of Appellant at 8.

The Commission contends that 1985 amendment was intended to change the existing law. However, the general rule is that the adoption of an amendment which materially changes the terminology of a statute only raises a presumption that the amendment was intended to change the existing law. North River Insurance Company v. Gibson, 244 S.C. 393, 137 S.E.2d 264 (1964). As stated in North River Insurance Company v. Gibson, "like all rules of construction, the presumption is merely an aid in interpreting an

ambiguous statute and determining the legislative intent". Id., 137 S.E.2d at 266.

Another rule of statutory construction allows a court to look at the circumstances regarding the enactment of the law. As stated in Greenville Baseball v. Bearden, 200 S.C. 363, 20 S.E.2d 813, 816 (1942), "the history of the period in which the Act was passed may be considered." In the instant case, a week after the Finding of the Commission was issued and almost two years from the date of the assessment, the Legislature changed the law. The Circuit Court viewed the quick reaction of the Legislature to change the Commission's interpretation of §12-19-100 as evidence that the Legislature did not agree with the Commission's interpretation. Clearly, therefore, the presumption that the 1985 amendment was intended to change existing law is refuted upon consideration of the circumstances surrounding the enactment of the 1985 amendment.

CONCLUSION

For the reasons stated in this Brief, the Respondent respectfully requests that this Court affirm the Circuit Court's Order requiring the South Carolina Tax Commission to refund to Duke $1,143,863 plus interest.

Respectfully submitted,

William E. Booth III
Attorney for the Respondent

July 14, 1986

I, William E. Booth III, hereby certify that I have mailed, postage prepaid, three (3) copies of the Brief of Respondent in re: Duke Power Company v. South Carolina Tax Commission, Case No. 86-344, to Ronald W. Urban, Esquire, Assistant Attorney General, Post Office Box 125, Columbia, South Carolina 29214, this 14th day of July, 1986.

William E. Booth III
Attorney for Respondent

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STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Duke Energy Corporation, Petitioner, vs. South Carolina Department of Revenue, Respondent.	Docket No.: 10-ALJ-17-0270-CC **CROSS-MOTION FOR SUMMARY JUDGMENT**

Pursuant to Rules 19 and 68 of the Rules of Procedure for the Administrative Law Court and Rule 56 of the South Carolina Rules of Civil Procedure, Petitioner Duke Energy Corporation ("Duke Energy"), by and through its undersigned counsel, hereby moves the Court for an Order granting summary judgment in its favor in this matter on the issue of calculation of gross income. As set forth in more detail in the memorandum of law filed contemporaneously herewith, the grounds for this motion are that the material facts are not in dispute and Petitioner is entitled to judgment as a matter of law because Title 12 of the South Carolina Code requires Duke Energy to include all of its gross receipts, including the total proceeds from the sales of securities in the calculation and apportionment of Duke Energy's income to South Carolina.

This motion is based on the pleadings, the attached affidavits, the applicable law, and the memorandum of law filed contemporaneously herewith.

[Signature Appears on Following Page]

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May 21, 2012
Columbia, South Carolina

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Duke Energy Corporation Petitioner, vs. South Carolina Department of Revenue, Respondent.	)	Docket No. 10-ALJ-17-0270-CC **AFFIDAVIT OF MARVIN N. DAVANT**

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

PERSONALLY APPEARED BEFORE ME, Marvin N. Davant, who first being duly sworn, deposes and says as follows:

1. I am over the age of eighteen (18) years old.

2. I was employed by the South Carolina Department of Revenue (formerly known as the South Carolina Tax Commission) (hereinafter referred to as the "Department") for thirty-seven (37) years beginning in 1964 as an auditor with the Estate & Gift Division, an assistant director of the Estate & Gift Division and then the combined Estate & Gift and Income Tax Divisions, and as Director, Field Services Division, until my retirement in 2001. After I retired, I acted as a consultant to the Director of the Department.

3. The Department authorized the Director of its Field Services Division to fill out, execute and issue Form FS-43 to taxpayers.

4. In the performance of my services as Director, I was authorized to issue and execute, and did routinely issue and execute, the Department's Form FS-43, Consent to Extend the Time to Assess Tax.

5. Form FS-43 was a commonly utilized form, to such extent that I, with approval of the Department, allowed my audit deputy to sign the form in the interests of time.

6. It was common practice for the Department to seek an extension of time to make an assessment and request that taxpayer's sign Form FS-43. For example, if auditors were on a short time frame to audit a file, they would request that the taxpayers sign Form FS-43 as an agreement with the Department to extend the time for both assessments and refunds.

7. The Department promulgated and issued Form FS-43 as an official Department form document. To the best of my knowledge, information and belief, the Department has utilized this form since at least the 1960s, as the form was in use prior to the time I became employed with the Department.

8. Form FS-43 was an official form issued by the Department and provided to the Field Services Division for use in its operations.

9. To the best of my knowledge, information and belief, the Department did not issue forms that had not been properly reviewed or approved.

10. The Department's forms identified which division used the form by including the division's name or initial on the form.

11. To the best of my knowledge, information and belief, no individual division of the Department promulgated its own forms, and every form used by any division was an official form provided to it by the Department.

12. The Field Services Division did not review or question Form FS-43 because it was instructed to use the form by the Department.

13. To the best of my knowledge, information and belief, the use of Form FS-43 by the Department was never questioned.

14. To the best of my knowledge, information and belief, the Department historically intended, believed and understood that Form FS-43 not only extended the time to assess additional tax, but also authorized or extended the time for a taxpayer to file a claim for refund within the time stated in the Form FS-43.

15. Prior to enactment of the South Carolina Revenue Procedures Act in 1995, the Department believed that after the execution of the FS-43 by the DOR and the taxpayer that it was authorized and permitted to issue refunds of overpaid tax even if a claim for refund by the taxpayer would not otherwise be timely under the applicable statutory limitations period for filing a refund claim and regardless of whether the period of time initially prescribed for filing a claim for refund had expired.

16. Prior to enactment of the South Carolina Revenue Procedures Act, it was my intent, belief and understanding as Director of Field Services that an executed Form FS-43 constituted the Department's agreement to issue a refund – whether resulting from a review of the taxpayer's records commenced by the Department's on its own initiative, upon consideration of a claim for refund filed by the taxpayer prior to the time stated in the Form FS-43, or otherwise – pursuant to its authority to issue refunds of overpaid tax even if a claim for refund would otherwise be untimely.

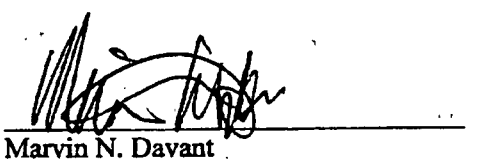
17. After enactment of the South Carolina Revenue Procedures Act, there was no difference in how Form FS-43 was interpreted by Department, and the content of the form remained the same.

18. To the best of my knowledge, information and belief, I had the same authority to sign Form FS-43 before and after enactment of the South Carolina Revenue Procedures Act.

19. Both before and after enactment of the South Carolina Revenue Procedures Act, the purpose of Form FS-43 was to allow the Department and the taxpayer by agreement to extend the time for assessment or refund, whether discovered on audit or a refund claim filed by the taxpayer. The form was specifically used for purposes of recording the agreement to extend the time limitations for both the Department and the taxpayer.

20. It was my intent, belief and understanding as Director of Field Services that a refund claim filed after the statute of limitations had expired would be treated differently than a refund claim filed during the extended period of time agreed to by the Department and the taxpayer by executing Form FS-43. The Department would not consider a refund claim filed in the former situation, but would, in accordance with its agreement, in the latter.

FURTHER AFFIANT SAYETH NOT.



Marvin N. Davant

SWORN and subscribed to before me
this 16th day of May, 2012.

Margie W. Rish (L.S.)
Notary Public for South Carolina
My Commission Expires: 11-4-2020

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

Duke Energy Corporation Petitioner, vs. South Carolina Department of Revenue, Respondent.	)	Docket No. 10-ALJ-17-0270-CC **AFFIDAVIT OF ROBERT K. ANDERSON**

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

PERSONALLY APPEARED BEFORE ME, Robert K. Anderson, who first being duly sworn, deposes and says as follows:

1. I am over the age of eighteen (18) years old.

2. I was employed by the South Carolina Department of Revenue (formerly known as the South Carolina Tax Commission) (hereinafter referred to as the "Department") from 1975 until I retired in 2008.

3. While employed with the Department, I served in various positions beginning with an entry-level position with the Audit Division, then was promoted to Regional Manager, then Manager of Audits, then Administrator of Field and Office Operations, and finally was employed as Senior Administrator until the time of my retirement.

4. Since the time I served as Manager of Audits, I had the primary responsibility and authority for executing Form FS-43, Consent to Extend the Time to Assess Tax.

5. In many cases, the authority to issue and execute Form FS-43 was delegated to the auditors auditing a taxpayer's file.

6. Form FS-43 was regularly and commonly used during my employment with the Department, and the Department typically was the party who requested that the form be executed.

7. Form FS-43 is an official document issued by the Department when agreeing to extend the time to assess additional tax or issue a refund with a taxpayer. I do not know when Form FS-43 was first promulgated, but it was many years, if not decades, ago.

8. The use of Form FS-43 was common knowledge within all levels of the Department. To my knowledge, the Department had a process for approving all forms and I assume the Form FS-43 went through such approval process.

9. The Department issued Form FS-43 to obtain the taxpayer's written consent to extend the time to assess or refund additional tax.

10. To encourage a taxpayer's agreement to extend the time to assess additional tax, the Department intended that Form FS-43 similarly extend the time for a taxpayer to file a refund claim with the Department or for the Department to grant a refund.

11. The Department did not issue any other form document or other writing to obtain a taxpayer's consent to extend the statute of limitations.

12. The Department had several revised versions of Form FS-43, all of which were intended to extend the time for the taxpayer to file a claim for refund during the waiver period.

13. By executing Form FS-43, the Department believed that it was exercising its discretionary authority to grant a refund upon examination of a taxpayer's return or otherwise, including the taxpayer's filing a refund claim with the Department within the period of time stated in the FS-43, in exchange for the taxpayer's consent to extend the period of time to assess additional tax.

14. I am not aware of any conflicts or controversy either within the Department or with taxpayers regarding the wording of Form FS-43. To my knowledge, the Department has never refused to honor a valid refund claim filed during the time period covered by Form FS-43.

15. The multiple execution of the Form FS-43s in the Duke Energy Corporation Audits over a long period of years was principally requested by the DOR auditor assigned to the file.

FURTHER AFFIANT SAYETH NOT.

Robert K. Anderson

SWORN and subscribed to before me
this 17th day of May, 2012.

(L.S.)
Notary Public for South Carolina
My Commission Expires: 5/7/22

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

DUKE ENERGY CORPORATION, Petitioner, **vs.** **SOUTH CAROLINA DEPARTMENT OF REVENUE,** Respondent.	**Docket No.: 10-ALJ-17-0270-CC**

DUKE ENERGY'S MEMORANDUM OF LAW IN OPPOSITION TO THE SOUTH CAROLINA DEPARTMENT OF REVENUE'S MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF DUKE ENERGY'S CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT

Duke Energy Corporation ("Duke Energy") opposes the South Carolina Department of Revenue's (the "Department") Motion for Summary Judgment ("Department's Motion") and files this Memorandum in opposition to the Department's Memorandum in Support of the Motion for Summary Judgment ("Department's Memorandum") and in support of its Cross-Motion for Partial Summary Judgment. Duke Energy respectfully states as follows:

INTRODUCTION

The Department seeks summary judgment on three issues: (1) whether Duke Energy may file refund claims for the tax years 1978-1993 even though the Department agreed in writing to extend the limitations period for Duke Energy to file such refund claims ("Waiver Issue"); (2) whether Duke Energy may use the single-factor gross-receipts apportionment formula to apportion its income to South Carolina

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("Apportionment Method Issue"); and (3) whether Duke Energy should include the proceeds from sales of securities in the calculation of its South Carolina corporate income tax apportionment formula ("Gross Receipts Issue"). (Department's Memorandum at 2.)

The Department's Motion must be denied. The Department is not entitled to the judgment requested as a matter of law, and genuine issues of material fact exist regarding the Waiver and Apportionment Method Issues. The Department has not provided undisputed, competent evidence to prove that: (1) for the 1978 through 1993 tax periods, as a matter of fact and law, the Department did not extend the statute of limitations to allow Duke Energy to file refund claims; (2) it is not barred from asserting that Duke Energy may not file refund claims for the 1978-1993 tax periods under the doctrines of equitable estoppel and equitable tolling; and (3) that Duke Energy is a "manufacturer" for purposes of the South Carolina apportionment statutes.

Duke Energy is entitled to summary judgment on the Gross Receipts Issue because the plain language of the South Carolina apportionment statute requires Duke Energy to include all of its gross receipts in the denominator of its South Carolina gross receipts factor.

Duke Energy respectfully requests that this Court deny the Department's Motion, and grant Duke Energy's Cross-Motion for Partial Summary Judgment with respect to the Gross Receipts Issue.

BACKGROUND

The Department's portrayal of the facts of this case is in dispute. In several material respects, the facts set forth in the Department's Memorandum are incomplete and in many cases inaccurate or misleading.

A. The Department's Audit of Duke Energy

This case began with the Department's examination (also referred to as an "audit") of Duke Energy's corporate income taxes for the year 1978. (Aff. of Rickey McCarver ¶ 5, Exhibit A.) What began as a routine audit evolved into a protracted review of Duke Energy's South Carolina tax returns that spanned decades. Duke Energy cooperatively and patiently accommodated the Department's serial requests to extend the audit due to health issues experienced by the Department's auditor, changes in the Department's personnel, and the pending results of an audit of Duke Energy by the Internal Revenue Service ("IRS"). (Department's Requests, Exhibit B.)

B. The Agreement Between the Department and Duke Energy to Extend the Statute of Limitations

The Department did not complete the initial audit in a timely manner and continued to audit Duke Energy for subsequent years. As a result, the Department's auditors systematically asked Duke Energy to sign agreements extending the time period to allow them to review Duke Energy's corporate income tax returns and potentially assess Duke Energy for corporate income taxes. (Department's Requests, Exhibit B.) These agreements, generally referred to as "Waivers" by the Department and taxpayers, also extended the time period for Duke Energy to file corporate income tax refund

claims. (Waiver Forms FS-43, Exhibit C; McCarver Aff. ¶ 8, Exhibit A; Aff. of Marvin N. Davant ¶¶ 6, 14, 19, Exhibit D; Aff. of Robert K. Anderson ¶ 10, Exhibit E.)

Years went by and each time a Waiver agreement was about to expire, the Department's auditors would ask Duke Energy to sign a new agreement further extending the statute of limitations. (McCarver Aff. ¶ 6, Exhibit A; Department's Requests, Exhibit B.) At times, the Department's auditors justified their requests for additional Waivers of the statute of limitations because of personal or family issues, and at other times, the auditors requested additional Waivers because they were simply too busy to complete the audit. (Department's Requests, Exhibit B.) Duke Energy agreed to the Waivers because the Department represented verbally and in writing that the statute of limitations was extended for both tax assessments and tax refund claims. (McCarver Aff. ¶ 3, Exhibit A; Davant Aff. ¶¶ 6, 14, 19, Exhibit D; Anderson Aff. ¶¶ 10, 12–13, Exhibit E; Dep. Tr. of Jan Urban 68:21-70:5, Exhibit F.) At no time was there any actual or implied notice that the statute of limitations was left open only for assessments. (McCarver Aff. ¶ 3, Exhibit A; Davant Aff. ¶ 19, Exhibit D; Anderson Aff. ¶ ¶¶ 10, 12–14, Exhibit E; J. Urban Dep. Tr. 68:21-70:5, Exhibit F.)

C. Duke Energy's Tax Overpayments

Within the time frame agreed to by the Department in writing in the Waivers, Duke Energy filed amended South Carolina corporate income tax returns for the 1978 through 2001 tax periods ("Tax Periods at Issue") to correct errors it had made on its South Carolina original tax returns. (Pet'r Preh'g Stmt. § 5.A, pp. 3-4 (filed Apr. 1, 2010).) Duke Energy's amended returns constituted refund claims.

The errors on Duke Energy's originally filed South Carolina tax returns related to the computation of Duke Energy's apportionment formula – which is the mechanism for determining how much income is associated with Duke Energy's South Carolina's business activities. The amendments correcting the errors were based primarily on two issues:

- The first issue was that South Carolina law requires a corporation to include all of its "gross receipts" in the denominator of its gross-receipts apportionment factor. Duke Energy's original returns for the tax years 1978-1999[1] excluded from the denominator of the gross-receipts factor receipts from sales of certain securities. (Pet'r Preh'g Stmt. § 5.A, p. 4.) The amendments included receipts from sales of securities in the gross receipts factor.
- The second issue was that because Duke Energy was primarily engaged in the business of selling electric service to its customers, it was required to apportion its income using the single-factor gross-receipts apportionment method rather than the three-factor method required for companies that manufacture tangible personal property. (Pet'r Preh'g Stmt. § 5.A, p. 4.) The amendments applied the single-factor formula (based on gross receipts) applicable to enterprises engaged in the provision of services. (Pet'r Preh'g Stmt. § 5.A, p. 4.)

[1] For 2000 and 2001, Duke Energy's original tax returns included receipts from sales of securities in the sales factor denominator.

D. The Department's Denial of the Amended Returns

The Department could not have been surprised by the receipt of the amended returns. For years Duke Energy discussed with the Department in emails and in writing that Duke Energy intended to file the amended returns. (Correspondence between Duke Energy Corp. and the S.C. Dep't of Rev., Exhibit G; J. Urban Dep. Tr. 68:21-70:5, Exhibit F.) In fact, the Department sought to incorporate some of the Tax Periods at Issue (*i.e.*, 1978-1994) into an agreement that would have foreclosed Duke Energy's right to file refund claims for corporate income taxes.[2] The parties, however, could not agree on all of the terms of the Department's proposed agreement.[3]

In 2003, the Department denied Duke Energy's refund claims. Duke Energy timely protested the denial soon thereafter. (Pet'r Preh'g Stmt. § 5.A, p. 4.) The Department took no action on Duke Energy's protest for approximately 7 years. In 2010, and in response to multiple requests from Duke Energy to rule on its protest, the Department issued a final determination denying Duke Energy's protest. (Pet'r Preh'g Stmt. § 5.A, p. 4.) At no time during this seven-year period did the Department assert

[2] In 2001, the Department concluded its audit of Duke Energy for corporate income, license, and sales taxes resulting in: (1) a corporate income tax refund due to Duke Energy in the amount of approximately $1,900,000 (exclusive of interest) for the years 1978-1994; (2) a license tax liability in the amount of approximately $835,000 (exclusive of interest for the years 1984-1994; and (3) a sales tax liability in the amount of approximately $1,700,000 (exclusive of interest) for tax years 1991-2001. (S.C. Dep't of Rev. Report of Field Audit, Exhibit H.) In August 2002, the parties agreed to offset the various amounts resulting in a net refund to Duke Energy in the amount of $3,067,703 (inclusive of interest). (*Id.*) As part of the agreement, Duke Energy and the Department executed form SC 870AD for sales tax purposes only, which forecloses either party's ability to issue assessments or seek refund claims, respectively. (SC 870AD, Exhibit I.) The parties did not execute a SC 870AD for corporate income tax purposes because Duke Energy had communicated to the Department on multiple occasions that it had intended to file the refund claims at issue here. (Correspondence, Exhibit G; J. Urban Dep. Tr. 68:21-70:5, Exhibit F.)

[3] In its Amended Prehearing Statement, the Department claimed that Duke Energy's refund claims for the tax period 1978-1994 are invalid because in 2002, the parties executed a settlement agreement which precluded Duke Energy from filing refund claims for that tax period. (Dep't Am. Prehr'g Stmt. § 3.C, p. 2 (filed on Nov. 30, 2010).) In depositions, it became clear that such a settlement agreement was not executed. (J. Urban Dep. Tr. 68:21-70:5, Exhibit F.) The Department appears to have abandoned its settlement claim.

that Duke Energy's refund claims were not timely or that the Waivers executed by the Department and Duke Energy did not allow Duke Energy to file refund claims.

E. Duke Energy's Offer to Identify Uncontroverted Facts

On two separate occasions after the filing of this action, Duke Energy asked the Department to identify uncontroverted facts and enter into a stipulation agreement related to any facts not in dispute. The Department initially agreed to enter into a stipulation of facts and, on two occasions, Duke Energy drafted a proposed stipulation of facts. After several months, the Department informed Duke Energy that it would not agree to any stipulation of facts in this case, precisely because genuine material factual issues exist, as further discussed below.

F. Department's Attempt to Reduce the Amount at Issue

In its Memorandum, the Department sets forth several theories that, if adopted by the Court, would lessen the amount of refund owed to Duke Energy. For example, the Department claims that if the Court found that the statute of limitations was closed for the period 1978-1993, the amount owed to Duke Energy would be $63,180,088. The refund calculations set forth in the Department's Memorandum are incorrect. For example, the Department did not take into consideration the impact of some of the Tax Periods at Issue which resulted in a net loss on the computation of the amount of refund Duke Energy would be entitled to.[4] In all cases, should the Court find any of the theories advanced by the Department to have merit, the amounts owed to Duke Energy would need to be determined.

[4] Furthermore, the Department and Duke Energy have disagreed on the impact of certain federal adjustments for the tax years 1986-1998 on Duke Energy's corporate income tax returns. (S.C. Dep't of Rev. Audit Report and Duke Energy Corp.'s Protest, Exhibit J.)

STANDARD FOR SUMMARY JUDGMENT

Summary judgment is appropriate only if "it is clear there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law." *Summer v. Carpenter*, 328 S.C. 36, 42, 492 S.E.2d 55, 58 (1997). However, summary judgment is not appropriate when "further inquiry into the facts of the case is desirable to clarify the application of the law." *Pee Dee Stores, Inc. v. Doyle*, 381 S.C. 234, 240, 672 S.E.2d 799, 802 (Ct. App. 2009). Even if the evidentiary facts are not disputed, but the conclusions or inferences to be drawn from them are, summary judgment should be denied. *Id.*; *see also Ellis v. Davidson*, 358 S.C. 509, 518, 595 S.E.2d 817, 821 (Ct. App. 2004) ("Summary judgment should not be granted even when there is no dispute as to evidentiary facts if there is a disagreement concerning the conclusion to be drawn from those facts.").

An issue is "material" if "the facts alleged are such as to constitute a legal defense or are of such a nature as to affect the result of the action." *Nelson v. Piggly Wiggly Cent., Inc.*, 390 S.C. 382, 388, 701 S.E.2d 776, 779 (Ct. App. 2010) (citation omitted).

Summary judgment is a "**drastic remedy**" and "should be cautiously invoked to ensure that a litigant is not improperly deprived of trial on disputed factual issues." *Rife v. Hitachi Constr. Mach. Co.*, 363 S.C. 209, 215, 609 S.E.2d 565, 568 (Ct. App. 2005) (emphasis added). In determining whether any triable issue of fact exists, the evidence and all inferences must be viewed in the light most favorable to the nonmoving party. *Pee Dee Stores*, 381 S.C. at 240, 672 S.E.2d at 802. "All ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly against the moving party." *Ellis*, 358 S.C. at 518, 595 S.E.2d at 821.

The party seeking summary judgment has the burden of "clearly establishing the absence of a genuine issue of material fact." *Rife*, 363 S.C. at 214, 609 S.E.2d at 568.

ARGUMENT

I. Genuine Issues of Material Fact Exist Regarding the Department's Contention That Duke Energy's Refund Claims for the Tax Years 1978-1993 Were Untimely.

The Department claims that there is no factual dispute regarding whether Duke Energy's refund claims for the 1978-1993 tax period were timely. Duke Energy disagrees. The Department entered into an agreement with Duke Energy to extend the statutory period of time that the Department could assess tax and Duke Energy could seek a refund. The agreement between the Department and Duke Energy to waive the statute of limitations was reached verbally and in writing. The existence of the Waivers, their effect, and their impact on the arguments raised by the Department are all factual issues that need to be determined as part of an evidentiary hearing before this Court.

In addition to ignoring the substantial factual evidence proving of the agreements between the Department and Duke Energy, the Department misinterprets South Carolina law. The Department makes two main arguments in support of its motion for summary judgment on the Waiver Issue. First the Department claims that the language of the Waiver form – Form FS-43 (the agreement the Department used to extend the period of time to assess tax or file refund claims) – was only intended to extend the time in which the Department may issue assessments. Second, the Department argues that South Carolina statutes governing requests for tax refunds prior to 1995 bar the Department from entering into agreements extending the time for a taxpayer to file refund claims.

(Department's Memorandum at 9-28.) These arguments are not supported by the facts of this case or South Carolina law.

1. Form FS-43 Authorizes the Department to Extend the Statute of Limitations for Assessments and Refunds.

Whether the Department agreed to extend the time for Duke Energy to file refund claims is a question of fact. *City of N. Myrtle Beach v. Lewis-Davis*, 360 S.C. 225, 235, 599 S.E.2d 462, 466-67 (Ct. App. 2004). During the Tax Periods at Issue, Form FS-43 was entitled "State of South Carolina, Department of Revenue, Field Services Division, Consent to Extend the Time to Assess Tax," or "State of South Carolina, South Carolina Tax Commission, Field Services Division, Consent to Extend the Time to Assess Tax." (Waiver Forms FS-43, Exhibit C.) Form FS-43 is an agreement drafted by the Department to seek a taxpayer's agreement to extend the time in which the Department may assess a tax or the taxpayer may file a refund claim. Prior to 1995, Form FS-43 specifically provided:

> 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.

(Waiver Forms FS-43, Exhibit C, Tabs 1–16, 18 (emphasis added).)[5]

After 1995, Form FS-43 provided:

> This agreement extends the time for mailing the notice of assessment **or refund** of the above tax pursuant to the provisions of Section 12-54-85(C)(5) of the 1976 South Carolina Code of Laws, as amended.

[5] Section 12-54-80 provided: "If, before the expiration of the time prescribed in this section for the mailing of a notice of assessment, the taxpayer has consented in writing to the mailing of the notice after the time, notice of assessment may be mailed at any time prior to the expiration of the period agreed upon. The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon." S.C. Code Ann. § 12-54-80 (repealed 1995).

(Waiver Forms FS-43, Exhibit C, Tabs 17, 19–22 (emphasis added).)[6]

Form FS-43 remained substantially the same throughout all Tax Periods at Issue. Minor changes were made to Form FS-43 in 1995 to reflect the redesignation of S.C. Code Ann. § 12-54-80 into S.C. Code Ann. § 12-54-85. However, these changes still provided that upon agreeing to a Waiver, the Department had an extended period of time to assess taxes, and the taxpayer had an extended period of time to file a refund claim. Both versions of Form FS-43 use the term "refund" and contemplate a taxpayer's ability to file refund claims. Neither version limits the Department's ability to issue tax assessments or a taxpayer's ability to file tax refund claims within the time frame mutually agreed upon by the taxpayer and the Department. The Department cannot in this case arbitrarily overwrite the plain language of the Form and ignore the representations it made by agreeing to execute the Waivers.

The Department argues that prior to 1995, the language of Form FS-43 reflects its "limited purpose" to extend the time in which the Department could issue assessments and did not extend the time in which a taxpayer could file a refund claim. (Department's Memorandum at 9.) In particular, the Department contends that its limited interpretation of Form FS-43 is "required by the statutory authority for the form: section 12-54-80." (Department's Memorandum at 10-11.) The Department's reliance is misplaced as S.C.

[6] As enacted in 1995, S.C. Code Ann. § 12-54-85(C)(5) provided as follows: "The department may determine and assess taxes and fees after the thirty-six month limitation if . . . [t]he person liable for any taxes of fees administered by the department consents in writing, before the expiration of the time prescribed in this section for assessing taxes or fees due, to the assessment of the taxes of fees after the time prescribed by this section." 1995 S.C. Laws Act 60, § 4D(1) (eff. Aug. 1, 1995). In 2000, the section was redesignated S.C. Code Ann. § 12-54-85(C)(4), which provides: "Taxes may be determined and assessed after the thirty-six month limitation if: ... the person liable for any taxes consents in writing, before the expiration of the time prescribed in this section for assessing taxes due, to the assessment of the taxes after the time prescribed by this section." 2000 S.C. Laws Act 399, § 3U(1) (eff. Aug. 17, 2000).

Code Ann. § 12-54-80 codified the statute of limitations for assessments and made no mention of the term "refund," a term specifically referenced in Form FS-43.

The Department's constrained reading of the Form's reference to S.C. Code Ann. § 12-54-80 is not supported by the statutory authority associated with the Form or sworn testimony of the Department's officials. The evidence at trial will show that the Department's officials who were authorized to sign - and did sign - the Waivers did not even contemplate the "one-way" position adopted in the Department's Memorandum. Instead, they believed, and told Duke Energy that each of the Forms FS-43 extended the time for the filing of refund claims. (Davant Aff. ¶¶ 6, 14, Exhibit D; Anderson Aff. ¶¶ 10, 12–14, Exhibit E.)

The auditors' statements were indeed consistent with the Department's longstanding policies. For years, the Department advised taxpayers that it had in place a policy to execute waiver agreements extending the statue of limitations for both assessments and refunds. S.C. Rev. Proc. Bulletin #00-3 (S.C. Dep't of Rev. Dec. 4, 2000) (Exhibit K, Tab 1.) (*See also* Davant Aff. ¶¶ 6, 14, Exhibit D;[7] Dep. Tr. of Joseph Southard 78:17–20, Exhibit L.)

The Department attempts to explain of the use of the term "refund" in Form FS-43 by relying to S.C. Code Ann. § 12-54-30. (Department's Memorandum at 11-13.) However, at no time during the Tax Periods at Issue did Form FS-43 mention or reference S.C. Code Ann. § 12-54-30. The Department's position is inconsistent because

[7] "[¶] 6. It was common practice for the Department to seek an extension of time to make an assessment and request that taxpayer[s] sign Form FS-43. For example, if auditors were on a short time frame to audit a file, they would request that the taxpayers sign Form FS-43 as an agreement with the Department to extend the time for both assessments and refund." "[¶] 14. "... the Department historically intended, believed and understood that Form FS-43 not only extended the time to assess additional tax, but also authorized or extended the time for a taxpayer to file a claim for refund with the time stated in the Form FS-43."

it simultaneously claims that Form FS-43 is limited only to assessments (based on statutory references in the Form - S.C. Code Ann. § 12-54-80), while also claiming that the Form's reference to "refund" has no effect based on its reliance on a statute that is not referenced in the Form. The Department's selective application of South Carolina law cannot withstand scrutiny.

In addition, the language of Form FS-43 had the effect of extending the statute of limitations for refund claims. This fact is evidenced not only by the language of the Form itself, but also by the Department's own Memorandum and deposition testimony of its employees. In particular, in its Memorandum, the Department does not dispute that the language of Form FS-43 (substantially the same language remained in effect for all of the tax years at issue in this case) extended the limitations period for the filing of refund claims so long as the Waivers related to tax periods that remained open on or after 1995. The Department also conceded this view of the plain language of the waivers in depositions. (Department's Memorandum at 27.) (Dep. Tr. of Ronald W. Urban 27:1–3, 41:1–42:8, Exhibit M.)[8]

Further, the Form FS-43 executed by the Department and Duke Energy from 1996 to 1999, well after the redesignation of section 12-54-80 into section 12-54-85, continued to make reference to S.C. Code Ann. § 12-54-80, a statute that no longer existed. And the Form FS-43 executed by the Department and Duke Energy from 2000 through 2002 incorrectly cited to subsection (C)(5) of S.C. Code Ann. § 12-54-85 instead of subsection (C)(4). Like S.C. Code Ann. § 12-54-80, S.C. Code Ann. § 12-54-85(C)(4) or (C)(5)

[8] The Department previously claimed that the Waiver Form was never intended to extend the time for filing refund claims, even if it were executed after 1995. (S.C. Dep't of Rev. Determination § III.A, p. 9, Exhibit N.) The Department appears to have abandoned that claim and has conceded in its Memorandum that a Waiver executed in or after 1995 constitutes a valid extension of the time for filing refund claims.

does not mention the term "refund." The Department does not contest that any of the Waiver Forms, which were executed after 1995 which were identical to the forms used prior to 1995, extended the statute of limitations for filing refund claims. And the Department has not challenged Duke Energy's refund claims after 1995 as untimely. Thus, the language of the Form does not support the Department's position that Duke Energy's refund claims were untimely. The Department's reading of the language of Form FS-43 is entirely subjective and creates a factual dispute, making summary judgment inappropriate.

2. The Department Is Not Entitled to a Judgment as a Matter of Law Regarding the Waiver Issue Because There Are Substantial Material Facts in Dispute and the Department Misinterprets South Carolina Law.

The Department argues that Duke Energy's refund claims for the tax periods 1978 through 1993 are untimely because the Department did not have the authority to extend the statute of limitations for refund claims prior to 1995.[9] To support its argument, the Department selectively cites excerpts from a number of cases and rulings which stand for the simple proposition that a taxpayer seeking a tax refund must comply with the pertinent statute. (Department's Memorandum at 16-18.) However, none of these cases addresses a situation where an agency agreed in writing, on several occasions over a period of multiple years, to extend a statute of limitations, and decades later argued the agreements were invalid.

[9] The Department has changed its view over the course of this litigation with regard to which of the Tax Periods at Issue remained open and were validly extended. In the Final Determination issued by the Department to Duke Energy, the Department took the position that the "only years for which the taxpayer's refund claim is timely are 2001, 2000, and 1999. (S.C. Dep't of Rev. Determination § III.A, p. 9, Exhibit N.) The Department now concedes that "this Court may consider the refund claims for the periods 1994-2001." (Department's Memorandum at 27.)

The cases and rulings cited by the Department involved: a taxpayer, a non-wholesaler, requesting a refund of taxes that were only refundable to a wholesaler, *Asmer v. Livingston*, 225 S.C. 341, 82 S.E.2d 465 (1954); a taxpayer failing to timely file an original state tax return, and there was no agreement extending the statute of limitations, *Anon. Taxpayer v. S.C. Dep't of Rev.*, No. 01-ALJ-17-0105-CC, 2001 WL 904045 (S.C. Admin. L.J. Div. June 29, 2001) (Geathers, A.L.J.), and *Anon. Taxpayer v. S.C. Dep't of Rev.*, No. 98-ALJ-17-0426-CC, 1999 WL 203341 (S.C. Admin. L.J. Div. Mar. 25, 1999) (Anderson, A.L.J.); a determination of whether a tax refund claim could properly be adjudicated in a jury trial, *C.W. Matthews Contracting Co. v. S.C. Tax Comm'n*, 267 S.C. 548, 230 S.E.2d 223 (1976); a request for an extension to qualify for a deduction, *Guar. Bank & Trust Co. v. S.C. Tax Comm'n*, 254 S.C. 82, 173 S.E.2d 367 (1970); and a request to extend the time for applying for an exemption, *TNS Mills, Inc. v. S.C. Dep't of Rev.*, 331 S.C. 611, 503 S.E.2d 471 (1998). (Department's Memorandum at 16-17.) None of these cases is similar to this case.

The authority cited by the Department simply stands for the proposition that a statute of limitations is closed if the applicable limitations period expired without the presence of a written agreement for the extension of such period. *See Anon. Taxpayer*, No. 01-ALJ-17-0105, 2001 WL 904045; *Anon. Taxpayer*, No. 98-ALJ-17-0426, 1999 WL 203341.

Unlike an exemption or a deduction, a statute of limitations is **procedural** in nature and operates as a defense to limit the remedy available from an existing cause of action. *Hercules Inc. v. S.C. Tax Comm'n*, 274 S.C. 137, 143, 262 S.E.2d 45, 48 (1980) ("[A] statute of limitations affects the **remedy** and **not the right** ....") (emphasis added);

Jenkins v. Meares, 302 S.C. 142, 146, 394 S.E.2d 317, 319 (1990) (holding that the statute of limitations "is **remedial** or **procedural** in nature") (emphasis added); *Langley v. Pierce*, 313 S.C. 401, 403-04, 438 S.E.2d 242, 243 (1993) ("A statute of limitations is a **procedural** device....") (citing *Goad v. Celotex Corp.*, 831 F.2d 508, 511 (4th Cir. 1987)) (emphasis added); *Case v. Hermitage Cotton Mills*, 236 S.C. 285, 287, 113 S.E.2d 794, 795 (1960) (a statute of limitations "is one of limitation, and its requirement is **not jurisdictional**") (emphasis added). As a procedural limitation, the statute of limitations can be waived and both the South Carolina Supreme Court and Court of Appeals have held so:

> **A party can waive a statute of limitations defense**, but the waiver must be shown by words or conduct, including an express agreement, failure to claim the defense, or any action or inaction inconsistent with an intention to use the statute of limitations defense.

Anon. Taxpayer v. S.C. Dep't of Rev., 377 S.C. 425, 440, 661 S.E.2d 73, 80 (2008) (emphasis added); *accord Mende v. Conway Hosp., Inc.*, 304 S.C. 313, 315, 404 S.E.2d 33, 34 (1991); *City of N. Myrtle Beach v. Lewis-Davis*, 360 S.C. 225, 235, 599 S.E.2d 462, 466-67 (Ct. App. 2004). *See also McLendon v. S.C. Dep't of Highways & Pub. Transp.*, 313 S.C. 525, 525–26, 443 S.E. 2d 539, 540 (1994) ("While a question of subject matter cannot be waived, a statute of limitations defense can be waived.") (internal citation omitted); *Stange v. United States*, 282 U.S. 270, 274 (1931) (a waiver of the statute of limitations for assessments executed after the limitations period had already closed effectively extended the time for issuing of assessments).

More importantly, the South Carolina Court of Appeals has specifically held that a "[w]aiver is a **question of fact for the finder of fact**." *City of N. Myrtle Beach*, 360

S.C. at 234-35, 599 S.E.2d at 466 (emphasis added). "To constitute a waiver there need not be a new agreement for a valuable consideration. A simple voluntary relinquishment of a right with knowledge of all the facts -- an expression of intention not to demand a certain thing is sufficient to constitute a waiver." *S.C. Tax Comm'n v. Metro. Life Ins. Co.*, 266 S.C. 34, 40, 221 S.E.2d 522, 524 (1975). Furthermore, the United States Court of Appeals for the Fourth Circuit has opined that when a waiver is qualified on specific conditions, "those conditions cannot be ignored." *Ripley v. Commissioner*, 103 F.3d 332, 337 (4th Cir. 1996) (citing *United States v. Hodgekins*, 28 F.3d 610, 614-15 (7th Cir. 1994) (holding that the IRS could not induce a taxpayer to relinquish the protection afforded by the statute of limitations based on representation contained in the extension agreement drafted by the IRS and then disregard the condition), and *United States v. Nat'l Steel Corp.*, 75 F.3d 1146, 1151 (7th Cir. 1996) (indicating that conditions recited in a waiver of applicable limitations period are enforceable against the IRS)). The Fourth Circuit Court has further held that "though ... a waiver of the applicable [statute of] limitations period [is] not a contract, many courts have recognized that principles of contractual interpretation must be utilized in construing them. Consequently, because the IRS drafted the [f]orm ..., including the language specifying the date of termination of the extension agreement, to the extent that the language is ambiguous it is construed against the IRS." *Ripley*, 103 F.3d at 337 (internal citation omitted).

The Department's position is inconsistent with the holding of the South Carolina Court of Appeals and the principles set forth by the Fourth Circuit. Summary judgment is inappropriate in this case precisely because the words and conduct of the Department with regard to the Waivers are a central issue in this case. Even assuming, *arguendo*,

Duke Energy's refund claims for some of the tax years prior to 1995 were not filed before the expiration of the limitations period, the Department could nevertheless validly waive its right to assert the statute of limitations as a defense. Thus, the Department's position is not only contrary to South Carolina law, but a view of the evidence makes it clear that genuine issues of material fact exist with regard to the Waiver Issue.

Year after year, the Department and Duke Energy executed the Waivers for the sole purpose of extending the limitations periods for assessments and refunds. (Davant Aff. ¶¶ 6, 14, Exhibit D; Anderson Aff. ¶¶ 10, 12–13, Exhibit E.) In most cases, the Waivers were executed at the Department's request as evidenced by the sworn statement of the Director of the Department's Field Audit Division (Davant Aff. ¶ 6, Exhibit D; *see also* Department's Requests, Exhibit B), and by the fact that a number of the Waivers were first signed and dated by the Department before they were later signed and dated by Duke Energy (Waiver Forms FS-43, Exhibit C, Tabs 1, 3–16, 18, 20). At no point during the Tax Periods at Issue did the Department refuse to sign a Waiver because it lacked the authority to do so or even raise the issue with Duke Energy.

The unequivocal language of the Waivers and the Department's willingness to sign the Waivers during the more than 20 years the Department has audited the Tax Periods at Issue indicate that the Department agreed to extend the statute of limitations for Duke Energy to file refund claims for the Tax Periods at Issue. However, in depositions, some of the Department's former employees called into question the validity of Form FS-43 and specifically, whether or not it was approved and authorized by the Department. (*Compare* R. Urban Dep. Tr. 27:14–16, Exhibit M,[10] *with* Davant Aff. ¶¶ 7-

[10] A: "[Form FS-43] is not a Tax Commission form. It says Tax Commission at the top, but that is not what it is."

13, Exhibit D.) Furthermore, the Department disputed the authority of Marvin Davant, Director of the Field Audit Division, who signed the majority of the Waivers for the Tax Periods at Issue, to execute the Waivers on behalf of the Department. (*Compare* R. Urban Dep. Tr. 25:4–10, 32:11–33:3, Exhibit M, *with* Davant Aff. ¶¶ 3-4, 18, Exhibit D.) These disputes are issues of fact that are inappropriate for summary judgment.

The Department devotes eight pages of its Memorandum to provide a review of the statutes of limitations for refunds in place prior to and after August 1, 1995, concluding that because pre-1995 refund statutes were "more restrictive," the Department had no authority to extend any of the Tax Periods at Issue prior to the 1994 income tax year. (Department's Memorandum at 20-22.) None of the statutes cited by the Department prohibits a waiver of the statute of limitations. And the Department's argument ignores South Carolina's longstanding judicial precedent which unequivocally provides that a statute of limitations can be waived. *See, e.g., Anon. Taxpayer*, 377 S.C. at 440, 661 S.E.2d at 80; *see also Mende*, 304 S.C. at 315, 404 S.E.2d at 34; *City of N. Myrtle Beach*, 360 S.C. at 234-35, 599 S.E.2d at 466.

The Department also notes that Revenue Procedure 95-5 provides that "all periods that were open on the effective date of the RPA [Revenue Procedure Act of 1995] may be extended further by consent of the Department and the taxpayer," and then summarily concludes, without citing to a single statute, regulation, rule or other authority, that "extensions of time for assessing taxes did not extend the time for filing a refund prior to the RPA...." (Department's Memorandum at 21.) The Department's contention is simply incorrect, and Revenue Procedure 95-5 provides no support for it. At a minimum, to the extent the Department's "longstanding policy" is relevant, an evidentiary hearing

would be needed to determine what that longstanding policy was because the Department's own former employees disagree on this issue. (*Compare* R. Urban Dep. Tr. 54:15–55:23, Exhibit M, *with* Davant Aff. ¶¶ 6, 14-15, Exhibit D.)

The Department also fails to bring to the Court's attention the more recent Revenue Procedure Bulletin #00-3 which the Department issued in 2000 and which superseded Revenue Procedure 95-5. S.C. Rev. Proc. Bulletin #00-3 (S.C. Dep't of Rev. Dec. 4, 2000) (Exhibit K, Tab 1.) In Revenue Procedure Bulletin #00-3, the Department advised that:

> Consistent with its **longstanding administrative position**, ... [i]f the taxpayer agrees to the Department's request that a waiver of the time limitations on assessments be extended, ... the Department will also consider the time within which a taxpayer may file a claim for refund to be extended until the agreed upon date."

Id. (emphasis added).

Thus, the Department's own written guidance states that the Department has consistently waived the limitations periods for refund claims. The Department's former employees also disagree on the Department's longstanding policy regarding the effect of the Waivers. (*Compare* R. Urban Dep. Tr. 10:1–2, 10:10–11, 59:14–25, 60:1–2, Exhibit M, *with* Davant Aff. ¶¶ 6, 14, Exhibit D.) In depositions, the Department called into question the extent of the Department's "longstanding" administrative policy stating that its administrative position outlined in Revenue Procedure Bulletin #00-3 was longstanding, but only since 1995. (R. Urban Dep. Tr. 54:15–55:23, Exhibit M.)[11] The

[11] "Q: Okay. And this document [S.C. Revenue Procedural Bulletin #00-3] ... states, 'Consistent with its longstanding administrative position the Department will continue to interpret the time limitations in code 12-54-85 consistent with the following rules.' Correct?
A: Correct.

disagreement over whether the Department actually waived the statute of limitations in this case is "a question of fact for the finder of fact" and thus precludes summary judgment. *City of N. Myrtle Beach*, 360 S.C. at 234-35, 599 S.E.2d at 466 (emphasis added).

Nothing in Revenue Procedure 95-5 prohibits the Department from waiving the statute of limitations for refunds during the tax periods 1978 through 1993. And the Department has not cited any statute, rule or other authority which would have precluded the Department from waiving the limitations period to allow Duke Energy to file its refund claims for the 1978-1993 tax period. To the contrary, the South Carolina highest court has unequivocally stated that a statute of limitations could be waived and it is a question for the finder of fact to determine whether a party has waived its statute of limitations defense. Because there are material facts in dispute with regard to whether the Department waived the statute of limitations for Duke Energy's refund claims, the Department's Motion must be denied.

3. The Department Is Estopped From Arguing That the Waivers Have No Effect.

Contrary to its assertion, the Department is estopped from claiming that the Waivers did not extend the statute of limitations to allow Duke Energy to file its refund claims prior to 1992. Only recently, the South Carolina Court of Appeals stated:

> Estoppel may apply against a government agency, but "the party asserting estoppel against the government must prove: (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question; (2)

Q: And then it goes on to state what those rules were. Given that you're familiar with the document, what would your view of these rules be?

A: I would take it to mean when 12-54-85 was enacted in 1995, the Commission had consistently followed 12-54-85 as, you know, after its enactment as it states here. I believe that's what it's saying here."

> justifiable reliance upon the government's conduct; and (3) prejudicial change in position.

Logan v. Cherokee Landscaping & Grading Co., 389 S.C. 611, 618–19, 698 S.E. 2d 879, 883 (Ct. App. 2010) (citation omitted). "A governmental body is not immune from the application of the doctrine of estoppel where its officers or agents act within the proper scope of their authority." *Quail Hill, LLC v. County of Richland*, 387 S.C. 223, 236, 692 S.E. 2d 499, 506 (2010) (citation omitted). Summary judgment is inappropriate in this case because even if the Department were correct in stating that it did not have the power to waive the statute of limitations, whether the Department should be estopped from asserting such a defense presents questions of fact for this Court's consideration.

The Waivers were executed on a form provided by the Department, on the Department's letterhead. The Department drafted and signed most of the Waivers prior to their delivery to Duke Energy. In many instances, the Department initiated contact with Duke Energy and asked Duke Energy to execute the Waivers. The Department compelled Duke Energy's consent to abandon the protection afforded by the statute of limitations by representing that the Waivers would also extend the time for Duke Energy to file its tax refund claims. Duke Energy justifiably relied on the Department's continued representations, its binding published opinions, and the plain language of the Waivers that the time for filing refund claims for the Tax Periods at Issue had been extended. The Department, therefore, should be estopped from arguing that the Waivers have no effect prior to 1992.

4. The State of Limitations Was Tolled During the Waiver Periods.

The Department is incorrect in arguing that it is not subject to equitable tolling. Courts have invoked the equitable tolling doctrine to suspend or extend a statutory period

to "ensure fundamental practicality and fairness." *Hooper v. Ebenezer Senior Servs.& Rehab. Ctr.*, 377 S.C. 217, 233-34, 659 S.E. 2d 213, 221-22 (Ct. App. 2008). Equitable tolling is a judicially created mechanism that "stems from the judiciary's inherent power to formulate rules of procedure where justice demands it." *Hooper v. Ebenezer Senior Servs. & Rehab. Ctr.*, 386 S.C. 108, 115, 687 S.E. 2d 29, 32 (2009).

In the instant case at hand, fundamental practicality and fairness requires that the Department be precluded from ignoring the agreement it entered into with Duke Energy. The Department repeatedly has requested Duke Energy's consent to extend the time for assessment and the time to file a refund claim. (Department's Requests, Exhibit B.) Equity requires the Department to live up to its agreement. The statute of limitations for Duke Energy to file refund claims should be tolled and Duke Energy's refund claims for all years at issue should be allowed as timely.

5. The Adjustments Made by the IRS for the 1978-1982 Tax Periods Opened Those Years for South Carolina Corporate Income Tax Purposes With Respect to All Issues.

Even if the statute of limitations closed, federal adjustments made by the IRS to Duke Energy's federal tax return had the effect of re-opening the statute of limitations for Duke Energy's 1978-1982 South Carolina tax years.

The 1978-1982 tax years were subject to a federal examination by the IRS. The IRS ultimately made certain adjustments to Duke Energy's federal income tax returns for those years. These federal adjustments reopened the South Carolina statute of limitations for that period, and Duke Energy amended its South Carolina income tax returns for those periods. The Department takes a narrow of view of the opening of the statute of limitations that is not supported by South Carolina law. Specifically, the Department

claims that the effect of the federal adjustments was limited to the tax issues raised by the IRS. (Department's Memorandum at 26 n.17.) In support of its claim, the Department cites to S.C. Code Ann. § 12-54-85(D)(1), but does not acknowledge that the statute was not in effect during the 1978-1982 tax years. In fact, prior to 1995, South Carolina did not provide a specific provision which addressed the effect of a federal adjustment on a taxpayer's state tax filings. Therefore, before South Carolina changed its law in 1995 to limit the effect of a federal adjustment on extensions only to issues raised by the IRS, the IRS's adjustments to Duke Energy's income reopened the entire 1978-1992 tax years to any and all issues, and the Department and Duke Energy executed Waivers that extended the limitations periods for those years.

6. The Department's Claim that the 1992-1993 Tax Periods Are Closed Is Simply Erroneous.

The Department no longer alleges that it lacked authority to execute the Waivers for the 1992 and 1993 tax periods. Instead, the Department claims that the Waivers are invalid because they were executed after the expiration of the three-year statute of limitations. (Department's Memorandum at 27.) The Department is simply wrong.

The three-year statute of limitations started running from "the time the return was filed." S.C. Code Ann. § 12-54-85(F)(1) (1995). Duke Energy timely filed its original South Carolina corporate income tax return for the 1992 tax year on September 14, 1993.[12] It then signed a Waiver for the 1992 tax year on May 30, 1996, far short of the expiration of the statute of limitations on September 14, 1996. (Waiver Forms FS-43, Exhibit C, Tab 13.) For the 1993 tax year, Duke Energy timely filed its original South Carolina corporate income tax return on September 10, 1994, and signed a Waiver for

[12] The Department has expressly conceded that all of Duke Energy's original tax returns for the Tax Periods at Issue were timely filed. (Department's Memorandum at 2.)

that year on June 20, 1997, about three months before the applicable limitations period would have expired, on September 10, 1997. (Waiver Forms FS-43, Exhibit C, Tab 14.)

Therefore, the 1992 and 1993 tax years remained open for Duke Energy to file its refund claims.[13]

II. The Department Is Not Entitled to a Judgment as a Matter of Law That Duke Energy Is a Manufacturer Because There are Material Facts in Dispute Regarding Whether Electricity Is a Service or Tangible Personal Property.

During the Tax Periods at Issue, taxpayers whose principal business in South Carolina was the "manufacturing or a form of collecting, buying, assembling, or processing goods and materials within the state," were required to apportion their income based on a three-factor apportionment formula, consisting of property, sales, and payroll factors. S.C. Code Ann. § 12-6-2250 (applicable to tax years after 1995); S.C. Code Ann. § 12-7-1120 (applicable to tax years prior to 1996). All other taxpayers (except certain specific industries not relevant here) had to apportion their income using a single-factor gross-receipts apportionment formula. S.C. Code Ann. § 12-6-2290 (applicable to tax years after 1995); S.C. Code Ann. § 12-7-1190 (applicable to tax years prior to 1996).

This Court has previously explained that the three-factor apportionment method, based on property, payroll, and sales, "is used for taxpayers whose principal business in South Carolina is dealing in **tangible personal property** (typically used by businesses that manufacture, sell, or rent tangible personal property)," whereas the gross-receipts apportionment method is "normally used by taxpayers who do not deal with tangible personal property, such as financial businesses and service businesses...". *Media Gen.*

[13] The Department previously conceded that the refund claims for the 1992 and 1993 tax years were open. (S.C. Dep't of Rev. Determination § III.B, p. 9, Exhibit N.) The Department has once again abandoned its position and now claims that those refund claims are untimely. However, for the reasons stated in I.6, the Department's claim is erroneous.

Commc'ns, Inc. v. S.C. Dep't of Rev., 07-ALJ-17-0089-CC, 07-ALJ-17-0090-CC, 2009 S.C. Tax LEXIS 56, *48, *58 (S.C. Admin. L. Ct. May 4, 2009) (emphasis added) (Kittrell, A.L.J.) (internal citations omitted).

"Tangible property" is "real property and corporeal personal property but does not include money, bank deposits, shares of stock, bonds, credits, evidences of debt, choses in action, or evidences of an interest in property." *Id.*, 2009 S.C. Tax LEXIS 56 at *48 (citing S.C. Code Ann. § 12-6-30(11)). "Manufacturer" or "manufacturing" is not specifically defined for South Carolina income tax purposes. Further, there is no South Carolina judicial or administrative authority discussing the meaning of the terms in the income apportionment tax context. The term "service" is not specifically defined; however, the South Carolina Supreme Court has cited to the following definition of "service" from the Webster Dictionary:

> Any result of useful labor which does not produce a tangible commodity. In economics, such business concerns as railroads, telephone companies, or laundries, and such persons as physicians, are regarded as performing services.

Fennell v. S.C. Tax Comm'n, 233 S.C. 43, 46, 103 S.E.2d 424, 426 (1958).

The Department has previously ruled that:

> [W]hether a business is a service related industry can be made by comparing the gross receipts of the business derived from providing services to total gross receipts of the business. If over 50 percent of the gross receipts are from providing services, then the business would be service related. <u>This method has been utilized by the [South Carolina Tax] [C]ommission in determining whether a multistate taxpayer is providing services and thus would utilize the gross receipts ratio to apportion its income</u>.

S.C. Rev. Rul. No. 87-5, 1987 S.C. Tax LEXIS 15, at *3 (S.C. Tax Comm'n Sept. 16, 1987) (emphasis added) (Exhibit K, Tab 2).

The Department argues that Duke Energy is a manufacturer because it claims that the generation of electricity is manufacturing. Both parties' experts agree that if the provision of electricity is a service, then Duke Energy cannot be classified as a manufacturer as suggested by the Department. (Dep. Tr. of Ioannis Papapolymerou 43:4–14, Exhibit O; Dep. Tr. of Glenn Robinson 72:19–73:20, Exhibit P.) At a minimum, a trial is necessary to determine, what, if anything, Duke Energy manufactures.

The Department's mischaracterization of Duke Energy as a manufacturer is premised on two decisions issued in other tax contexts by the South Carolina Supreme Court and an out-of-context property tax opinion issued by the South Carolina Attorney General. However, the Department refuses to apply *Consolidated Hydro S.E., Inc. v. S.C. Dep't of Rev. & Taxation*, No. 95-ALJ-17-0634, 1996 WL 909155 (S.C. Admin. L.J. Div. May 13, 1996) (Lee, A.L.J.). In *Consolidated Hydro*, this Court held that the provision of electricity is not tangible personal property and instead constitutes a service for license tax purposes. *Id.* The Department's reliance on the property tax and Manufacturer's Act decisions, while dismissing a license tax case by this Court as "not directly relevant ... for income tax purposes" is disingenuous at best. (Department's Memorandum at 30-31.)

There is little question that South Carolina law treats electricity as tangible personal property in some contexts and as a service for others. For instance, the South Carolina legislature has specifically stated that for sales taxes, electricity is a service. S.C. Code Ann. § 12-36-60. Because the South Carolina courts, legislature and Attorney General have found that electricity means different things in different contexts, and electricity has not been defined in the corporate income tax context, an evidentiary

hearing is necessary to determine whether electricity is a good or a service for purposes of the South Carolina corporate income tax.

In concluding that electricity is a service in *Consolidated Hydro*, this Court applied the definition of "tangible personal property" for South Carolina sales tax purposes, which included "services and intangibles, including ... furnishing ... sales of electricity." *Consolidated Hydro*, 1996 WL 909155, at *2 (citing to S.C. Code Ann. § 12-36-60) (emphasis in the original). This Court reasoned that "while electricity is included in the statutes discussing the application of sales tax on the sale of tangible personal property, the sale of electricity is specifically recognized and defined as a service." *Id.* at *4 (emphasis added).

Similarly, other states treat the provision of electricity as a service. *See, e.g.*, Request for Private Letter Ruling – Nexus Issues (N.C Dep't of Rev. Feb. 9, 2007) ("For corporate income tax purposes, North Carolina does not consider the sale of electricity as the sale of tangible personal property.") (Exhibit Q); *In re Appeal of PacifiCorp*, 2002-SBE-005-A, 2002 Cal. Tax LEXIS 469 (Cal. SBE Sept. 12, 2002) (concluding that electricity is intangible rather than tangible, and that the sale of electricity is properly characterized as the sale of a service rather than a product, and thus does not qualify as tangible personal property for corporate income tax purposes; the Board noted that both the Multistate Tax Commission and the Federation of Tax Administrators categorize the sale of electricity as a service, rather than the sale of tangible personal property for corporate income tax purposes) (Exhibit R); *EUA Ocean State Corp. v. Comm'r of Rev.*, Mass. App. Tax Bd., Nos. C-258405-406, C258424-425; C258882-833; C259158-159; C259563; C262566-568 (Mass. App. Tax Bd. Apr. 24, 2006) (Exhibit S). *See also*

Comm'r of Revenue v. Houghton Mifflin Co., 423 Mass. 42, 45, 666 N.E.2d 491, 493-94 (1996); *Westinghouse Broad. Co. v. Comm'r of Rev.*, 382 Mass. 354, 357, 416 N.E.2d 191, 193 (1981); *Miller v. City of Los Angeles*, 185 Cal. 440, 197 P. 342 (1921); *State of La. v. New Orleans Ry. & Light Co.*, 116 La. 144, 150, 40 So. 597, 598 (1906); *Williams v. Park*, 72 N.H. 305, 56 A. 463, 464-65 (1903); *Commonwealth of Pa. v. Northern Elec. Light & Power Co.*, 145 Pa. 105, 119-20, 22 A. 839, 840-41 (1891).

The Department has not presented facts that would establish that electricity is tangible personal property. To the contrary, the fact that the Department retained an expert who gave sworn testimony regarding "the nature of electricity, electrical generation, electricity and commerce" is an admission that material facts are in dispute. (Robinson Dep. Tr. 5:14–19, Exhibit P.)

The evidence will show at trial that Duke Energy's sales constitute the provision of a service. (Expert Report of Prof. Ioannis Papapolymerou, Exhibit T; Papapolymerou Dep. Tr. 43:4–14, Exhibit O; Deposition of Dhiaa Jamil 50:1–51:11, Exhibit U.) In depositions, the Department's own expert admitted that Duke Energy provides a service:

> Q: So in your view, electricity – the electricity that Duke sells, the electric energy that Duke sells, it would change from material to a service if Duke went ahead and sold it on a single charge, you know, $40 per month for all the electricity? ...
>
> A: That's a service. No question.

(Robinson Dep. Tr. 72:19–73:20, Exhibit P.)

Because the record is replete with evidence that belies the Department's contention, there is a clear dispute over the material facts underlying the Apportionment Method Issue, and summary judgment is improper.

III. Duke Energy Is Entitled to a Judgment That as a Matter of Law the Entire Gross Receipts from Sales of Securities Must Be Included in the Computation of the Gross-Receipts Apportionment Formula.

The Gross Receipts Issue is appropriate for summary judgment because there are no genuine factual issues in dispute. Duke Energy respectfully requests that this Court deny the Department's Motion with regard to the Gross Receipts Issue and grant summary judgment in Duke Energy's favor declaring that gross receipts from sales of investment securities must be included in Duke Energy's South Carolina apportionment formula.

1. The Plain Language of the South Carolina Statutes Provides That Duke Energy Must Include Its "Gross" Receipts in Its South Carolina Apportionment Formula.

During the Tax Periods at Issue, South Carolina law provided that a taxpayer required to apply the single-factor gross-receipts apportionment formula must do so "using a fraction in which the numerator is gross receipts from within this State during the taxable year and the denominator is total gross receipts from everywhere during the taxable year." *See, e.g.*, S.C. Code Ann. § 12-6-2290 (applicable for tax years beginning after 1996); *see* S.C. Code Ann. § 12-7-1190 (applicable for tax years prior to 1996).[14] "Gross receipts" was not defined under South Carolina law during the Tax Periods at Issue.[15]

[14] Section 12-7-1190 provided: "[S]uch taxpayer shall make returns and pay annually an income tax upon a proportion of its remaining net income computed on the basis of the ratio of gross receipts from within this State during the income year to the total gross receipts of such year within and without the State." S.C. Code Ann. § 12-7-1190 (repealed 1996) (emphasis added).

[15] For purposes of the three-factor apportionment formula the sales factor consists of "[t]he ratio of sales made by such taxpayer during the income year which are attributable to this State to the total sales made by such taxpayer everywhere during the income year ....." S.C. Code Ann. § 12-6-2280 (for tax years after 1995); S.C. Code Ann. § 12-7-1170 (for tax years prior to 1996). The term "sales" was not defined under South Carolina law during the Tax Periods at Issue. Based on the discussion in Section II above, Duke Energy is not required to apportion its income under the three-factor apportionment formula, and instead must use the single-factor gross receipts apportionment method. However, regardless of the apportionment

Notwithstanding the use of the term "gross receipts," the Department argues that Duke Energy should include only its net receipts in the gross receipts factor. The Department's view is inconsistent with the plain language of the statute, and the Department has cited to no part of the South Carolina Code that supports the view that "gross" actually means "net."

Furthermore, the Department's contention is in direct conflict with the South Carolina canons of statutory interpretation which mandate that:

> The language of a tax statute must be given its plain ordinary meaning in the absence of an ambiguity therein. ... [I]f a legislative intent is clearly apparent from the language of the statute there is no occasion for resort to the rule of statutory construction.

Beach v. Livingston, 248 S.C. 135, 139, 149 S.E.2d 328, 330 (1996) (citation omitted).

The intent of this statute is to apportion a portion of a taxpayer's gross income to South Carolina to the extent of the taxpayer's activities in the state. There is nothing in the statute that justifies an interpretation that "gross receipts" to mean "net receipts."

2. "Gross" Receipts Has Been Broadly Interpreted by the Department and South Carolina Courts to Include All Receipts

Both the South Carolina Supreme Court and the Department have broadly construed the definition of "gross receipts" for purposes of the corporate license fee.

Recently, the South Carolina Supreme Court affirmed the broad meaning of the term "gross proceeds" in *Travelscape, LLC v. S.C. Dep't of Revenue*, 391 S.C. 89, 705 S.E.2d 28 (S.C. 2011), *upholding Travelscape, LLC v. S.C. Dep't of Revenue*, 08-ALJ-

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methodology applied, as discussed in Section III, both "gross receipts" (for purposes of the single-factor apportionment formula) and "sales" (for purposes of the three-factor apportionment formula) include the entire gross receipts from sales of securities. Therefore, Duke Energy's position contained in Section III applies to both "gross receipts" and "sales."

17-0076-CC (S.C. Admin. L.J. Div. Feb. 12, 2009) (Anderson A.L.J.). The South Carolina Supreme Court held that Travelscape's service and facilitation charges constituted gross proceeds on which it was required to pay sales tax and rejected the taxpayer's attempt to apply the tax to a net amount:

> We find the term gross proceeds as used in section 12-36-920(A) is a similar term to gross proceeds of sales. Therefore, the definition of gross proceeds of sales also applies to gross proceeds. Accordingly, "gross proceeds" under section 12-36-920(A) includes the value obtained from the rental of accommodations without deduction for the cost of services. S.C. Code Ann. § 12-36-90(1)(b)(ii). Because the cost of services is specifically included in the definition of gross proceeds of sales, we find the fees retained by Travelscape for its services are taxable as gross proceeds.

391 S.C. at 98, 705 S.E.2d at 33 (internal emphasis omitted).

In *Duke Power Co. v. South Tax Commission*, the South Carolina Supreme Court held that the language of the license fee imposition statute "clearly states that the license fee is based on entire gross receipts." *Duke Power Co. v. South Tax Comm'n*, 292 S.C. 64, 66, 354 S.E.2d 902, 903 (1987) (emphasis added).

Further, the South Carolina Code contains 85 uses of "gross" for tax purposes, including gross receipts, gross income, gross wages, gross estate, and gross proceeds. (Excerpts from Title 12, S.C. Code Ann., Exhibit V.) These statutes uniformly have been interpreted by the Department to mean gross and not net. For example, S.C. Code Ann. § 12-36-90 imposes the sales tax on "[g]ross proceeds of sales." S.C. Code Ann. § 12-37-930 imposes a special depreciation rule for certain "gross cost of assets" located in this state. "Gross wages" means all wages, and not the net amount an employee receives after

deductions. In each and every instance, the term "gross" is interpreted and applied by the Department to mean gross, and not net.

The term "gross receipts" was undefined for South Carolina license tax purposes, as is the case for corporate income tax purposes for during the Tax Periods at Issue. The Department specifically ruled that "[g]ross receipts is a broad term which includes all proceeds received by the entity so long as such receipts resulted from any part of its business." I-D-352, 1984 S.C. Tax LEXIS 14, at *2 (S.C. Tax Comm'n Mar. 26, 1984) (Exhibit K, Tab 3). The Department refused to limit the scope of "gross receipts" to net receipts in the license tax context, because "[t]he two are something separate and apart. 'Gross receipts' has been defined to mean the whole receipts as opposed to net receipts." I-D-384, 1985 S.C. Tax LEXIS 6, at *5 (S.C. Tax Comm'n May 17, 1985) (Exhibit K, Tab 4). The Department opined that:

> [T]he language of the license tax statute clearly indicates that the license fee ... is based on the entire gross receipt .... Where a statute is clear and unambiguous, there is no room for construction and the terms of the statute must be given their literal meaning.

Id. at *3.

The Department has abandoned its long-standing interpretation of "gross" in its attempt to refute Duke Energy's refund claim. The Department's results-oriented statutory interpretation is inconsistent with the plain meaning of the statute, should be afforded no weight, and should be invalidated.[16]

[16] A comparison of the South Carolina income tax return for "C" corporations and the South Carolina property tax return form for electric utilities further demonstrates that the Department has consistently viewed "gross" and "net" as two distinct concepts. The corporate income tax return uses the terms "total sales," for purposes of the three-factor apportionment formula, and "total gross receipts," for purposes of the gross-receipts apportionment formula. (SC 1120, Exhibit W, Tab 1.) The instructions to the return do not require netting for receipts from sales of securities. By contrast, the property tax return requires that certain items be reported at gross while other are reported at net (i.e., Total Net Operating Income, South

Finally, the South Carolina Attorney General has held that "gross" means gross for purposes of municipal business license taxes. Op. Att'y Gen., 2012 WL 1615813, at *2 (Apr. 2, 2012) ("all 'gross receipts' not specifically excluded by ordinance and not exempted by other law should be reported ... as the basis for its tax") (Exhibit K, Tab 5); Op. Att'y Gen., 2006 WL 1574907, at *1 (May 26, 2006) ("In Section 5-7-30 of the South Carolina Code (2004), the Legislature confers numerous powers upon municipalities, including the power to levy a business license tax on gross income .... [T]he town['s] ... business license tax is based on the business' gross income, instead of what the business nets.") (Exhibit K, Tab 6); Op. Att'y Gen. No. 83-76, 1983 WL 142745, at *1–2 (Sept. 26, 1983) ("Gross income means the total receipts from a business before deducting expenditures for any purpose. Net income is that portion of the receipts which remains after paying wages and paying for materials .... [G]iving the term 'gross income' its common meaning, and strictly construing the ordinance as written, the Town of Leesville is permitted to compute the license fees on the total receipts of a business, before any deductions are taken.") (internal citations omitted) (Exhibit K, Tab 7); Op. Att'y Gen. No. 77-40, 1977 WL 24383 (Feb. 2, 1977) ("In response to your request for an opinion from this Office as to the meaning of the term 'gross income' as it appears in Section 47-32, Code of Laws of South Carolina, 1962, as amended (Cum. Supp.), my opinion is that the ordinary and common meaning is 'gross receipts' of a business before deductions or expenditures for any purpose.") (Exhibit K, Tab 8.)

Carolina Net Operating Income; Total Gross Investment, South Carolina Gross Investment, Total Net Investment, South Carolina Net Investment). (PT-300, Exhibit W, Tab 2.)

3. The 2007 South Carolina Law Change Demonstrates That "Gross" Receipts Must Include All Receipts.

The plain meaning of S.C. Code Ann. § 12-6-2290 is further illustrated by the fact that five years after the close of the Tax Periods at Issue, the South Carolina legislature statutorily changed the apportionment formula to eliminate certain gross receipts, including receipts from sales of securities. The Department seeks to retroactively apply this significant law change to Duke Energy's Tax Periods at Issue despite the fact that the law change was effective for tax years beginning after 2006.

In 2007, S.C. Code Ann. § 12-6-2295 was enacted to define gross receipts to exclude the following receipts:

> (1) repayment, maturity, or redemption of the principal of a loan, bond, or mutual fund or certificate of deposit or similar marketable instrument;
>
> (2) the principal amount received under a repurchase agreement or other transaction properly characterized as a loan;
>
> (3) proceeds from the issuance of the taxpayer's stock or from sale of treasury stock;
>
> (4) damages and other amounts received as the result of litigation;
>
> (5) property acquired by an agent on behalf of another;
>
> (6) tax refunds and other tax benefit recoveries;
>
> (7) pension reversions;
>
> (8) contributions to capital, except for sales of securities by securities dealers;
>
> (9) income from forgiveness of indebtedness; or
>
> (10) amounts realized from exchanges of inventory that are not recognized by the Internal Revenue Code.

2007 S.C. Laws Act 110 § 51.A (enacted as S.C. Code Ann. § 12-6-2295(B) (emphasis added); *see also* 2007 S.C. Laws Act 116 §56.A (same).

This change in law was drastic. South Carolina law went from including all gross proceeds to excluding 10 categories of receipts.

The Department acknowledges that the apportionment statutes have been amended several times during the Tax Periods at Issue. (Department's Memorandum at 36.) However, the Department seeks to diminish the significance of the 2007 law changes by referencing them in a footnote. (*Id.* at 36 n.22.) The Department makes two inconsistent arguments: (1) the Department argues that because prior to 2007 the General Assembly did not amend the apportionment statutes, the General Assembly must have supported the Department's interpretation of "gross receipts," and (2) the General Assembly's adoption of the 2007 law change reflected an affirmation of the Department's position. These two positions are irreconcilable. The General Assembly's 2007 law change did not reflect prior law – it changed prior law to exclude 10 categories of receipts. The Department should not be allowed to retroactively apply this law change.

The South Carolina Supreme Court has held that in adopting an amendment to a statute that effectuates a **material** change, there is a presumption that the Legislature intended to change the existing law rather than to clarify its original intent. *Key Corporate Capital, Inc. v. County of Beaufort*, 373 S.C. 55, 60-61, 644 S.E.2d 675, 678 (2007) (acknowledging the "presumption that in adopting an amendment to a statute, the Legislature intended to change the existing law" and finding that the amendment at issue did in fact change the law because "to hold otherwise would indicate that this amendment

essentially was a futile act"); *see also Kerr v. State,* 345 S.C. 183, 189, 547 S.E.2d 494, 497 (2001) (adoption of amendment which materially changes statute's terminology raises presumption that departure from original law was intended); *Denene, Inc. v. City of Charleston,* 352 S.C. 208, 212, 574 S.E.2d 196, 198 (2002) ("The Court must presume the Legislature did not intend a futile act, but rather intended its statutes to accomplish something"). The court has also held that where "a statute is clear and unambiguous there is no room for construction, and courts must give the terms of the statute their literal meaning." *Southeastern Fire Ins. Co. v. S.C. Tax Comm'n,* 253 S.C. 407, 410, 171 S.E.2d 355, 356 (1969); *see also Carolina Power & Light Co. v. City of Bennettsville & Marlboro Elec. Coop.*, 314 S.C. 137, 139, 442 S.E.2d 177, 179 (1994). When statutes imposing taxes are involved, the "statute must be construed most favorably to the taxpayer, and any doubt should be resolved against the taxing authority." *Ryder Truck Lines, Inc. v. S.C. Tax Comm'n.*, 248 S.C. 148, 152, 149 S.E.2d 435, 437 (1966).

For example, in *Key Corporate Capital*, the South Carolina Supreme Court held that a subsequent legislative amendment effectuated a change in prior law. *Key Corporate Capital,* 373 S.C. at 60-61, 644 S.E.2d at 678. Prior to the amendment, South Carolina law required that the "amount paid" be refunded to a successful bidder when a tax sale was voided. The legislature later amended the statute to expressly provide that when a tax sale was voided, the purchaser would be entitled to actual interest earned. At issue before the court was whether under prior law, the "amount paid" included any interest. The court explained that "[i]f a statute's language is plain, unambiguous, and conveys a clear meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning." *Id.*, 373 S.C. at 59, 644 S.E.2d at 677 (citation

omitted). It then reasoned that the plain language of the original statute limited the remedy to the "amount paid" and did not provide for the refund of interest. The court further acknowledged the "presumption that in adopting an amendment to a statute, the Legislature intended to change the existing law." *Id*, 373 S.C. at 60, 644 S.E.2d at 678. It then held that "[b]ecause the amendment materially changed the terminology of the statute, a departure from existing law clearly was intended, rather than a clarification of original intent. ... In fact, to hold otherwise would indicate that this amendment essentially was a futile act, which we are disinclined to do." *Id.* at 61, 644 S.E.2d at 678 (internal citation omitted).

Similarly, the 2007 legislative change added a new statutory section (S.C. Code Ann. § 12-6-2295) which materially changed the terminology of the South Carolina apportionment statute. The new definition of "sales" and "gross receipts," which excludes items ordinarily understood to be included in those terms, was enacted only for purposes of the South Carolina income apportionment statutes, and not for all tax purposes. The titles to the acts expressly provide that S.C. Code Ann. § 12-6-2295 was added to the Code "to define the terms 'sales' and 'gross receipts' consistently and specifically for [the] purpose" of another new added section, S.C. Code Ann. § 12-6-2252, which provides for "allocation and apportionment of business income for state income tax purposes by basing the determination only on a sales factor." 2007 S.C. Laws Act 110; 2007 S.C. Laws Act 116. The titles to these acts additionally state the purpose "to amend Section 12-6-2290, relating to apportionment of income derived from other sources, so as to include a cross reference to the new definition for 'gross receipts'" enacted as S.C. Code Ann. § 12-6-2295. *Id.*

Further, neither the title of the legislative acts enacting S.C. Code Ann. § 12-6-2295 nor any legislative history suggest that S.C. Code Ann. § 12-6-2295 was intended to be a mere clarification. In contrast, the plain language of the titles to these acts indicate that the purpose of the enactment of S.C. Code Ann. § 12-6-2295 was to add a new definition of gross receipts for apportionment purposes, and thus clearly indicate the legislature's intent to change existing law. *See Demas v. Convention Motor Inns*, 268 S.C. 186, 190, 232 S.E.2d 724, 726 (1977) (recognizing propriety of discerning legislative intent from the title of an act).

Notably, the Department has in the past contended that a statutory amendment that was more limited than the original statute was in fact a change in the law. In particular, the Department has argued that the 1985 statutory amendment to the South Carolina license tax imposition statute, which previously imposed the tax on "the entire gross receipts from business" and was later changed to "the gross receipts from services rendered from regulated business", limited the scope of the tax and was thus a change in the law. Br. App't at pp. 8-9, *Duke Power* (1987) ("The new language of § 12-19-110 now states that the tax levied therein is restricted to 'receipts derived from services rendered.' This indicates that the prior language of § 12-19-110 was not limited in this respect.") (Exhibit X.) Like the 1985 amendment to the license tax, the 2007 legislative amendment to the apportionment statute had a restrictive effect and specifically excluded, for the first time, certain items of income from the definition of "gross receipts." As a result, the 2007 law change further evidences the fact that "gross receipts" prior to the change included all receipts, and not just "net" receipts.

4. A Predominant Number of Other States' Courts Have Ruled That the Gross Receipts from Sales of Securities Must Be Included in the Sales or Gross Receipts Apportionment Factor.

The issue as to whether gross receipts from sales of securities are includible in the denominator of the sales or gross-receipts apportionment factor is not new. While the Department cites to a handful of cases from other jurisdictions that have ruled on this issue, the Department does not bring to the Court's attention a number of other, more recent, state court decisions that have ruled that "gross" means "gross" and not "net." For example, in a case dealing with the inclusion of treasury receipts in the sales apportionment factor, the California Supreme Court stated:

> We agree with Microsoft that ... "[g]ross" implies the whole amount received, not just the amount received in excess of the purchase price. To only consider the net price difference as "gross receipts" is an awkward fit with the statutory language, at best.

Microsoft Corp. v. Franchise Tax Board, 39 Cal. 4th 750, 759, 139 P.3d 1169, 1174 (2006).

In the most recent case on point, the California Court of Appeal held that the full sales price of future sales contracts were "gross receipts" to be included in the sales factor. *General Mills v. Franchise Tax Board*, 172 Cal. App. 4th 1535, 92 Cal. Rptr. 3d 208 (Ct. App. 2009). The court stated:

> "[g]ross" implies the whole amount received, not just the amount received in excess of the purchase price. To only consider the net price difference as "gross receipts" is an awkward fit with the statutory language, at best. To the extent the language is ambiguous, we generally will prefer the interpretation favoring the taxpayer.

Id., 172 Cal. App. 4th at 1543, 92 Cal. Rptr. 3d at 214 (quoting *Microsoft Corp.*, 39 Cal. 4th at 759, 139 P.3d at 1174).

The California cases adopt the view espoused by other courts that gross receipts require the inclusion of all receipts, including receipts from the sale of securities. For example, in *Sherwin-Williams Co. v. Department of Revenue,* 329 Or. 599, 996 P.2d 500 (Or. 2000), the Oregon Supreme Court affirmed the Oregon Tax Court's decision that the Department of Revenue erroneously included in the sales factor net income rather than gross receipts from the disposition of investment securities. Following the court's decision, the Oregon legislature changed its law to exclude from gross receipts the sale of intangible assets including, but not limited to, securities, unless those receipts are derived from the taxpayer's primary business activity. Or. Rev. Stat. § 314.665(6)(a).

In *Mead Corp. v. Department of Revenue,* OO CH 01854 (Ill. Cir. Ct. Feb. 5, 2002) (Exhibit Y, Tab 1), the Illinois Circuit Court upheld Mead's position that Illinois statutes required the inclusion of gross receipts from the sale of investments in the sales factor.

In Rhode Island, the district court concluded that the plain meaning of the sales factor statute required that the "total gross receipts," including receipts from the disposition of intangibles, should be included in the sales factor. *Western Elec. Co. v. Norberg,* AA No. 81-391 (R.I. Dist. Ct. 6th Div., Mar. 30, 1983), *cert. denied,* 461 A.2d 679 (R.I. 1983) (Exhibit Y, Tab 2). After the tax years at issue in that case, Rhode Island also amended its statute to provide that only the net income from the sale of securities or other financial obligations was to be included in the sales factor denominator. R.I. Gen. Laws § 44-11-14 (a)(2)(v) (1995 & Supp. 1997).

In *United States Steel Corp. v. Wisconsin Dep't of Revenue,* Dkt. I-6578 (Wis. Tax App. Comm'n May 9, 1985), (Exhibit Y, Tab 3), the Wisconsin Tax Appeals Commission determined that the entire proceeds from the sale and redemption of short-term securities should be included in the sales factor. Wisconsin reacted to the court's decision by subsequently amending its statute to exclude interest, dividends, and receipts and the gain or loss from the disposition of securities from the sales factor. Other tribunals adjudicating similar controversies have likewise held that the gross receipts rather than the net income from the sale of intangibles should be included in the sales factor. *Illinois Tool Works, Inc. v. Lindley,* 70 Ohio St. 2d 175, 436 N.E.2d 220 (1982); PD 89-235 (Va. Tax Comm'r Sept. 6, 1989) (Exhibit Y, Tab 4); PD 87-77 (Va. Tax Comm'r Feb. 27, 1987) (Exhibit Y, Tab 5); *AT&T v. Dep't of Rev.*, 15 OTR 202, 2000 WL 1279835 (Or. T.C. 2000) (Exhibit Y, Tab 6); *Pennzoil Co. v. Dep't of Rev.*, 15 OTR 101, 2000 WL 1025573 (Or. T.C. 2000) (Exhibit Y, Tab 7); *AT & T. v. State Tax Appeal Bd.*, 241 Mont. 440, 787 P.2d 754 (1990).

The Department claims that the "inclusion [of the return of principal] does nothing more than artificially inflate the denominator" of the apportionment factor. (Department's Memorandum at 34.) In support of its proposition, the Department cites exclusively to decisions from other jurisdictions even though, in its Memorandum, the Department essentially refutes the practice of relying on other state court opinions: "And in any event, decisions from the courts of other states do not bear upon or alter the decision of the Supreme Court of this state." (Department's Memorandum at 32.) The Department once again relies on the same group of cases in support of its contention that the inclusion of the return of principal from investment transactions "is plainly absurd."

(Department's Memorandum at 38.)[17] The progenitor of this group of cases, *AT & T v. Director, Division of Taxation*, 194 N.J. Super. 168, 173, 476 A.2d 800, 802 (App. Div. 1984), premises its holding on the notion that interpreting New Jersey's receipts factor to include all receipts from short-term securities investments would produce "absurd results." The rest of the cases cited by the Department follow *AT&T* and reason similarly. However, other state courts have specifically rejected the "absurd results" line of cases for two reasons:

> First, they do violence to the language of the statutes they interpret. In each case, the same language governs both sales of off-the-shelf products and sales of securities. *AT&T* and its progeny offer no explanation why in one instance that language should require inclusion of gross proceeds and in the other require inclusion of only net proceeds. Second, they overlook the fact no absurd result is required.

Microsoft Corp., 39 Cal. 4th at 763, 139 P.3d at 1177; *accord Sherwin-Williams Co. v. Johnson*, 989 S.W.2d 710, 715 (Tenn. Ct. App. 1998) ("With deference to sister jurisdictions, this court is reluctant to apply the same 'absurd result standard.'"). Those courts have found that where the statutory language is plain and clear, "[a]n absurd result is not necessary for, in spite of the plain language of [the sales factor statute], the commissioner may opt for a different scheme of assessment whenever the resulting apportionment does not fairly represent the taxpayer's business in this state." *Sherwin-Williams*, 989 S.W.2d at 715. In the instant case at hand, the plain language of the apportionment statute requires that all gross receipts from Duke Energy's sales of investment securities must be included in the gross-receipts apportionment factor. The

[17] The Department's reliance on *General Motors Corp. v. Franchise Tax Bd.*, 39 Cal. 4th 773, 139 P.3d 1183 (2006), is misplaced. In *General Motors*, the court's holding that only interest from sale of securities constitutes gross receipts was limited to repos. Repos represent a nominal percentage of the instruments purchased and sold by Duke Energy.

Department may not disregard the plain and unambiguous words of the statute. Only the South Carolina legislature can amend a statute – which is exactly what happened to the apportionment statute in 2007

5. The Department's Purported "Long-Standing Administrative Policy" of Interpreting "Gross" Receipts to Mean "Net" Receipts Directly Contravenes South Carolina Law.

The Department's argument that "gross" means "net" is premised on the assertion that "[i]t has been the long-standing administrative policy of the Department to require only the inclusion of the net gain or interest from short-term investment transactions in the calculation of the apportionment formula." (Department's Memorandum at 33.) The Department then summarily concludes, without any further explanation, that its "interpretive policy is entirely consistent with and furthers the purpose of the apportionment statutes" and insists that its "policy is entitled to deference by this Court." (Department's Memorandum at 35.) The Department's reading of the cases upon which it relies in making its conclusion misses the point. While, as a general matter, the construction of a statute by an agency will be accorded deference, "where the terms of the statute are clear, the court must apply those terms according to their literal meaning ... [and] the court will reject the agency's interpretation where it is specifically contrary to the statute or regulation." *Comm'rs of Pub. Works v. S.C. Dep't of Health & Envtl. Control*, 372 S.C. 351, 359, 641 S.E.2d 763, 767 (Ct. App. 2007) (emphasis added); *Brown v. Bi-Lo, Inc.*, 354 S.C. 436, 440, 581 S.E.2d 836, 838 (2003) ("[W]here, as here, the plain language of the statute is contrary to the agency's interpretation, the Court will reject the agency's interpretation.").

That is because "the final responsibility for the interpretation of the law rests with the courts":

> At most, administrative practice is a weight in the scale, to be considered, but not to be inevitably followed. While we are of course bound to weigh seriously such rulings, they are never conclusive.

Stone Mfg. Co. v. S.C. Empl't Sec. Comm'n, 219 S.C. 239, 249, 64 S.E.2d 644, 648 (1951) (internal quotations omitted).

In any event, the level of deference afforded to an agency varies:

> The level of deference that should be accorded an agency's interpretation of a statute often depends on its form – for example, whether the interpretation is a binding norm or a general statement of policy. When the agency's interpretation is validly promulgated as a regulation, it has the force and effect of law . . . [W]hether an agency's action or statement amounts to a rule which must be formally enacted as a regulation – or a general policy statement – which does not have to be enacted as a regulation – depends on whether the action or statement establishes a – "binding norm."
> ****
> When an agency's interpretation is not a binding norm, but simply a general policy statement, it is less clear what deference if any it should be given.

S.C. Dep't of Motor Vehicles v. Serge Lajueness, No. 06-ALJ-21-0270-AP, (S.C. Admin. L.J. Div. Mar. 4, 2008) (internal citations and quotations omitted); *see also S.C. Administrative Practice & Procedure*, Ch. I, pp. 15-16 (Randolph R. Lowell ed., 2d ed. 2008).

In fact, the South Carolina Supreme Court has in the past refused to afford any deference to the Department's administrative policy when such policy was contrary to state law. In *Bass v. State*, the Department had issued on multiple occasions administrative interpretations of a statute. *Bass v. State*, 307 S.C. 113, 414 S.E.2d 110

(1992), *cert. granted, judgment vacated on other grounds by Bass v. S. Carolina*, 509 U.S. 916 (1993) and *abrogated by Harper v. Va. Dep't of Taxation*, 509 U.S. 86 (1993). Refusing to follow the Department's longstanding policy, the court reasoned:

> While we agree...that it is very unfortunate the Tax Commission has instilled false hopes by advising persons that there is a three year statute of limitations ..., we are not bound by the Tax Commission's misinterpretation of [the statute]. Indeed, in light of our prior case law, we are obligated to correct this erroneous interpretation of [the statute].

Id., 307 S.C. at 118, 414 S.E.2d at 113.

Here, the Department's purported "long-standing administrative policy" is contrary to the plain language of the apportionment statute. South Carolina courts have long held that "in construing a statute, words must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation." *State v. Leopard*, 349 S.C. 467, 471, 563 S.E.2d 342, 344 (Ct. App. 2002). In the instant case, the language of S.C. Code Ann. § 12-6-2290, and its predecessor, could not be more clear in that the gross, and not net, receipts must be included in the computation of the gross-receipts apportionment factor. The Department has not presented a single shred of evidence that would indicate that, in enacting the gross receipts apportionment statute, the South Carolina Legislature intended otherwise. If the Legislature had wanted to limit the scope of "gross receipts" by only including the net receipts from certain transactions, it was free to do so (and subsequently did do so in 2007). The Department's policy is in effect asking the Court to retroactively usurp the role of the Legislature and create a limitation that did not otherwise exist. *Am. Petroleum Inst. v. S.C. Dep't of Rev.*, 382 S.C. 572, 579, 677 S.E.2d 16, 20 (2009); *Henderson v.*

Evans, 268 S.C. 127, 130, 232 S.E.2d 331, 333 (1977). Therefore, the Department's policy is invalid.

In sum, the plain language of the apportionment statute and the 2007 statutory law change demonstrate that all gross receipts from the sale of securities must be included in the computation of the gross receipts factor. Furthermore, the Department has consistently interpreted "gross" to include all gross receipts, and not net. Likewise, South Carolina courts and the Attorney General have broadly interpreted the term "gross receipts" to include all gross receipts of a taxpayer. And the Department's purported long-standing practice to the contrary cannot change that. Therefore, for all of the above reasons, this Court should grant Duke Energy's Motion that all gross receipts are includible in the computation of its gross receipts factor as a matter of law, and should deny the Department's Motion as to the Gross Receipts Issue.

CONCLUSION

The Department is not entitled to a judgment as a matter of law with regard to the Waiver Issue. The Department has *not* provided uncontroverted evidence to prove that (a) for the 1978 through 1993 tax periods, the Department did not extend the statute of limitations to allow Duke Energy to file refund claims, and (b) the Department is not estopped from claiming that Duke Energy could not file refund claims for the 1978 through 1993 tax periods under the doctrines of equitable estoppel and equitable tolling.

The Department is not entitled to a judgment as a matter of law with regard to the Apportionment Method Issue because there are genuine issues of material facts regarding whether Duke Energy is a "manufacturer" for purposes of the South Carolina apportionment statutes.

Duke Energy is entitled to summary judgment with respect to the Gross Receipts Issue because South Carolina law is clear in that Duke Energy is required to include all of its gross receipts in the denominator of its South Carolina gross receipts apportionment factor.

For the foregoing reasons, the Department's Motion for Summary Judgment should be DENIED, and Duke Energy's Cross-Motion for Partial Summary Judgment should be GRANTED.

RESPECTFULLY SUBMITTED,

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Attorneys for Petitioner Duke Energy Corporation

May 21, 2012
Columbia, South Carolina

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

DUKE ENERGY CORPORATION, Petitioner, **vs.** **SOUTH CAROLINA DEPARTMENT OF REVENUE,** Respondent.	**Docket No.: 10-ALJ-17-0270-CC**

LIST OF EXHIBITS TO
DUKE ENERGY'S MEMORANDUM OF LAW IN OPPOSITION TO THE SOUTH CAROLINA DEPARTMENT OF REVENUE'S MOTION FOR SUMMARY JUDGMENT AND IN SUPPORT OF
DUKE ENERGY'S CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT

Exhibit	Description
A	Affidavit of Rickey McCarver
B	Department's Requests
C	Waiver Forms FS-43
D	Affidavit of Marvin N. Davant
E	Affidavit of Robert K. Anderson
F	Deposition of Jan Urban
G	Correspondence between Duke Energy Corp. and the S.C. Dep't of Rev.
H	SC Dep't of Rev. Report of Field Audit
I	SC 870AD
J	S.C. Dep't of Rev.'s Audit Report and Duke Energy Corp.'s Protest
K Tab 1	S.C. Rev. Proc. Bulletin #00-3 (S.C. Dep't of Rev. Dec. 4, 2000)

Tab 2	S.C. Rev. Rul. No. 87-5 (S.C. Tax Comm'n Sept. 16, 1987)
Tab 3	I-D-352
Tab 4	I-D-384
Tab 5	Op. Att'y Gen., 2012 WL 1615813 (Apr. 2, 2012)
Tab 6	Op. Att'y Gen., 2006 WL 1574907 (May 26, 2006)
Tab 7	Op. Att'y Gen. No. 77-40, 1977 WL 24383 (Feb. 2, 1977)
L	Deposition of Joseph Southard
M	Deposition of Ronald W. Urban
N	S.C. Dep't of Rev. Determination
O	Deposition of Ioannis Papapolymerou
P	Deposition of Glenn Robinson
Q	Request for Private Letter Ruling – Nexus Issues (N.C. Dep't of Rev. Feb. 9, 2007)
R	In the Matter of the Appeal of PacifiCorp, 2002-SBE-005-A, (Cal. SBE Sept. 12, 2002)
S	EUA Ocean State Corp. v. Comm'r of Revenue, Mass. App. Tax Bd., Nos. C-258405-406, C258424-425; C258882-833; C259158-159; C259563; C262566-568 (April 24, 2006)
T	Expert Report of Prof. Ioannis Papapolymerou
U	Deposition of Dhiaa Jamil
V	Excerpts from Title 12, S.C. Code Ann.
W	
Tab 1	SC 1120
Tab 2	PT-300
X	Br. App't at pp. 8-9, Duke Power (1987)
Y	
Tab 1	*Mead Corp. v. Dep't of Revenue*, OO CH 01854 (Ill. Cir. Ct. Feb. 5, 2002)
Tab 2	*Western Elec. Co. v. Norberg*, AA No. 81-391 (R.I. Dist. Ct. 6th Div., Mar. 30, 1983)
Tab 3	*United States Steel v. Wisconsin Dep't of Revenue*, Dkt. I-6578 (Wis. Tax App.

	Comm'n May 9, 1985)
Tab 4	PD 89-235 (Va. Tax Comm'r Sept. 6, 1989)
Tab 5	PD 87-77 (Va. Tax Comm'r Feb. 27, 1987)
Tab 6	*AT&T v. Dep't of Revenue*, 15 OTR 202, 2000 Ore. Tax LEXIS 17 (Or. Tax 2000)
Tab 7	*Pennzoil Co. v. Dep't of Revenue*, 15 OTR 101, 2000 Ore. Tax LEXIS 6, 2000 WL 1025573 (Or. Tax 2000)

Exhibit A

Re-order from Bushnell Company
(215) 842-9520
www.BushnellCo.com

RECYCLED PAPER
RECYCLABLE

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

DUKE ENERGY CORPORATION, Petitioner, **vs.** **SOUTH CAROLINA DEPARTMENT OF REVENUE,** Respondent.	**Docket No.: 10-ALJ-17-0270-CC**

AFFIDAVIT OF RICKEY MCCARVER

Appeared before the undersigned officer duly authorized to administer oaths, Rickey McCarver, who deposed and stated as follows:

1.

My name is Rickey McCarver. I am over the age of 18 years, and I am not under any disability that would impair my competency to provide an affidavit.

2.

This affidavit is given from my personal knowledge.

3.

During the period 1978-2001 ("Period at Issue"), Duke Energy

Corporation ("Duke Energy") was a North Carolina corporation engaged principally in the business of selling electricity, with principal offices located at 526 S. Church Street, Charlotte, North Carolina 28285.

4.

From July 2, 1984 until November 30, 2010, I was at various times the Assistant Tax Manager, Tax Manager, and Tax Director of Duke Energy. In those roles, I prepared Federal and state income tax returns, performed tax research and planning, and managing federal and state tax audits. Included in my responsibilities was the management of the South Carolina income tax audits.

5.

South Carolina first began auditing Duke Energy for South Carolina income tax purposes in 1978.

6.

Every year during the Period at Issue, South Carolina auditors would travel to, and spend a week at, the offices of Duke Energy in Charlotte, North Carolina, reviewing documentation relating to the income tax audit for that particular year.

7.

To the best of my knowledge, no South Carolina auditor ever provided Duke Energy with an audit report for any particular year during the

Period at Issue.

8.

To the best of my knowledge, every year during the Period at Issue, at the request of the South Carolina Department of Revenue ("Department"), the Department and Duke Energy agreed to sign a waiver extending the statute of limitations applicable to that particular year and including any previous year(s) that remained open under South Carolina law or by virtue of a previously executed waiver.

9.

To the best of my knowledge, both the Department and Duke Energy understood that all waivers extended the statute of limitations with respect to audits and refund claims.

10.

During the Period at Issue, the Department has never disputed or disagreed with Duke Energy's classification of investment securities as taxable or exempt.

11.

I declare under penalty of perjury that the foregoing is true and correct.

Further affiant sayeth not, this 7th day of January, 2011.

Rickey A. McCarver

Rickey McCarver

Subscribed before me this
7th day of January, 2011.

Judith A. Reese

Notary Public

My commission expires: 02/26/2012

7990484.1

Exhibit B

Re-order from Bushnell Company
(215) 842-9520
www.BushnellCo.com

RECYCLED PAPER
RECYCLABLE

State of South Carolina
Department of Revenue
301 Gervais Street, P.O. Box 125, Columbia, South Carolina 29214

June 15, 1998

Duke Power Corporation
422 Church Street
Charlotte, NC 28242-0001
Attn: Mr. Rick McCarver

Dear Rick,

I'm faxing the waiver to you and sending the original by mail.
Please fax back a copy of executed waiver to my attention at (803) 898-5685, and return the original to me at SC Department of Revenue, PO Box 125, Columbia, SC 29214.

I'm sorry again for the delay, but I was in charge of my Mother's 6 month battle with lung cancer which ended June 9, 1998, and everything got put on the back burner. I'm back on the job again and will get with my supervisor next week to get his thoughts on the methods we were using to see if he has any different ideas.

I'll give you a call next week and let you know where we stand.
Give me a call if we need to talk.

Yours Very Truly,

Randy Wilson

Randy Wilson, Auditor
(803) 898-5615

DES00000210

State of South Carolina
Department of Revenue
301 Gervais Street, P.O. Box 125, Columbia, South Carolina 29214

December, 7 1998

Duke Power Corporation
422 Church Street
Charlotte, NC 28242-0001
Attn: Mr. Rick McCarver

Dear Rick,

I'm faxing the waiver to you and sending the original by mail.
Please fax back a copy of executed waiver to my attention at (803) 898-5685, and return the original to me at SC Department of Revenue, PO Box 125, Columbia, SC 29214.

I'm sorry again for the latest delay, but I once my mother passed away on June 9, my mother -in-law announced that the non-hodgkins lymphona cancer that she had and that had been in remission had come back and was all around her kidneys. etc. We still don't know what her prognosis is but my wife has quite her job to spend time with and to help take care of her mothr. This has been the thoughest year in my 49 years, so far. My father now needs for me to be sure he gets fed, handle all of his business, etc. I know everybody goes through these things but I feel like I've got more than I can do.

I'll give you a call after the first of the year and get a draft copy to you. Thanks for being understanding.

Also, I had a guy run a red light and totaled our '86 Buick LeSabre back in July. I think they gave me about $2,200 but I'd had some repairs I'd recently made like a whole new air conditioning system ($600) and some other ones where it was just time for the parts to be replaced so I didn't get enough money for the car that I lost.The car was still in great shape I liked that car so much that I bought a '92 Buick LeSebre to replace the other one.

Give me a call if we need to talk.

Yours Very Truly,

Randy Wilson

Randy Wilson, Auditor
(803) 898-5615

DES00000211

South Carolina
Department of Revenue
P. O. Box 125 Columbia, S.C. 29214

RETURN
SERVICE
REQUESTED

COLUMBIA
DEC 9 96
SC

U.S. POSTAGE
.525

RICK MCCARVER
DUKE POWER CORP
422 CHURCH ST
CHARLOTTE NC 28242 0001

28242-0001

439

DES0000212

TO Duke Power Company
P.O. Box 33189
Charlotte, N.C. 28242
Attn: Mr. Wilson R. Taylor

FROM S.C. TAX COMMISSION
P. O. BOX 125
Columbia, South Carolina 29214
Phone (803) 737-4408

SUBJECT Income Tax '83, '84, '85, '86 (income); '83, '86, '87, '88 Fee. | PLEASE RETURN WITHIN 10 DAYS | DATE 11/1/89

MESSAGE

Rena,

Please have the enclosed waivers signed and returned to me so that we can finish the audit once the IRS audit is finalized. Thanks,

SIGNED Randy Wilson

PLEASE REPLY BELOW

My case is still in Appeals. I'll let you know when it has been settled.

DATE 11/8/89 SIGNED

RETURN PINK COPY WITH REQUESTED INFORMATION, KEEP WHITE COPY

DES00000299

C-157 (10/84)

SOUTH CAROLINA TAX COMMISS
FIELD SERVICES DIVISION
CONSENT TO EXTEND THE TIME TO ASSESS TAX

File No. 20090024-9

Duke Power Company — SSN
Name of Taxpayer(s)

PO Box 33189, Charlotte, N.C. 28242
Address (Number, Street, City or Town, State, Zip Code)

and the SOUTH CAROLINA TAX COMMISSION consent and agree to the following:

(1) The amount of any STATE Income Tax / License Fee tax due on any return(s) made by or for the above taxpayer(s) for the period(s) ended December 31, 1983/84, December 31, 1984/85, December 31, 1985/86 and December 31, 1986/87 may be assessed at any time on or before December 31, 1990 (Expiration Date)

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.

(Name of Taxpayer)

By: John P.O. Vaupel
(Taxpayer, Partner, Officer of Corp., etc.,)

VP Taxes — 11/8/89
(Title) (Date)

SOUTH CAROLINA TAX COMMISSION

By: Marvin N. Davant Randy Weber — 11/1/89
(Director, Field Services Division) (Date)

If this waiver is executed on behalf of a corporation, it will be signed by such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition, to which the seal, if any, of the corporation must be affixed.

FS-43 (11/85)

DES00000300

SOUTH CAROLINA TAX COMMISSION
FIELD SERVICES DIVISION
CONSENT TO EXTEND THE TIME TO ASSESS TAX

File No. 20090024-9

Duke Power Company — SSN
Name of Taxpayer(s)

Po Box 33189, Charlotte, N.C. 28242
Address (Number, Street, City or Town, State, Zip Code)

and the SOUTH CAROLINA TAX COMMISSION consent and agree to the following:

(1) The amount of any STATE Income Tax / License Fee tax due on any return(s) made by or for the above taxpayer(s) for the period(s) ended December 31, 1983/84, December 31, 1984/85 and December 31, 1985/86

may be assessed at any time on or before December 31, 1989
(Expiration Date)

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.

Duke Power Co.
(Name of Taxpayer)

By: [signature] V.P. Tax
(Taxpayer, Partner, Officer of Corp., etc.,)

(Title)

6/19/89
(Date)

SOUTH CAROLINA TAX COMMISSION

By: Marvin N. Durant Rw
(Director, Field Services Division)

5/25/89
(Date)

If this waiver is executed on behalf of a corporation, it will be signed by such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition, to which the seal, if any, of the corporation must be affixed.

FS-43 (11/85)

DES00000301

Duke Power Co.
P.O. Box 33189
Charlotte, NC 28242
Attn: M Wilson R Taylor

TAX CO.
P.O. BOX 125
Columbia, South Carolina 29214
Phone: (803) 737-4408

TO

SUBJECT: Waiver for 83, 84, 85 (income) & 84, 85, 86 Lic. Fee

PLEASE RETURN WITHIN 10 DAYS

DATE 5/20/92

MESSAGE

Fm:

Please have the enclosed waivers signed and returned to me so that we can finish this audit and the IRS audit in a timely fashion. Thanks.

Randy Little

SIGNED

PLEASE REPLY BELOW

I've attached the executed waivers.

Duke Power Co

P.O. Box [illegible] US Tax

DATE

SIGNED

RETURN PINK COPY WITH REQUESTED INFORMATION. KEEP WHITE COPY.

C-157 (10/84)

DES00000302

TO Duke Power Company
PO Box 33189
Charlotte, N.C. 28242
Attn: Wilson R. Taylor

FROM S.C. TAX COMMISSION
P. O. BOX 125
Columbia, South Carolina 29214
Phone (803) 737-4408

FOLD

SUBJECT Waiver for 1983+1984 (income); 84+85 License Fee | PLEASE RETURN WITHIN 10 DAYS | DATE 3/3/89

MESSAGE

Remi,

Please have the enclosed waiver signed + returned to me so that we can finalize this audit. Thanks,

SIGNED Randy Wilson

PLEASE REPLY BELOW

DATE SIGNED

RETURN PINK COPY WITH REQUESTED INFORMATION, KEEP WHITE COPY

C-157 (10/84)

DES00000303

SOUTH CAROLINA TAX COMMISSION
FIELD SERVICES DIVISION
CONSENT TO EXTEND THE TIME TO ASSESS TAX

File No. 20090034-9

Duke Power Company — SSN
Name of Taxpayer(s)

P O Box 33189 Charlotte, N.C. 28242
Address (Number, Street, City or Town, State, Zip Code)

and the SOUTH CAROLINA TAX COMMISSION consent and agree to the following:

(1) The amount of any STATE Income Tax / License Fee tax due on any return(s) made by or for the above taxpayer(s) for the period(s) ended December 31, 1983/84 and December 31, 1984/85

may be assessed at any time on or before June 30, 1989
(Expiration Date)

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.

Duke Power Co
(Name of Taxpayer)

By: John P. D. Kelly
(Taxpayer, Partner, Officer of Corp., etc.)

V P, Taxes
(Title)

3/7/89
(Date)

SOUTH CAROLINA TAX COMMISSION

By: Marvin H. Durant pw
(Director, Field Services Division)

3/3/89
(Date)

If this waiver is executed on behalf of a corporation, it will be signed by such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation. In addition, to which the seal, if any, of the corporation must be affixed.

FS-43 (11/85)

DES00000304

State of South Carolina
Department of Revenue
301 Gervais Street, P.O. Box 125, Columbia, South Carolina 29214

December 7, 2001

Duke Energy Corporation
422 S. Church St.
Charlotte, NC 28242-0001
Attn: Mr. Rick McCarver

Dear Rick,

Please have this waiver executed, fax a copy to me at (803) 898-5811 and return the original at your earliest convenience.

I look forward to resolving this audit and moving on the next one which will surely be much less complicated and settled in a much shorter period of time. I'm sure you feel the same as I do.

Have a happy and safe holiday season.

Yours truly,

Randy

Randy Wilson, Auditor
(803) 898-5615

DES00000346

DUKE ENERGY TAX DEPT x:704-382-8261

** Transmit Conf.Report **

P.1 Dec 11 2001 9:35

Fax/Phone Number	Mode	Start	Time	Page	Result	Note
18038985811	NORMAL	11, 9:35	0'24"	2	# O K	

713-989-3200

Corporate Tax Department
422 S. Church Street, PB05B
P.O. Box 1244
Charlotte, NC 28201-1244
fax: 704-382-8261

Facsimile Memorandum

TO: RANDY WILSON

FROM: RICK McCARVER

DATE: 12-11-01

NUMBER OF PAGES ATTACHED: 1

MESSAGE: SC WAIVER - 1978-1998

If you do not receive all of the pages please call Kim Tuttle at (704) 382-8126.

DES00000348

State of South Carolina
Department of Revenue
Field Services Division
Consent to extend the time to Assess Tax

FS-43

File#20090024-9
FEI#56-0205520

Duke Energy Corp. (Formerly: Duke Power Co.) & Combined Affiliates
Name of Taxpayer(s)
422 S Church St. Charlotte, NC 28242-0001
Address

and the SOUTH CAROLINA DEPARTMENT OF REVENUE consent and agree to the following:

The amount of any STATE Corp. Income/License Fee tax due on any return(s) made by or for the period(s) ended:

December 31, 1978 - December 31, 1998 (Income)

December 31, 1984 - December 31, 1999 (License Fee)

may be assessed at any time on or before June 30, 2002.
(Expiration Date)

This agreement extends the time for mailing the notice of assessment or refund of the above tax pursuant to the provisions of Section 12-54-85(c)(5) of the 1976 South Carolina Code of Laws, as amended.

Duke Energy Corporation
(Name of Taxpayer)

By: _____
(Taxpayer, Partner, Corp.Officer,etc.)

Senior Vice President Corporate Tax — 12-11-01
(Title) — (Date)

SOUTH CAROLINA DEPARTMENT OF REVENUE

By: Robert K. Anderson by TKW — 12/7/01
(Director, Field Services Div.) — (Date)

If this waiver is executed on behalf of a corporation, it will be signed by such officer of officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition, to which the seal, if any, of the corporation must be affixed.

DES00000350

State of South Carolina
Department of Revenue
Field Services Division
Consent to extend the time to Assess Tax

FS-43

File#20090024-9
FEI#56-0205520

Duke Energy Corp. (Formerly: Duke Power Co.) & Combined Affiliates
Name of Taxpayer(s)
422 S Church St. Charlotte, NC 28242-0001
Address

and the SOUTH CAROLINA DEPARTMENT OF REVENUE consent and agree to the following:

The amount of any STATE Corp. Income/License Fee tax due on any return(s) made by or for the period(s) ended:

December 31, 1978 - December 31, 1998 (Income)

December 31, 1984 - December 31, 1999 (License Fee)

may be assessed at any time on or before June 30, 2002.
(Expiration Date)

This agreement extends the time for mailing the notice of assessment or refund of the above tax pursuant to the provisions of Section 12-54-85(c)(5) of the 1976 South Carolina Code of Laws, as amended.

Duke Energy Corporation
(Name of Taxpayer)

By: _____
(Taxpayer, Partner, Corp.Officer, etc.)

Senior Vice President Corporate Tax — 12-11-01
(Title) — (Date)

SOUTH CAROLINA DEPARTMENT OF REVENUE

By: Robert K. Anderson by TKW — 12/7/01
(Director, Field Services Div.) — (Date)

If this waiver is executed on behalf of a corporation, it will be signed by such officer of officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition, to which the seal, if any, of the corporation must be affixed.

DES00000351

SOUTH CAROLINA DEPARTMENT OF REVENUE
301 GERVAIS STREET
COLUMBIA, SOUTH CAROLINA 29214

December 15, 2000

Duke Energy Corporation
422 S Church Street
Charlotte, NC 28242-0001
Attn: Mr. Rick McCarver

Dear Rick,

Please have the enclosed waiver executed and return to me at your earliest convenience. You can fax a copy to my office at 803-898-5685 and return the original by mail.

I'll call you after the first of the year to discuss an audit plan.

Yours Very Truly,

Randy Wilson

Randy Wilson, Auditor
(803) 898-5615

State of South Carolina
Department of Revenue
Field Services Division

FS-43

Consent to extend the time to Assess Tax

File#20090024-9
FEI#56-0205520

Duke Energy Corp. (Formerly: Duke Power Co.) & Combined Affiliates
Name of Taxpayer(s)

422 S Church St Charlotte, NC 28242-0001
Address

and the SOUTH CAROLINA DEPARTMENT OF REVENUE consent and agree to the following:

The amount of any STATE Corp. Income/License Fee tax due on any return(s) made by or for the period(s) ended:

December 31, 1978 - December 31, 1997 (Income)

December 31, 1984 - December 31, 1998 (License Fee)

may be assessed at any time on or before December 31,2001,
(Expiration Date)

This agreement extends the time for mailing the notice of assessment or refund of the above tax pursuant to the provisions of Section 12-54-85(c)(5) of the 1976 South Carolina Code of Laws, as amended.

Duke Energy Corporation
(Name of Taxpayer)

By: _____
(Taxpayer, Partner, Corp.Officer, etc.)

Senior Vice President Corporate Tax
(Title)

12/18/2000
(Date)

SOUTH CAROLINA DEPARTMENT OF REVENUE

By: Robert K. Anderson by TRW
(Director, Field Services Div.)

12/15/00
(Date)

If this waiver is executed on behalf of a corporation, it will be signed by such officer of officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition, to which the seal, if any, of the corporation must be affixed.

DES00000353

State of South Carolina
Department of Revenue
301 Gervais Street, P.O. Box 125, Columbia, South Carolina 29214

December, 7 1998

Duke Power Corporation
422 Church Street
Charlotte, NC 28242-0001
Attn: Mr. Rick McCarver

Dear Rick,

I'm faxing the waiver to you and sending the original by mail.
Please fax back a copy of executed waiver to my attention at (803) 898-5685, and return the original to me at SC Department of Revenue, PO Box 125, Columbia, SC 29214.

I'm sorry again for the latest delay, but I once my mother passed away on June 9, my mother -in-law announced that the non-hodgkins lymphona cancer that she had and that had been in remission had come back and was all around her kidneys. etc. We still don't know what her prognosis is but my wife has quite her job to spend time with and to help take care of her mothr. This has been the thoughest year in my 49 years, so far. My father now needs for me to be sure he gets fed, handle all of his business, etc. I know everybody goes through these things but I feel like I've got more than I can do.

I'll give you a call after the first of the year and get a draft copy to you. Thanks for being understanding.

Also, I had a guy run a red light and totaled our '86 Buick LeSabre back in July. I think they gave me about $2,200 but I'd had some repairs I'd recently made like a whole new air conditioning system ($600) and some other ones where it was just time for the parts to be replaced so I didn't get enough money for the car that I lost.The car was still in great shape I liked that car so much that I bought a '92 Buick LeSebre to replace the other one.

Give me a call if we need to talk.

Yours Very Truly,

Randy Wilson

Randy Wilson, Auditor
(803) 898-5615

DES00000376

DEC. 8.1998 9:10AM SCDOR FSD 8037374685 452 NO.385 P.2

The State of Sou Carolina

Department of Revenue

FAX COVER SHEET

Columbia Main Office
(check box below for return fax number)

Administrative Division (ADMIN.)
- ☐ Human Resources (803) 898-5425
- ☐ Legislative / Public Assistance (803) 898-5446

Field Services Division (FSD)
- ☐ All Departments (803) 898-5685

Information Resources Management (IRM)
- ☐ All Departments (803) 898-5507

Office of General Counsel (OGC)
- ☐ Criminal Investigation Dept (803) 898-5425
- ☐ Regulatory Litigation / Policy (803) 898-5446
- ☐ Revenue Litigation (803) 898-5147

Office Services Division (OSD)
- ☐ Alcohol Beverage License (803) 898-5899
- ☐ All Other Departments (803) 898-5888

Property Division (PROP.)
- ☐ All Departments (803) 898-5484

Taxpayer Service Centers
(check box below for return fax number)

- ☐ Aiken (803) 641-7684
- ☐ Beaufort (843) 524-2188
- ☐ Charleston (843) 556-1780
- ☐ Columbia (803) 798-1160
- ☐ Florence (843) 662-4876
- ☐ Greenville (864) 232-5008
- ☐ Myrtle Beach (843) 293-2014
- ☐ Rock Hill (803) 324-8289
- ☐ Spartanburg (864) 594-4908

TO: Rick McCarver (704) 382-8175 FAX (704) 382-8261

FROM: Randy (First) Wilson (Last) PHONE: (803) 898-5615

DIVISION: Field Services DATE: 12/7/98

COMMENTS: Rick, Sorry again. This thing will be cleared up in 1999. Call me if you need me for anything

2nd try - paper jammed the first time.

CONFIDENTIALITY NOTICE

This transmission is intended only for the use of the individual or entity to which it is addressed and may contain information which is privileged and confidential. If the reader of this message is not the intended recipient, you are hereby notified that any disclosure, distribution, or copying of this information is strictly prohibited. If you have received this transmission in error, please notify the sender immediately by calling the above telephone number. DES00000377

PAGE 1 OF 3 PAGES INCLUDING COVERSHEET

C-228 (Rev. 04/98) R155

STATE OF SOUTH CAROLINA
DEPARTMENT OF REVENUE AND TAXATION
FIELD SERVICES DIVISION
CONSENT TO EXTEND THE TIME TO ASSESS TAX

FS-43
Rev. (10/93)
2024

File No. 20090024-9

Duke Power Co. (Now renamed: Duke Power Corporation) ~~SSN~~ FEI #56-0205520
Name of Taxpayer(s)

422 South Church St. Charlotte, NC 28242-0001
Address (Number, Street, City or Town, State, Zip Code)

and the SOUTH CAROLINA DEPARTMENT OF REVENUE AND TAXATION consent and agree to the following:

(1) The amount of any STATE Corp. Income/License Fee tax due on any return(s) made by or for the above taxpayer(s) for the period(s) ended December 31, 1978 through December 31, 1994 (Income)
December 31, 1984 through December 31, 1995 (License)

may be assessed at any time on or before December 31, 1998
(Expiration Date)

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.

DUKE POWER CO. (Now renamed Duke Energy Corp.)
(Name of Taxpayer)

By: _____
(Taxpayer, Partner, Officer of Corp., etc.,)

Cary Flynn, Vice President Corporate Tax
(Title)

6/19/98
(Date)

SOUTH CAROLINA DEPARTMENT OF REVENUE AND TAXATION

By: Marvin N. Durant by Randy Wilson
(Director, Field Services Division)

6/15/98
(Date)

If this waiver is executed on behalf of a corporation, it will be signed by such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition, to which the seal, if any, of the corporation must be affixed.

DES00000378

STATE OF SOUTH CAROLINA
DEPARTMENT OF REVENUE AND TAXATION
FIELD SERVICES DIVISION
CONSENT TO EXTEND THE TIME TO ASSESS TAX

FS-43
Rev. (10/93)
2024

File No. 20090024-9

Duke Power Co. (Now renamed Duke Energy Corp.) SSN FEI# 56-0205520
Name of Taxpayer(s)

422 South Church St. Charlotte, NC 28242-0001
Address (Number, Street, City or Town, State, Zip Code)

and the SOUTH CAROLINA DEPARTMENT OF REVENUE AND TAXATION consent and agree to the following:

(1) The amount of any STATE Corp. Income/License Fee tax due on any return(s) made by or for the above taxpayer(s) for the period(s) ended Dec. 31, 1978 through Dec. 31, 1994 (Income)
Dec. 31, 1984 through Dec. 31, 1995 (License)

may be assessed at any time on or before June 30, 1998
(Expiration Date)

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.

DUKE POWER CO. (Now renamed Duke Energy Corp.)
(Name of Taxpayer)

By: E. G. Ruff
(Taxpayer, Partner, Officer of Corp., etc.,)
Ellen T. Ruff
Vice President and General Counsel, Electric Operations 12/22/97
(Title) (Date)

SOUTH CAROLINA DEPARTMENT OF REVENUE AND TAXATION

By: Marvin N. Grant/tb 12/19/97
(Director, Field Services Division) (Date)

If this waiver is executed on behalf of a corporation, it will be signed by such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition, to which the seal, if any, of the corporation must be affixed.

DES00000379

State of South Carolina
Department of Revenue
301 Gervais Street, P.O. Box 125, Columbia, South Carolina, 29214

December 19, 1997

Duke Energy Corporation
422 South Church St.
Charlotte, NC 28242-0001

Attn: Mr. Rick McCarver

Dear Rick,

Please have the enclosed waiver signed before December 31, 1997 and return to me at your earliest convenience. I am completing the report this week to be reviewed possibly by year-end and mailed to you early January.

I hope you and your family have a happy holiday season.

Yours very truly,

SC DEPARTMENT OF REVENUE
FIELD SERVICES DIVISION

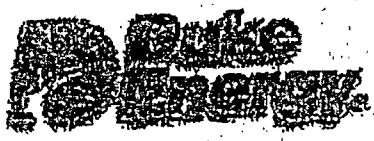
Randy Wilson
Auditor
(803)898-5615

/tb

****
*** TX REPORT ***
****

TRANSMISSION OK

TX/RX NO	2438
CONNECTION TEL	18038985685
CONNECTION ID	
ST. TIME	06/19 09:38
USAGE T	00'53
PGS.	2
RESULT	OK



Corporate Tax Department
422 S Church Street, PB05B
P.O. Box 1244
Charlotte, NC 28201-1244
fax: 704-382-8261

Facsimile Memorandum

TO: RANDY WILSON

FROM: RICK McCARVER

DATE: 6-19-98

NUMBER OF PAGES: 2

If you do not receive all of the pages, please call Judie Reese at (704) 382-2736 as soon as possible.

MESSAGE: Sorry to hear about your Mom. You have my deepest sympathy.

DES00000381

STATE OF SOUTH CAROLINA
DEPARTMENT OF REVENUE AND TAXATION
FIELD SERVICES DIVISION
CONSENT TO EXTEND THE TIME TO ASSESS TAX

FS-43
Rev. (10/93)
2024

File No. 20090024-9

Duke Power Co. (Now renamed Duke Energy Corporation) SSN FEI #56-0205520
Name of Taxpayer(s)

422 South Church St. Charlotte, NC 28242-0001
Address (Number, Street, City or Town, State, Zip Code)

and the SOUTH CAROLINA DEPARTMENT OF REVENUE AND TAXATION consent and agree to the following:

(1) The amount of any STATE Corp. Income/License Fee tax due on any return(s) made by or for the above taxpayer(s) for the period(s) ended December 31, 1978 through December 31, 1993 (Income)
December 31, 1984 through December 31, 1994 (License)

may be assessed at any time on or before December 31, 1997
(Expiration Date)

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.

Duke Power Co. (Now renamed Duke Energy Corporation)
(Name of Taxpayer)

By: Robert A. Jolin
(Taxpayer, Partner, Officer of Corp., etc.)

Vice President and General Counsel-Corporate and Energy Services (Title)

6-25-97
(Date)

SOUTH CAROLINA DEPARTMENT OF REVENUE AND TAXATION

By: Marion M. Davenport Jr.
(Director, Field Services Division)

6/20/97
(Date)

If this waiver is executed on behalf of a corporation, it will be signed by such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition, to which the seal, if any, of the corporation must be affixed.

DES00000382

State of South Carolina
Department of Revenue
301 Gervais Street, P.O. Box 125, Columbia, South Carolina 29214

June 20, 1997

Duke Power Company
422 S. Church Street
Charlotte, N. C. 28242-0001

Attn: Mr. Rick McCarver

Dear Rick,

Please have the enclosed waiver executed and return it to me by June 30, 1997. Also, I need for you to fax a copy of the executed waiver to me at (803) 737-4685 and mail the original to my attention.

I will be completing my work and reviewing it with my supervisor next week, so you should be receiving the report early in July.

Thanks for your help and if you have any questions, please call me at the number listed below.

Yours very truly,

S. C. DEPARTMENT OF REVENUE
FIELD SERVICES DIVISION

Randy Wilson

Randy Wilson, Auditor
(803) 737-4408

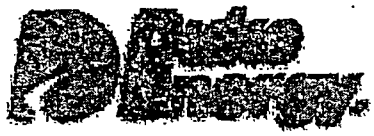
(803) 898-5615

DES00000383

****
*** TX REPORT ***
****

TRANSMISSION OK

TX/RX NO	1551
CONNECTION TEL	18037374685
CONNECTION ID	
ST. TIME	06/25 14:07
USAGE T	01'10
PGS.	2
RESULT	OK



Corporate Tax Department
422 South Church Street, PB05B
Charlotte, North Carolina 28242-0001
fax: 704-382-8261

Facsimile Memorandum

Tax Department Telecopier

(704)382-8261

TO: Randy Wilson

FROM: Rick McCarver

DATE: June 25, 1997

NUMBER OF PAGES: 2 (including cover)

If you do not receive all of the pages, please call Margaret Milen at (704)382-1075 as soon as possible.

MESSAGE:

DES00000384

State of South Carolina
Department of Revenue
301 Gervais Street, P.O. Box 125, Columbia, South Carolina, 29214

August 9, 1995

Duke Power Co.
422 S Church St.
Charlotte, NC 28242-0001

Attn: Mr. Rick A McCarver

Dear Mr. McCarver:

Please have the enclosed waiver executed and returned to me at your earliest convenience.

Joe or I will be back in touch with you to discuss a date to meet you again.

If I can be of assistance, please feel free to call me at the number listed below.

Yours very truly,

SOUTH CAROLINA DEPARTMENT OF REVENUE
FIELD SERVICES DIVISION

Randy Wilson

Randy Wilson
Auditor
(803)737-4408

/dd
Enclosure

DES00000385

The State of South Carolina

Department of Revenue

Columbia (Main Office) Fax: (803) 898-5446

Taxpayer Service Centers

Aiken
Fax: (803) 641-7684

Beaufort
Fax: (803) 524-2188

Charleston
Fax: (803) 556-1780

Columbia (Dutch Plaza)
Fax: (803) 798-1160

Columbia (Field Services)
Fax: (803) 898-5685

Columbia (Office Services)
Fax: (803) 898-5888

Florence
Fax: (803) 662-4876

Greenville
Fax: (864) 232-5008

Myrtle Beach
Fax: (803) 293-2014

Rock Hill
Fax: (803) 324-8289

Spartanburg
Fax: (864) 594-4906

TO: Mr. Rick McCarver

PHONE: (704) 382-8175 FAX (704) 382-8261

FROM: Randy Wilson

PHONE: (803) 898-5615 (FAX) (803) 898-5685

DATE: 6/15/98

COMMENTS: Rick, This is the last waiver we'll need. Time to put back on the front burner. Give me a call if you need anything I be in touch with you soon, Randy

CONFIDENTIALITY NOTICE

This transmission is intended only for the use of the individual or entity to which it is addressed and may contain information which is privileged and confidential. If the reader of this message is not the intended recipient, you are hereby notified that any disclosure, distribution, or copying of this information is strictly prohibited. If you have received this transmission in error, please notify the sender immediately by calling the above telephone number.

DES00000386

PAGE 1 OF 3 PAGES INCLUDING COVERSHEET

C-224 (Rev. 11/97) 8155

STATE OF SOUTH CAROLINA
DEPARTMENT OF REVENUE AND TAXATION
FIELD SERVICES DIVISION
CONSENT TO EXTEND THE TIME TO ASSESS TAX

FS-43
Rev. (10/93)
2024

File No. 20090024-9

Duke Power Co. (Now renamed: Duke Power Corporation) ~~SSN~~ FEI #56-0205520

Name of Taxpayer(s)

422 South Church St. Charlotte, NC 28242-0001

Address (Number, Street, City or Town, State, Zip Code)

and the SOUTH CAROLINA DEPARTMENT OF REVENUE AND TAXATION consent and agree to the following:

(1) The amount of any STATE Corp. Income/License Fee tax due on any return(s) made by or for the above taxpayer(s) for the period(s) ended December 31, 1978 through December 31, 1994 (Income)
December 31, 1984 through December 31, 1995 (License)

may be assessed at any time on or before December 31, 1998
(Expiration Date)

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.

(Name of Taxpayer)

By: _____
(Taxpayer, Partner, Officer of Corp., etc.)

(Title) (Date)

SOUTH CAROLINA DEPARTMENT OF REVENUE AND TAXATION

By: Marvin N. Durant by Randy Wilson 6/15/98
(Director, Field Services Division) (Date)

If this waiver is executed on behalf of a corporation, it will be signed by such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation. In addition, to which the seal, if any, of the corporation must be affixed.

DES00000387

State of South Carolina
Department of Revenue
301 Gervais Street, P.O. Box 125, Columbia, South Carolina 29214

June 15, 1998

Duke Power Corporation
422 Church Street
Charlotte, NC 28242-0001
Attn: Mr. Rick McCarver

Dear Rick,

I'm faxing the waiver to you and sending the original by mail.
Please fax back a copy of executed waiver to my attention at (803) 898-5685, and return the original to me at SC Department of Revenue, PO Box 125, Columbia, SC 29214.

I'm sorry again for the delay, but I was in charge of my Mother's 6 month battle with lung cancer which ended June 9, 1998, and everything got put on the back burner. I'm back on the job again and will get with my supervisor next week to get his thoughts on the methods we were using to see if he has any different ideas.

I'll give you a call next week and let you know where we stand.
Give me a call if we need to talk.

Yours Very Truly,

Randy Wilson

Randy Wilson, Auditor
(803) 898-5615

DES00000388

COPY

FS-43
Rev 1/99
2024

State of South Carolina
DEPARTMENT OF REVENUE
FIELD SERVICES DIVISION
CONSENT TO EXTEND THE TIME TO ASSESS TAX

File No. 20090024-9

Duke Energy Corp.(Formerly:Duke Power Co.)&Combined Affiliates SSN/FEI 56-0205520
Name of Taxpayer

422 S. Church St., Charlotte, NC 28242-0001
Address (Number, Street, City or Town, State, Zip Code)

and the SOUTH CAROLINA DEPARTMENT OF REVENUE consent and agree to the following:

(1) The amount of any STATE Income/License Fee tax due on any return(s) made by or for the above taxpayer(s) for the period(s) ended December 31, 1978 - December 31, 1999 (Income) December 31, 1984 - December 31, 2000 (License Fee) may be assessed at anytime on or before December 31, 2002 (Expiration Date)

This agreements extends the time for mailing the notice of assessment or refund of the above tax pursuant to the provisions of Section 12-54-85(C)(5) of the 1976 South Carolina Code of Laws, as amended.

Duke Energy Corporation
(Name of Taxpayer)

By: _____
(Taxpayer, Partner, Officer of Corp., etc.,)

Senior Vice President Corporate Tax
(Title)

6-21-02
(Date)

SOUTH CAROLINA DEPARTMENT OF REVENUE
By: Robert Anderson/ By:

Robert Anderson by Sandy Wilson
(Administrator, Field Services Division)

6/21/02
(Date)

If this waiver is executed on behalf of a corporation, it will be signed by such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition, to which the seal, if any, of the corporation must be affixed.

DES00000389

COPY

FS-43
Rev 1/99
2024

State of South Carolina
DEPARTMENT OF REVENUE
FIELD SERVICES DIVISION
CONSENT TO EXTEND THE TIME TO ASSESS TAX

File No. 20090024-9

Duke Energy Corp. (Formerly Duke Power Co.) &Combined Affiliates SSN/FEI 56-0205520
Name of Taxpayer

422 S. Church St., Charlotte, NC 28242-0001
Address (Number, Street, City or Town, State, Zip Code)

and the SOUTH CAROLINA DEPARTMENT OF REVENUE consent and agree to the following:

(1) The amount of any STATE Income/License Fee tax due on any return(s) made by or for the above taxpayer(s) for the period(s) ended December 31, 1978 - December 31, 1999 (Income) December 31, 1984 - December 31, 2000 (License Fee) may be assessed at anytime on or before December 31, 2002
(Expiration Date)

This agreement extends the time for mailing the notice of assessment or refund of the above tax pursuant to the provisions of Section 12-54-85(C)(5) of the 1976 South Carolina Code of Laws, as amended.

Duke Energy Corporation
(Name of Taxpayer)

By: [signature]
(Taxpayer, Partner, Officer of Corp., etc.,)

Senior Vice President Corporate Tax
(Title)

6-21-02
(Date)

SOUTH CAROLINA DEPARTMENT OF REVENUE
By: Robert Anderson/ By:

Robert Anderson by Randy Wilson
(Administrator, Field Services Division)

6/21/02
(Date)

If this waiver is executed on behalf of a corporation, it will be signed by such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition, to which the seal, if any, of the corporation must be affixed.

DES00000390

COPY

FS-43
Rev 1/99
2024

State of South Carolina
DEPARTMENT OF REVENUE
FIELD SERVICES DIVISION
CONSENT TO EXTEND THE TIME TO ASSESS TAX

File No. 20090024-9

Duke Energy Corp.(Formerly:Duke Power Co.)&Combined Affiliates SSN/FEI 56-0205520
Name of Taxpayer

422 S. Church St., Charlotte, NC 28242-0001
Address (Number, Street, City or Town, State, Zip Code)

and the SOUTH CAROLINA DEPARTMENT OF REVENUE consent and agree to the following:

(1) The amount of any STATE Income/License Fee tax due on any return(s) made by or for the above taxpayer(s) for the period(s) ended December 31, 1978 - December 31, 1999 (Income) December 31, 1984 - December 31, 2000 (License Fee) may be assessed at anytime on or before December 31, 2002 (Expiration Date)

This agreement extends the time for mailing the notice of assessment or refund of the above tax pursuant to the provisions of Section 12-54-85(C)(5) of the 1976 South Carolina Code of Laws, as amended.

Duke Energy Corporation
(Name of Taxpayer)

By: [signature]
(Taxpayer, Partner, Officer of Corp., etc.)

Senior Vice President Corporate Tax
(Title)

6-21-02
(Date)

SOUTH CAROLINA DEPARTMENT OF REVENUE
By: Robert Anderson/ By:

Robert Anderson by [signature]
(Administrator, Field Services Division)

6/21/02
(Date)

If this waiver is executed on behalf of a corporation, it will be signed by such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition, to which the seal, if any, of the corporation must be affixed.

DES00000391

COPY

FS-43
Rev 1/99
2024

State of South Carolina
DEPARTMENT OF REVENUE
FIELD SERVICES DIVISION
CONSENT TO EXTEND THE TIME TO ASSESS TAX

File No. 20090024-9

Duke Energy Corp. (Formerly Duke Power Co.) & Combined Affiliates SSN/FEI 56-0205520
Name of Taxpayer

422 S. Church St., Charlotte, NC 28242-0001
Address (Number, Street, City or Town, State, Zip Code)

and the SOUTH CAROLINA DEPARTMENT OF REVENUE consent and agree to the following:

(1) The amount of any STATE Income/License Fee tax due on any return(s) made by or for the above taxpayer(s) for the period(s) ended December 31, 1978 - December 31, 1999 (Income) December 31, 1984 - December 31, 2000 (License Fee) may be assessed at anytime on or before December 31, 2002 (Expiration Date)

This agreement extends the time for mailing the notice of assessment or refund of the above tax pursuant to the provisions of Section 12-54-85(C)(5) of the 1976 South Carolina Code of Laws, as amended.

Duke Energy Corporation
(Name of Taxpayer)

By: [signature]
(Taxpayer, Partner, Officer of Corp., etc.)

Senior Vice President Corporate Tax
(Title)

6-21-02
(Date)

SOUTH CAROLINA DEPARTMENT OF REVENUE
By: Robert Anderson/ By:

Robert Anderson by [signature]
(Administrator, Field Services Division)

6/21/02
(Date)

If this waiver is executed on behalf of a corporation, it will be signed by such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition, to which the seal, if any, of the corporation must be affixed.

DES00000392

State of South Carolina
Department of Revenue
301 Gervais Street, P.O. Box 125, Columbia, South Carolina, 29214

December 19, 1997

Duke Energy Corporation
422 South Church St.
Charlotte, NC 28242-0001

Attn: Mr. Rick McCarver

Dear Rick,

Please have the enclosed waiver signed before December 31, 1997 and return to me at your earliest convenience. I am completing the report this week to be reviewed possibly by year-end and mailed to you early January.

I hope you and your family have a happy holiday season.

Yours very truly,

SC DEPARTMENT OF REVENUE
FIELD SERVICES DIVISION

Randy Wilson
Auditor
(803)898-5615

/tb

DES00000393

STATE OF SOUTH CAROLINA
DEPARTMENT OF REVENUE AND TAXATION
FIELD SERVICES DIVISION
CONSENT TO EXTEND THE TIME TO ASSESS TAX

FS-43
Rev. (10/93)
2024

File No. 20090024-9

Duke Power Co. (Now renamed Duke Energy Corp.) SSN FEI# 56-0205520

Name of Taxpayer(s)

422 South Church St. Charlotte, NC 28242-0001

Address (Number, Street, City or Town, State, Zip Code)

and the SOUTH CAROLINA DEPARTMENT OF REVENUE AND TAXATION consent and agree to the following:

(1) The amount of any STATE Corp. Income/License Fee tax due on any return(s) made by or for the above taxpayer(s) for the period(s) ended Dec. 31, 1978 through Dec. 31, 1994 (Income)
Dec. 31, 1984 through Dec. 31, 1995 (License)

may be assessed at any time on or before June 30, 1998
(Expiration Date)

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.

DUKE POWER CO. (Now renamed Duke Energy Corp.)
(Name of Taxpayer)

By: E. G. Ruff
(Taxpayer, Partner, Officer of Corp., etc.,)

Ellen T. Ruff
Vice President and General Counsel, Electric Operations 12/22/97
(Title) (Date)

SOUTH CAROLINA DEPARTMENT OF REVENUE AND TAXATION

By: Marvin N. Grant/tb 12/19/97
(Director, Field Services Division) (Date)

If this waiver is executed on behalf of a corporation, it will be signed by such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition, to which the seal, if any, of the corporation must be affixed.

DES00000394

STATE OF SOUTH CAROLINA
DEPARTMENT OF REVENUE AND TAXATION
FIELD SERVICES DIVISION
CONSENT TO EXTEND THE TIME TO ASSESS TAX

FS-43
Rev. (10/93)
2024

File No. 20090024-9

Duke Power Co. (Now renamed Duke Energy Corp.) SSN FEI# 56-0205520
Name of Taxpayer(s)

422 South Church St. Charlotte, NC 28242-0001
Address (Number, Street, City or Town, State, Zip Code)

and the SOUTH CAROLINA DEPARTMENT OF REVENUE AND TAXATION consent and agree to the following:

(1) The amount of any STATE Corp. Income/License Fee tax due on any return(s) made by or for the above taxpayer(s) for the period(s) ended Dec. 31, 1978 through Dec. 31, 1994 (Income)
Dec. 31, 1984 through Dec. 31, 1995 (License)

may be assessed at any time on or before June 30, 1998
(Expiration Date)

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.

DUKE POWER CO. (Now renamed Duke Energy Corp.)
(Name of Taxpayer)

By: E. T. Ruff
(Taxpayer, Partner, Officer of Corp., etc.)
Ellen T. Ruff
Vice President and General Counsel, Electric Operations 12/22/97
(Title) (Date)

SOUTH CAROLINA DEPARTMENT OF REVENUE AND TAXATION

By: Marvin N. Stewart/tb 12/19/97
(Director, Field Services Division) (Date)

If this waiver is executed on behalf of a corporation, it will be signed by such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition, to which the seal, if any, of the corporation must be affixed.

DES00000395

SOUTH CAROLINA TAX COMMISSION
FIELD SERVICES DIVISION
CONSENT TO EXTEND THE TIME TO ASSESS TAX

File No. 20090024-9

Duke Power Co. SSN FEI #56-0205520
Name of Taxpayer(s)

422 South Church St. Charlotte, NC 28242-0001
Address (Number, Street, City or Town, State, Zip Code)

and the SOUTH CAROLINA TAX COMMISSION consent and agree to the following:

(1) The amount of any STATE Corp. Income/License Fee tax due on any return(s) made by or for the above taxpayer(s) for the period(s) ended December 31, 1978 through December 31, 1992 (Income)
December 31, 1984 through December 31, 1993 (License)

may be assessed at any time on or before **June 30, 1997**
(Expiration Date)

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.

DUKE POWER COMPANY
(Name of Taxpayer)

By: Robert A. Jolin
(Taxpayer, Partner, Officer of Corp., etc.,)

V.P. 6-3-96
(Title) (Date)

SOUTH CAROLINA TAX COMMISSION

By: Marvin A. Daniel RW 5/30/96
(Director, Field Services Division) (Date)

If this waiver is executed on behalf of a corporation, it will be signed by such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition, to which the seal, if any, of the corporation must be affixed.

FS-43 (11/85)

DES00000396

SOUTH CAROLINA TAX COMMISSION
FIELD SERVICES DIVISION
CONSENT TO EXTEND THE TIME TO ASSESS TAX

File No. 20090024-9

Duke Power Co. SSN FEI #56-0205520
Name of Taxpayer(s)

422 South Church St. Charlotte, NC 28242-0001
Address (Number, Street, City or Town, State, Zip Code)

and the SOUTH CAROLINA TAX COMMISSION consent and agree to the following:

(1) The amount of any STATE Corp. Income/License Fee tax due on any return(s) made by or for the above taxpayer(s) for the period(s) ended December 31, 1978 through December 31, 1992 (Income)
December 31, 1984 through December 31, 1993 (License)

may be assessed at any time on or before **June 30, 1997**
(Expiration Date)

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.

DUKE POWER COMPANY
(Name of Taxpayer)

By: Robert A. Lukens
(Taxpayer, Partner, Officer of Corp., etc.,)

V.P.
(Title)

6-3-96
(Date)

SOUTH CAROLINA TAX COMMISSION

By: Marion A. Daniel RW
(Director, Field Services Division)

5/30/96
(Date)

If this waiver is executed on behalf of a corporation, it will be signed by such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition, to which the seal, if any, of the corporation must be affixed.

FS-43 (11/85)

DES00000397

STATE OF SOUTH CAROLINA
DEPARTMENT OF REVENUE AND TAXATION
FIELD SERVICES DIVISION
CONSENT TO EXTEND THE TIME TO ASSESS TAX

FS-43
Rev. (10/93)
2024

File No. 20090024-9

Duke Power Co. ~~SSN~~ FEI# 56-0205520
Name of Taxpayer(s)

422 South Church Street Charlotte, NC 28242-0001
Address (Number, Street, City or Town, State, Zip Code)

and the SOUTH CAROLINA DEPARTMENT OF REVENUE AND TAXATION consent and agree to the following:

(1) The amount of any STATE Corp. Income/License Fee tax due on any return(s) made by or for the above taxpayer(s) for the period(s) ended December 31, 1983 through December 31, 1991 (Income) December 31, 1984 through December 31, 1992 (License) may be assessed at any time on or before June 30,1996
(Expiration Date)

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.

Duke Power Company
(Name of Taxpayer)

By: Robert A. Jeter
(Taxpayer, Partner, Officer of Corp., etc.,)

V.P. & Tax Counsel — 8-21-95
(Title) (Date)

SOUTH CAROLINA DEPARTMENT OF REVENUE AND TAXATION

By: Mavis T. Davant by RW — 8/9/95
(Director, Field Services Division) (Date)

If this waiver is executed on behalf of a corporation, it will be signed by such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition, to which the seal, if any, of the corporation must be affixed.

DES00000398

STATE OF SOUTH CAROLINA
DEPARTMENT OF REVENUE AND TAXATION
FIELD SERVICES DIVISION
CONSENT TO EXTEND THE TIME TO ASSESS TAX

FS-43
Rev. (10/93)
2024

File No. 20090024-9

Duke Power Company — ~~SSN~~ FEI #56-0205520
Name of Taxpayer(s)

422 South Church St. Charlotte, NC 28242-0001
Address (Number, Street, City or Town, State, Zip Code)

and the SOUTH CAROLINA DEPARTMENT OF REVENUE AND TAXATION consent and agree to the following:

(1) The amount of any STATE Corp. Income/License Fee tax due on any return(s) made by or for the above taxpayer(s) for the period(s) ended December 31, 1983 through December 31, 1990 (Income)
December 31, 1984 through December 31, 1991 (License)
may be assessed at any time on or before November 30, 1995
(Expiration Date)

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.

DUKE POWER COMPANY
(Name of Taxpayer)

By: Robert B. Jolissaint
(Taxpayer, Partner, Officer of Corp., etc.)

V.P. & TAX COUNSEL
(Title)

5-7-95
(Date)

SOUTH CAROLINA DEPARTMENT OF REVENUE AND TAXATION

By: Joseph P. Southard for Marvin Pevant
(Director, Field Services Division)

2 May 1995
(Date)

If this waiver is executed on behalf of a corporation, it will be signed by such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition, to which the seal, if any, of the corporation must be affixed.

DES00000399

STATE OF SOUTH CAROLINA
DEPARTMENT OF REVENUE AND TAXATION
FIELD SERVICES DIVISION
CONSENT TO EXTEND THE TIME TO ASSESS TAX

FS-43
Rev. (10/93)
2024

File No. 20090024-9

Duke Power Company — SSN
Name of Taxpayer(s)

422 South Church St. Charlotte, NC 28242-0001
Address (Number, Street, City or Town, State, Zip Code)

and the SOUTH CAROLINA DEPARTMENT OF REVENUE AND TAXATION consent and agree to the following:

(1) The amount of any STATE Corp. Income/License Fee tax due on any return(s) made by or for the above taxpayer(s) for the period(s) ended December 31, 1983/84, December 31, 1984/85, December 31, 1985/86, December 31, 1986/87, December 31, 1987/88, December 31, 1988/89, December 31, 1989/90 and December 31, 1990/91

may be assessed at any time on or before May 30, 1995.
(Expiration Date)

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.

Duke Power Company
(Name of Taxpayer)

By: Robert L. Gibbs, Vice Pres.
(Taxpayer, Partner, Officer of Corp., etc.,)

Vice President — (Title)

8.29.94 — (Date)

SOUTH CAROLINA DEPARTMENT OF REVENUE AND TAXATION

By: Marvin N. Durant, Jr. — (Director, Field Services Division)

8/24/94 — (Date)

If this waiver is executed on behalf of a corporation, it will be signed by such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition, to which the seal, if any, of the corporation must be affixed.

DES00000400

STATE OF SOUTH CAROLINA
DEPARTMENT OF REVENUE AND TAXATION
FIELD SERVICES DIVISION
CONSENT TO EXTEND THE TIME TO ASSESS TAX

FS-43
Rev. (10/93)
2024

File No. 20090024-9

Duke Power Company — SSN
Name of Taxpayer(s)

422 South Church St. Charlotte, NC 28242-0001
Address (Number, Street, City or Town, State, Zip Code)

and the SOUTH CAROLINA DEPARTMENT OF REVENUE AND TAXATION consent and agree to the following:

(1) The amount of any STATE Corp. Income/License Fee tax due on any return(s) made by or for the above taxpayer(s) for the period(s) ended December 31, 1983/84, December 31, 1984/85, December 31, 1985/86, December 31, 1986/87, December 31, 1987/88, December 31, 1988/89, December 31, 1989/90 and December 31, 1990/91

may be assessed at any time on or before May 30, 1995
(Expiration Date)

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.

Duke Power Company
(Name of Taxpayer)

By: Robert L. Fulton, Vice Pres.
(Taxpayer, Partner, Officer of Corp., etc.,)

Vice President
(Title)

8-29-94
(Date)

SOUTH CAROLINA DEPARTMENT OF REVENUE AND TAXATION

By: Marvin N. Davant, Jr.
(Director, Field Services Division)

8/24/94
(Date)

If this waiver is executed on behalf of a corporation, it will be signed by such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition, to which the seal, if any, of the corporation must be affixed.

DES00000401

State of South Carolina
Department of Revenue and Taxation
301 Gervais Street, P.O. Box 125, Columbia, South Carolina, 29214

October 19, 1993

Duke Power Company
422 South Church St.
Charlotte, NC 28242-0001

Attn: Mr. Wilson R Taylor

Dear Remi:

Please have the enclosed waiver signed and returned to me at your earliest convenience. Also, when you complete your spreadsheet or have any additional information regarding the audit, give me a call so I can make plans to complete my examination.

Your cooperation is appreciated.

Yours very truly,

SOUTH CAROLINA TAX COMMISSION
FIELD SERVICES DIVISION

Randy Wilson

Randy Wilson
Auditor
(803)737-4408

/dd
Enclosure

DES00000402

SOUTH CAROLINA TAX COMMISSION
FIELD SERVICES DIVISION
CONSENT TO EXTEND THE TIME TO ASSESS TAX

File No. 20090024-9

Duke Power Company — SSN
Name of Taxpayer(s)

422 South Church Street Charlotte, NC 28242-0001
Address (Number, Street, City or Town, State, Zip Code)

and the SOUTH CAROLINA TAX COMMISSION consent and agree to the following:

(1) The amount of any STATE Corp. Income/License Fee tax due on any return(s) made by or for the above taxpayer(s) for the period(s) ended December 31, 1983/84, December 31, 1984/85, December 31, 1985/86, December 31, 1986/87, December 31, 1987/88, December 31, 1988/89 and December 31, 1989/90
may be assessed at any time on or before December 31, 1994
(Expiration Date)

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.

Duke Power Company
(Name of Taxpayer)

By: Robert S. Lilien, VP & Tax Counsel
(Taxpayer, Partner, Officer of Corp., etc.,)

VP. & Tax Counsel — 11-16-93
(Title) (Date)

SOUTH CAROLINA TAX COMMISSION

By: Marvin N. Davant by Randy Wilson — 10/19/93
(Director, Field Services Division) (Date)

If this waiver is executed on behalf of a corporation, it will be signed by such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition, to which the seal, if any, of the corporation must be affixed.

FS-43 (11/85)

DES00000403

TO Duke Power Co.
P.O. Box 33189
Charlotte, NC 28242
Attn: Mr. Wilson R. Taylor

FROM S. C. TAX COMMISSION
P. O. BOX 125
Columbia, South Carolina 29214
Phone (803) 737-4408

FOLD

SUBJECT Waiver 83-89

PLEASE RETURN WITHIN 10 DAYS

DATE 12/15/92

MESSAGE

Rene,

Please have the enclosed waiver signed & return to me.

Thanks,

SIGNED Kathy Weber

PLEASE REPLY BELOW

Kathy Ready

DATE 12/23/92

SIGNED Rene Taylor

RETURN PINK COPY WITH REQUESTED INFORMATION, KEEP WHITE COPY

C-137 (10/84)

DES00000404

STATE OF SOUTH CAROLINA
SOUTH CAROLINA TAX COMMISSION
FIELD SERVICES DIVISION
CONSENT TO EXTEND THE TIME TO ASSESS TAX

FS-43
Rev. (7/90)
2024

File No. 20090024-9

Duke Power Company
Name of Taxpayer(s)

SSN

P O Box 33189 Charlotte, NC 28242 Attn: Mr. Wilson R. Taylor
Address (Number, Street, City or Town, State, Zip Code)

and the SOUTH CAROLINA TAX COMMISSION consent and agree to the following:

(1) The amount of any STATE Income/License Fee tax due on any return(s) made by or for the above taxpayer(s) for the period(s) ended December 31, 1983/84, December 31, 1984/85, December 31, 1985/86, December 31, 1986/87, December 31, 1987/88, December 31, 1988/89 and December 31, 1989/90
may be assessed at any time on or before December 31, 1993
(Expiration Date)

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.

(Name of Taxpayer)

By: John W. D. Kelly
(Taxpayer, Partner, Officer of Corp., etc.,)

V P Taxes
(Title)

12/23/92
(Date)

SOUTH CAROLINA TAX COMMISSION

By: Marvin N. Davant by Randy Wilson
(Director, Field Services Division)

12/14/92
(Date)

If this waiver is executed on behalf of a corporation, it will be signed by such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition, to which the seal, if any, of the corporation must be affixed.

DES00000405

MO AND REPLY

TO Duke Power Company
P O Box 33189
Charlotte, N.C. 28242
Attn: ~~Wilson R Taylor~~

FROM S. C. TAX COMMISSION
P. O. BOX 125
Columbia, South Carolina 29214
Phone (803) 737-4408

FOLD

SUBJECT Waiver for 1983 + 1984 tax years; 84+85 License Fees

PLEASE RETURN WITHIN 10 DAYS

DATE 12/20/88

MESSAGE

Remi,

Please have the enclosed waiver signed + returned to me as soon as possible so that we can complete this audit during the first part of next year. I'll need to have this in hand prior to 12/31/88 so the quicker you can get it back in the mail the better.

SIGNED Randy Wilson

PLEASE REPLY BELOW

DATE SIGNED

RETURN PINK COPY WITH REQUESTED INFORMATION, KEEP WHITE COPY

C-157 (10/84)

DES00000424

SOUTH CAROLINA TAX COMMISSION
FIELD SERVICES DIVISION
CONSENT TO EXTEND THE TIME TO ASSESS TAX

File No. 20090024-9

Duke Power Company — SSN
Name of Taxpayer(s)

P.O Box 33189 Charlotte, N.C. 28242
Address (Number, Street, City or Town, State, Zip Code)

and the SOUTH CAROLINA TAX COMMISSION consent and agree to the following:

(1) The amount of any STATE Income Tax / License Fee tax due on any return(s) made by or for the above taxpayer(s) for the period(s) ended December 31, 1983/84 and December 31, 1984/85

may be assessed at any time on or before March 31, 1989
(Expiration Date)

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.

(Name of Taxpayer)

By: _____
(Taxpayer, Partner, Officer of Corp., etc.)

(Title) (Date)

SOUTH CAROLINA TAX COMMISSION

By: Marvin N. Davant RW — 12/20/88
(Director, Field Services Division) (Date)

If this waiver is executed on behalf of a corporation, it will be signed by such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition, to which the seal, if any, of the corporation must be affixed.

FS-43 (11/85)

DES00000425

TO Duke Power Compo
Po Box 33189
Charlotte, N.C. 28242
Attn: Wilson R. Taylor

FROM S.C. TAX COMMISSION
P. O. BOX 125
Columbia, South Carolina 29214
Phone (803) 737-4408

SUBJECT Waiver for 1983+1984 tax years | PLEASE RETURN WITHIN 10 DAYS | DATE 8/9/88

MESSAGE

Remi,

Please have the enclosed waiver signed and return to me so that I can conduct the audit after September 15. The week of October 10 or October 31 are still open on my calendar. If one of these weeks looks ok to you, please let me know when you return the waiver or give me a call. Thanks SIGNED Randy Wilson

PLEASE REPLY BELOW

Randy -

Attached is the executed Consent to extend the Time to assess Tax on 83 & 84 income and 84 & 85 sales -

call me around 1st of September so we can set a date -

DATE 8-16-88 SIGNED Remi Taylor

RETURN PINK COPY WITH REQUESTED INFORMATION, KEEP WHITE COPY

C-157 (10/86)

DES00000427

SOUTH CAROLINA TAX COMMISSION
FIELD SERVICES DIVISION
CONSENT TO EXTEND THE TIME TO ASSESS TAX

File No. 20090024-9

Duke Power Company — SSN
Name of Taxpayer(s)

Po Box 33189 Charlotte NC 28242
Address (Number, Street, City or Town, State, Zip Code)

and the SOUTH CAROLINA TAX COMMISSION consent and agree to the following:

(1) The amount of any STATE Income Tax / License Fee tax due on any return(s) made by or for the above taxpayer(s) for the period(s) ended December 31, 1983/84 and December 31, 1984/85

may be assessed at any time on or before December 31, 1988
(Expiration Date)

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.

Duke Power Company
(Name of Taxpayer)

By: John D. Kyle
(Taxpayer, Partner, Officer of Corp., etc.,)

V.P. Taxes
(Title)

8/16/88
(Date)

SOUTH CAROLINA TAX COMMISSION

By: Marvin N. Davant pw
(Director, Field Services Division)

August 9, 1988
(Date)

If this waiver is executed on behalf of a corporation, it will be signed by such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition, to which the seal, if any, of the corporation must be affixed.

FS-43 (11/85)

DES00000428

Exhibit C

RECYCLED PAPER.
RECYCLABLE

COPY

SOUTH CAROLINA TAX COMMISSION
FIELD SERVICES DIVISION
CONSENT TO EXTEND THE TIME TO ASSESS TAX

File No. 20090024-9

Duke Power Company
Name of Taxpayer(s) SSN

Po Box 33189 Charlotte NC 28242
Address (Number, Street, City or Town, State, Zip Code)

and the SOUTH CAROLINA TAX COMMISSION consent and agree to the following:

(1) The amount of any STATE Income Tax / License Fee tax due on any return(s) made by or for the above taxpayer(s) for the period(s) ended December 31, 1983/84 and December 31, 1984/85

may be assessed at any time on or before December 31, 1988
(Expiration Date)

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.

Duke Power Company
(Name of Taxpayer)

By: John D. Rue
(Taxpayer, Partner, Officer of Corp., etc.)

V.P. Taxes
(Title)

8/16/88
(Date)

SOUTH CAROLINA TAX COMMISSION

By: Marvin N. Davant pw
(Director, Field Services Division)

August 9, 1988
(Date)

If this waiver is executed on behalf of a corporation, it will be signed by such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition, to which the seal, if any, of the corporation must be affixed.

FS-43 (11/85)

DE00007290

COPY

SOUTH CAROLINA TAX COMMISSION
FIELD SERVICES DIVISION
CONSENT TO EXTEND THE TIME TO ASSESS TAX

File No. 20090024-9

Duke Power Company — SSN
Name of Taxpayer(s)

Po Box 33189 Charlotte NC 28242
Address (Number, Street, City or Town, State, Zip Code)

and the SOUTH CAROLINA TAX COMMISSION consent and agree to the following:

(1) The amount of any STATE Income Tax / License Fee tax due on any return(s) made by or for the above taxpayer(s) for the period(s) ended December 31, 1983/84 and December 31, 1984/85

may be assessed at any time on or before March 31, 1989
(Expiration Date)

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.

Duke Power Company
(Name of Taxpayer)

By: [signature] P.O. Kuyle
(Taxpayer, Partner, Officer of Corp., etc.)

Vice President, Taxes
(Title)

December 27, 1988
(Date)

SOUTH CAROLINA TAX COMMISSION

By: [signature]
(Director, Field Services Division)

12/28/88
(Date)

If this waiver is executed on behalf of a corporation, it will be signed by such officer or officers of the corporation as are empowered under the laws of the State in which the corporation is located to sign for the corporation, in addition, to which the seal, if any, of the corporation must be affixed.

FS-43 (11/85)

DE00007289