

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

VOLUME VII

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INDEX

ORDERS

1.	Consent Order, dated August 8, 2003	9
2.	Order Granting Summary Judgment in Part and Denying Summary Judgment in Part, dated August 9, 2012	11
3.	Suspension Notice, dated August 29, 2012	47
4.	Amended Order Granting Summary Judgment in Part and Denying Summary Judgment in Part, dated October 11, 2012	49
5.	Order Denying Motion for Reconsideration in Part and Granting Reconsideration in Part, dated October 11, 2012	85
6.	Final Order and Decision, dated November 2, 2012	93
7.	Amended Final Order and Decision, dated December 4, 2012	120
8.	Reconsideration Order, dated December 4, 2012	147

PLEADINGS

9.	Department of Revenue's Motion for Summary Judgment and Memorandum In Support, dated April 20, 2012	166
10.	Duke Energy's Cross-Motion for Summary Judgment and Memorandum, dated May 21, 2012.....	371
11.	Department of Revenue's Memorandum in Reply to the Response of Duke Energy Opposing the Motion for Summary Judgment by the Department of Revenue and Memorandum Objecting to the Grant of the Cross-Motion for Summary Judgment by Duke Energy, with all Attachments & Exhibits, dated June 4, 2012.....	825
12.	Duke Energy's Post-Hearing Memorandum of Law, dated June 28, 2012	978
13.	Department of Revenue's Response to Duke Energy's Post-Hearing Memorandum of Law, dated July 9, 2012.....	1022
14.	SCDOR Response to Questions by Court, dated July 17, 2012	1030
15.	Duke Energy's Motion for Reconsideration of the Court's Order Granting the Department of Revenue's Motion for Summary Judgment and Memorandum of Authorities, dated August 20, 2012	1034

16.	Department of Revenue's Pre-Trial Memorandum, dated August 27, 2012	1153
17.	Duke Energy Corporation's Pre-Trial Brief, dated August 27, 2012	1180
18.	Stipulations of Facts and Issues, dated September 4, 2012	1815
19.	Department of Revenue's Memorandum Opposing Duke Energy's Motion for Reconsideration of the Order Granting Partial Summary Judgment to the Department, dated September 14, 2012	1820
20.	Duke Energy Corporation's Responses to the Inquiries Presented by the ALC on September 19, 2012	1835
21.	Department of Revenue's September 21, 2012 letter in response to ALC's inquiries regarding statement made by Duke Energy in its Motion for Reconsideration.....	1877
22.	Notice of Appeal, dated October 9, 2012	1879
23.	Amended Notice of Appeal, dated October 23, 2012	1926
24.	Duke Energy's Motion for Reconsideration of the Court's Final Order and Decision, dated November 12, 2012	1975
25.	Notice of Appeal, dated January 2, 2013	2020
26.	Amended Notice of Appeal, dated January 3, 2013	2075
27.	Duke Energy's Motion to Consolidate, dated January 14, 2013	2368

TRANSCRIPTS

28.	Trial Transcript, dated September 5-6, 2012	2380
29.	Excerpts from the Motion for Summary Judgment Hearing Transcript, dated June 26, 2012	2796
30.	Excerpts from the Deposition Transcript of Sherwood Lee Love, dated November 22, 2011	2983
31.	Excerpts from Deposition Transcript of Joe Southard, dated December 2, 2011	3135
32.	Excerpts from Deposition Transcript of Jan Urban, dated December 21, 2011	3335
33.	Excerpts from Deposition Transcript of Glenn J. Robinson, dated January 4, 2012	3539
34.	Excerpts from Deposition Transcript of Dr. Ioannis "John" Papapolymerou, dated January 11, 2012	3872

35.	Excerpts from Deposition Transcript of Dhiaa M. Jamil, dated January 17, 2012.....	3983
36.	Excerpts from Deposition Transcript of Ronald W. Urban, dated March 14, 2012...	4042
37.	Excerpts from the Deposition Transcript of Sarah G. Major, dated March 14, 2012	4127

EXHIBITS AND OTHER MATERIALS

38.	Pet.'s Trial Ex. 1 (Duke's Amended South Carolina Tax Returns for 1978)	4183
39.	Pet.'s Trial Ex. 2 (Duke's Amended South Carolina Tax Returns for 1979)	4201
40.	Pet.'s Trial Ex. 3 (Duke's Amended South Carolina Tax Returns for 1980)	4257
41.	Pet.'s Trial Ex. 4 (Duke's Amended South Carolina Tax Returns for 1981)	4275
42.	Pet.'s Trial Ex. 5 (Duke's Amended South Carolina Tax Returns for 1982)	4321
43.	Pet.'s Trial Ex. 6 (Duke's Amended South Carolina Tax Returns for 1983)	4371
44.	Pet.'s Trial Ex. 7 (Duke's Amended South Carolina Tax Returns for 1984)	4393
45.	Pet.'s Trial Ex. 8 (Duke's Amended South Carolina Tax Returns for 1985)	4413
46.	Pet.'s Trial Ex. 9 (Duke's Amended South Carolina Tax Returns for 1986)	4435
47.	Pet.'s Trial Ex. 10 (Duke's Amended South Carolina Tax Returns for 1987)	4455
48.	Pet.'s Trial Ex. 11 (Duke's Amended South Carolina Tax Returns for 1988)	4483
49.	Pet.'s Trial Ex. 12 (Duke's Amended South Carolina Tax Returns for 1989)	4567
50.	Pet.'s Trial Ex. 13 (Duke's Amended South Carolina Tax Returns for 1990)	4601
51.	Pet.'s Trial Ex. 14 (Duke's Amended South Carolina Tax Returns for 1991)	4667
52.	Pet.'s Trial Ex. 15 (Duke's Amended South Carolina Tax Returns for 1992)	4701
53.	Pet.'s Trial Ex. 16 (Duke's Amended South Carolina Tax Returns for 1993)	4759
54.	Pet.'s Trial Ex. 17 (Duke's Amended South Carolina Tax Returns for 1994)	4787
55.	Pet.'s Trial Ex. 18 (Duke's Amended South Carolina Tax Returns for 1995)	4867
56.	Pet.'s Trial Ex. 19 (Duke's Amended South Carolina Tax Returns for 1996)	4936

57.	Pet.'s Trial Ex. 20 (Duke's Amended South Carolina Tax Returns for 1997)	5004
58.	Pet.'s Trial Ex. 21 (Duke's Amended South Carolina Tax Returns for 1998)	5072
59.	Pet.'s Trial Ex. 22 (Duke's Amended South Carolina Tax Returns for 1999)	5188
60.	Pet.'s Trial Ex. 23 (Duke's Amended South Carolina Tax Returns for 2000)	5368
61.	Pet.'s Trial Ex. 24 (Duke's Amended South Carolina Tax Returns for 2001)	5422
62.	Pet.'s Trial Ex. 25 (Letter dated February 12, 2003 from the Department of Revenue to Duke denying refund claims)	5532
63.	Pet.'s Trial Ex. 26 (Letter dated March 13, 2003 from Duke protesting denial)	5533
64.	Pet.'s Trial Ex. 27 (Letter dated April 30, 2003 from Jan Steensen Crangle to Craig Fields re appeal of Department of Revenue's findings)	5543
65.	Pet.'s Trial Ex. 28_1 (Cooper Monroe's field notes for audit December 1-5, 2003)	5544
66.	Pet.'s Trial Ex. 28_2 (State Audit Tracker for Duke Energy State Income Tax, dated February 18, 2003)	5545
67.	Pet.'s Trial Ex. 29 (Department of Revenue's Determination, dated February 4, 2010)	5546
68.	Pet.'s Trial Ex. 30 (Duke's Notice of Request for Contested Case Hearing, dated March 4, 2010)	5558
69.	Pet.'s Trial Ex. 31 (Department of Revenue's Prehearing Statement, dated March 31, 2010)	5582
70.	Pet.'s Trial Ex. 32 (Department of Revenue's Amended Prehearing Statement, dated November 30, 2010)	5588
71.	Pet.'s Trial Ex. 33 (Duke's Products and Services)	5594
72.	Pet.'s Trial Ex. 34 (Dhiaa Jamil's CV)	5598
73.	Pet.'s Trial Ex. 35 (Duke's 10-K for fiscal year ending December 31, 2001)	5599
74.	Pet.'s Trial Ex. 36 (Public Service Commission Report for 2010-2012)	5767
75.	Pet.'s Trial Ex. 37 (Service Commission of SC Proposed Order, dated October 25, 1991)	5801

76.	Pet.'s Trial Ex. 38 (PSC Direct Testimony of Dhiaa M. Jamil, dated 2009).....	5897
77.	Pet.'s Trial Ex. 43 (Dr. Papapolymerou's CV).....	5923
78.	Pet.'s Trial Ex. 49_B-1 (Duke Power 10-K for FYE 12/31/78).....	5927
79.	Pet.'s Trial Ex. 49_B-2 (Duke Power 10-K for FYE 12/31/79).....	5975
80.	Pet.'s Trial Ex. 49_B-3 (Duke Power 10-K for FYE 12/31/80).....	6027
81.	Pet.'s Trial Ex. 49_B-4 (Duke Power 10-K for FYE 12/31/81).....	6081
82.	Pet.'s Trial Ex. 49_B-5 (Duke Power 10-K for FYE 12/31/82).....	6133
83.	Pet.'s Trial Ex. 49_B-6 (Duke Power 10-K for FYE 12/31/83).....	6187
84.	Pet.'s Trial Ex. 49_B-7 (Duke Power 10-K for FYE 12/31/84).....	6239
85.	Pet.'s Trial Ex. 49_B-8 (Duke Power 10-K for FYE 12/31/85).....	6293
86.	Pet.'s Trial Ex. 49_B-9 (Duke Power 10-K for FYE 12/31/86).....	6347
87.	Pet.'s Trial Ex. 49_B-10 (Duke Power 10-K for FYE 12/31/87).....	6401
88.	Pet.'s Trial Ex. 49_B-11 (Duke Power 10-K for FYE 12/31/88).....	6491
89.	Pet.'s Trial Ex. 49_B-12 (Duke Power 10-K for FYE 12/31/89).....	6583
90.	Pet.'s Trial Ex. 49_B-13 (Duke Power 10-K for FYE 12/31/90).....	6673
91.	Pet.'s Trial Ex. 49_B-14 (Duke Power 10-K for FYE 12/31/91).....	6689
92.	Pet.'s Trial Ex. 49_B-15 (Duke Power 10-K for FYE 12/31/92).....	6789
93.	Pet.'s Trial Ex. 49_B-16 (Duke Power 10-K for FYE 12/31/93).....	6901
94.	Pet.'s Trial Ex. 49_B-17 (Duke Power 10-K for FYE 12/31/94).....	6963
95.	Pet.'s Trial Ex. 49_B-18 (Duke Power 10-K for FYE 12/31/95).....	7025
96.	Pet.'s Trial Ex. 49_B-19 (Duke Power 10-K for FYE 12/31/96).....	7045
97.	Pet.'s Trial Ex. 49_B-20 (Duke Power 10-K for FYE 12/31/97).....	7271
98.	Pet.'s Trial Ex. 49_B-21 (Duke Power 10-K for FYE 12/31/98).....	7311
99.	Pet.'s Trial Ex. 49_B-22 (Duke Power 10-K for FYE 12/31/99).....	7467

100.	Pet.'s Trial Ex. 49_B-23 (Duke Power 10-K for FYE 12/31/00)	7703
101.	Pet.'s Trial Ex. 49_B-24 (Duke Power 10-K for FYE 12/31/01)	7733
102.	Pet.'s Trial Ex. 50 (Dr. Pomp's responses to interrogatories, dated September 23, 2011)	7889
102.	Respondent's Trial Exhibit 1 (Income Tax Division, Foreign Corporate Training Manual)	7893
103.	Respondent's Trial Exhibit 2 (Restated Charter of Duke Power Company, dated July 25, 1977)	7938
104.	Respondent's Trial Exhibit 3 (Restated Articles of Incorporation of Duke Power Company, dated October 6, 1993)	7969
105.	Respondent's Trial Exhibit 4 (Related Articles of Incorporation of Duke Energy Corporation, dated June 18, 1997)	8030
106.	Waiver Forms FS-43	8086
107.	Department of Revenue's requests to extend the audit, 1989 – 2001	8108
108.	IRS' Final Determination with respect to tax years 1984 and 1986 through 1989, dated September 23, 1992	8157
109.	IRS' Final Determination with respect to tax years 1990 and 1991, dated May 11, 2001	8161
110.	IRS' Final Determination with respect to tax years 1992 and 1993, dated July 17, 2001	8165
111.	Correspondence between Duke Energy and the Department of Revenue re: Duke's intention to file amended tax returns, March and July 2002	8166
112.	Department of Revenue's Report of Field Audit, dated August 8, 2002	8176
113.	Form SC870AD - Offer of Waiver of Restrictions on Assessment and Collection of Additional Tax or Acceptance of Over Assessment, dated August 13, 2002	8177
114.	Duke Energy's Protest / Application for Appeal, dated April 18, 2008	8178
115.	Duke Energy's Prehearing Statement, dated April 1, 2010	8194
116.	Department of Revenue's Responses to Petitioner's Request for Production of Documents	8201
117.	Affidavit of Sherwood Love, dated December 31, 2010	8211

118.	Affidavit of Rickey McCarver, dated January 7, 2011.....	8218
119.	Affidavit of Marvin N. Davant, dated May 16, 2012	8222
120.	Affidavit of Robert K. Anderson, dated May 17, 2012	8226
121.	Affidavit of T. Cooper Monroe, III, dated June 28, 2012.....	8229
122.	Return File Date Chart.....	8233
123.	Waivers Schedule.....	8234
124.	IRS Notice.....	8235
125.	Certificate of Counsel	8236

1 didn't have a waiver, so it tried to find a
2 reason why it could make an untimely filing
3 without a waiver. Our case is obviously
4 completely different. We had a waiver.
5 Now, obviously, we're in rough shape if you say
6 the waiver's ineffective. But if you find the
7 waiver to be effective, that's the short
8 answer, just take -- this case is completely
9 different than *TNS Mills*.

10 **THE COURT:** Well, then, that takes me back to you've
11 got to have the authority to do it.

12 **MR. MAYBANK:** Correct.

13 **THE COURT:** Yeah.

14 **MR. MAYBANK:** And, again, we -- and our position is
15 they do have the authority to do it.

16 **THE COURT:** Okay. Now we're moving on. I
17 interrupted you.

18 **MR. MAYBANK:** Okay. Equitable tolling, there is a
19 case directly on point. It's from another
20 jurisdiction, however. But there's an
21 equitable tolling case and let me give you
22 the -- South Carolina recently -- rather
23 recently adopted equitable tolling. It's sort
24 of the modern era. It's a very lengthy case.
25 I've got it cited in here. I thought I had it

1 pulled out.

2 THE COURT: If it's in your brief, you can just tell
3 me.

4 MR. MAYBANK: Right. It is. It's *Hooper versus*
5 *Ebenezer Senior Services and Rehabilitation*
6 *Center*. And in that case, the court discusses
7 at length the concept of equitable tolling,
8 which is different than equitable estoppel. So
9 it's equitable tolling of the statute of
10 limitations. And they discuss it at great
11 length.

12 The difference is, it's basically -- it
13 provides a court the method -- or to serve the
14 ends of justice where technical forfeitures
15 would unjustifiably prevent a trial on the
16 merits.

17 Equitable tolling is judicially created. It
18 stems from the judiciary's inherent power to
19 formulate rules of procedure where justice
20 demands it.

21 The most recent case -- and there are two cases
22 of equitable tolling of the statute of
23 limitations against the government, but neither
24 case did the litigant prevail. But there are
25 two cases of equitable tolling against the

1 government: *American Legion Post versus Horry*
2 *County*, 674 S.E.2d 181 -- that's actually a
3 2009 case -- and *Strom versus USC School of*
4 *Medicine*.

5 The case that we would urge Your Honor to look
6 at is factually very similar. *State of Nevada*
7 *Department of Taxation versus Masco Builder*
8 *Cabinet*, 265 P.3d 666. That's a 2011 case,
9 very similar in that *State of Nevada Department*
10 *of Revenue* executed waivers. They executed one
11 waiver and the taxpayer was given the
12 understanding they would execute a second
13 waiver. So the waiver issue is identical --

14 THE COURT: Wait a second.

15 MR. MAYBANK: They ended up --

16 THE COURT: Hold on one moment. Let me pull that
17 up.

18 MS. TODOROVA: I have it. May I approach?

19 THE COURT: I've got it. I've got and I've got it
20 highlighted.

21 MR. MAYBANK: Well, that's making me nervous.

22 Now, that case is factually very similar in
23 that it involves waiver, waiver of the statute
24 of limitations by the Department of Revenue.
25 But it's different and a weaker case than our

1 case because it's my recollection of the facts
2 in that case -- I'm getting kind of nervous
3 that you've highlighted them.

4 It's my recollection the facts in that case,
5 they led the taxpayer on to believe after
6 having signed the first waiver they would sign
7 the second waiver. In fact, they didn't sign
8 the second waiver, so the taxpayer filed its
9 position out of time.

10 By contrast, we filed our amended returns
11 within the time done by the waiver. The
12 Department of Revenue executed waivers for us.
13 So even if you found, well, Robby Anderson was
14 the number three guy at the Department of
15 Revenue and Marvin Davant was chief of field
16 services division, but that doesn't mean they
17 necessarily had the authority to execute this
18 document, then that's where the doctrine of
19 equitable tolling would come in to backstop and
20 prevent a gross injustice.

21 **THE COURT:** All right.

22 **MR. MAYBANK:** Thank you, Your Honor. I'm way over
23 time, so I'm going to turn it over to
24 co-counsel.

25 **MR. TRESH:** Your Honor, may I approach the bench

1 with a copy of the PowerPoint?

2 THE COURT: Yeah.

3 MR. TRESH: Thank you.

4 ARGUMENT BY MR. TRESH:

5 MR. TRESH: Good morning, Your Honor. May it please
6 the Court. My name is Eric Tresh. I'm
7 representing Duke Energy today and I'll be
8 talking about the electricity issue.

9 Your Honor, in listening to Mr. Green's
10 presentation, he referred time and time again
11 to Section 12-6-2250 as a statute that imposes
12 a filing methodology on a manufacturer. That's
13 not quite what 12-6-2250 says.

14 THE COURT: When you say "methodology"...

15 MR. TRESH: An apportionment methodology.

16 THE COURT: Yeah, it's apportionment.

17 MR. TRESH: Yes, Your Honor.

18 What 12-6-2250 says is that if you are a
19 manufacturer -- if you're in the principal
20 business in this state as manufacturing or
21 processing goods or materials in this state,
22 today you're required to file using a
23 four-factor formula; in prior years it was
24 three factor or two factors.

25 12-6-2290 says every other business -- those

1 that are in the business of services, selling
2 intangibles, any other business, is required to
3 file using a single-factor formula based upon
4 gross receipts.

5 Now, this provision has been interpreted by
6 both the Department and the Courts in this
7 State. We need not look to property tax cases
8 or license tax cases, particularly very old
9 ones, to figure out what that phrase means:
10 manufacturing or processing goods or materials
11 in this state.

12 These -- this -- these two provisions when
13 operated together, 2250 and 2290, have a rather
14 simple proposition. If you're in the business
15 of producing goods or materials, you file using
16 four-factor. If you're in the business of
17 doing anything else, you file single-factor.

18 Now, if we look on the screen, you'll see South
19 Carolina Revenue Ruling 87-5, which interpreted
20 for corporate income tax purposes the very
21 provision that's at issue in this state -- this
22 case. It didn't look to whether the seller is
23 a manufacturer. It simply looks to whether or
24 not the taxpayer in the case is a multi-state
25 taxpayer deriving over 50 percent of its income

1 from dealing in tangible person property.
2 If they did, at the time it was a three-factor
3 formula. They would file using the
4 multi-factor formula as opposed to filing on a
5 single gross receipts method.

6 So the Department itself has acknowledged that
7 for corporate income tax purposes, one looks to
8 what the business is selling. Whether or not
9 it's a manufacturer or not a manufacturer is of
10 little consequence. For income tax purposes --

11 **THE COURT:** Hold on. Back up.

12 **MR. TRESH:** Yeah.

13 **THE COURT:** So your argument now, then, is that all
14 you have to do is show that you're engaged in
15 more than 50 percent of your gross receipts are
16 from providing services --

17 **MR. TRESH:** Yes, Your Honor.

18 **THE COURT:** -- then you're a manufacturer. But the
19 problem is the operative phrase "services."

20 **MR. TRESH:** No, no, Your Honor. If you're in the
21 business -- if you're more than -- if you read
22 the front section, "If over 50" --

23 **THE COURT:** That's what I'm reading.

24 **MR. TRESH:** I'm sorry. "If over 50 percent of the
25 gross receipts are from providing services,

1 then the business would be service related.
2 This method has been utilized by the
3 Department" --

4 **THE COURT:** That's what I'm saying. The defect of
5 that particular sentence is what I'm getting
6 at. The sentence uses the same term in both
7 the beginning and the end. If you're providing
8 services, then you're in the business of
9 service. The operative concept of that is
10 you've got to buy into the providing a service.

11 **MR. TRESH:** Correct, Your Honor, correct.

12 **THE COURT:** Yeah, that's what I'm saying. That's
13 the whole defect of the whole sentence is that
14 manufacturing is not considered a service, is
15 it not?

16 **MR. TRESH:** That's correct, Your Honor.

17 **THE COURT:** All right.

18 **MR. TRESH:** That's 100 percent correct, Your Honor.
19 If this Court were to find that Duke is in the
20 business of providing services, it can't be a
21 manufacturer and would not file under the
22 three- or four-factor -- under the four-factor
23 formula.

24 **THE COURT:** Well, I'll agree with that, yeah.

25 **MR. TRESH:** So that -- that really is the operative

1 test.

2 And the court in *Media General* only recently
3 recognized that. Looking at the *Media General*
4 holding, which was affirmed by the Supreme
5 Court, the Court said that based upon this
6 method -- and referring to the three-factor
7 apportionment formula -- is reserved for those
8 dealing in tangible personal property. It's
9 kind of the corollary of what we were just
10 speaking about.

11 **THE COURT:** Uh-huh (affirmatively responds).

12 **MR. TRESH:** So the operative issue in this case is,
13 if Duke sells services, it files using the
14 single gross receipts method. If Duke sells
15 tangible personal property, it's required to
16 file using the four-factor formula. That
17 inquiry, what Dukes sells, the nature of
18 electricity, is an inherently factual question.
19 Time and time again, the Department has argued
20 in this case that its long-standing policies
21 should control. So if the Department has a
22 long-standing policy dating back to 1987, the
23 date of that Revenue Ruling, that the relevant
24 inquiry is services versus tangible personal
25 property, then we have to do -- make an inquiry

1 into what it is that Duke sells: service or
2 tangible personal property.

3 Now, if we can move on, the Department of
4 Revenue and Duke recognizing early on that was
5 the fundamental issue in this case, both
6 engaged experts. Duke's expert witness under
7 deposition testified that what Duke sells,
8 electricity, is indeed the provision of a
9 service. The Department's expert in deposition
10 testimony testified the exact same thing, as
11 evidenced by the short "Q" and "A" on the
12 screen.

13 The context behind it was, we were at -- I
14 asked the witness, "Well, if Duke sold
15 electricity for a flat rate, 30 dollars a month
16 in this case, would that be the provision of a
17 service?" And his answer, "That would
18 definitely be a service."

19 Well, whether Duke sells the electricity for 30
20 dollars a month or 30 dollars a kilowatt hour,
21 I'm not sure how that would change the
22 provision of what Duke does.

23 I know that since this deposition, the
24 Department's expert has changed his story a bit
25 and filed a subsequent affidavit that Mr. Green

1 filed with his motion that says, "Well, what I
2 really meant was electricity is tangible
3 personal property." That back and forth, quite
4 frankly, only highlights the factual issues in
5 this case.

6 Now --

7 **THE COURT:** Hold on. It highlights the fact that
8 there may be a disputed factual issue; is that
9 what you're getting at?

10 **MR. TRESH:** Yes, Your Honor. Yes, Your Honor.

11 With respect to the two cases that Mr. Green
12 relies on, the *Columbia Railroad* case and the
13 *Duke Power* case, they're in opposite to this
14 current case.

15 For starters, each is over 80 years old. Each
16 case interprets --

17 **THE COURT:** I used to tell judges back when I was a
18 prosecutor that the pages may be yellow but the
19 law is still good.

20 **MR. TRESH:** I would agree with that, Your Honor, as
21 to property taxes and somewhat agree with it
22 with respect to license taxes, because the
23 Legislature has since changed the law.

24 **THE COURT:** Well, the fact that the case is old,
25 dealing with that which has not changed since

1 Ben Franklin got his little shock -- I mean,
2 the concept of electricity works the same now
3 as it has before. So I don't -- I think your
4 argument along the lines of it may be dealing
5 with a different factual area or legal area is
6 your better shot here.

7 MR. TRESH: I think it's both. I think it -- it's
8 not so much that electricity has changed. That
9 is not our argument at all. Our argument is
10 that these cases interpreted in an entirely set
11 of statutes.

12 In other words, back in the *Columbia Railroad*
13 case, we were dealing with what was the old
14 license tax; there's a new license tax in place
15 today. In the *Duke Power* case, we were
16 interpreting a property tax exemption.

17 The Legislature chose specific words and the
18 Court looked to the company's charter and
19 without much analysis as to what or was not
20 electricity decided under those statutes, not
21 under the corporate income tax but under those
22 statutes, that Duke met the definition of a
23 "manufacturer" for those purposes.

24 Now, in this case, corporate income tax is very
25 different. Both the South Carolina Department

1 of Revenue and the courts have put out an
2 entirely different test. They've both said
3 that the operative inquiry is: Does the
4 taxpayer provide more than 50 percent services
5 or less than 50 percent services?
6 Now, while the nature of electricity may not
7 have changed much, it is up to the Legislature
8 to go ahead and determine how these statutes
9 ought to be interpreted. And the Legislature
10 has said that the provision of electricity is
11 a service in more than one instance.
12 So, for example, in the South Carolina sales
13 tax code, they note that tangible personal
14 property also includes services and intangibles
15 including sales of electricity. So for sales
16 tax purposes, the sale of electricity would be
17 deemed to be a service.
18 Similarly, for license tax purposes -- I'm
19 sorry, for license tax purposes, the old
20 license tax -- what's very interesting, on one
21 hand Mr. Green cites to an old license tax
22 case, the *Consolidated Railroad* case, and says,
23 "Aha! That's the reason why Duke's a
24 manufacturer."
25 But years later when the license tax changed,

1 the courts have ruled that for today's license
2 tax purposes, Duke sells services and the
3 statute says the exact same thing. The
4 Legislature determined that under today's
5 license tax, the provision of electricity is a
6 service.

7 So this is all -- my point in contrasting the
8 different statutes is that this is a matter of
9 what the Legislature intended. Did the
10 Legislature intend -- the Legislature has
11 treated electricity as tangible personal
12 property or as services for different statutes.
13 And in the income tax context, everybody's kind
14 of clear that if the test is tangible personal
15 property or services, not so much that the *Duke*
16 *Power* case from 1930 or the *Columbia Railroad*
17 case from 1926 should control for corporate
18 income tax purposes. There's no authority
19 whatsoever that would say that.

20 Now, other states have looked to this same
21 issue. The issue of how electricity is treated
22 for corporate income tax purposes has been
23 addressed by a number of states. It has been
24 briefed by the parties. The courts have gone
25 different ways, quite frankly. Our sister

1 state of North Carolina has ruled very clearly
2 that for income tax purposes, electricity is
3 the provision of a service.

4 And that makes sense, because when you look at
5 the policy behind these different taxes, the
6 idea that Duke would be a manufacturer for
7 purposes of the property tax, particularly,
8 that tax policy behind that was looking at
9 Duke's property and saying, "How does it use
10 this property?"

11 Income taxes are inherently different. Income
12 taxes are based -- in this state the
13 apportionment formula is based upon gross
14 receipts. What are the receipts that the
15 company is taking in and how should I apportion
16 those receipts?

17 That looks -- it would make sense that the
18 Legislature would have a different policy with
19 respect to how it would choose to tax receipts
20 versus how it would choose to tax property.

21 **THE COURT:** Back up and do that again for me. I
22 don't know if I followed you entirely on that.

23 **MR. TRESH:** So in the -- in the Columbia Railroad
24 case, we had a property tax exemption at issue.
25 The court determined that Duke was a

1 manufacturer --

2 THE COURT: For property tax purposes.

3 MR. TRESH: -- for property tax purposes.

4 THE COURT: But, now, your analogy just now was for
5 property tax purposes why they're more apt to
6 be considered a service.

7 MR. TRESH: Not that they're a service, but they
8 were deemed to be a manufacturer. That --

9 THE COURT: Okay.

10 MR. TRESH: For purposes of an exemption.

11 THE COURT: Maybe that's where I missed it. Go
12 ahead.

13 MR. TRESH: Yeah, for purposes of an exemption, for
14 looking at the type of property involved, it
15 makes sense that I would look to -- or that the
16 Legislature might include somebody that sells
17 services and say that they're manufacturing
18 something, because they want to exempt the type
19 of property involved.

20 On the flip side, what we're dealing with for
21 income taxes is an apportionment form that
22 apportions gross receipts. And so it makes
23 sense that as opposed to looking at the
24 statute -- the two statutes that I have to
25 construe, the three-factor statute versus the

1 single factor, it makes sense that in
2 determining how I have to apportion the gross
3 receipts that the Legislature would look to
4 what it is I'm selling. And that would
5 become --

6 **THE COURT:** How is this policy argument going to
7 enter into my interpretation of the statute at
8 hand?

9 **MR. TRESH:** I think that if Your Honor agrees that
10 the correct determination would be "I have to
11 figure out whether Duke is selling tangible
12 property or selling a service or an intangible
13 or anything else," then the policy argument is
14 irrelevant.

15 It would only come into play to the extent that
16 Your Honor was struggling with why the
17 difference, why did *Duke Power* in 1930 was that
18 decided one way in terms of that case ruling
19 that Duke was a manufacturer with respect to
20 reconciling that with an opinion that would
21 say, "Well, I'm going to make a factual inquiry
22 into what it is that Duke does, whether
23 electricity is a service" --

24 **THE COURT:** I see your point now.

25 **MR. TRESH:** Thank you, Your Honor.

1 In sum, I think it's a fairly simple inquiry in
2 that regard, that the South Carolina Supreme
3 Court has never ruled on the issue before you.
4 They've never ruled on how Duke shoulder
5 apportion its income for corporate income tax
6 purposes.

7 This Court, as affirmed by the South Carolina
8 Supreme Court in *Media General*, and the
9 Department of Revenue has set forth a test, a
10 very simple test: What's the principal line of
11 business that Duke's in? If it's more than
12 50 percent service, it's one way; if it's more
13 than 50 percent tangible property, it's another
14 way.

15 We would submit that that test is
16 straightforward and we'd ask Your Honor to
17 adopt it, conduct a factual inquiry into the
18 nature of electricity, and deny the
19 Department's motion.

20 THE COURT: All right.

21 MR. TRESH: Thank you, Your Honor.

22 MR. FRIEDMAN: If you don't mind, Your Honor, I'd
23 like to use the podium.

24 THE COURT: That's fine.

25 ARGUMENT BY MR. FRIEDMAN:

1 MR. FRIEDMAN: May it please the Court, Your Honor.

2 My name is Jeff Friedman on behalf of Duke. I
3 guess good afternoon now.

4 THE COURT: Not quite there, but you're getting
5 close.

6 MR. FRIEDMAN: Getting close, yeah. I promise I'll
7 take you there.

8 I'd like to spend a few minutes or more talking
9 about the gross receipts issue. It's an issue
10 that, frankly, we've been very interested on
11 getting before you ever since we received the
12 State's motion and we believe it's one that is
13 ripe for Motion for Summary Judgment, unlike
14 the other issues the State has moved for today.
15 Of course, the parties disagree as to how the
16 law applies here and we disagree as to the
17 ultimate outcome. We believe our motion should
18 be granted; the State's should be denied.

19 As you heard, Your Honor, the Department
20 recognizes that gross receipts from sales are
21 included in the gross receipts factor. I think
22 that's pretty clear. Everybody seems to
23 understand that.

24 However, the Department -- the State has
25 concluded that there's something special,

1 something different about sales of securities
2 or sales of intangibles that justifies
3 interpreting the term "gross receipts" to mean
4 "net receipts."

5 So "gross" does not mean "net" in the eyes of
6 the State as it relates to these receipts.
7 However, doing so ignores the plain language of
8 the term "gross receipts." The plain language
9 of the term "gross receipts" --

10 **THE COURT:** I hear your argument. When you're
11 making that, you're saying, well, "gross" means
12 "net". And, of course, when I read the
13 statutory construction, there's case law that
14 says "or" can mean "and" and "and" can mean
15 "or," so ...

16 **MR. FRIEDMAN:** Well, I'd like to spend some time
17 addressing that.

18 **THE COURT:** All right. Recognizing that you need to
19 develop it further, because I don't think that
20 gets you there.

21 **MR. FRIEDMAN:** Yeah, I mean, you -- you know, you
22 can look at the word "apple" and interpret it
23 as an orange and if you do so over a long
24 period of time and it becomes well-settled,
25 that's something that's helpful.

1 THE COURT: All right.

2 MR. FRIEDMAN: But that's not what happened in this
3 case here.

4 THE COURT: Okay.

5 MR. FRIEDMAN: Okay. Now, let's look at the plain
6 language of the statute. It's always a good
7 place to start.

8 Income is apportioned based upon gross
9 receipts, a gross receipts apportionment
10 formula, and I'll quote, "using a fraction in
11 which the numerator is gross receipts from
12 within the state during the taxable year and
13 the denominator is total gross receipts from
14 everywhere during the taxable year."

15 So both the numerator of the fraction and the
16 denominator of the fraction are predicated upon
17 this term "gross receipts." It's used in both.
18 Of course, the numerator is in-state; the
19 denominator, the bottom part of the fraction,
20 is everywhere.

21 "Gross receipts" was not defined in the South
22 Carolina apportionment law. Perhaps if it was,
23 Your Honor, we wouldn't be here today. But
24 during the years at issue, it was not defined
25 in the South Carolina corporate income tax

1 apportionment law.

2 But "gross receipts" is a term that's used and

3 repeated 85 times, Your Honor. And I think our

4 brief does a good job of bringing this to

5 light. Eighty-five times throughout the South

6 Carolina taxing regimes the term "gross

7 receipts" is used. Eighty-five times.

8 There's an apple. Eighty-five times "gross

9 receipts" is interpreted as "gross, all, all

10 inclusive, no deductions." Eighty-five times

11 an apple is an apple, Your Honor.

12 The Department has not produced one example,

13 not one single example where the term "gross

14 receipts" means "net." Not one.

15 "Gross receipts" has been broadly interpreted

16 by the Department, the South Carolina courts

17 and the South Carolina Attorney General. Let

18 me give you some examples of that, Your Honor.

19 Just last year, the South Carolina Supreme

20 Court upholding an earlier decision by this

21 Court had the opportunity to interpret the term

22 "gross."

23 **THE COURT:** Is that *Travelscape*?

24 **MR. FRIEDMAN:** That's *Travelscape*, a case you know

25 well, I suspect, Your Honor.

1 THE COURT: Well, I heard the case.

2 MR. FRIEDMAN: Yep. I was suspicious.

3 In the context of the South Carolina sales tax,
4 the Supreme Court rejected the taxpayer's
5 request to interpret "gross" as something less
6 than "all." So the taxpayer in that case
7 wanted "gross" to mean something less than
8 "all."

9 The Supreme Court in South Carolina rejected
10 that request and said "gross proceeds" includes
11 the value obtained without reduction. And that
12 is the *Travelscape* decision, Your Honor.

13 This case presents a number of bizarre twists,
14 interesting turns that we will bring to light
15 at trial. One of my favorites is a 1987 case,
16 *Duke Power versus the South Carolina Tax*
17 *Commission*.

18 It's a very interesting case. It's one that I
19 noticed Mr. Green had cited in his slides and
20 in his briefing. But let me remind all, in
21 1987 the State rejected Duke's request to
22 use -- or, I'm sorry, to reduce its gross
23 receipts to mean something less than "gross."
24 So in this 1987 Supreme Court decision from
25 South Carolina, *Duke Energy*, the same taxpayer

1 here, argued that "gross" should mean something
2 less than "gross."

3 The State rejected that request. Duke
4 litigated that rejection through the South
5 Carolina tax system. The State consistently
6 took the position that "gross receipts" means
7 all of Duke's receipts, irrespective of the
8 fact that many of the receipts for that tax
9 year were generated from the sale of its plants
10 in South Carolina, not from the provision of an
11 electricity service.

12 So, again, Duke took the position that the
13 license tax should be imposed just on its
14 electricity service, wanted to exclude the sale
15 proceeds from its plant. The State objected
16 and said "gross" means "gross." We don't care.
17 "Gross" is a plain and easy term to describe.
18 It means all receipts.

19 1987, the South Carolina Supreme Court upheld
20 that State's determination. Consistently, the
21 State has argued that "gross proceeds, gross
22 receipts" mean all receipts, all proceeds.

23 More interestingly out of that South Carolina
24 Supreme Court decision are some rules of
25 statutory construction that we think have

1 applicability here and work to drive an answer.
2 Quote, "Where a statute is clear and
3 unambiguous, there's no room for construction
4 and the terms of the statute must be given
5 their literal meaning."

6 So, Your Honor, a State can't just -- the State
7 cannot just look at a statute and see it says
8 "apple" and says, "Well, today we're going to
9 call it an 'orange'." They can't do it.

10 In fact, ambiguities are resolved in favor of
11 Duke. Why do I say that? Well, South Carolina
12 Attorney General opinion regarding the meaning
13 of "gross receipts" in the context of a
14 municipal tax -- so, again, we're onto defining
15 what are meant by "gross receipts" -- the South
16 Carolina Attorney General opined, quote: "It
17 is as well-established rule of construction
18 that a tax statute is not to be extended beyond
19 the clear import of its language, and that any
20 substantial doubt as to its meaning should be
21 resolved against the government and in favor of
22 the taxpayer."

23 Your Honor, these rules of statutory
24 construction somehow don't make it into the
25 State's briefing, somehow don't make it into

1 their presentation. And this was a municipal
2 business license tax predicated on gross.

3 Moreover, the 1987 Duke case, the South
4 Carolina Legislature amended the statute four
5 years after the period at issue, but before the
6 Court. So, again, Duke was litigating that
7 "gross" should mean something less than gross.

8 The State says "gross" means "gross." The
9 statute subsequently was changed. The case
10 makes its way to the South Carolina Supreme
11 Court. Duke brings to light the fact that the
12 statutory language changed and the Court
13 decided, "We don't care regarding that
14 statutory change. It occurred later. That was
15 a change. For these periods, 'gross' meant
16 'gross'." This sounds eerily familiar to the
17 facts before you today and the law before you
18 today, Your Honor. Very bizarre.

19 The State also issued a South Carolina license
20 tax ruling construing the term "gross receipts"
21 in 1984. 1984 is a special year, Your Honor.
22 1984 is the same year as a case that the State
23 relies on heavily, the New Jersey AT&T case
24 I'll get to later.

25 In 1984, the taxpayer in this ruling sought to

1 exclude receipts that were received as the
2 result of a settlement agreement. The taxpayer
3 received the settlement agreement proceeds.
4 Not surprisingly, the State did not cite toward
5 knowledge, New Jersey litigation it's now
6 relying on today. In this case, it was in the
7 state's best interest to include the settlement
8 proceeds as gross receipts. Doing so resulted
9 in more tax.
10 What the State did conclude is fascinating.
11 Quote, "'Gross receipts' is a broad term which
12 includes all proceeds received by the entity so
13 long as such receipts resulted from any part of
14 its business."
15 There's no question that the treasury receipts
16 that Duke earned were part of its business.
17 The State doesn't make any argument to the
18 contrary. It's part of its unitary business.
19 Your Honor, the State's taxpayers, particularly
20 Duke Energy, deserves better than a results-
21 oriented position. Just because it sees apple
22 in the code and wants it to be an orange
23 doesn't make it an orange, Your Honor.
24 While we can all understand that the Department
25 is required to enforce the State's tax laws, it

1 must do so fairly and consistently; otherwise,
2 the South Carolina tax system doesn't have
3 integrity.

4 Moreover, the fact that these arguments are
5 being put forward by the Department's outside
6 counsel should be viewed as no different than
7 the State advancing them on their own. These
8 positions constructed by counsel undermine
9 South Carolina tax administration. I'll get to
10 more of that later.

11 The Department has specifically opined that
12 "'Gross receipts'" -- I'm quoting -- "is a
13 broad term which includes all proceeds received
14 by the entity so long as such receipts resulted
15 from any part of its business." And that's a
16 1984 ruling.

17 "Gross" is not "net" and, in fact, the
18 Department has opined that the two are
19 something separate and apart. "'Gross
20 proceeds' and 'gross receipts' has been defined
21 to mean the whole receipts as opposed to net
22 receipts." And that's in the 1985 Tax
23 Commission decision issued by the South
24 Carolina Department of Revenue.

25 There are no South Carolina definitions of

1 "gross receipts" in the apportionment code, as
2 I mentioned earlier. But it is a term that's
3 not unfamiliar to the Department of Revenue.
4 In fact, they're used to applying it and
5 "gross" has always meant "gross." The statute
6 is clear.

7 However, Your Honor, make no mistake, Duke
8 Energy agrees that the South Carolina
9 Legislature, not the Department of Revenue but
10 the Legislature, can alter the apportionment
11 law and include certain receipts, exclude
12 certain receipts, or include them at net.
13 Clearly that's permissible under the
14 Legislature's powers.

15 And, in fact, the Legislature did just that in
16 2007. The Legislature excluded the receipts at
17 issue in this case. Excluded the receipts at
18 issue in this case from the apportionment
19 formula. They didn't only exclude treasury
20 receipts from the sales factor, but they
21 specifically excluded other sales from the
22 apportionment formula including things like
23 income from indebtedness, damages and pension
24 reversions.

25 This change to the South Carolina apportionment

1 statute was significant. Not only did they
2 exclude ten classes of receipts, they
3 specifically included a number of receipts to
4 insure that they were included, some at net and
5 some at gross, which is well within the South
6 Carolina Legislature's province, not the
7 Department of Revenue.

8 The 2007 exclusions from gross receipts
9 represented targeted and specific carve-outs,
10 presumably as the result of careful thought and
11 legislative action.

12 But the second and, perhaps, most interesting
13 observation about the change is the change
14 itself. The Legislature did not include
15 treasury receipts at net, as the Department is
16 here arguing for today. They did not.

17 In 2007, the Legislature excluded these
18 receipts altogether. They are not included at
19 gross or net. They're included at zero.

20 The Department's attempt to misapply this law
21 change and do so retroactively is bizarre. Not
22 only could it not apply the law change
23 retroactively, they're misapplying the law
24 change.

25 The Department cannot act as a mini Legislature

1 and, quote/unquote, "enact a law change." It
2 is Duke Energy's position that only the South
3 Carolina Legislature can do so and doing so
4 interferes with South Carolina's governmental
5 bodies.

6 A predominant number of modern courts, I should
7 note, have found that gross receipts from the
8 sales of these type of securities must be
9 included in the apportionment formula.

10 There was some discussion earlier regarding
11 *General Motors* and *Microsoft*, a case that we're
12 familiar with. I should probably note that
13 *Microsoft* is our client on its appeal in their
14 litigation in California today.

15 The State misrepresents the *General Motors*
16 decision, Your Honor. The California court
17 system, especially the California Supreme
18 Court, has specifically, explicitly included
19 treasury receipts as gross receipts for
20 purposes of determining the California
21 apportionment formula, using the same words
22 here in South Carolina.

23 The *General Motors* case, decided the same day
24 as *Microsoft*, specifically included treasury
25 receipts in the apportionment formula. There

1 was one small class of receipts they excluded:
2 repurchase agreements. Repurchase agreements
3 were declared not to be sales of securities.
4 They were declared to be loans, not sales, and
5 excluded from the formula.
6 All the other receipts, all the other *General*
7 *Motors* and *Microsoft* receipts from its treasury
8 function, included in the sales factor under
9 that term. The litigation went on to define
10 what is meant by "distortion" or "equitable
11 apportionment." Something we look forward to
12 talking with you about at trial.
13 Let me spend a moment or two to address the
14 State's argument. The State's argument is
15 founded on a claim of long-standing
16 administrative policy. Quote/unquote,
17 "long-standing administrative policy." Well,
18 let's explore how long-standing this
19 administrative policy really is.
20 The State's claiming that sales of intangible
21 property in its briefing are included in the
22 sales factor at net and not gross during this
23 time period as a result of this long-standing
24 administrative policy.
25 The first citation, the first thing that the

1 State is relying on, the earliest thing that
2 the State is relying on that we can we can find
3 in their briefing, in their PowerPoint
4 presentation, and through our discussions with
5 them is a 1982 Department of Revenue decision.
6 Let's talk about the 1982 Department of Revenue
7 decision to see if it establishes a
8 long-standing administrative position. This
9 decision concerned a number of issues including
10 whether gross sales --

11 **THE COURT:** Whether it establishes a long-standing
12 administrative position or whether it initially
13 establishes?

14 **MR. FRIEDMAN:** We have both, Your Honor -- I'm glad
15 you asked -- regarding this 1982 Department of
16 Revenue decision.

17 The reason why we have both is, it's the first
18 one that's described in their briefing. But in
19 their briefing, they relate to it -- they note
20 that it was 1977 where the Department of
21 Revenue establishes this position. 1977. They
22 provide no citation for a 1977 reference that
23 supports that position.

24 They repeat this 1977 year without authority,
25 without citation, without any support at all.

1 We're still waiting for a 1977 authority that
2 allegedly commences this long-standing
3 administrative position.

4 **THE COURT:** So without that authority, you're going
5 to start with '82.

6 **MR. FRIEDMAN:** Without that authority, we can only
7 start with 1982. I don't know what else to do
8 with it.

9 **THE COURT:** All right. Go ahead.

10 **MR. FRIEDMAN:** In this decision, it concerned a
11 number of issues including whether, quote,
12 "gross sales price of business assets -- gross
13 sales price of business assets should be
14 excluded from the apportionment factor."
15 Excluded from the apportionment factor.

16 The State describes the decision as standing
17 for the proposition that sales of intangibles
18 are included at net and not gross. But that's
19 not what the decision says in 1982. Rather,
20 the South Carolina Department of Revenue stated
21 that they include the gains of sold tangible
22 and intangible property.

23 Yes, it concerned tangible and intangible
24 property and whether they should be reflected
25 in the apportionment factor. Very different

1 than the Department position today, that treats
2 intangible property itself, intangible property
3 itself as special or different.

4 The second authority in this alleged,
5 long-standing administrative position is a 1988
6 decision, 88-11, where the Department claims
7 support that including gains from the
8 disposition of foreign exchange contracts in
9 the sales factor should be excluded.

10 In reaching its decision, the Department
11 claimed it has been the practice of the Tax
12 Commission since 1977, without citation, and
13 it's a long-standing administrative position to
14 exclude them. But there's no cite to anything
15 that relates to 1977, as I mentioned before.
16 It appears to be a date established without
17 support or guidance.

18 However, in this ruling -- I'm sorry, in their
19 briefing, the State argues that its so-called
20 long-standing administrative position was
21 quote/unquote "adopted" -- adopted by the South
22 Carolina Legislature in 2007.

23 The 2007 law change I was describing before?
24 The State is claiming that their quote/unquote
25 "long-standing administrative position" was

1 adopted by the Legislature. Let's take a look.
2 Once again the Department shows that it's
3 unfamiliar with its laws. For instance, the
4 2000 law change contains very specific
5 inclusions and exclusions. Interestingly,
6 receipts from intangible property, receipts
7 from licensing patents, Your Honor, are
8 explicitly included in the sales factor.

9 **THE COURT:** What number?

10 **MR. FRIEDMAN:** I believe it's three.

11 Do you have the law change handy?

12 Yeah. Yeah, number three.

13 **THE COURT:** Okay. Go ahead.

14 **MR. FRIEDMAN:** So the 2000 law change does not
15 support the notion that excluding sales or
16 receipts from intangible property is excluded
17 from the factor, included at net. They're
18 included in the factor, specifically.

19 The 2007 law change, of course, does have a
20 series of exclusions. There they are. And
21 what do we see there? Do we see including
22 sales of securities at net, which is the
23 Department's litigation position today? Nope.
24 What we see there is excluding them altogether,
25 a complete exclusion of treasury receipts from

1 the sales factor.

2 In short, Your Honor, there is no long-standing
3 administrative position to apply here. If
4 there were, it would be arbitrary and
5 capricious to apply it.

6 The second basis for the State's position is
7 this notion of absurd results-oriented
8 statutory construction that comes out of the
9 1984 New Jersey Supreme Court decision I
10 referenced earlier. Let's take a look at that
11 case.

12 New Jersey challenged AT&T's inclusion of its
13 treasury receipts in the New Jersey receipts
14 factor. The New Jersey court stated in its
15 holding, quote, "It is axiomatic that a statute
16 will not be construed to lead to absurd
17 results."

18 As a result, many folks were litigating a
19 position similar to what the State is arguing
20 today, quote: "The absurd results portion of
21 the decision as its holding."

22 The New Jersey court's decision should not be
23 applied here, however, and it cannot be applied
24 here. The New Jersey court applied statutory
25 construction principles that simply have no

1 place in South Carolina law and cannot be
2 reconciled with the principles that I mentioned
3 earlier, described earlier.

4 This "absurd results" test has no place here
5 because -- and I'll give you some reasons.
6 Including treasury receipts in the sales factor
7 has become acceptable and an expected result in
8 states with similar laws, if not identical laws
9 to South Carolina's. New Jersey's tax law is
10 far different. In other words, it is
11 commonplace and not absurd to include treasury
12 receipts as gross receipts.

13 As mentioned earlier, in the South Carolina
14 Legislature amended its statute by carving out
15 these receipts, along with a number of other
16 receipts, and also specifically including some
17 receipts at gross and at net, thereby
18 acknowledging that included treasury receipts
19 is not an absurd result in prior law. One must
20 assume that the South Carolina Legislature
21 would not address trivial or absurd
22 consequences when it enacted its law change in
23 2007, Your Honor.

24 Finally, the 28-year-old case, the 28-year-old
25 New Jersey Supreme Court case, compared the

1 inclusion of the receipts in the factor as akin
2 to depositing money into a bank account. That
3 analogy reflects a serious misunderstanding of
4 how South Carolina apportionment works.
5 For instance, depositing money into a bank
6 account is not a quote/unquote "sale" for
7 purposes of South Carolina apportionment and
8 would never be considered for inclusion in the
9 apportionment factor in the first place.
10 But if the court -- if the New Jersey court or
11 if this Court were concerned with the repeated
12 or serial nature of treasury transactions, the
13 Court need only look to only transactions which
14 repeat and unquestionably produce receipts
15 included in the sales factor.
16 An airlines provision of a seat on an airplane
17 is a serial transaction. That seat's used
18 five, six, seven times a day over and over
19 again.
20 Leased property, particularly mobile, leased
21 property, might be leased several times a day
22 in serial fashion. Licensing software, the
23 same intangible property, could be licenced a
24 hundred, a thousand, or in the cloud computing
25 context, a million times a day over and over

1 again. Clearly, serial transactions are
2 included in the sales factor under the pre-2007
3 law.

4 The sales of these investments produced
5 receipts. As history has taught us, there's no
6 such thing as a "sure thing," particularly when
7 it comes to investing, Your Honor. There's a
8 risk associated with every financial
9 transaction, as we've come to see, since 2008.
10 There's a risk associated with Duke's treasury
11 department when they undertook these
12 transactions. In fact, it is fair to say that
13 Duke's tax department had involvement or at
14 times no knowledge of these transactions.

15 Your Honor, I should also note that if the
16 treasury department at Duke decided not to
17 engage in the treasury transactions at issue in
18 this case, but decided to invest overnight in
19 gold bullion, in pork bellies, in desk chairs,
20 in Burnie Maybank's honey, we wouldn't be here
21 today, Your Honor.

22 **THE COURT:** Yeah, you'd lost a lot of money on that
23 one.

24 **MR. FRIEDMAN:** I understand it's good honey.

25 Moreover, Your Honor, let's assume that we

1 didn't invest in gold bullion, we wouldn't be
2 here today. Certainly buying and selling of a
3 tangible food and the Department of Revenue
4 shouldn't have a problem with that. What about
5 futures of gold bullion? Should they be
6 treated differently?
7 What you're going to see at trial, Your Honor,
8 is a whole series of transactions that Duke
9 Energy engaged in during this period dealing
10 with intangible property, that the Department
11 of Revenue had no problem with, that were
12 clearly included in the apportionment formula,
13 that never came within the sights of the
14 Department of Revenue's lawyers.
15 But yet they're carving out a special class of
16 intangible transactions; a class of
17 transactions that are intangible but are
18 financial in nature; a class of transactions
19 that they never issued a regulation on, that
20 they can't claim to have a long-standing
21 administrative policy when none exists on; a
22 class of transactions that were subsequently
23 addressed in 2007 by the South Carolina
24 Legislature and excluded from the apportionment
25 formula, which, by the way, other states have

1 done as well.

2 During this period at issue, there was nothing
3 different about investment transactions under
4 the apportionment code of South Carolina. And
5 the fact that if we bought yaks in Outer
6 Mongolia overnight and sold them, they wouldn't
7 be included in our treasury -- or, I'm sorry,
8 in our sales factor. But the fact that we
9 bought commercial paper and now the Department
10 of Revenue is taking the position they should
11 be excluded is something that they were
12 well-equipped to address and chose not to over
13 and over again.

14 This is not an unusual issue. The Department
15 itself acknowledges it's been around since at
16 least 1984 and, frankly, prior to that, and
17 never issued any formal guidance on it, Your
18 Honor.

19 **THE COURT:** When you say "this" is not an unusual
20 issue, let me be clear, what is "this"?

21 **MR. FRIEDMAN:** Well, the fact -- you can describe it
22 in a few different ways, but let me take a stab
23 at it.

24 Treasury receipts, of course, or treasury
25 function is a function that every large and

1 small company has. Nearly every small company,
2 every large company has a treasury function.
3 Those treasury functions routinely invest for
4 short-term purposes. Not knowing what their
5 short-term cash needs are, they'll invest for
6 short-term purposes. Those investments produce
7 receipts. Those receipts have been challenged
8 by some states, like New Jersey in 1984, as to
9 whether they are appropriately included in the
10 apportionment factor. This is not a novel
11 legal issue.

12 The Department of Revenue looked -- has known
13 about this issue for sometime, an issue that
14 they claim to have a long-standing policy on
15 but none exists, had opportunity to issue
16 regulations addressing it, like they do on a
17 number of other apportionment issues and never
18 did.

19 But, yet, they claim a long-standing
20 administrative position based upon a 1982 and
21 1982 -- I'm sorry, 1982 and 1988 rulings that
22 really are off point? And a 1977 reference
23 that nobody's been able to show me exists
24 anywhere? Really astonishing, Your Honor.

25 In this reply brief, they let seep in this

1 other notion, and Mr. Green alluded to it again
2 today in his oral argument, and that's this
3 notion of distortion.

4 Distortion is a shorthand way that state tax
5 lawyers refer to whether an alternative
6 apportionment formula should be applied when
7 the statutorily required formula produces an
8 unfair result.

9 So when you apply the statutory formula, it
10 spits out a result, because it's mathematical
11 at the end of the day, and you look at that
12 result and you say to yourself, either the
13 State or the taxpayer, that result doesn't make
14 sense or produces an unfairness.

15 THE COURT: Can I stop you here?

16 MR. FRIEDMAN: Yeah.

17 THE COURT: When you say the distortion issue, are
18 we talking about the Rent-A-Center?

19 MR. GREEN: I'm sorry, Your Honor?

20 THE COURT: Are you familiar with the Rent-A-Center
21 case?

22 MR. GREEN: Somewhat, yes.

23 THE COURT: Is that what we're talking about, that
24 type of --

25 MR. GREEN: You're talking about -- yes, the -- that

1 was the -- the statute -- yes, the alternative
2 apportionment.

3 THE COURT: Okay. All right. Go ahead.

4 MR. GREEN: Right.

5 MR. FRIEDMAN: All right.

6 MR. GREEN: To some degree we're talking about that.

7 I mean, I think the Department's --

8 THE COURT: You said that concept.

9 MR. GREEN: Yes, sir.

10 THE COURT: All right.

11 MR. FRIEDMAN: Yep, that concept. "Distortion" is a
12 concept that is associated with the application
13 of equitable apportionment, alternative
14 apportionment, which is when the statutory
15 formula produces a result that's unfair, you
16 then come in and --

17 THE COURT: I've dealt with that.

18 MR. FRIEDMAN: I understand you have, Your Honor.
19 And it's a very -- as you know, Your Honor, a
20 very factually intensive process to determine
21 whether a result is fair or unfair. In fact,
22 the notion --

23 THE COURT: Must be, I wrote some pretty long
24 opinions on it, so ...

25 MR. FRIEDMAN: I understand you've been exposed to

1 this concept before.

2 Of course, it has no place in a Motion for
3 Summary Judgment because in every distortion
4 type debate, experts are put forward, evidence
5 is put forward as to whether the results are
6 fair, and the fairness is compared, by the way,
7 Your Honor -- I'm sure you recall -- to the
8 taxpayer's in-state business activities.

9 But using this distortion concept has no place
10 in determining whether the statutory formula --
11 I'm now back to the statutory formula -- how
12 that's computed. They are two separate
13 concepts: statutory formula, gross receipts.
14 Distortion is applied after you determine the
15 results of the statutory formula. And it
16 either does or does not apply based upon
17 whether the results are fair or not of the
18 statutory formula.

19 But, yet, the State in its reply brief has let
20 seep in this distortion concept and, in some
21 ways, has made a mini distortion argument that
22 including treasury receipts in the sales factor
23 produces a distortive result.

24 Your Honor, we're very much looking forward to
25 the opportunity in discussing "distortion" with

1 you at trial. We have some great experts that
2 are going to talk about the fairness of our
3 apportionment results as associated with our
4 in-state business activities, but that's not
5 before you here today.

6 The only thing before you here today on this
7 issue is whether sales of treasury receipts are
8 included in the sales factor, gross receipts
9 factor or not.

10 **THE COURT:** All right. I tell you what I'm going to
11 do. How long are you going to be?

12 **THE COURT REPORTER:** I need a break.

13 **THE COURT:** Okay.

14 **MR. GREEN:** What's that?

15 **THE COURT:** My request to you has been trumped by
16 the court reporter, so your opinion no longer
17 matters.

18 **MR. GREEN:** I understand.

19 **THE COURT:** We're going to take a lunch break.

20 **MR. GREEN:** Okay.

21 **MR. FRIEDMAN:** Thank you, Your Honor.

22 **THE COURT:** Let's be back at, let's say, 1:30.

23 (Lunch break from 12:28 to 1:30 p.m.)

24 **THE COURT:** All right. Y'all be seated.

25 Give me a second, Mr. Green.

1 MR. GREEN: Thank you, Your Honor.

2 THE COURT: All right.

3 REPLY ARGUMENT BY MR. GREEN:

4 MR. GREEN: Thank you, Your Honor. I just have a
5 few points.

6 You've obviously heard and read a lot for this,
7 so I will not going into great detail on the
8 issues. I'll just try to respond to a few
9 things that I noted. I think I'll go in
10 reverse order.

11 There's been some discussion about the nature
12 of the agency precedent here. It didn't deal
13 with this precise issue. I mean, that's
14 readily apparent. It did, however, deal with
15 intangibles. We're dealing with intangible
16 transactions here and, more particularly, we're
17 dealing with products that are essentially
18 loans, they're repos, or loan in exchange
19 for -- secured by a security.

20 As found by the *General Motors* case, commercial
21 paper really is a short-term loan. A municipal
22 bond is a loan. It is a loan and it is an
23 agreement to pay money in the future. They may
24 have a security nature, but it is a loan to pay
25 an amount and those are the type of

1 transactions that we're dealing with here.

2 The taxpayer's argument is to include the
3 principal from the return of that loan here,
4 which is the same as the type of transaction
5 the intangibles address in the prior agency
6 rulings,

7 So we'd submit, Your Honor -- and we'd submit
8 that even aside from the agency precedent,
9 frankly, by applying the material -- or the
10 authorities and sources we've referenced in our
11 brief, it would lead you to the same
12 conclusion, which is that including principal
13 in transactions such as these is inappropriate
14 and does not provide a reasonable basis on
15 which to determine income properly reported in
16 South Carolina.

17 **THE COURT:** Well, when you say it doesn't provide a
18 reasonable basis, is that analysis more one
19 that should be made in the second stage of --
20 by this case or is that one that is one that is
21 more -- I know you're going to say "yes," so
22 it's more proper in determining what the
23 statute says.

24 **MR. GREEN:** Admittedly, Your Honor, they're probably
25 a pretty similar analyses, frankly. I think

1 the reason that you can consider it here partly
2 is the agency precedent. Partly is -- and, in
3 fact, I think we cited -- I'm sorry, Your
4 Honor?

5 THE COURT: If I find agency precedent, I have to
6 find compelling reasons to go otherwise.

7 MR. GREEN: Yes, sir.

8 THE COURT: But if the statute is clear on its face,
9 then that would be compelling reasons.

10 MR. GREEN: If you --

11 THE COURT: If it's plain, plainly says "gross" ...

12 MR. GREEN: Gross receipts.

13 THE COURT: Receipts, yeah.

14 MR. GREEN: Yes, Your Honor. Yes, if you found the
15 statute plain on its face, that is true. I
16 would submit, however, that your interpretation
17 is not to take the gross receipts in isolation
18 from that statute, but interpret along that
19 statutory framework, which is determining a
20 factor, a factor to determine the amount of
21 income to be reported to South Carolina that
22 under 2210 provides a reasonable basis. I
23 forget exactly the language. We've obviously
24 quoted it ad nauseum in our brief.

25 THE COURT: Yeah.

1 **MR. GREEN:** That provides a reasonable -- I think
2 the cases that we've cited that I mentioned in
3 my earlier presentation is that you interpret
4 it in light of the framework and not just take
5 that term out in isolation. And I think you're
6 also not supposed to do interpretations that
7 lead to absurd results.

8 **THE COURT:** Okay.

9 **MR. GREEN:** We submit that it would be an absurd
10 result that making short-term securities
11 transactions, which it's undisputed there's
12 never been a loss, and then getting that money
13 back and that goes in the denominator, that is
14 an absurd result.

15 **THE COURT:** It is a result, though, for which the
16 existing statutory framework provides a remedy
17 for if it would be an absurd result. Is it
18 not, though?

19 **MR. GREEN:** There --

20 **THE COURT:** Are you following what I'm getting at?

21 **MR. GREEN:** I am following, yes, sir. I think I am,
22 Your Honor.

23 **THE COURT:** Because if it does result in something
24 that's absurd, then you would find that the
25 apportionment -- the standard apportionment

1 formula is one that should not be used and it
2 would invoke the statute to allow you to use
3 the more appropriate apportioning formula, is
4 that not ...

5 MR. GREEN: If -- yeah. If you -- for instance, if
6 you reach that conclusion, that gross receipts
7 covers these types of transactions, the return
8 of somebody's principal within 30 days is a
9 gross receipt, it has to be added to the
10 apportionment basis, then yes, we would go to
11 the next step.

12 THE COURT: Well, what I'm getting at is, you're
13 asking me to look at the statute as a whole.
14 They could equally be asking me to look at the
15 statute as a whole to accomplish their result,
16 too. So that's what I'm trying to figure: Who
17 gets the whole?

18 MR. GREEN: Understood, Your Honor. And we
19 obviously think we're entitled to the whole --

20 THE COURT: And who falls in it?

21 MR. GREEN: We obviously think we're entitled to
22 that.

23 THE COURT: I guess one side gets W-H-O-L-E and the
24 other falls into H-O-L-E.

25 MR. GREEN: Yes, Your Honor. Yes, Your Honor.

1 But determining -- we would submit that
2 determining the definition of that term in the
3 first place, because you're doing it in the
4 context of a factor. The alternative
5 apportionment deals with what happens if that
6 factor's applied. So we submit that you're
7 interpreting in the context of the factor in
8 light of 2210.

9 THE COURT: And not?

10 MR. GREEN: And then based on agency precedent,
11 obviously.

12 THE COURT: And why would 22...

13 MR. GREEN: I think 10, which provides a reasonable
14 basis for determining income in this state.
15 Isn't it 2210?

16 THE COURT: Well, make sure you got the right one,
17 so I can go back and look at all this.

18 MR. GREEN: Yes, 12-6-2210: If a taxpayer's
19 transacting or conducting business within or
20 without the State, income tax is imposed upon
21 a base which reasonably represents the
22 proportion of the trade or business carried on
23 within this state.

24 And I submit to Your Honor, you know, it's more
25 than just me saying, "Oh, that's a great

1 statute for me to look at." In four
2 apportionment cases, the Supreme Court cited
3 that statute really first as part of their
4 argument. One of the cases -- it may be
5 Colonial -- one of those cases, though, says
6 the starting point is 2210.

7 THE COURT: Okay.

8 MR. GREEN: So we submit you start there, as well.
9 And we submit the agency precedent starts
10 there, as well.

11 THE COURT: All right.

12 MR. GREEN: Okay. That's all I have on that, unless
13 you have any further questions for me on that
14 issue.

15 THE COURT: You got that, Harvin? All right.

16 MR. GREEN: A lot of these statutes are referenced
17 in the PowerPoint presentation, as well as our
18 brief, so you've got some sources there.
19 On the "electricity is manufacturing" issue,
20 just a few points. They're citing the agency
21 discussions of determining whether somebody
22 particularly is or is not a manufacturer or
23 providing services.
24 The agency has determined that generators of
25 electricity are engaged in manufacturing and

1 that, frankly, is based upon Supreme Court
2 precedent. So we're getting in the issue of
3 manufacturing and that's what the basis of our
4 Summary Judgment motion is.

5 They cite the Glen Robinson's affidavit. We
6 addressed that issue in our brief.
7 Mr. Robinson was saying, "Look, if they're just
8 giving you -- they're not measuring the
9 quantity of the product, it's a service."
10 Essentially, I think he was saying it's akin to
11 somebody taking a good from A to B. The
12 trucking company that brings me something is
13 providing a service. If they're measuring it
14 by quantity, which is what a kilowatt hour is,
15 that's manufacturing. That was his issue and
16 we addressed that in our memorandum, I think,
17 Your Honor.

18 On the waiver issue, I'll just address some
19 points about affidavits. The McCarver
20 affidavit, even if taken as true, that they --
21 he thought they could extend the statute of
22 limitations. Even taken as true, that this was
23 considered as far as back as 1987, which is
24 when I think the first affidavit -- the first
25 Form FS-43 was executed. The cases have

1 instances where an erroneous representation was
2 made by a Department employee; that is not
3 binding on the Commission or the Courts.

4 Mr. Davant said that FS-43 made no difference
5 than the pre/post Revenue Procedures Act. We
6 would submit that 88 -- Commission Decision
7 88-162, as well as the Revenue Procedures Act,
8 which I've discussed before, does make a
9 difference and that even if he thought that, he
10 was incorrect.

11 **THE COURT:** When you say it does make a difference,
12 you mean that particular --

13 **MR. GREEN:** There was no authority prior to Revenue
14 Procedures Act to extend the refund time.

15 **THE COURT:** Okay.

16 **MR. GREEN:** Yes, Your Honor.

17 Mr. Southard, he has -- there's a statement of
18 Mr. Southard there that they cited about "if
19 you told (sic) a refund after signing a waiver,
20 would you tell them they couldn't seek a refund
21 after signing the waiver?" Frankly, from the
22 context it's not clear that he was talking
23 about post '95 or pre-'95. Even if he was,
24 again, we submit that that's an erroneous
25 determination on the statute, Your Honor.

1 And with that, if you don't have any more
2 questions for me, that's all I have on my
3 argument.

4 THE COURT: I was about to ask you about them, but
5 you've covered that just now.

6 All right. You're standing. You're either
7 uncomfortable or you're --

8 MR. TRESH: May we have a few quick points, Your
9 Honor?

10 THE COURT: Well, yep, on new matter he raised.

11 MR. TRESH: New matters.

12 THE COURT: Okay.

13 MR. TRESH: New matters and a question Your Honor
14 raised earlier.

15 REPLY ARGUMENT BY MR. TRESH:

16 MR. TRESH: Your Honor, no state Department of
17 Revenue has ever taken the position that a
18 waiver, which is routinely signed across the
19 county, runs one way, that they waive the
20 statute of limitations and it only applies to
21 assessments of tax against the taxpayer and
22 would not apply to an assessment of a refund.

23 THE COURT: Is there an affidavit to that effect or
24 this is you on the factual aspect of the entire
25 United States?

1 MR. TRESH: Professor Pomp, who we have declared as
2 an expert witness, will testify to that fact at
3 trial. We believe that that's a fact that we
4 can prove and do intend to prove at trial.

5 THE COURT: All right.

6 MR. TRESH: So South Carolina would be -- this would
7 be the only instance of that position.
8 Now, the fact that the DOR -- the Department of
9 Revenue signed multiple waivers over decades
10 certainly represents a long-standing agency
11 policy.

12 Mr. Green has argued with regard to all of the
13 positions he's advanced that they're based upon
14 long-standing agency policy.

15 Over the course of decades, several Department
16 of Revenue employees, high ranking employees,
17 directors, people with -- who certainly
18 represented they had the authority to sign
19 these waivers, informed Duke Energy that these
20 waivers were reciprocal, that the statute of
21 limitations to file refund claims was open.

22 THE COURT: So now you're going to take
23 long-standing policy and if it's oral policy,
24 you think that's a long-standing -- not only
25 oral policy, you want to take the deference

1 standard and take it to not just oral statement
2 of an agency official, but not even one who
3 necessarily has the authority to invoke policy,
4 do you?

5 I mean, do you have an affidavit that says that
6 any of these people you're relying upon are in
7 the position -- because I haven't read all the
8 affidavits -- are in the position to invoke
9 policies for the Department of Revenue?

10 MR. TRESH: We think that this is part of the reason
11 why we are opposing the Motion for Summary
12 Judgment as opposed to filing a cross motion on
13 the Summary Judgment issue.

14 THE COURT: Yeah.

15 MR. TRESH: We don't have an affidavit. But we
16 believe that many of the people whose
17 affidavits and deposition testimony have been
18 taken are people that Mr. Green just went
19 through, Joe Southard --

20 THE COURT: Well, I'm putting you on the spot on
21 this one because when you make that assertion,
22 you've got to back the assertion up with
23 something. Or other than that, it's just
24 simply an assertion that I see no legal support
25 for whatsoever. That's what I'm getting at.

1 I'm not trying to beat you down on that -- on
2 this one because I want to see what you've got
3 to support it.

4 MR. TRESH: Marvin Davant and Rickey McCarver would
5 both testify.

6 THE COURT: No, I can't --

7 MR. TRESH: I'm sorry.

8 THE COURT: -- go with what they would. I'm at
9 Summary Judgment. I have to go with what is
10 there. So what is there now?

11 MR. TRESH: In Mr. Davant's affidavit, Mr. Davant
12 says that he regularly issued these waivers to
13 taxpayers for years with the understanding that
14 the -- that those waivers ran before and
15 against. There's nothing in the affidavit that
16 would say it's an agency policy. It is a
17 course of conduct, though.

18 THE COURT: Okay.

19 REPLY ARGUMENT BY MR. MAYBANK:

20 MR. MAYBANK: He did say, Your Honor, that as far as
21 he was concerned, the entire agency had blessed
22 the form and had no reason to speak to the
23 contrary; that's basically in his affidavit.

24 THE COURT: All right. I tell you what, who --
25 what's his name again?

1 MR. MAYBANK: Marvin Davant.

2 THE COURT: I'll look at that, because I get nervous
3 when lawyers tell me "basically that's what's
4 in there."

5 MR. MAYBANK: Your Honor --

6 THE COURT: I've heard that before and it was
7 basically --

8 MR. MAYBANK: I just happen to have that -- Marvin
9 Davant's affidavit with me.

10 THE COURT: Well, let's get a little more exact,
11 then.

12 MR. MAYBANK: Well, he goes -- he says it so many
13 different ways. Why don't I hand you Robby
14 Anderson's affidavit.

15 THE COURT: That would be even better. Just hand it
16 to Harvin.

17 MR. MAYBANK: Thank you.

18 THE COURT: Okay.

19 REPLY ARGUMENT BY MR. TRESH (Continued):

20 MR. TRESH: Your Honor, may I approach? You had
21 asked the question earlier about the difference
22 between 12-54-80 pre-1995 and 12-54-85
23 post-1995.

24 THE COURT: (C)? I looked that up while I was -- I
25 can pull West Law up while y'all are trying to

1 tell me what the law is to find out what the
2 law really is, so ...

3 But you want to hand me that?

4 MR. TRESH: Yes, Your Honor.

5 THE COURT: Okay.

6 MR. TRESH: I've highlighted the relevant portions.

7 And, I apologize, it's the statute. I don't
8 have multiple copies with me.

9 The point in those two statutes, if you -- Your
10 Honor's question was, Mr. Maybank had on the
11 screen -- if we can put it back on, Maria --
12 the two different -- the language from the two
13 different waiver forms, the pre-1995 law change
14 and the post-1995 law change. And the
15 language, as you can see, was very similar, but
16 there was a statutory reference that was
17 different.

18 THE COURT: 85(C).

19 MR. TRESH: When you go to the statute, both of
20 those statutes, while the language is not
21 exactly the same, it's very similar in that
22 both of those statutes provide the authority
23 for the party, for the taxpayer, the Department
24 of Revenue to ask the taxpayer to sign a
25 waiver.

1 MR. GREEN: Your Honor, I object. I didn't raise
2 this in my response. When I stood back up, I
3 didn't get into this. It's a repetition of the
4 issues. He's just making his same argument
5 again.

6 MR. TRESH: I believe Your Honor asked a question
7 earlier and I said when I stood up I'd liked to
8 do two things, raise the issues and answer a
9 question that Your Honor had raised.

10 THE COURT: I'll let him go in since I -- well, I
11 raised the question, though, to Mr. Maybank
12 while he was making the argument.

13 MR. TRESH: Yes, Your Honor.

14 THE COURT: I can look at the law. So, I tell you
15 what, I'm going to -- I'm going to sustain his
16 objection on that, because I know I can --

17 MR. GREEN: Thank you, Your Honor.

18 THE COURT: -- accomplish that on my own.

19 MR. TRESH: Your Honor, if I can briefly turn to my
20 colleague, Mr. Friedman, to address a few of
21 the points that Mr. Green made on gross
22 receipts.

23 THE COURT: Okay.

24 REPLY ARGUMENT BY MR. FRIEDMAN:

25 MR. FRIEDMAN: And I'll be very brief, Your Honor.

1 One is the notion that commercial paper is
2 nothing more than a loan. In fact, municipal
3 bonds, I believe Mr. Green says is nothing more
4 than a loan.

5 The question isn't whether things are loans
6 versus equity versus some other type of
7 financial instrument. The question is whether
8 these are sales or not, whether these sales
9 produce gross receipts; if they produce gross
10 receipts, they're included in the apportionment
11 factor by definition on its plain face of the
12 plain meaning of the statute.

13 So Mr. Green's attempt to distinguish between
14 financial instruments doesn't really have any
15 relevance here.

16 The second thing I wanted to address is the
17 absurd result.

18 **THE COURT:** And they are? You said the question is
19 whether they are sales or not.

20 **MR. FRIEDMAN:** Sales of instruments.

21 **THE COURT:** Okay.

22 **MR. FRIEDMAN:** Uh-huh (affirmatively responds).
23 Whether it's stock, debt, pork bellies, pork
24 belly futures --

25 **THE COURT:** Okay.

1 MR. FRIEDMAN: -- Mr. Maybank's honey...

2 The absurd result point that Mr. Green made,
3 the absurd result seems to be swallowed in its
4 entirety, Your Honor, by the distortion or
5 equitable apportionment case law in this state.
6 For instance, if the taxpayer had one
7 transaction in financial instruments that moved
8 or had an effect on the apportionment factor by
9 one one-thousandth of a percent, clearly not an
10 absurd result. Two transactions. Three
11 transactions. Five hundred transactions. Five
12 million transactions. Those are factual
13 questions, Your Honor, that are best dealt with
14 as a result of an apportionment -- equitable
15 apportionment type of analysis. It's not one
16 dealt with by the plain language of the statute
17 in the apportionment statute, the 2210 statute
18 that Mr. Green was relying on before.

19 THE COURT: What is the purpose of 2210, then?

20 MR. FRIEDMAN: The purpose of 2210, Your Honor, is
21 to provide a rough approximation of the
22 taxpayer's business activities in the State of
23 South Carolina. And if somebody wants to
24 challenge the result of that statutory result,
25 there's a statutory mechanism for doing so;

1 that's contained in 2320, I believe, 12-6-2320.
2 That's the equitable apportionment statute.
3 That's the subject of the litigation in this
4 case. We're very much looking forward to the
5 trial on that issue.

6 **THE COURT:** Okay.

7 **MR. FRIEDMAN:** Thank you, Your Honor.

8 **THE COURT:** All right. Now, do we need to address
9 other issues? Apparently ...

10 **MR. GREEN:** Yes, Your Honor. We have a motion to
11 compel.

12 **THE COURT:** Apparently someone -- someone sent a
13 letter also -- or some parties have sent
14 letters requesting to be amicus curiae.

15 **MR. GREEN:** Yes, there are two -- I think two
16 parties requested to file as amicus curiae. We
17 opposed that motion.

18 **THE COURT:** I don't know -- I never have heard of an
19 amicus curiae in litigation. I think you
20 become a party or you're not a party.
21 So are you going to argue this?

22 **MR. MAYBANK:** I would, Your Honor.

23 **THE COURT:** All right.

24 **ARGUMENT BY MR. MAYBANK:**

25 **MR. MAYBANK:** There's actually four ALC cases. I

1 know you had said earlier that --

2 **THE COURT:** Yeah, I'm not going to bite on what
3 somebody else did on that.

4 **MR. MAYBANK:** Well, maybe the cumulative impact.
5 There are three ALC cases allowing an amicus
6 brief, one not allowing an amicus brief. There
7 is a reference in the ALC rules that amicus
8 briefs that did, in all honesty, appear to be
9 kind of a dangling participle. But --

10 **THE COURT:** Well, was it in the contested case rules
11 or the appellate rules?

12 **MR. MAYBANK:** Well, it was actually --

13 **THE COURT:** The thing is, we hear both cases.

14 **MR. MAYBANK:** It actually was in the cover of the
15 brief.

16 **THE COURT:** Oh.

17 **MR. MAYBANK:** But the -- basically what the -- what
18 the ALC cases have said, people have attempted
19 to intervene and several at the ALC said,
20 "You're really not in a position of an
21 intervenor. You need to file an amicus brief,"
22 is what they did.

23 In our case, the state chamber in the FC and
24 they filed amicus briefs. They're just
25 basically -- an amicus brief is nothing more

1 than to provide additional authorities to the
2 Court.

3 The ALC rules are silent whether to allow or
4 disallow. There is a reference to an amicus
5 brief and we think it just, given the equities
6 of it, it would be preferable to allow it in
7 rather than disallow it.

8 **THE COURT:** Well, I'm going to disallow it. I'm
9 going to do it under the intervention rules and
10 the intervention rules set forth that I deny
11 intervention when the existing parties
12 can -- and I'm not quoting on this one; I'm
13 paraphrasing -- but when they can fully develop
14 the legal issues themselves.

15 And under that theory, I see no defect in your
16 abilities to present your case at this point in
17 time. So not finding that defect, I deny the
18 motion by whomever.

19 I will -- one of the parties raised the issue
20 about whether or not -- at least as far as
21 the -- I was curious over this, Mr. Maybank --
22 whether is the impact of FS-43 -- were they
23 wishing to file an amicus brief in a situation
24 where other people out there have FS-43 issues
25 that go back pre-1995? Because I could see --

1 this case, to me, just appears to be something
2 that would be unusual, but --

3 **MR. MAYBANK:** It is. Neither amicus brief alleges
4 pre-1995 issues. They just speak to -- they
5 both speak to the public policy of a state
6 agency reneging on an agreement that's signed.

7 **THE COURT:** Okay. Well, I mean, you got to have
8 standing, even if they were making a motion to
9 intervene. So they would have to be in a
10 position to have pre-'95 issues, because '95 on
11 we don't have -- you know, we don't have the
12 issues concerning FS-43 that we had pre-'95.

13 **MR. MAYBANK:** That's correct, Your Honor.

14 **THE COURT:** And, actually, I'm probably picking the
15 wrong date. It might be '93.

16 **MR. MAYBANK:** Right.

17 **THE COURT:** So ...

18 **MR. MAYBANK:** But neither amicus brief asserted that
19 they had members with pre-'95 claims, to answer
20 your question.

21 **THE COURT:** Neither did?

22 **MR. MAYBANK:** Correct.

23 **THE COURT:** Okay. All right. Thank you.

24 Now -- all right. Motion -- what's the next
25 one?

1 MR. GREEN: However you want to proceed, Your Honor.

2 THE COURT: I'll hear from you now.

3 ARGUMENT BY MR. GREEN:

4 MR. GREEN: We filed a Motion to Compel about two
5 general subjects of discovery that we have
6 requested and that Duke Energy has rejected our
7 request on.

8 THE COURT: All right.

9 MR. GREEN: Put briefly, Your Honor, we sent
10 discovery requests last year requesting
11 documents related to lawsuit, documents to
12 treasury department and marketable securities
13 and copies of all state tax returns filed by
14 Duke.

15 Duke served responses. They produced some cash
16 disbursement reports and documents and
17 spreadsheets. They objected to producing state
18 tax returns. We then -- we sent a letter on
19 April of this year requesting they give us
20 North Carolina state income tax returns.

21 THE COURT: So you're not asking for all of them
22 now, just --

23 MR. GREEN: I just want North Carolina.

24 THE COURT: Okay.

25 MR. GREEN: And the reason I want North Carolina is

1 primarily -- you know, they've produced expert
2 testimony -- and we've dealt with this issue,
3 obviously, but they have -- they have in Forms
4 10-Q, I think, produced earlier -- generated
5 early in the 1990's, about 30 percent of their
6 business was in South Carolina. The South
7 Carolina return approximately comes to that.
8 We'd like to see if South Carolina -- North
9 Carolina is roughly the opposite side of the
10 coin.

11 The other thing we'd like to see is, they
12 produced an expert -- I think I deposed him in
13 April, shortly before I sent the letter -- and
14 he gave some testimony where he was sort of
15 breaking down, really on an accounting basis is
16 my characterization of him -- how the business
17 activities should be broken down in the State of
18 South Carolina.

19 And in his expert report, which I think is
20 attached to their opposition, they have a copy
21 of that report where it has percentage to South
22 Carolina, percentage to North Carolina --

23 **THE COURT:** You want that for impeachment purposes?

24 **MR. GREEN:** I want it for impeachment purposes, yes.

25 And I'd like to have my experts to be able to

1 look at it so if we go to a trial on this, they
2 can opine on that.

3 THE COURT: All right.

4 MR. GREEN: The other is the -- for -- John, you
5 correct me if I'm wrong here -- from some
6 years, I think it's '86 to '98, we have some
7 pretty detailed information on the nature of
8 their short-term securities transactions, so
9 that the expert can look at it and analyze it.
10 Pre-1988 -- '86 and post-1998, the information
11 is much less detailed. It's hard for the
12 expert to figure out what's going on to be able
13 to determine what's going on.

14 THE COURT: Can I -- on that one, is that not an
15 issue that -- I'm getting confused, but is that
16 an issue that both of y'all agreed was correct
17 or proper for Summary Judgment?

18 MR. GREEN: We agreed that the -- well, we cross-
19 moved on the gross receipts issue, so -- but it
20 still would be relevant in the distortion
21 context.

22 THE COURT: Okay.

23 MR. GREEN: So, for instance, if you ruled against
24 us and granted their motion for Summary
25 Judgment --

1 THE COURT: Okay.

2 MR. GREEN: -- we'd still have the equitable
3 apportionment.

4 THE COURT: All right. I understand.

5 MR. GREEN: So it would still be pertinent to that
6 issue.

7 THE COURT: Okay.

8 MR. GREEN: We -- I mean, it's a lot of information
9 because as you can imagine, Duke's done a lot
10 of securities transactions through their
11 treasury function over the last 20 some-odd
12 years.

13 We first figured out that we couldn't figure --
14 we first figured out that we couldn't figure
15 out some years when we were working with the
16 expert trying to give him more detailed
17 information.

18 And what we're just looking for is
19 information -- if they put this information
20 together, they must have some source documents
21 that they were able to compile it. There's
22 some email traffic where they indicated at some
23 point in time internally that they were having
24 problems compiling it, but then it was compiled
25 because the returns were filed, I gather. So

1 what we're just looking for is the information
2 that we can check numbers to determine that.
3 They've argued in their opposition that we did
4 an audit and we verified all the numbers. But,
5 frankly, I don't see how verifying -- even if
6 that was true, I don't even see how that would
7 be in the context of this where we're dealing
8 with detailed issues and the equitable
9 apportionment statute wasn't at all at issue.

10 **THE COURT:** Okay.

11 **MR. GREEN:** So I submit we're entitled to both
12 those, Your Honor. Thank you.

13 **ARGUMENT BY MR. TRESH:**

14 **MR. TRESH:** Your Honor, first on the request for the
15 North Carolina returns. The Department's
16 response says that "the need for the North
17 Carolina returns arises from Duke's expert and
18 it begs the question of whether the methodology
19 and the numbers provided in that expert report
20 would show that Duke Energy's income in North
21 Carolina was fairly reflected on its North
22 Carolina returns." That's a quote.
23 This case has nothing do with whether or not
24 Duke's income was fairly reflected or not on
25 its North Carolina returns. It only has to do

1 with whether or not Duke Energy correctly filed
2 its South Carolina income tax returns.

3 Now, from a South Carolina perspective, to
4 Mr. Green's point on the distortion or
5 equitable apportion provisions, if this case
6 were to go to trial, on those provisions our
7 expert was given a fair amount of information
8 that showed North Carolina and South Carolina
9 percentages, as well as a fair amount of
10 information regarding Duke's South Carolina
11 income tax returns.

12 Duke's expert did not rely on the North
13 Carolina income tax return, was not given the
14 North Carolina income tax returns. We've
15 turned over everything to the Department that
16 we gave to the expert witness, who made the
17 report in this case.

18 North Carolina -- what Duke pays or doesn't pay
19 is absolutely not at issue in terms of
20 determining both whether Duke correctly
21 filed -- whether Duke's amended returns were
22 correctly filed or whether the alternative
23 apportionment provisions should compel a
24 different result in South Carolina.

25 Those alternative apportionment provisions are

1 designed to ensure that the number that Duke
2 put on its amended returns fairly reflects its
3 business activities in South Carolina; no
4 mention of any other state.

5 And so why sensitive information like that
6 ought to be turned over to the Department or
7 has any bearing or relevance on this case is --
8 somewhat escapes us.

9 With respect to the second request related to
10 the information on the calculation of the
11 receipts, we've turned over to the Department
12 in this case 62,000 pages of information.
13 Included in that documentation is thousands of
14 pages of source documentation related to
15 treasury receipt transactions over the course
16 of the time period.

17 We've turned over everything that we have in
18 that regard to the Department. To the extent
19 that we uncover additional information, we'll,
20 of course, turn over more. But at this time
21 we've given the Department what we have.

22 **THE COURT:** So where I can be sure, you're saying
23 you've already fully complied with the second
24 request.

25 **MR. TRESH:** That's correct, Your Honor.

1 I would also note that what Mr. Green
2 characterized as an audit, just to be clear,
3 the Department spent -- sent two people out to
4 Duke Energy for over a week on two different
5 occasions to audit the numbers. They went
6 through thousands and thousands of pages of
7 original source transactions relative to the
8 treasury receipts. And in their final agency
9 determination, in a footnote Mr. Green said
10 distortion was not an issue. That's not the
11 case.

12 In the final agency determination, the
13 Department specifically raised the issue of
14 distortion in one of their footnotes. So the
15 auditors must have clearly been looking at
16 whether distortion was an issue on both
17 occasions when they audited Duke's return.

18 THE COURT: Yeah.

19 MR. TRESH: The third objection, Your Honor, is --

20 THE COURT: You're getting weaker.

21 MR. TRESH: The third objection really is a course
22 of conduct argument, Your Honor, relative to
23 Rule 11. This case has progressed for -- has
24 gone on for a long time. Over the course of
25 the years that this case has been going on,

1 we've made every attempt to accommodate the
2 Department with respect to their changes of
3 counsel, with respect to multiple requests to
4 go ahead and extend their discovery time lines.
5 We still have discovery issues pending with the
6 Department.

7 We didn't file a Motion to Compel without any
8 kind of meet and confer and, quite frankly, we
9 were shocked that after the accommodations that
10 we've provided to the Department over the past
11 couple of years that after we sent Mr. Green
12 our letter that we didn't continue to try and
13 work through the factual issues in this case,
14 understanding that a trial was months away.
15 And so we think the Department by filing a
16 Motion to Compel violated Rule 11.

17 **THE COURT:** All right.

18 **REPLY ARGUMENT BY MR. GREEN:**

19 **MR. GREEN:** Your Honor, just a few points in reply.
20 He said he didn't look -- he said the expert
21 didn't look at the North Carolina returns. He
22 didn't look at the South Carolina returns.
23 Frankly, that makes them more appropriate for
24 impeachment.
25 We referenced impeachment in letter. We

1 referenced impeachment in the motion, because
2 the way he breaks it down, it's almost an
3 accounting breakdown. I think it is an
4 accounting breakdown. And so it really -- it's
5 either/or.

6 Well, if you break it down that way, then I
7 need to be able to determine whether it's
8 appropriate or not.

9 **THE COURT:** Well, the issue's not just whether it's
10 relevant but whether it may lead to something.

11 **MR. GREEN:** Yes, Your Honor. And we submit that it
12 would for several reasons. You know, they're
13 concerned about sensitivity. I mean, I've got
14 no problem keeping it confidential, anyway.
15 Obviously I'm bound by that, anyway. That's
16 not an issue.

17 On the second issue, Your Honor, if they don't
18 have it, they don't have it. That's not what
19 I've understood the response to be. If they
20 don't have it, obviously they can't make it.
21 They can give us what they have.

22 **THE COURT:** As an officer of the Court -- you're pro
23 hac, right?

24 **MR. TRESH:** I am, Your Honor.

25 **THE COURT:** You're still bound. He said he doesn't

1 have it

2 **MR. GREEN:** What we're going on is for some years in
3 there, there's very detailed information
4 that's -- frankly, it's pretty easy -- I won't
5 say "easy," but it is efficient to go through
6 and determine the numbers and stuff like that.
7 But for those years on the book end years is
8 much harder and the information is not as
9 detailed. But if they don't have it, they
10 don't have it, and they can't produce it; I
11 understand that.

12 On the third issue, Your Honor, I wrote a
13 letter --

14 **THE COURT:** I read it. I did read that part about
15 the letter, so I don't need to hear --

16 **MR. GREEN:** Thank you, Your Honor.

17 **THE COURT:** Maybe you could have done more effort,
18 but it's enough to survive any Rule 11 issues.
19 On that issue, I'm going to go ahead and rule
20 that I'm going to require that -- I'm going to
21 grant your Motion to Compel the North Carolina
22 returns.

23 I find that whether they're relevant or not,
24 I've heard enough to make me believe that it's
25 sufficient potentially for impeachment

1 purposes, especially in light of the fact that
2 the rules do not require that it necessarily be
3 relevant but that it may lead to discovery of
4 something that may be relevant.

5 I don't know if they have anything in there
6 that is impeachment value and I don't want to
7 allow people to go on fishing expeditions, but
8 I think I've heard enough to grant it,
9 especially in light of the fact of the
10 confidentiality requirements of the Department
11 of the government, so ...

12 MR. TRESH: Your Honor, in granting that order,
13 could we ask that those returns be limited to
14 attorneys' eyes only?

15 THE COURT: Yes. When you say that, their
16 attorneys' eyes and expert witnesses?

17 MR. TRESH: Attorneys and expert witnesses, Your
18 Honor, I'm sorry.

19 THE COURT: Attorney eyes only would be a little
20 difficult.

21 MR. TRESH: Understood, Your Honor.

22 MR. GREEN: And let me just ask for clarification,
23 and I have no problem in concept with that. I
24 assume that means if I need somebody on the
25 Department staff to assist me in processing or

1 dealing with them, I can use those people.

2 **MR. TRESH:** I would submit that to the extent that
3 they're going to use it to impeach, you've
4 hired an expert witness on any of the issues
5 here and I think the Department has that -- the
6 returns can be shared with those expert
7 witnesses.

8 What we take objection to is those returns
9 getting shared to multiple people within the
10 Department. If you have an expert witness that
11 helps would make sense to us.

12 **THE COURT:** Well, "multiple people" -- I don't want
13 to get into the negotiating of this, but ...

14 **MR. GREEN:** I think we can work this -- I don't
15 think this will be -- I don't think it will be
16 a problem and I certainly have no problem --

17 **THE COURT:** I can see where you may need a
18 departmental expert witness that you could
19 designate. Let's just say the designated
20 expert witness and one other Department expert?

21 **MR. GREEN:** I think we can do that. It may not be
22 necessary. I'm just don't want to limit
23 myself. It may be that I can handle it all in
24 my firm and it doesn't have to get extra -- you
25 know, it'd be just the attorneys here and my

1 firm.

2 THE COURT: Well, let's --

3 MR. GREEN: And that would solve their problem,
4 obviously.

5 THE COURT: Well, let's -- how about -- this will be
6 more simple. It's currently -- I'm going to
7 require the disclosure for the attorneys and
8 the expert witnesses designated and that if you
9 need it to go further, we'll just do a
10 conference call and I'll hear the facts that
11 support that.

12 MR. GREEN: Okay. So attorneys and expert witness.

13 THE COURT: Yeah.

14 MR. GREEN: And I can share it with people within my
15 firm. I mean, not share it but like if I need,
16 for instance, my assistant, she can assist me
17 in dealing with the issue.

18 MR. TRESH: Your Honor, we wouldn't take issue with
19 the assistant, but I believe Mr. Green's firm
20 represents competing electric providers and we
21 would not want those firm -- those returns
22 being distributed outside of the attorneys in
23 this case.

24 Mr. Green and his colleagues seated here are
25 well-able to represent the State in this

1 matter, as they've shown.

2 **THE COURT:** I don't know if I want you to email it
3 everybody in your firm, so I guess we'll --

4 **MR. GREEN:** "Look at these! Look at these!" No,
5 sir, Your Honor. We're not going to do that.
6 No. And I can take steps -- I understand that
7 concern and I can take steps to address that
8 concern. That won't be a problem.

9 **THE COURT:** Okay. I'll say the same thing to you.
10 He's an officer of the Court and I think I --
11 he understands the perspective that we need to
12 employ today.

13 **MR. TRESH:** Thank you, Your Honor.

14 **THE COURT:** All right. I don't know if that was
15 good phraseology, but you got my idea.

16 **MR. GREEN:** I don't think the Department has
17 anything else. Do we? Not for today.

18 **THE COURT:** All right. Mr. Green, you could prepare
19 the order on the Motion to Compel.

20 **MR. GREEN:** Yes, Your Honor.

21 **THE COURT:** And the amicus, I guess, since I granted
22 your ...

23 **MR. GREEN:** Yes, sir.

24 **THE COURT:** All right. You've got motions to
25 strike?

1 ARGUMENT BY MR. TRESH:

2 MR. TRESH: Yeah, there is a -- the item, the
3 Motions to Strike. We filed two motions -- a
4 Motion to Strike two of the affidavits
5 submitted by Mr. Green as being -- the first
6 one, the affidavit of Glen Robinson, the
7 Department's expert, was in direct conflict, in
8 our view, with the deposition testimony that he
9 gave.

10 I understand that Mr. Green has made some
11 arguments as to try and reconcile that, but I
12 think the simple point was is one -- in
13 deposition testimony he said electricity is a
14 service; in his affidavit he says it's tangible
15 personal property. And we ask the Court to
16 strike that.

17 The second affidavit --

18 THE COURT: Strike it under what ground?

19 MR. TRESH: Strike it on the ground --

20 THE COURT: (Inaudible.)

21 MR. TRESH: -- that the affidavit is -- that the
22 affidavit conflicts his sworn deposition
23 testimony.

24 THE COURT: Well, does the Court strike anytime
25 someone submits -- has a deposition and then

1 submits an affidavit that conflicts with that
2 deposition, would that always be struck? Under
3 what principle?

4 **MR. TRESH:** In the context of a Motion for Summary
5 Judgment to the extent that the affidavit is in
6 conflict, it would be -- the portions of that
7 affidavit that are in conflict could be struck
8 under the doctrine that it is a sham.

9 **THE COURT:** I understand the sham rule, but I don't
10 think the sham rule requires that any time and
11 every time it's in conflict it's stricken. I
12 think the sham rule requires it raises new
13 issues.

14 **MR. TRESH:** If it offers explanation -- if the
15 affidavit that's filed offers an explanation to
16 go ahead and reconcile that affidavit with the
17 sworn deposition testimony, it can be accepted
18 by the Court. It wouldn't be struck in all
19 occasions.

20 In this context, the affidavit itself, in our
21 view, did not explain the difference between
22 deposition testimony and --

23 **THE COURT:** You are right on that. It requires
24 explanation. Okay.

25 **MR. TRESH:** On the second affidavit, the affidavit

1 of Mr. Urban, that affidavit makes --
2 essentially reiterates the Department's brief
3 and makes numerous conclusions of law and we
4 believe that's an inappropriate testimony of
5 what the laws of this state in that affidavit.

6 **THE COURT:** I don't have that in front of me, but I
7 think you are correct on some of those. It was
8 like I remember reading not every one of them
9 was issues of law, but some of them were.

10 **MR. TRESH:** We noted in the affidavit, Your Honor,
11 which paragraphs we believed were conclusions
12 of law and ask that those be struck. We do not
13 ask that the affidavit be struck in entirety.

14 **THE COURT:** All right. Well, the problem I've got
15 is, as I remember, I agreed with you on some of
16 your motion and not all of it, though. But I
17 don't remember distinctly which ones.
18 I'll hear your response.

19 **ARGUMENT BY MR. GREEN:**

20 **MR. GREEN:** Thank you, Your Honor.

21 First of all, I think we filed an objection and
22 we indicated that we objected to the
23 consideration of this motion. It could have
24 been filed several weeks ago. We filed our
25 response, I think, on June 4th or -- I think it

1 was June 4th -- that it violates the ten-day
2 rule. They had ample time to file it, so we
3 object to consideration of the motion.

4 THE COURT: Well, if you want me to consider it
5 today, I'll wait.

6 MR. GREEN: Well, I certainly would object to
7 consideration, but I don't want it to impede
8 the Court's consideration of the Summary
9 Judgment motion.

10 THE COURT: Okay. Well, interesting. At least the
11 first -- the affidavits were submitted in
12 support of the Summary Judgment Motion, are
13 they not?

14 MR. GREEN: They are.

15 THE COURT: Then you're in a Catch 22, are you not?

16 MR. GREEN: A little bit of a Catch 22.

17 And let me just proceed on, then.

18 THE COURT: Okay. So you're punting on that last
19 argument?

20 MR. GREEN: I will -- if I'm going to hold up
21 consideration of the Summary Judgment, then I
22 will pull back from that argument.

23 THE COURT: Okay.

24 MR. GREEN: Again, Mr. Robinson's affidavit, that's
25 not a sham affidavit rule. It may require

1 explanation. It may require consideration. I
2 don't think anything in that affidavit is
3 inconsistent. We explained that in the memo.
4 So I think that stands for what it stands for.
5 Mr. Urban was testifying based on his
6 experience regarding the Tax Commission of what
7 he understands they did, how he understands it,
8 best of his recollection.

9 THE COURT: Well, as I --

10 MR. GREEN: That's what Mr. Urban was testifying --

11 THE COURT: There was aspects of that where he was
12 testifying to how they did it and what they did
13 and all that. As I remember, there was some
14 points made where it did appear to be where he
15 was giving opinion on how the law was
16 interpreted. But I'll have to go back and look
17 at that.

18 MR. GREEN: Yes, Your Honor. I mean, I would
19 submit -- obviously, if he --

20 THE COURT: I agree with you on the practice.

21 MR. GREEN: Obviously, on the --

22 THE COURT: The Department's practice, I have no
23 problem that.

24 MR. GREEN: Thank you, Your Honor. I'm sorry, I
25 don't mean to keep interrupting you.

1 Obviously, on the law, I mean, the Court can
2 interpret the law and I understand that. That
3 is not my understanding of the affidavit.
4 Without particular ones, I can't particularly
5 address the argument. I'd just submit he was
6 dealing with the Tax Commission practices.

7 **THE COURT:** Well, I'll just have to reread that
8 again and get back with y'all.

9 **MR. GREEN:** Okay. And that's my response. Thank
10 you, Your Honor.

11 **THE COURT:** Is there a motion for confidential
12 treatment of certain materials from the DOR?

13 **MR. GREEN:** Yes, we've -- I just moved to keep --
14 when I filed my motion, there was a spreadsheet
15 that had some pretty detailed tax information
16 from Duke's returns, and so I filed that
17 separately under seal.

18 I provided it to the Court, but I did not file
19 it -- I filed under seal so it was preserved.
20 It just has some detailed information about,
21 you know, their apportionment formula.

22 Frankly, probably some of the issues that
23 they're concerned about as it is. And it just
24 broke it down more than I was comfortable with.

25 **THE COURT:** Do we need to address that today?

1 MR. GREEN: I assume they don't object to keeping it
2 confidential, so I think we're good.

3 MR. TRESH: We don't, Your Honor.

4 THE COURT: Okay. All right. Anything else, then?

5 MR. TRESH: No, sir, Your Honor.

6 THE COURT: All right. I'm going to probably get
7 back with y'all. I don't know if I'm going to
8 try to issue an order myself or not and I may
9 not go from where I'm thinking; plus y'all have
10 given me something to think about in addition
11 to what I've already read.

12 I may not do orders straight up one side or the
13 other, so, I tell you what, give me a few days
14 to get back with you. All right?

15 MR. TRESH: Your Honor, would it be appropriate
16 before we conclude for the parties to submit
17 post trial briefs? I think Your Honor had
18 referenced that earlier on some of the new
19 issues that were raised today and maybe do it
20 within seven days?

21 MR. GREEN: From my standpoint, that's up to the
22 Court. If the Court thinks additional briefs
23 would be appropriate on the issue ...
24 I'm content and let the Court decide based on
25 what he's heard -- it's heard today.

1 **THE COURT:** If a party wishes to present additional
2 briefing on issues that were raised, I don't
3 object to that.

4 So seven days? I can go with that, but I'd
5 probably want to have it sooner.

6 **MR. TRESH:** Would five days be better, Your Honor?

7 **THE COURT:** Yeah.

8 **MR. TRESH:** Thank you.

9 **THE COURT:** Let's go with five.

10 **MR. GREEN:** Five days would be Sunday.

11 **MR. TRESH:** Monday?

12 **MR. GREEN:** Say by Monday?

13 **THE COURT:** Then make it six. That's only one day
14 short of a week. Boy, did I save a lot of
15 time.

16 Hold on one moment.

17 I will tell y'all, on some of your arguments,
18 both of you, I don't buy the statute of
19 limitations issue relating to estoppel that
20 much. And I'll give you an example:
21 388 S.W.2d 614, it's a Kentucky case back in
22 1965, but it says -- let's see. I'll just
23 start at this point.

24 "Whereas the statute of limitations neither
25 creates nor extinguishes any right, but merely

1 places a limitation upon the remedy,"
2 parenthetical, "which can be waived or tolled,"
3 closed parenthetical, "a limitation such as the
4 one in question," which is very similar to this
5 case, "is a condition essential to the
6 existence of the right." In other words, a
7 condition precedent.

8 The distinction was first stated in the *Lilly*
9 case. But, basically, they went on to state
10 that, you know, a condition precedent is not
11 analogous to the statute of limitations.

12 And, honestly, when I -- I take the Kentucky
13 case and I read the South Carolina cases, it
14 all makes sense, because if I read a wide open
15 approach to the concept of the statute of
16 limitations Mr. Maybank proposes me to employ,
17 some of the case law out there doesn't make any
18 sense, because the Court shouldn't be as
19 limiting. So there must be some reason driving
20 the limitations in some areas of the law and
21 not others.

22 I'll tell y'all, I'll give you an
23 opportunity -- or y'all may wish to try to
24 explain that.

25 And it goes in your favor.

1 So I don't know how y'all wish to approach, but
2 that's where I stand on that aspect of the
3 argument. There's a lot of other nuances that
4 I need to consider before then.

5 All right. Thank you very much for your time.
6 This hearing is adjourned.

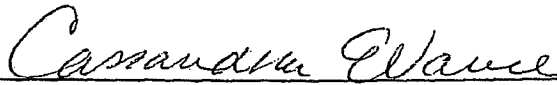
7 (The proceedings concluded at 2:22 p.m.)
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CERTIFICATE

This is to certify that the Motions Hearing, consisting of One Hundred Eighty-Six (186) pages, is a true and correct transcript of the testimony given; said administrative hearing was reported by the method of Stenotype with Backup.

I further certify that I am neither employed by nor related to any of the parties in this matter or their counsel; nor do I have any interest, financial or otherwise, in the outcome of same.

IN WITNESS WHEREOF I have hereunto set my hand and seal on June 29, 2012.



Cassandra E. Vance
Court Reporter

Notary Public for South Carolina
My Commission Expires: February 26, 2018

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1 STATE OF SOUTH CAROLINA
 2 ADMINISTRATIVE LAW COURT
 3

4 Duke Energy Corporation,) Docket No.
 5) 10-ALJ-17-0270-CC
 6 Petitioner,)
 7)
 8 vs.)
 9)
 10 South Carolina Department of)
 11 Revenue,)
 12)
 13 Respondent.)
 14)
 15)
 16)
 17)
 18)
 19)
 20)
 21)
 22)
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 25)

11 D E P O S I T I O N

12 WITNESS: SHERWOOD LEE LOVE
 13 DATE: Tuesday, November 22, 2011
 14 TIME: 10:37 a.m.
 15 LOCATION: Nexsen Pruet, LLC
 16 227 West Trade Street, Suite 1550
 17 Charlotte, North Carolina
 18 TAKEN BY: Attorneys for the Respondent
 19 REPORTED BY: NANCY J. MARTIN, CSR, RPR
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A P P E A R A N C E S

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ALSO PRESENT:

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SOUTH CAROLINA DEPARTMENT OF REVENUE

T. COOPER MONROE III
DUKE ENERGY

1 CHARLOTTE, NORTH CAROLINA, TUESDAY,

2 NOVEMBER 22, 2011 10:37 A.M.

3 --oOo--

4 P R O C E E D I N G S

5

6 SHERWOOD LEE LOVE,

7 having been first duly sworn, was examined and

8 testified as follows:

9

10 EXAMINATION

11 BY MR. GREEN:

12 Q. Mr. Love, would you state your full name for
13 the -- and spell it for the record, please.

14 A. Sherwood Lee Love, S-h-e-r-w-o-o-d, L-e-e,
15 L-o-v-e.

16 Q. And before we get started, I'd like to just
17 go through a few things on the record about the
18 process and stuff like that. Have you ever given a
19 deposition before?

20 A. Yes.

21 Q. Okay. And so you've been through this
22 process before?

23 A. Yes.

24 Q. Okay. Once the deposition has begun, you're
25 not supposed to talk to your lawyers. You can talk to

1 the record.

2 And we are doing it according to
3 South Carolina rules of Civil Procedure because it is
4 a South Carolina proceeding. With that, I'll get
5 started.

6 Q. Tab 1 in that notebook I believe is an
7 affidavit that you have prepared in this case. If
8 you'd take a look at that affidavit and confirm that
9 that is correct.

10 (The Reporter marked the document
11 referred to as Deposition
12 Exhibit 1 for identification.)

13 (The witness reviewed Exhibit 1.)

14 THE WITNESS: That is correct.

15 BY MR. GREEN:

16 Q. And is the information in that affidavit
17 still correct to the best of your knowledge?

18 (The witness further reviewed Exhibit 1.)

19 THE WITNESS: Yes.

20 BY MR. GREEN:

21 Q. All right. Now, I think you said before that
22 you have given a deposition before?

23 A. Correct.

24 Q. How many times?

25 A. Once.

1 Q. How many years ago?

2 A. I think more than 10 years ago.

3 Q. Do you remember what the nature of the
4 proceeding was?

5 A. It was a dispute between one of Duke's
6 subsidiaries and Exxon Mobil.

7 Q. Okay. And do you recall what you testified
8 about in that case?

9 A. Yes.

10 Q. And what did you testify about in that case?

11 A. As I recall, I testified as to the
12 implications on Duke's ability to arrange short-term
13 bank borrowing facilities.

14 Q. On Duke's ability?

15 A. Ability of Duke or one of our subsidiaries,
16 as I recall.

17 Q. Did you testify in trial on that or did you
18 just give a deposition in that case?

19 A. I just gave a deposition.

20 Q. In your affidavit it says, I think now, that
21 you are the general manager of long-term investment
22 and assistant treasurer of Duke Energy?

23 A. That was the case when I signed the document.

24 Q. All right. And that has changed now?

25 A. That's correct.

1 Q. What is your position now?

2 A. Retiree.

3 Q. You retired?

4 A. Yes.

5 Q. Congratulations.

6 A. Thank you.

7 Q. How long have you been retired?

8 A. Since the day I signed this document.

9 Q. Okay. So this was one of your last acts
10 before you retired?

11 A. It was.

12 Q. Okay. All right. Fair enough. So but
13 before you retired from April of 2006 until the date
14 of the affidavit and the date of retirement, you were
15 the general manager of long-term investments and
16 assistant treasurer of Duke Energy?

17 A. Correct.

18 Q. And it says you're responsible for managing
19 Duke Energy's long-term trust investments?

20 A. Correct.

21 Q. What are those? What are trust investments?

22 A. These are the pension funds that are
23 established for the employees of Duke Energy and
24 retirees who have not yet taken distributions.

25 Q. And you moved to that from assistant

1 treasurer of cash management of Duke Energy?

2 A. Yes.

3 Q. And your affidavit says you held that
4 position from March 1989 until April 2006?

5 A. Correct.

6 Q. And so you did that for quite a long time.

7 A. Yes.

8 Q. Do you know when the cash management group
9 was formed by Duke Energy?

10 A. No.

11 Q. It had started, though, before you became the
12 assistant treasurer of cash management?

13 A. Yes.

14 Q. Do you know -- did it operate all during the
15 1980's?

16 A. I don't know.

17 Q. So let me summarize, and correct me if I'm
18 wrong. The cash management group was formed before
19 you became the assistant treasurer of it, but you
20 don't know exactly when it started?

21 A. Correct.

22 Q. Okay. The cash management group is part of
23 Duke Energy Company? I guess -- here's where I'm
24 trying to go with this. I'm trying to get a little
25 understanding of how it's structured and organized

1 within the company, and then I know there are --
2 though I don't know exactly the relationships and
3 nexus, I know there are subsidiary companies and
4 wholly owned and things like that.

5 So what I'm trying to understand is which
6 company has the cash management group and does it
7 operate over all the subsidiaries. So that's what I'm
8 trying to get at with this.

9 So Duke Energy, I guess, is the parent
10 company of --

11 A. Yes.

12 Q. It's the main company?

13 A. Yes.

14 Q. Does it then own a number of subsidiary
15 companies?

16 A. Yes.

17 Q. It owns them directly? In other words, there
18 would be a Duke Energy, and it own shares in Sub A,
19 Subsidiary B, and the like?

20 A. Yes.

21 Q. Okay. Is Duke Energy held by a holding
22 company?

23 A. I don't know.

24 Q. Okay. But the cash management group is
25 within Duke Energy?

1 A. Yes.

2 Q. Now, am I correct that Duke Energy previously
3 was called Duke Power Company; is that correct?

4 A. Yes.

5 Q. And the cash management group is part of Duke
6 Energy, formerly Duke Power Company?

7 A. Correct.

8 Q. And if you would turn to Tab 3 in that
9 notebook, which has what appears to be the "Corporate
10 Cash Management Policy" effective April 1, 2006. Are
11 you familiar with this document (indicating)?

12 A. I saw it for the first time yesterday.

13 Q. Okay. You had not seen it prior to that
14 time?

15 A. Not that I recall.

16 Q. Did you review the document at that time,
17 when you saw it yesterday?

18 A. I looked at it briefly.

19 Q. Okay. When you looked at it, did you see
20 anything that struck you as incorrect or wrong?

21 A. I didn't read it.

22 Q. You did not read it. Okay. All right.
23 Well, let's work through it today. It says down there
24 under "'Policy Expectations,' This policy applies to
25 the consolidated Corporation, which consists of Duke

1 Energy Corporation and all of its consolidated or
2 controlled subsidiaries and affiliates."

3 A. I'm sorry. I don't know where you're
4 reading.

5 Q. That's okay. If you go down on the left
6 side, you'll see a bold heading, "Policy
7 Expectations."

8 A. I don't see that. Oh, I see it now. Okay.

9 Q. The first sentence under that.

10 (The witness reviewed the document.)

11 THE WITNESS: All right. I'm sorry. I see
12 it now.

13 BY MR. GREEN:

14 Q. That's fine. And so the cash management
15 group controls, it appears to me, all the cash
16 investments for Duke Energy Corporation and all of its
17 subsidiaries and affiliated companies; is that
18 correct?

19 A. According to this statement, yes.

20 Q. Well, based on your experience, is that
21 correct?

22 A. It's correct certainly within the U.S.

23 Q. Okay. And there are different policies for
24 outside of the United States?

25 A. There were -- I'm not sure about policies,

1 but within operating facilities in South America they
2 handled the cash within their operations. That was
3 not handled by the team in Charlotte.

4 Q. Okay. So whatever the facilities were in
5 South America -- if I say this wrong, correct me.
6 Whatever the facilities were in South America or
7 certain foreign countries, they were handled by the
8 operations part of that. Your centralized group did
9 not handle those?

10 A. Correct.

11 Q. Okay. But transactions within the
12 United States, cash transactions were handled by your
13 centralized group?

14 (Pause in proceedings.)

15 THE WITNESS: I think that's correct.

16 BY MR. GREEN:

17 Q. Okay. You say you "think that's correct."
18 What gives you pause?

19 A. Certain subsidiaries operating within the
20 U.S. had their subsidiary teams. I would say it very
21 well could be that they initiated their own electronic
22 payments. I just don't recall clearly.

23 Q. When you say those certain subsidiaries may
24 have "initiated their own payments," what types of
25 payments are you talking about?

1 A. Electronic funds transfers.

2 Q. Okay. And electronic funds -- excuse me.
3 Electronic funds transfers for what type of payments?

4 A. Payments certainly associated with their
5 operations capital expansion.

6 Q. Okay. So business related expenses such as
7 plant equipment, payables for operating expenses,
8 business transactions like that?

9 A. Correct.

10 Q. Would those subsidiaries have made their own
11 investments?

12 A. No.

13 Q. Would the cash management group have made all
14 the investments, short-term investments of cash for
15 the United States?

16 A. Yes.

17 Q. I believe your affidavit says that the cash
18 management group is located in Charlotte,
19 North Carolina; is that correct?

20 A. It is.

21 Q. And that's at Duke Energy's headquarters?

22 A. Yes.

23 Q. And I think you said in your affidavit that
24 there were an average of 10 to 12 employees in the
25 cash management group?

1 A. That's correct.

2 Q. Were all those employees located in
3 Charlotte, North Carolina?

4 A. Yes.

5 Q. I believe you said in Paragraph 15 of your
6 affidavit that cash management group had four
7 subgroups, "Cash Operations, Short-term Liquidity,
8 Credit Facilities, and International Cash Management";
9 is that correct?

10 A. It is.

11 Q. We will take these a little bit out of order.
12 What does international cash management do?

13 A. It reviews the cash availability of our
14 subsidiary operations. It works with various
15 corporate as well as the international subsidiaries in
16 reviewing processes for utilizing those funds.

17 Q. Is international cash management, does it
18 deal more with Duke's international subsidiaries and
19 affiliates?

20 A. I don't understand your question.

21 Q. Well, the international cash management
22 group, you told me earlier that Duke has some foreign.
23 Does the international cash management group deal more
24 with those foreign subsidiaries and corporations, or
25 does it deal with all and it's just dealing with

1 international opportunities for investing cash? And
2 if neither of those, then just please explain to me
3 what you mean by "international cash management."

4 A. Well, it was focused, again, on the
5 international cash that was out there.

6 Q. Okay.

7 A. If financings were considered internationally
8 or any consideration of repatriating any funds, that
9 was the focus of that group.

10 Q. Going back to the 10 to 12 employees, did the
11 10 to 12 employees -- did they work interchangeably
12 among these groups, or were they assigned to these
13 groups?

14 A. They were assigned to the groups.

15 Q. How many employees did international cash
16 management have?

17 A. One.

18 Q. Okay. Credit facilities group is one of the
19 subgroups. I think you said in your affidavit it was
20 responsible for negotiating and establishing credit
21 facilities.

22 A. Correct.

23 Q. What are "credit facilities," as you use the
24 term?

25 A. Credit facilities are short-term bank

1 borrowing facilities where a group of banks end up
2 committing a certain level of commitment to that
3 facility that they would -- that the company could
4 borrow funds under that agreement.

5 Q. And, generally, what do you mean by "short
6 term"? What range of time?

7 A. Generally, anything a year or less.

8 Q. And how many employees worked in credit
9 facilities?

10 A. Anywhere from one to two.

11 Q. And then there are -- there's a group
12 "Short-term Liquidity." And if I understand
13 correctly, short-term liquidity is responsible for
14 funding the daily liquidity needs of Duke Energy; is
15 that correct?

16 A. It is.

17 Q. And what do you mean by "daily liquidity
18 needs"?

19 A. To ensure there are sufficient funds to cover
20 the payments due on any given day.

21 Q. I think your affidavit also says that the
22 short-term liquidity group "was responsible for
23 setting commercial paper borrowing rates and selecting
24 short-term investments, and, when conditions allowed,
25 negotiated investment rates." That's in Paragraph 21

1 of the affidavit. I believe it says, "When conditions
2 allowed, negotiated investment rates." What does
3 "when conditions allowed" mean?

4 A. When you're making -- when you have excess
5 funds to invest, we worked with several different
6 investment firms to find out what investment products,
7 what securities, short-term securities to invest our
8 cash in. Depending on the market on any given day,
9 there might be a substantial value of those securities
10 available for investment.

11 On those days, any time you contact an
12 investment dealer, they indicate what's available and
13 what the interest rate would be and what the terms
14 would be. If the value of that particular product was
15 somewhat significant, we might declare an interest in
16 the product, but only if we could get an extra basis
17 point, or three, better than they were offering.

18 There might be other days that the volume of
19 that product appeared to be somewhat limited. We were
20 interested in the product. So there wouldn't be the
21 opportunity to bargain, so to speak, the interest
22 rate.

23 Q. Okay. So is it correct that the short-term
24 liquidity group dealt with investments, short-term
25 investments that Duke Energy would purchase, but also,

1 it would deal with if Duke Energy needed to deal --
2 make short-term borrowings to funds its cash?

3 A. Correct.

4 Q. And so I think it says in Paragraph 21 the
5 short-term liquidity group was responsible for setting
6 commercial paper borrowing rates.

7 A. Correct.

8 Q. Is that the interest rate that Duke would pay
9 to somebody to loan it money on a short-term basis?

10 A. Yes.

11 Q. How many employees worked in the short-term
12 liquidity group?

13 A. Three to four.

14 Q. Okay. And then the last group I think you
15 mentioned was cash operations?

16 A. Yes, sir.

17 Q. And how did cash operations differ from the
18 short-term liquidity group?

19 A. Cash operations ended up executing the
20 electronic wire transfer payments for the corporation.
21 They I think also handle the -- I think completing the
22 documentation associated with banking transactions
23 each and every day.

24 Q. Did cash operations deal with all cash
25 payments made by the company?

1 A. State that again, please.

2 Q. Okay. The cash operations group, as I
3 understand it, dealt with, I think you said, executing
4 certain cash payments for the company. And if I say
5 this wrong, correct me.

6 A. Correct.

7 Q. Okay. Obviously -- I say, "obviously." I
8 presume that Duke Energy had payments to make of
9 varying levels, some very significant, in the millions
10 of dollars, some of a few thousand dollars, some
11 probably less than that. Did the cash operations
12 group or subgroup, did it deal with all those cash
13 payments, or was it responsible for just executing the
14 larger payment?

15 A. It was responsible for executing the
16 electronic funds transfer payments.

17 Q. Okay. So it just executed the electronic
18 transfers from the cash account to other companies or
19 to investor -- excuse me. To your investment brokers,
20 transfers like that?

21 A. Correct.

22 Q. It did not write checks to a local vendor for
23 cleaning services in the building, for instance?

24 A. Correct.

25 Q. Do you know if other electric utilities have

1 a similar cash management process like that employed
2 by Duke Energy?

3 A. I believe they do.

4 Q. And what is the basis of your belief for
5 that?

6 A. My having been involved in a statewide --
7 North Carolina statewide cash management organization.

8 Q. What was the nature of that organization?

9 A. Its purpose was to meet several times a year
10 to provide education, share procedures, experiences
11 among the individuals.

12 Q. What was the name of that group?

13 A. North Carolina Cash Management Association.

14 Q. Do you recall how many companies were members
15 of that group?

16 A. I don't.

17 Q. Let me step back a little bit. I think you
18 referenced in Paragraph 11 a cash management interface
19 "with Treasury, Finance and Corporate management to
20 determine the sizing of short-term borrowing
21 facilities that provide liquidity support for
22 commercial paper borrowing programs." And that's
23 Paragraph 11.

24 A. Correct.

25 Q. And by "commercial paper," do you mean

1 short-term notes that Duke would execute to borrow
2 funds? And if not, tell me what you mean by the
3 commercial paper in that context.

4 A. That's what I mean.

5 Q. Okay. And I think you said in there, as
6 well, in Paragraph 11, that you used that program for
7 "short-term funding of additional electric generation,
8 transmission and distribution facilities to serve
9 customers"?

10 A. Correct.

11 Q. So the borrowing program was used to fund
12 Duke Energy's capital investments?

13 A. It was used to fund Duke Energy's operating
14 cash requirements on a daily basis as well as its
15 capital expansion needs.

16 Q. Have you ever given testimony or an affidavit
17 for either the North Carolina or the South Carolina
18 public service commission?

19 A. No.

20 Q. In your position as assistant treasurer over
21 cash management, to whom did you report? Who was your
22 supervisor?

23 A. The treasurer.

24 Q. And that was the same when you were the --
25 over long term trust investments? You reported to the

1 treasurer?

2 A. Correct.

3 Q. How frequently did Duke Energy, in your
4 experience, have to borrow commercial paper?

5 A. Pretty much every day.

6 Q. So on a daily basis -- tell me if this is
7 correct or not. On a daily basis, would it borrow
8 some commercial paper, pay off some other commercial
9 paper, or how did that process work?

10 A. There were many days that we initiated new
11 borrowings to pay off maturing borrowings, but we also
12 may issue more commercial paper than what was maturing
13 that day, depending upon our needs.

14 Q. How does money come into the cash management
15 group? I think you said in Paragraph 8 you had a
16 "daily interface with Central Cash remittance."
17 Explain that to me, if you could, please.

18 A. Central cash remittance for any customers
19 that mailed payments into Duke, they were all sent in
20 to one P.O. box number. Central cash remittance had
21 the equipment to open all those payments and to tally
22 up all the funds covered by those checks. They also
23 separated the checks for the larger banks, and they
24 would advise us mid to late morning as to where they
25 were in the process, what the current amounts were for

1 each of the larger banks that we separated checks on.

2 We would also receive electronic funds
3 transfers into our bank accounts. And then we used a
4 commercial paper issuing and paying agent. So when we
5 issued commercial paper to borrow funds, that is all
6 issued electronically through one financial
7 institution, and they consolidate those funds through
8 the issuance of commercial paper.

9 Central cash remittance also ran programs,
10 as I recall, computer programs to identify the value
11 of cash deposits that were being made across our
12 service territory by customers that came into Duke
13 branches to pay either in cash or check, but to pay
14 directly to the company. Deposits were made in local
15 banks. And so that was another source.

16 Q. Okay. And so when that money comes in to
17 Central Cash remittance, did they make you aware of
18 the money that's come in for each day?

19 A. Correct. For -- as of a certain time, mid to
20 late morning. They may or may not be complete by
21 then, but they would advise us as to where they stood.

22 Q. It sounds from your description that a
23 daily -- a routine day was pretty hectic at cash
24 management. There would have been a lot going on in a
25 pretty short time?

1 A. I think that's a fair statement.

2 Q. When that money comes in, is there a step
3 that it's transferred from a Central Cash remittance
4 account to a cash management group account, or it's
5 the same account and they just make you aware --
6 "they" being Central Cash remittance, they make you
7 aware of how much has come into that account as of a
8 certain time that day?

9 A. They advised us as to the dollar amounts for
10 the larger banks that we separated checks on, and for
11 the banks that we didn't separate checks, we had a
12 particular bank that we deposited the rest of the
13 checks into.

14 Q. So you're dealing with multiple banks, not
15 just one bank account?

16 A. Correct.

17 Q. Do you recall how many bank accounts cash
18 management worked with?

19 A. Actively, I believe it was half a dozen to a
20 dozen accounts.

21 Q. Where is the Central Cash remittance
22 department located?

23 A. In Charlotte.

24 Q. Were any bank accounts located in
25 South Carolina?

1 A. State that question again.

2 Q. Were any of the bank accounts that you were
3 working with through the cash management group, were
4 they with banks located -- headquartered within
5 South Carolina?

6 A. Not that we had Central Cash separate checks
7 on, and thus, deposited into from Central Cash. As I
8 stated before, we have customers come into branches.
9 Our branches were across our service territory,
10 including South Carolina, and certainly deposits were
11 being made in those banks, relatively small, but...

12 Q. Let me point your attention to Tab 2 in the
13 notebook. Turn to the second page. It should be at
14 the bottom. It should say, "DE," a bunch of zeros and
15 -375. That's the page I'm referring to. At the
16 bottom of that page it says, "FINANCING PROGRAM."
17 Now, I believe -- this is a document that Duke Energy
18 provided to us through discovery, and I believe this
19 comes from a Form 10K or an annual financial
20 statement, one or the other, which is pretty much the
21 same anyway.

22 The financing program says that "The Company
23 presently estimates it will obtain, through the sale
24 of securities and other external sources, between 50%
25 and 55% of its 1980-1982 total capital requirements."

1 Do you know if this is referencing the securities
2 transactions conducted by the cash management group?

3 A. I believe it included the funds raised
4 through the sale of commercial paper. But I believe
5 it also included sales of longer term securities
6 and -- as well as any stock, preferred or common, that
7 might have been issued.

8 Q. Did you -- as part of the cash management
9 group, did you assist -- strike that.

10 As part of the cash management group, did
11 you provide reports projecting how much interest and
12 investment income cash management group would earn
13 during a quarter or a year? Did you ever project
14 those amounts?

15 A. I don't recall that we did.

16 Q. In Paragraph 13 of your affidavit you
17 indicated that the cash management group "invested in
18 various short-term marketable securities including
19 municipal bonds, loan repurchase agreements, and
20 commercial paper"; is that correct?

21 A. Yes.

22 Q. What are "loan repurchase agreements"?

23 A. They're commonly called repos. These are
24 where, in most cases, you make an overnight investment
25 through a financial institution and that investment is

1 secured by, typically, U.S. government and agency
2 securities to secure that investment, typically
3 overnight.

4 Q. And municipal bonds are just bond obligations
5 issued by municipalities?

6 A. Correct.

7 Q. And we have discussed commercial paper
8 before. Did you invest in any other type of
9 short-term marketable securities?

10 A. I believe we may have from time to time
11 invested in U.S. Treasury and agency securities
12 directly.

13 Q. Did you ever invest in corporate stocks?

14 A. No.

15 Q. In Paragraph 22 of your affidavit, you
16 indicated that "Cash Management Group makes investment
17 decisions in accordance with established investment
18 guidelines approved by Board's Finance and Risk
19 Management Committee, which defines the type, term and
20 ratings of permitted investment securities." Do these
21 guidelines, do they change much during the time you
22 were over the cash management group?

23 A. No.

24 Q. What did they require of the cash management
25 group as far as -- in other words, the type, term and

1 ratings, what were you limited to investing in?

2 A. Again, the types of securities were defined
3 in the document. The required rating agency ratings
4 associated with those securities were defined. They
5 were defined limits regarding the magnitude of
6 investments through any single issuer of securities.
7 It was all defined in those approved guidelines.

8 Q. And when the ratings -- did the security have
9 to have a higher rating for it to be a qualified
10 investment source?

11 A. Yes.

12 Q. And did it require that the securities have a
13 low investment risk?

14 A. Yes, as reflected by the high rating.

15 Q. Okay. Did the guidelines prohibit you from
16 investing in corporate stock?

17 A. If not listed, the answer is yes.

18 Q. When you say, "not listed," please explain.

19 A. If it wasn't on the list of approved
20 securities to invest in, then --

21 Q. Did the investment guidelines have a list of
22 the approved securities?

23 A. Approved types of securities.

24 Q. Approved types of securities. Okay. You
25 also stated that the guidelines define the term of

1 permitted securities. What was the permitted term?

2 A. For different types of securities, it's
3 stated that the short-term maturity of that type
4 security couldn't exceed "X" number of days.

5 Q. How did the cash management group determine
6 that it had excess cash to invest?

7 A. We developed a cash forecast for every day
8 for the next 60 to 90 days, and we updated that
9 forecast every day.

10 Q. Is this based on a computer model?

11 A. It was based on information from our
12 corporate financial models. It was based on various
13 spreadsheets that we ran following month to month
14 throughout the month as to the magnitude of customer
15 payments. The flow of those payments varied
16 throughout the month, and it would be updated with any
17 new specific information we received from various
18 operating departments or other corporate groups,
19 again, regarding cash flows.

20 Q. And was that process consistent throughout
21 the whole time you were associated with cash
22 management group?

23 A. Yes.

24 Q. I neglected to ask this earlier. So let me
25 go back. Prior to, I think you said, March 1989, you

1 became assistant treasurer for cash management. Did
2 you work in the cash management group before that
3 time?

4 A. No.

5 Q. What did you do before March 1989?

6 A. Immediately prior to that, I headed up the
7 corporate budget function for 10 years.

8 Q. Were you always employed by Duke Energy?

9 A. Since graduating from college, yes.

10 Q. Did you always work in the financial part of
11 Duke Energy?

12 A. Yes.

13 Q. What did you do before you headed up the
14 corporate budget process?

15 A. Five years or so prior to that opportunity, I
16 worked in the corporate finance group or for long term
17 investments -- it had different names -- but within
18 treasury.

19 Q. What was your undergraduate degree in?

20 A. Bachelor of business administration.

21 Q. Did you focus on finance or accounting or
22 anything?

23 A. No.

24 Q. At the end of the year -- well, strike that.

25 Let me ask this question: Did Duke

1 Energy -- were its financial statements on an annual
2 basis? In other words, was it fiscal year January 1
3 to December 31?

4 A. Yes.

5 Q. So at the end of the year, I would presume
6 there would be some amount of cash, at least
7 short-term marketable securities outstanding at the
8 end of the year?

9 A. Correct.

10 Q. How would those be reported on the balance
11 sheet?

12 A. I believe it's short-term borrower.

13 Q. And is that the same for the municipal bonds?
14 It would all be shown as short-term borrower?

15 A. Municipal bonds would be investments.

16 Q. Okay. And you would show that as short-term
17 investments?

18 A. I believe so.

19 Q. Okay. I think you said in Paragraph 14 of
20 your affidavit that "all transactions were conducted,
21 and all investment accounts located, outside of
22 South Carolina"; is that correct?

23 A. Yes.

24 Q. Let me break that down a little bit. Where
25 were the transactions conducted? It says, "outside of

1 South Carolina" but what state, what area were they
2 conducted?

3 A. I'm sorry. Which paragraph?

4 Q. Paragraph 14.

5 A. Well, on our -- again, our short-term
6 borrowings, we had an issuing and paying agent. Our
7 issuing and paying agent was a New York bank. So,
8 again, all of the transactions and settlements on both
9 borrowings and paying off of maturities flowed through
10 that financial institution.

11 With regard to our investments, we again
12 used a New York bank as our main cash bank to
13 concentrate the flow of funds through so as we made
14 investments, we would initiate wire transfers out of
15 that New York bank. Maturities of those investments
16 would come back into that same account.

17 Q. And you would -- is it correct you would wire
18 transfer the money to your investment agent or broker?

19 A. Correct.

20 Q. Who decided what the excess money should be
21 invested in?

22 A. Members of our team.

23 Q. Okay. So did you -- for instance, let's say
24 you determined you had 10 million excess cash on one
25 day. Did you decide what that 10 million should be

1 invested in?

2 A. No.

3 Q. You just decided there was 10 million in
4 excess cash?

5 A. Within cash management, we decided it was
6 10 million.

7 Q. Right. It was 10 million.

8 A. And then we decided what it would be invested
9 in.

10 Q. And you decided what it would be invested in
11 too?

12 A. Yeah.

13 Q. Okay.

14 A. You're saying, "you," and I'm saying, "we."

15 Q. I'm sorry. I apologize. I was trying to use
16 "you" as cash management, not you individually.

17 A. I understand.

18 Q. Thank you for clearing it up because I'm
19 certainly not purposely trying to be unclear.

20 Okay. So cash management group would decide what
21 investment to make, and then it would wire transfer
22 the excess cash to your investment broker who would
23 then execute that investment?

24 A. In effect, yes.

25 Q. Okay. You say, "in effect." Tell me where I

1 may be wrong.

2 A. Well, we would make the investment decision
3 sometime in the a.m. Those funds might not be wire
4 transferred until sometime in the p.m.

5 Q. Did the cash management group always make the
6 decision of what to invest in?

7 A. Yes.

8 Q. And that was based upon the investment
9 guidelines?

10 A. Correct.

11 Q. When the short-term investments were sold or
12 redeemed, what happened to the money once it came back
13 into the investment agent?

14 A. Those funds were used to meet our obligations
15 for the day.

16 Q. Would the investment agent wire transfer the
17 funds back to the cash management group?

18 A. They would be wire transferred into one of
19 our corporate accounts.

20 Q. You said the cash management group always
21 made the decision of what to invest in?

22 A. Correct.

23 Q. Was that always done by -- was it ever done
24 by computer modeling, or was it always done by people
25 within the group making the decision?

1 A. People within the group.

2 Q. And these investment transactions were always
3 placed by investment agents outside of North Carolina
4 and South Carolina?

5 A. Most were -- almost all -- I'd say most were
6 placed outside of the Carolinas.

7 Q. And I think you said in Paragraph 14 "all
8 transactions were conducted outside of
9 South Carolina"?

10 A. Correct.

11 Q. So most of them were outside of
12 North Carolina, and all of them were outside of
13 South Carolina?

14 A. Correct.

15 Q. You said in Paragraph 11 of your affidavit
16 that cash management group was also responsible for
17 funding or managing cash "from significant transaction
18 settlements." Would you define what you meant by
19 "significant transaction settlements"?

20 A. Significant transaction settlements could be
21 the maturity of a long-term bond issue. It could be
22 significant coal payments. Significant payments on
23 equipment associated with new or replacement
24 generation transmission distribution facilities.
25 Nuclear fuel payments, dividend payments, payroll.

1 Q. And by "significant," do you mean
2 transactions of a high dollar amount?

3 A. Which paragraph again?

4 Q. Paragraph 14 -- I'm sorry. Paragraph 11. I
5 apologize.

6 A. Yes.

7 Q. If you'll turn to Tab 4, there are three
8 memoranda behind that tab labeled A, B, and C.

9 A. Uh-huh.

10 Q. Have you previously seen these memoranda?

11 A. It's possible, but I don't really recall.

12 Q. You have no specific recollection of having
13 seen them?

14 A. Right.

15 Q. Okay. Behind Tab 5 there's an agenda for a
16 meeting on February 16, 2001. Were you present at
17 that meeting?

18 A. I don't recall.

19 Q. You don't recall. Okay. Are you familiar
20 with the issues in this case?

21 A. Vaguely.

22 Q. And are you aware that one of the issues is
23 the -- I guess, vaguely, the treatment of the
24 securities transactions executed by the cash
25 management group?

1 A. Yes.

2 Q. Were you involved in any discussions of the
3 appropriate treatment of those items for
4 South Carolina state tax purposes?

5 A. No.

6 Q. Okay. How were -- if you know, how were the
7 gains from the investment transactions made by the
8 cash management group? How were those reported on
9 Duke Energy's tax return?

10 A. I don't know.

11 Q. Would your group -- does Duke Energy have a
12 centralized tax group within the company?

13 A. Yes.

14 Q. Would you provide reports to them regarding
15 your transactions throughout the year? "You" being
16 cash management group again.

17 A. We would provide reports to accounting and
18 probably tax as well.

19 Q. But other than that, cash management group
20 was not involved in the tax reporting of your
21 transactions throughout the year?

22 A. Not that I recall.

23 Q. You doing all right? You want to take a
24 break? You doing okay?

25 A. I'm good.

1 Q. If you would turn to Tab 6, and I guess
2 6-A-1. This was provided to us in discovery from Duke
3 Energy. What does this page represent?

4 A. It defines it as a cash statement as of
5 August 7, it looks like 1996 or 1990 -- yeah, 1996.

6 Q. I believe it's '96. I understand that from
7 it too. Is this a document or a form generated by the
8 cash management group?

9 A. Not to my knowledge.

10 Q. Okay. Let's turn to the next tab, Tab 2. I
11 think there are three documents behind Tab 2. Were
12 these documents generated by the cash management
13 group?

14 (The witness reviewed the document.)

15 THE WITNESS: Yes.

16 BY MR. GREEN:

17 Q. And did the cash management group -- would it
18 have generated documents like this on each working
19 day?

20 A. Yes.

21 Q. Tell me what the first document is, please.

22 A. I guess it's providing the details of
23 receipts and disbursements for the First Union
24 National Bank of North Carolina, identifying key
25 receipts and key disbursements.

1 Q. Who was this document -- what was the purpose
2 of this document?

3 A. Again, I believe it was to record key
4 receipts and disbursements from this particular bank.

5 Q. Okay. And I didn't mean to ask the same
6 question twice. Was this document then sent somewhere
7 else, to the bank, to accounting, or was it just used
8 to record it within the cash management group?

9 A. I think it was recorded within cash
10 management, and it was an available record for
11 accounting or others to access as they had a need.

12 Q. Okay. What is the second page, the purpose
13 of the second page there?

14 A. It appears to record wire transfers that were
15 to be executed on August 7 of 1996 and referencing the
16 accounting transactions that needed to be booked
17 accordingly.

18 Q. Okay. So the first part there is wires to be
19 made. The second part is bookings. Entries to be
20 recorded in the books. Is that what that means?

21 A. I believe so.

22 Q. At the top there are what appear to be two
23 reconciliation blocks. One that says, "FIRST CHICAGO"
24 and one that says, "CHASE." Do you know why those
25 two -- well, what do those two blocks refer to?

1 A. Well, Chase was our issuing -- commercial
2 paper issuing and paying agent. So, therefore, we had
3 frequent transactions through our corporate account at
4 Chase. First Chicago at that time had -- I think
5 First Chicago was the bank we were using for our ACH
6 payments. ACH payments are payments that are
7 initiated through the automatic clearinghouse. They
8 are electronic payments, but they are payments that I
9 think the significance of doesn't require a wire
10 transfer. So they are more of a volume electronic
11 payment vehicle at a lower cost per transaction.

12 Q. Okay. And what is the third page behind that
13 tab?

14 A. This is a document within Duke Energy
15 detailing a wire transfer to be executed that day,
16 August 7, 1996.

17 Q. Okay. And it says there, I believe, "These
18 wires, totaling" \$14,982,900 "will cover today's
19 investments for Duke Power." The name at the bottom
20 is "Dale Carpenter." Who is Dale Carpenter?

21 A. He was the manager of our short-term
22 liquidity group.

23 Q. Okay. And so on this day, it appears cash
24 management group decided there was 14.9 million excess
25 cash that could be invested, and so it wired that to

1 Bankers Trust to execute the investment; is that
2 correct?

3 A. Well, it's identifying, of the banks listed
4 on this form, that 14.9 million plus was to be wired
5 to Bankers Trust in New York.

6 Q. And that 14.9 million plus is the same amount
7 as reflected on Page 1 behind that tab at the bottom;
8 is that correct?

9 A. Correct.

10 Q. And the same 14.9 plus million on Page 2 of
11 the tab, I guess Item 3, wires to be made?

12 A. Correct.

13 Q. And so that amount, 14.9 million plus, was
14 wired from First Union, the First Union account to
15 Bankers Trust. It says, "Bankers/Merrill." So I
16 assume Merrill Lynch is -- well, I say, "I assume."
17 You tell me. Would Merrill Lynch also be the
18 investment agent?

19 A. Yes.

20 Q. And so did they maintain an account -- "they"
21 being Merrill. Does Merrill have an account with
22 Bankers Trust that it uses to execute your
23 transactions, "your" being cash management group?

24 A. The account Merrill would have with Bankers
25 Trust would not be designated for Duke Energy only.

1 It would --

2 Q. It's just their account, everybody's account?

3 A. Probably all of their transactions.

4 Q. Okay. Okay. And then did the cash
5 management group separately contact Merrill Lynch to
6 tell them how to invest those funds?

7 A. Yes.

8 Q. If you flip over to Page 3.

9 REPORTER MARTIN: When you get to a
10 convenient spot, may we take a brief break?

11 MR. GREEN: We can take one right now. I
12 wouldn't mind myself. So we'll take a break.

13 (A recess was taken from 12:11 p.m.
14 to 12:20 p.m.)

15 BY MR. GREEN:

16 Q. I think I referred you to Tab 3 behind, I
17 guess 6, 683. What does that document represent?

18 A. This was a document initiated by First Union
19 confirming the wire transfers that occurred and were
20 posted on August 7, 1996.

21 Q. And, again, tell me if I'm correct. We see
22 the same 14.9 million plus listed there?

23 A. Correct.

24 Q. Now, I think the third page back behind that
25 tab is a Nations Bank document. What does that

1 document represent?

2 A. Again, this was a document provided by
3 Nations Bank on -- confirming a wire transfer that
4 occurred on August 7, 1996.

5 Q. And the amount 4.9 million, that is the same
6 amount listed on the first page behind that tab, the
7 First Union document; is that correct?

8 A. I believe it is, yes.

9 Q. And then there's one final page behind that
10 Tab 3. What is that document?

11 A. I believe this is a document, again, that is
12 provided electronically from Nations Bank as to the
13 entries affecting the -- I guess affecting our cash
14 concentration account at Nations Bank on August 7,
15 1996.

16 Q. Okay. On that document it has a number of
17 entries with "LOCATION" and "AMOUNT." Do you know
18 what "LOCATION" means?

19 A. I believe those are amounts associated with
20 various deposits made by our branches in different
21 banks. We used Nations Bank as what's called our cash
22 concentration bank.

23 Q. Uh-huh.

24 A. You make deposits in a lot of small banks
25 throughout our service territory, and electronically

1 you consolidate all that money into one account
2 referred to as "cash concentration," and Nations Bank,
3 at that point in time, was our cash concentration
4 bank.

5 Q. Okay. Were they always the cash
6 concentration bank?

7 A. I don't recall.

8 Q. Okay. Would you turn to Tab C and turn to
9 C-2, which would be a "RECEIPTS AND DISBURSEMENTS"
10 document dated 8-15-96. Do you have that?

11 A. I do.

12 Q. Under the receipts it has short-term
13 investment of \$14.9 plus million, the same amount that
14 we saw earlier on the August 7 data, or at least it
15 appears to me. Do you agree with that?

16 A. That appears to be the same amount. I agree.

17 Q. Okay. And then on the following page from
18 the receipts and disbursements detail, there is at the
19 bottom, similar form we looked at earlier. Does that
20 say, "Investment maturity \$14,982,900" and "Interest
21 \$17,100" under Item 6 of "BOOKINGS TO BE DONE"?

22 A. That's how it reads, correct.

23 Q. And then the third page, I believe -- who
24 prepared this document?

25 A. That was prepared by Dale Carpenter.

1 Q. And it says, "Principal Maturing Today
2 \$14,982,900, Book receipt to 136.10"; is that correct?

3 A. Correct.

4 Q. What is "136.10"?

5 A. I don't recall.

6 Q. Okay. Let me ask you this, if you know. If
7 you turn back to Tab 1 there. Tab 1.C.

8 A. Sorry.

9 Q. That's all right. I just want to make sure
10 we're on the same one.

11 A. Okay.

12 Q. And at the bottom, just to make sure, the
13 last four digits should be -1701. Same page?

14 A. Yes.

15 Q. And on the left-hand side about half the way
16 down, I see where it says, "Short Term Investment,"
17 Account No. 136.10, "TODAY, 14,982,900." Do you see
18 where I'm --

19 A. Yes.

20 Q. Do you know, this appears to record the
21 receipts into that account for August 15, '96; is that
22 correct?

23 A. I agree.

24 Q. Now, there is today the amount 14- -- at the
25 14.9 million number under "TODAY." There's that same

1 number to the right under the column that says, "MTD."

2 Does that stand for month to date?

3 A. I'm sorry. Help me again, what you're
4 looking at.

5 Q. Sure. That page we were just looking at, the
6 -1701 --

7 A. Yes.

8 Q. -- the 14.9 million that we looked at?

9 A. Yes.

10 Q. Next to it, the same number under a column
11 "MTD"?

12 A. Yes.

13 Q. If you look at the top, you'll see it says,
14 "MTD."

15 A. Yes.

16 Q. Does "MTD" stand for month to date?

17 A. I believe it does.

18 Q. Okay. Do you know -- these account numbers
19 that are listed on the side, are those internal
20 accounts that items were recorded in by Duke Energy?

21 A. I believe so.

22 Q. Now, on the right-hand side it looks like the
23 same page, it has "CASH DISBURSEMENTS," and about half
24 the way down it has "Short Term Investments, 136.10"
25 with different amounts. Do you see what I'm talking

1 about?

2 A. Yes.

3 Q. So is it correct that receipts and
4 disbursements of short-term investments were run
5 through the same internal account?

6 A. It certainly appears as though the principal
7 associated with the short-term investment maturity and
8 the amount of the short-term investment were booked to
9 the same account.

10 Q. And following up on that, let me get you, if
11 I can, to turn back to Tab A-1.

12 A. Tab A-1.

13 Q. Yes, sir.

14 A. Which A-1?

15 Q. It would be 6-A-1. I promise I didn't make
16 it intentionally tricky.

17 (Pause in proceedings.)

18 THE WITNESS: Okay.

19 BY MR. GREEN:

20 Q. And just to confirm, the last four digits at
21 the bottom should be -1695?

22 A. Okay.

23 Q. If you'll look about halfway up on the right
24 side of the page, again, on the disbursements part,
25 short-term investments, it has today account number

1 136.10. Today 14,982,900?

2 A. Correct.

3 Q. Is it correct that that corresponds to the
4 placement of the short-term investment by Duke Energy?

5 A. That appears to be the case.

6 Q. Okay. All right. Turn -- bear with me just
7 a moment. Turn back if you would to Tab C-2. I'm
8 looking for the document, the Merrill Lynch, I guess
9 reconciliation. 6-C-2. Everything I'm doing right
10 now is 6.

11 A. Okay.

12 Q. And that document, we've already looked at
13 the 14.9 million and the interest on maturities. Is
14 that the interest that was earned on that investment?

15 A. You're speaking at the top of the page --

16 Q. Yes, sir.

17 A. -- in the receipts?

18 Q. I'm sorry. Turn back to Page 3 of that.
19 That would be the document that looks like -- same
20 tab, I think, but it would just -- we talked about
21 that document just a few moments ago.

22 MR. FRIEDMAN: Do you want to put the number
23 in?

24 MR. GREEN: Sure. -1677 is the last four
25 digits.

1 THE WITNESS: I'm sorry.

2 BY MR. GREEN:

3 Q. That's all right. I apologize for this being
4 confusing. I did not mean for it to be. I thought
5 this would help.

6 A. -1677?

7 Q. Yes, sir.

8 A. Okay.

9 Q. And we've talked about the 14.9 million there
10 at the top.

11 A. Uh-huh.

12 Q. And then the next line is "Interest on
13 Maturities, 17,100"?

14 A. Correct.

15 Q. That's the interest that was earned on that
16 investment?

17 A. I think that's correct.

18 Q. And it says over there, "Book receipt to
19 171.10." So the interest on maturities was recorded
20 in a different account; is that correct?

21 A. I believe that's correct.

22 Q. All right. And then that rolls down to the
23 bottom. It says, "Total Maturing Today,
24 \$15,000,000.00"?

25 A. (Nods head.)

1 Q. And then it says, "Rolled." What does
2 "Rolled" mean?

3 A. That means we decided to reinvest that total
4 of \$15 million.

5 Q. Okay. And so tell me -- so is it correct,
6 then, you left that at Merrill Lynch, and they
7 invested that money elsewhere?

8 A. They invested it according to, yes, our
9 direction.

10 Q. Okay. All right. Fair enough. Turn, if you
11 would, to Tab -- bear with me just a second.

12 (Pause in proceedings.)

13 BY MR. GREEN:

14 Q. Turn with me if you would to Tab E.

15 A. Which section are we in? Still in 6?

16 Q. Yes, sir. Tab 1 behind the E.

17 A. Okay.

18 Q. It should be a document, the last four digits
19 are -1712. Again, we're seeing the same cash receipts
20 and disbursements page that we've seen in other days
21 that we've looked at; correct?

22 A. I believe so, yes.

23 Q. Okay. If you'll turn to the next page,
24 there's a different form of page. It has cash
25 disbursement regarding taxes. What is that page?

1 A. I'm not familiar with it.

2 Q. The third page is again the same cash
3 receipts and disbursements page we've seen before, and
4 it's also for August 30, 1996. But at the bottom
5 right-hand corner -- and this document is -1714. At
6 the bottom right-hand corner, it has a cash balance,
7 it looks like a -- I assume that is not a minus. I
8 assume that's just the accounting entry. But, anyway,
9 it says 53,283- --

10 A. I'm sorry. Which line item are you looking
11 at?

12 Q. Oh, sure. Down at the bottom right-hand
13 corner.

14 A. Okay.

15 Q. And do you see "CASH BALANCE" at the "END OF
16 PERIOD"?

17 A. Yes.

18 Q. It says \$53,283,156.17?

19 A. Uh-huh.

20 Q. That is different than the amount on the
21 first page behind that tab, Page -1712. Do you know
22 why that might be?

23 A. No.

24 Q. If you'll turn back further -- I think it's
25 two more pages. It looks like a computer printout,

1 and the four digits are -1717.

2 A. Okay.

3 Q. Do you know what this document is?

4 A. It appears to be a printout of an accounting
5 journal entry with -- identifying debit and credit
6 amounts.

7 Q. Okay. And then if you'll flip to the next
8 page, it says, "TO RECORD CASH RECEIVED AND DISBURSED
9 DURING THE MONTH OF AUGUST AS PER DETAILS ON FILE."
10 So at the end of each month, accounting would make a
11 journal entry that would record its cash transactions
12 during the month? Is that what this was for?

13 A. I believe so.

14 Q. Okay. Then the next page -- skip that. Flip
15 back two pages, if you would, to the Document -1720,
16 the last four digits. What is this document? It
17 says, "MONTHLY INVESTMENT REPORT."

18 A. This appears to be a summary of the
19 investments that were made for the -- where I'm
20 leaving either August or September of 1996.

21 Q. At the top of that list of investments, it
22 says, "ISSUER, EXXON ASSET MANAGEMENT." Then if you
23 go over five columns it says, "ISSUE DATE,
24 07-August-96. MATURITY DATE, 15-August-96; FACE
25 AMOUNT, \$15,000,00.00," and a little bit over,

1 "PRINCIPAL, \$14,982,900." Do you see where I'm
2 referencing?

3 A. Yes.

4 Q. Is that the same 14.9 million plus investment
5 we were discussing earlier?

6 A. I believe it is.

7 Q. Okay. And a little bit over there is a
8 column that has number of days. That appears to be
9 the number of days the investment was outstanding; is
10 that correct?

11 A. I believe that's correct.

12 Q. And it looks like these range from 1 day
13 outstanding to 21 days outstanding?

14 A. Correct.

15 Q. In your experience, is that fairly typical
16 for the times that investments like these were
17 outstanding?

18 A. I believe so.

19 Q. Were investments like these typically --
20 strike that.

21 Did Duke Energy typically leave investments
22 like this outstanding for more than 30 days?

23 A. Typically, no.

24 Q. It was typically less than 30 days?

25 A. Correct.

1 Q. Was there an average that you typically left
2 them outstanding that you know of?

3 A. No.

4 Q. There wasn't a guideline about anything like
5 that other than it would be a short-term investment?

6 A. Correct.

7 Q. Okay. If you go over two more columns, I
8 think, from the number of days, it says "IN PER." I
9 presume that means in period?

10 A. I believe so.

11 Q. And so that's the number of days in the month
12 that that investment was outstanding; is that correct?

13 A. I believe so, yes.

14 Q. Okay. What does the column "DOLLAR DAYS"
15 mean? There are actually two columns, "DOLLAR DAYS."
16 What does the first one mean?

17 A. I don't recall.

18 Q. And same for the second?

19 A. I don't recall.

20 Q. Okay. Look over to the following Tab 2 and
21 then the second page behind that tab. And there is
22 Document -1630, the last four, "PAYABLE TO: DUKE
23 POWER COMPANY," and it says, "TO: LG&E Power
24 Marketing." What does that document represent?

25 A. It appears to be a customer bill.

1 Q. Do you know what Power Marketing is?

2 A. No.

3 Q. Turn over to Tab 3 if you would. Second
4 page. The Document -6904 is the last four. It looks
5 like a transaction document from Merrill Lynch
6 regarding a purchase of Federal Farm Credit Bank
7 obligation; is that correct?

8 A. It appears to be the purchase of a repo that
9 was, I think, secured by the Federal Farm Credit Bank.

10 Q. Okay. When Merrill Lynch, or whoever the
11 broker was, purchased obligations like this in
12 municipal bonds, did they actually -- do you know if
13 they actually received a security or a document
14 representing that obligation on your behalf?

15 A. I'm quite certain they did. It may have been
16 electronic.

17 Q. And when you say you're "quite certain," why
18 are you certain of that?

19 A. Because repos, again, are backed up by
20 various government treasury type of securities or
21 defined securities, and those securities are -- those
22 securities are held, in our case, in a Duke Energy
23 designated account within the firm.

24 Q. Okay. Would that have been the same for the
25 municipal bonds, they would receive a certificate or

1 document back?

2 A. Yes.

3 Q. Bear with me just a moment, please. If you'd
4 turn back to the monthly investment report we were
5 looking at, -1720. It would be the page immediately
6 before Tab 2.

7 A. Okay.

8 Q. I notice on here based on looking down the
9 line, I see two instances of the South Carolina Public
10 Service Authority, it looks like; is that correct?

11 A. That's what I'm reading as well, yes.

12 Q. Then I see one, the Texas Municipal Power
13 Agency. Did the investment guidelines require or
14 suggest that you invest in obligations of electric
15 producing utilities?

16 A. Repeat your question.

17 Q. Let me try. Did the investment guidelines at
18 the company promulgated, did they require you to
19 invest some obligations in electric producing
20 utilities?

21 A. No.

22 Q. Any reason you would pick the South Carolina
23 Public Service Authority other than it met the
24 challenge investment -- I mean, excuse me, the
25 required investment guidelines?

1 A. Met the investment guidelines. I'm sure it
2 was a highly rated security and that provided a good
3 return.

4 Q. Sure. Do you know, did Duke Energy have
5 intercompany transactions with the Public Service
6 Authority, South Carolina Public Service Authority?

7 A. Help me with your question. Did Duke Energy
8 have --

9 Q. In other words, did it sell to or buy
10 electricity from the Public Service Authority?

11 A. I don't know.

12 Q. You don't know. Okay. It looks like on this
13 form some of these obligations are taxable and some
14 are tax exempt.

15 A. Uh-huh.

16 Q. What were your guidelines on investing in
17 taxable versus tax exempt obligations?

18 A. I'm sure they were both designated as
19 approved securities we could invest in. Then it was
20 up to our team to determine the best net, best net
21 return that the company would receive.

22 Q. Does the cash management group -- I say,
23 "cash management group" because it's the one
24 responsible for making the transactions. Do the
25 investments made by the cash management group, do

1 those typically result in interest income or a gain?
2 I guess what I'm asking is do you ever suffer a loss
3 on these investments?

4 A. It results in a gain.

5 Q. Do you ever suffer a loss on these
6 investments?

7 A. I don't recall that we did.

8 Q. Do you know what happened with any of these
9 investments, I guess, during the -- I guess I'll
10 generically refer to it as the market crash in 2008?
11 Do you know what -- if the cash management group had
12 any problems recovering gains or returns on its
13 investments during that period of time?

14 A. I don't know.

15 MR. GREEN: Okay. Why don't you let us take
16 a little break now. Let us go talk, and we'll come
17 back in just a few minutes.

18 THE WITNESS: All right. Sounds good.

19 (A recess was taken from 12:58 p.m.
20 to 1:02 p.m.)

21 BY MR. GREEN:

22 Q. I think you said earlier in the deposition, I
23 believe you said that you did not know really anything
24 about the tax reporting of the investment activities
25 of your group; is that correct?

1 SIGNATURE OF DEPONENT

2 I, the undersigned, DANNY WRISTON, do hereby
3 certify that I have read the foregoing deposition and
4 find it to be a true and accurate transcription
5 of my testimony, with the following corrections, if
6 any:

7 PAGE LINE CHANGE

REASON

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SHERWOOD LEE LOVE

1 A. Correct.

2 Q. Did anybody on your staff ever interface with
3 anybody from the tax department regarding those
4 issues?

5 A. I believe there was some occasional
6 interface.

7 Q. Okay. You didn't have anybody on your staff
8 from the tax group, though, or anything like that?

9 A. Correct.

10 Q. In other words, your staff was your staff,
11 and tax had their own separate staff?

12 A. Correct.

13 Q. Okay. And you didn't report to anybody that
14 really was over the tax group?

15 A. I reported to the treasurer.

16 Q. Was he over the tax group?

17 A. Some of the time. All of the time, I'm not
18 sure, but some of the time.

19 MR. GREEN: Okay. All right. I think those
20 are all the questions I have today.

21 MR. FRIEDMAN: Perfect.

22 MR. GREEN: Y'all have anything to add?

23 MR. FRIEDMAN: No.

24 MR. GREEN: All right. Then I think we're
25 done today.

1 THE WITNESS: Thank you very much.

2 MR. GREEN: Thank you. I appreciate it.

3 (WHEREUPON, the foregoing deposition was
4 concluded at 1:04 p.m. on November 22,
5 2011.)

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1 STATE OF NORTH CAROLINA

2 COUNTY OF CABARRUS

3 REPORTER'S CERTIFICATE

4 I, Nancy J. Martin, a Notary Public
5 in and for the State of North Carolina, do hereby
6 certify that there came before me the person
7 hereinbefore named, who was by me duly sworn to
8 testify to the truth and nothing but the truth of his
9 knowledge concerning the matters in controversy in
10 this cause; that the witness was thereupon examined
11 under oath, the examination reduced to typewriting
12 under my direction, and the deposition is a true
13 record of the testimony given by the witness.

14 I further certify that I am neither
15 attorney or counsel for, nor related to or employed
16 by, any attorney or counsel employed by the parties
17 hereto or financially interested in the action.

18 IN WITNESS WHEREOF, I have hereto set my
19 hand, this the 1st day of November, 2011.

20

21

22

23

Nancy J. Martin, Notary Public
Notary Number: 2004251016

25

1 I N D E X

2 WITNESS/EXAMINATION Page

3 SHERWOOD LEE LOVE

4 By Mr. Green 3

5

6

7 E X H I B I T S

8 No. Description Page

9 Exhibit 1 Exhibits for Deposition of Duke 5
10 Energy Rule 30(b)(6) Witness
11 Sherwood Love, 126 pages
12
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Duke Energy Corporation,

Petitioner,

VS.

South Carolina Department of Revenue,

Respondent,

November 21, 2011

3045

Table of Contents

TAB

1. Affidavit of Sherwood L. Love
2. Duke's 10-K Statements (1978-1993, except 1981 and 1991)
3. Corporate Cash Management Policy
4. Price Waterhouse Coopers Memo
 - A. September 13, 2000
 - B. November 20, 2000
 - C. December 4, 2000
5. February 16, 2001 - "Short-Term Investments" -Tax Meeting Agenda
6. Cash Receipts and Disbursement Documents
 - A. August 7, 1996
 - B. August 8, 1996
 - C. August 15, 1996
 - D. August 29, 1996
 - E. August 30, 1996

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 SHERWOOD L. LOVE

Appeared before the undersigned officer duly authorized to administer oaths, Sherwood L. Love, who deposed and stated as follows:

1.

My name is Sherwood L. Love. 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 March 1989 until April 2006, I was the Assistant Treasurer - Cash Management of Duke Energy. In that role, I was responsible for the cash management function at Duke Energy. The cash management function covered basic commercial banking; providing daily corporate liquidity through short-term borrowing and investing; and, establishing short-term bank borrowing facilities ("credit facilities").

5.

From April 2006 until the date of this affidavit, I was the General Manager Long Term Investments and Assistant Treasurer of Duke Energy. In that role, I am responsible for managing Duke Energy's long term trust investments.

6.

During the Period at Issue, Duke Energy maintained a Treasury Department and a Cash Management Group at its headquarters in North Carolina, as part of its operations.

7.

During the Period at Issue, Duke Energy's Cash Management Group

was engaged in investing Duke Energy's excess cash from its electricity sales to maximize its return, within approved investment guidelines, and providing for its short-term cash needs.

8.

The Cash Management Group maintained a daily interface with Central Cash Remittance, the department responsible for processing all direct payments from electric customers, and the daily consolidation of local branch deposits of electric customer payments across the Duke Energy service territory.

9.

The Cash Management Group received daily bank reports showing the value of checks being presented for payment on corporate disbursement accounts that needed to be funded that day. The Cash Management Group utilized reports from corporate financial models to forecast and fund maturing debt issues and all significant corporate payments, including quarterly dividends.

10.

The Cash Management Group was responsible for executing and funding all electronic payments, including all wire transfers.

11.

The Cash Management Group interfaced with various departments and subsidiaries to fund or manage cash from significant transaction settlements.

In addition, the Cash Management Group managed all short-term borrowing and investing, and the related cash settlements. Using corporate financial models, the Cash Management Group interfaced with Treasury, Finance and Corporate management to determine the sizing of short-term bank borrowing facilities that would provided required liquidity support for Duke Energy's commercial paper borrowing programs. Such programs were used for the short-term funding of additional electric generation, transmission and distribution facilities to serve our customers.

12.

The Cash Management Group was responsible for working with Duke Legal and our commercial and investment banks to negotiate and establish credit facilities.

13.

During the Period at Issue, the Treasury Department invested Duke Energy's excess operating cash in various short-term marketable securities including municipal bonds, loan repurchase agreements, and commercial paper.

14.

During the Period at Issue, all securities trading transactions were conducted, and all investment accounts were located, outside of South Carolina.

15.

During the Period at Issue, Duke Energy's Cash Management Group evolved into four subgroups: (1) Cash Operations; (2) Short-term Liquidity; (3) Credit Facilities; and (4) International Cash Management.

16.

An average of 10-12 employees were employed in the Cash Management Group.

17.

The Cash Management Group was located in Charlotte, North Carolina, and was responsible for funding Duke Energy's daily liquidity needs. The Cash Management Group provided funding for Duke Energy's operations, including purchasing fuel, payroll, acquiring and maintaining production, transmission and distribution equipment, and other capital expenditures.

18.

In addition, the Cash Management Group was responsible for forecasting cash needs and maximizing investment returns within approved investment guidelines.

19.

During the Period at Issue, the Cash Management Group maintained daily contact with investment dealers located outside of South Carolina in order to

maximize cash investment opportunities.

20.

During the Period at Issue, the Short-Term Liquidity Group generally consisted of an average of four employees located in Charlotte, North Carolina, and was responsible for gathering short-term borrowing and investment information, and for ensuring that short-term borrowings were minimized and that excess cash was appropriately invested, with a goal of minimizing cash in corporate bank accounts.

21.

Cash Management Group was responsible for setting commercial paper borrowing rates and selecting short-term investments, and, when market conditions allowed, negotiated investment rates.

22.

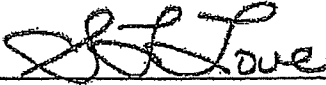
Cash Management Group makes investment decisions in accordance with established investment guidelines approved by the Duke Energy Board's Finance and Risk Management Committee, which defines the type, term and ratings of permitted investment securities.

23.

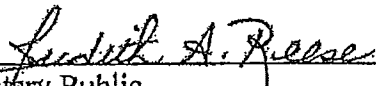
I declare under penalty of perjury that the foregoing is true and correct.

10330698.3

Further affiant sayeth not, this 31st day of December, 2010.


Sherwood L. Love

Subscribed before me this
31st day of December, 2010.


Notary Public

My commission expires: 02/26/12

PART I

Item 1 Business

THE COMPANY

The Company is engaged in the generation, transmission, distribution and sale of electric energy in the central portion of North Carolina and the western portion of South Carolina, comprising the area in both States known as the Piedmont Carolinas. Its service area, approximately two-thirds of which lies in North Carolina, covers about 20,000 square miles with an estimated population of 4,000,000 and includes a number of cities, of which the largest are Charlotte, Greensboro, Winston-Salem and Durham in North Carolina, and Greenville, Spartanburg and Anderson in South Carolina. During 1978 the Company's electric revenues amounted to approximately \$1.4 billion, of which about 70% was derived from North Carolina and 30% from South Carolina. The Company ranks ninth in the United States among investor-owned utilities in kilowatt-hour sales.

The electric utility industry in general has been experiencing problems in a number of areas including the effects of inflation upon the cost of operations and upon construction costs; availability and increased cost of fuel for the generation of electric energy; costs and licensing delays related to compliance with changing environmental regulations; efforts by opposition groups to delay or prevent construction of nuclear generating and related facilities and to limit the use of existing facilities; uncertainties regarding the availability of reprocessing and storage facilities for spent nuclear fuel; difficulty in obtaining sufficient capital on reasonable terms; difficulty in obtaining sufficient return on invested capital and obtaining adequate rate increases when required; and substantially increased capital outlays and longer construction periods required for larger, more complex generating facilities. The Company is currently experiencing these problems in varying degrees.

SERVICE AREA

The Company supplies electric service directly to approximately 1,222,000 customers in more than 200 cities, towns and unincorporated communities in North Carolina and South Carolina. Electricity is sold at wholesale to 37 other incorporated municipalities and to a number of rural electric cooperatives and private utilities. The Company renders electric service in a total of 56 counties and is the principal supplier of electric energy in 44 of them.

The Company's service area is undergoing increasingly diversified industrial development. The textile, tobacco and furniture industries are of major significance to the economy of the area and there is a diversity of other industrial activity, including the manufacture of metal products, paper and allied products, chemicals, food products, and various other light and heavy manufacturing and service businesses. The largest industry served by the Company is the textile industry, which accounted for approximately \$233 million of the Company's revenues for 1978, representing 17% of electric revenues and 52% of electric industrial revenues.

PART I

Item 1. *Business.*

DUKE POWER COMPANY

Duke Power Company (the Company) is engaged in the generation, transmission, distribution and sale of electric energy in the central portion of North Carolina and the western portion of South Carolina, comprising the area in both States known as the Piedmont Carolinas. Its service area, approximately two-thirds of which lies in North Carolina, covers about 20,000 square miles with an estimated population of 4,000,000 and includes a number of cities, of which the largest are Charlotte, Greensboro, Winston-Salem and Durham in North Carolina and Greenville, Spartanburg and Anderson in South Carolina. During 1979 the Company's electric revenues amounted to approximately \$1.5 billion, of which about 70% was derived from North Carolina and 30% from South Carolina. The Company ranks ninth in the United States among investor-owned utilities in kilowatt-hour sales. Its executive offices are located in the Power Building, 422 South Church Street, Charlotte, North Carolina 28242.

Factors Affecting the Industry. The electric utility industry in general has been experiencing problems in a number of areas including the effects of inflation upon the cost of operations and upon construction costs; availability and increased cost of fuel for the generation of electric energy; costs and licensing delays related to compliance with changing environmental regulations; efforts to delay or prevent construction of nuclear generating and related facilities and to preclude or limit the use of existing facilities, particularly in the aftermath of the Three Mile Island accident; uncertainties regarding the availability of reprocessing and storage facilities for spent nuclear fuel; difficulty in obtaining sufficient capital on reasonable terms; difficulty in obtaining sufficient return on invested capital and obtaining adequate rate increases when required; and substantially increased capital outlays and longer construction periods required for larger, more complex generating facilities. The Company is currently experiencing these problems in varying degrees.

For a discussion of the developments affecting the Company, see "Construction Program" (pages 2 through 6), "Business—Rate Matters" (pages 8 and 9), "Business—Fuel Supply" (pages 9 through 12), "Business—Regulation—Environmental Matters" (pages 12 through 14) and "Business—Regulation—Nuclear Facilities", which contains, among other things, information concerning possible delay in the granting of an operating license for the McGuire Nuclear Station and the current implementation of various requirements of the Nuclear Regulatory Commission with respect to the operation of the Oconee Nuclear Station (pages 14 and 15).

FINANCING PROGRAM

The Company presently estimates that it will obtain through the sale of securities and other external sources between 50% and 55% of its 1980-1982 total capital requirements, which include cost estimates of \$2.1 billion for the construction program, \$583 million for nuclear fuel, \$95 million for the refunding of maturing long-term debt and sinking fund requirements and approximately \$125 million related to maturities with respect to capitalized nuclear fuel trusts. The balance of such requirements is expected to be obtained from retained earnings, depreciation and amortization, deferred taxes, investment tax credit and other internal sources. Such expectation is based in part upon receiving future rate increases as to which no assurance can be given. On February 14, 1980, the Company received proceeds of approximately \$49.4 million from the sale of 500,000 shares of 11% Cumulative Preferred Stock, Series O (par value \$100) (the New Preferred Stock). In addition, on March 19, 1980, the Company received proceeds of approximately \$148 million from the sale of \$100,000,000 principal amount of First and Refunding Mortgage Bonds, 14% Series Due 2010, and \$50,000,000 principal amount of First and Refunding Mortgage Bonds, 14% Series Due 1987 (collectively, the New Bonds). The types, amounts and timing of sales of additional securities will depend upon market conditions and other factors.

PART I.

Item 1. *Business.*

DUKE POWER COMPANY

Duke Power Company (the Company) is engaged in the generation, transmission, distribution and sale of electric energy in the central portion of North Carolina and the western portion of South Carolina, comprising the area in both States known as the Piedmont Carolinas. Its service area, approximately two-thirds of which lies in North Carolina, covers about 20,000 square miles with an estimated population of 4,000,000 and includes a number of cities, of which the largest are Charlotte, Greensboro, Winston-Salem and Durham in North Carolina and Greenville, Spartanburg and Anderson in South Carolina. During 1980, the Company's electric revenues amounted to approximately \$1.7 billion, of which about 70% was derived from North Carolina and 30% from South Carolina. The Company ranks ninth in the United States among investor-owned utilities in kilowatt-hour sales. Its executive offices are located in the Power Building, 422 South Church Street, Charlotte, North Carolina 28242 (Telephone No. 704-373-4317).

Factors Affecting the Industry. The electric utility industry in general has been experiencing problems in a number of areas including the effects of inflation upon the cost of operations and upon construction costs; availability and increased cost of fuel for the generation of electric energy; costs and licensing delays related to compliance with changing environmental regulations; efforts to delay or prevent construction of nuclear generating and related facilities and to preclude or limit the use of existing facilities, particularly in the aftermath of the Three Mile Island accident; uncertainties regarding the availability of reprocessing and storage facilities for spent nuclear fuel; difficulty in obtaining sufficient capital on reasonable terms; difficulty in obtaining sufficient return on invested capital and obtaining adequate rate increases when required; and substantially increased capital outlays and longer construction periods required for larger, more complex generating facilities. The Company is currently experiencing these problems in varying degrees.

For a discussion of the developments affecting the Company, see "Construction Program" (pages 2 through 6), "Business—Rate Matters" (pages 8 and 9), "Business—Fuel Supply" (pages 9 through 12), "Business—Regulation—Environmental Matters" (pages 12 through 15) and "Business—Regulation—Nuclear Facilities" (page 15).

FINANCING PROGRAM

On February 6, 1981, the Company received \$521 million from the sale of a 75% undivided interest in Unit No. 1 of the Catawba Nuclear Station to groups of its North Carolina and South Carolina rural electric cooperative customers. The proceeds of such sale are expected to substantially meet the Company's capital requirements for the remainder of 1981. During 1982 and 1983, the Company expects to obtain a major portion of its capital requirements through external sources with the types, amounts and timing of sales of securities to depend upon market conditions and other factors. The balance of such requirements is expected to be obtained from retained earnings, depreciation and amortization, deferred taxes, investment tax credit and other internal sources. The amount of internal cash will depend in part upon receiving future rate increases as to which no assurance can be given.

The sale of any further portion of the Catawba Nuclear Station would reduce the amount of external financing required by the Company by the amount initially received and by the amounts of progress payments to be made as additional construction costs are incurred. As described under "Construction Program—Facilities Under Construction", the Company has reached an agreement to sell a portion of its remaining interest in that Station to a group of its South Carolina municipal customers. Should such sale be consummated at the end of this year, the Company anticipates that it will receive approximately \$235 million at that time. The Company has no assurance that such sale will be consummated.

PART I.

Item 1. *Business.*

DUKE POWER COMPANY

Duke Power Company (the Company) is engaged in the generation, transmission, distribution and sale of electric energy in the central portion of North Carolina and the western portion of South Carolina, comprising the area in both States known as the Piedmont Carolinas. Its service area, approximately two-thirds of which lies in North Carolina, covers about 20,000 square miles with an estimated population of 4,000,000 and includes a number of cities, of which the largest are Charlotte, Greensboro, Winston-Salem and Durham in North Carolina and Greenville, Spartanburg and Anderson in South Carolina. During 1982, the Company's electric revenues amounted to approximately \$2.2 billion, of which about 70% was derived from North Carolina and 30% from South Carolina. The Company ranks ninth in the United States among investor-owned utilities in kilowatt-hour sales. Its executive offices are located in the Power Building, 422 South Church Street, Charlotte, North Carolina 28242 (Telephone No. 704-373-4011).

Factors Affecting the Industry. The electric utility industry in general has been experiencing problems in a number of areas including difficulty in obtaining sufficient return on invested capital and obtaining adequate rate increases when required; difficulty in obtaining sufficient capital on reasonable terms; the effects of inflation upon the cost of operations and upon construction costs; availability and increased cost of fuel for the generation of electric energy; costs and licensing delays related to compliance with changing environmental regulations; efforts to delay or prevent construction of nuclear generating and related facilities and to preclude or limit the use of existing facilities; uncertainties regarding the availability of reprocessing and storage facilities for spent nuclear fuel; and substantially increased capital outlays and longer construction periods required for larger, more complex generating facilities. The Company is currently experiencing these problems in varying degrees.

For a discussion of the developments affecting the Company, see "Construction Program" (pages 2 through 5), "Business—Rate Matters" (pages 7 and 8), "Business—Fuel Supply" (pages 8 through 10), "Business—Regulation—Environmental Matters" (pages 10 through 12) and "Business—Regulation—Nuclear Facilities" (pages 12 and 13).

FINANCING PROGRAM

The Company estimates that it will obtain through the sale of securities and other external sources at least 30% of its 1983-1985 total capital requirements, which include cost estimates of \$1.9 billion for the construction program, \$581 million for nuclear fuel, \$57 million for the refunding of maturing long-term debt and sinking fund requirements and approximately \$114 million related to maturities with respect to capitalized nuclear fuel trusts. The balance of such requirements is expected to be obtained from retained earnings, depreciation and amortization, deferred taxes, investment tax credit and other internal sources. Such expectation is based in part upon receiving future rate increases as to which no assurance can be given. During 1983, the Company proposes to borrow the proceeds of the sale of approximately \$100 million principal amount of pollution control revenue bonds to be issued by Oconee County, South Carolina, subject to a favorable ruling of the Internal Revenue Service and certain other contingencies. The Company also has an effective registration statement under Rule 415 of the Securities Act of 1933 for the possible issuance during 1983 of up to \$50 million of Preferred Stock A (\$25 par value). The types, amounts and timing of sales of additional securities will depend upon market conditions and other factors.

The foregoing estimates of the Company's capital requirements expected to be obtained from external sources do not give effect to the proceeds of the proposed sale of a portion of the Company's remaining interest in the Catawba Nuclear Station to Piedmont Municipal Power Agency (PMPA), a joint agency formed by a group of the Company's South Carolina municipal customers, as described under "Facilities Under Construction." Such sale would reduce the amount of external financing required by the Company by the amount initially received and by the amounts of progress payments to be made as additional construction costs are incurred. The sale, which is contingent upon the arrangement of necessary financing by PMPA and subject to other contingencies, has been delayed by an appeal from an order of The Public Service Commission of South Carolina (PSC) authorizing the transaction. The Company has no assurance that such sale will be consummated.

While the Company has budgeted for certain contingencies, including potential cancellation charges related to Cherokee Unit 2, it has no assurance that budgeted contingencies will fully cover ultimate cancellation costs. The budgeted capital requirements do not give effect to any change in the status of construction of Cherokee Unit 1. See "Construction Program."

PART I.

Item 1. *Business.*

DUKE POWER COMPANY

Duke Power Company (the Company) is engaged in the generation, transmission, distribution and sale of electric energy in the central portion of North Carolina and the western portion of South Carolina, comprising the area in both States known as the Piedmont Carolinas. Its service area, approximately two-thirds of which lies in North Carolina, covers about 20,000 square miles with an estimated population of 4,300,000 and includes a number of cities, of which the largest are Charlotte, Greensboro, Winston-Salem and Durham in North Carolina and Greenville, Spartanburg and Anderson in South Carolina. During 1983, the Company's electric revenues amounted to approximately \$2.4 billion, of which about 70% was derived from North Carolina and 30% from South Carolina. The Company ranks eighth in the United States among investor-owned utilities in kilowatt-hour sales. Its executive offices are located in the Power Building, 422 South Church Street, Charlotte, North Carolina 28242 (Telephone No. 704-373-4011).

Factors Affecting the Industry. The electric utility industry in general has been experiencing problems in a number of areas including difficulty in obtaining sufficient return on invested capital and obtaining adequate rate increases when required; difficulty in obtaining sufficient capital on reasonable terms; the effects of inflation upon the cost of operations and upon construction costs; availability and increased cost of fuel for the generation of electric energy; costs and licensing delays related to compliance with changing environmental regulations; efforts to delay or prevent construction of nuclear generating and related facilities and to preclude or limit the use of existing facilities; uncertainties regarding the availability of reprocessing and storage facilities for spent nuclear fuel; and substantially increased capital outlays and longer construction periods required for larger, more complex generating facilities. The Company is currently experiencing these problems in varying degrees.

For a discussion of the developments affecting the Company, see "Construction Program" (pages 2 through 5), "Business—Rate Matters" (page 7), "Business—Fuel Supply" (pages 7 through 9), "Business—Regulation—Environmental Matters" (pages 9 and 10) and "Business—Regulation—Nuclear Facilities" (pages 10 and 11).

FINANCING PROGRAM

The Company estimates that it will obtain through the sale of securities and other external sources about 10% of its 1984-1986 total capital requirements, which include cost estimates of \$1.5 billion for the construction program and \$531 million for nuclear fuel. The balance of such requirements is expected to be obtained from retained earnings, depreciation and amortization, deferred taxes, investment tax credit and other internal sources. Such expectation is based in part upon receiving future rate increases as to which no assurance can be given.

The foregoing estimates of the Company's capital requirements expected to be obtained from external sources do not give effect to the proceeds of the proposed sale of a portion of the Company's remaining interest in the Catawba Nuclear Station to Piedmont Municipal Power Agency (PMPA), a joint agency formed by a group of the Company's South Carolina municipal customers, as described under "Facilities Under Construction." The sale, which is contingent upon the arrangement of necessary financing by PMPA and subject to other contingencies, has been delayed by an appeal from an order of The Public Service Commission of South Carolina (PSC) authorizing the transaction. The Company has no assurance that such sale will be consummated.

In order to issue additional mortgage bonds and preferred stock, the Company must comply with earnings coverage and assets requirements contained in its mortgage indenture and articles of incorporation. Under the provisions of such indenture, additional bonds (other than certain types of refunding bonds) may not be issued unless the Company's available net earnings (as defined) for 12 consecutive calendar months within the 15 calendar months immediately preceding shall have been at least twice the amount of the annual interest charges on all bonds outstanding and applied for under the indenture. Additional bonds may be issued only

DUKE POWER COMPANY

PART I

Item 1. *Business.*

Duke Power Company (the Company) is engaged in the generation, transmission, distribution and sale of electric energy in the central portion of North Carolina and the western portion of South Carolina, comprising the area in both States known as the Piedmont Carolinas. Its service area, approximately two-thirds of which lies in North Carolina, covers about 20,000 square miles with an estimated population of 4,400,000 and includes a number of cities, of which the largest are Charlotte, Greensboro, Winston-Salem and Durham in North Carolina and Greenville, Spartanburg and Anderson in South Carolina. During 1984, the Company's electric revenues amounted to approximately \$2.7 billion, of which about 70% was derived from North Carolina and 30% from South Carolina. The Company ranks eighth in the United States among investor-owned utilities in kilowatt-hour sales. Its executive offices are located in the Power Building, 422 South Church Street, Charlotte, North Carolina 28242 (Telephone No. 704-373-4011).

Service Area

The Company supplies electric service directly to approximately 1,396,000 retail customers in more than 200 cities, towns and unincorporated communities in North Carolina and South Carolina. Electricity is sold through contractual arrangements to North Carolina Municipal Power Agency Number 1 (NCMPA), North Carolina Electric Membership Corporation (NCEMC) and Saluda River Electric Cooperative Inc. (Saluda) and at wholesale to 18 other incorporated municipalities and to several private utilities. The Company renders electric service in a total of 56 counties and is the principal supplier of electric energy in 44 of these counties.

The Company's service area is undergoing increasingly diversified industrial development. The textile, tobacco, furniture and chemical industries are of major significance to the economy of the area, and other industrial activity includes the manufacture of metal products, paper and allied products, food products and various other light and heavy manufacturing and service businesses. The largest industry served by the Company is the textile industry, which accounted for approximately \$410 million of the Company's revenues for 1984, representing 15% of electric revenues and 46% of electric industrial revenues.

Energy Requirements and Capability

The following table sets forth the Company's generating capability at December 31, 1984, its generation of electric energy for 1984, and certain corresponding information presently projected for 1985:

Source	Generating Capability — KW(1)		Generation — KWH (millions)	
	Actual December 31, 1984	Projected 1985(2)	Actual 1984	Projected 1985(2)
Coal	6,603,000	6,603,000	26,394	25,300
Nuclear	4,940,000	6,085,000(2)	32,632	36,600(2)
Hydro and other	2,051,000	2,051,000	1,995	1,700
Total	<u>13,594,000</u>	<u>14,739,000</u>	61,021	63,600
Purchased power, net, and energy retained by Catawba purchasers			(2,908)	(1,200)
Total			<u>58,113</u>	<u>62,400</u>

(1) The data relating to capability does not reflect the possible unavailability or reduction of capability of facilities at any given time because of scheduled maintenance, repair requirements or regulatory restrictions.

(2) Nuclear capability and related generation projected for 1985 do not reflect the sale of portions of the Catawba Nuclear Station. (See "Construction Program — *Facilities Under Construction.*")

DUKE POWER COMPANY

PART I.

Item 1. *Business.*

Duke Power Company (the Company) is engaged in the generation, transmission, distribution and sale of electric energy in the central portion of North Carolina and the western portion of South Carolina, comprising the area in both States known as the Piedmont Carolinas. Its service area, approximately two-thirds of which lies in North Carolina, covers about 20,000 square miles with an estimated population of 4,400,000 and includes a number of cities, of which the largest are Charlotte, Greensboro, Winston-Salem and Durham in North Carolina and Greenville, Spartanburg and Anderson in South Carolina. During 1985, the Company's electric revenues amounted to approximately \$2.9 billion, of which about 70% was derived from North Carolina and 30% from South Carolina. The Company ranks seventh in the United States among investor-owned utilities in kilowatt-hour sales. Its executive offices are located in the Power Building, 422 South Church Street, Charlotte, North Carolina 28242 (Telephone No. 704-373-4011).

Service Area

The Company supplies electric service directly to approximately 1,439,000 retail customers in more than 200 cities, towns and unincorporated communities in North Carolina and South Carolina. Electricity is sold through contractual arrangements to North Carolina Municipal Power Agency Number 1 (NCMPA), North Carolina Electric Membership Corporation (NCEMC), Saluda River Electric Cooperative Inc. (Saluda) and Piedmont Municipal Power Agency (PMPA), each of which have purchased from the Company portions of the Catawba Nuclear Station (collectively, the Catawba Buyers). All participating members of the Catawba Buyers were formerly wholesale municipal or cooperative customers of the Company. Electricity is also sold at wholesale to 9 other incorporated municipalities and to several private utilities. The Company renders electric service in a total of 56 counties and is the principal supplier of electric energy in 44 of these counties:

The Company's service area is undergoing increasingly diversified industrial development. The textile, tobacco, furniture and chemical industries are of major significance to the economy of the area, and other industrial activity includes the manufacture of metal products, paper and allied products, food products and various other light and heavy manufacturing and service businesses. The largest industry served by the Company is the textile industry, which accounted for approximately \$421 million of the Company's revenues for 1985, representing 15% of electric revenues and 45% of electric industrial revenues.

Energy Requirements and Capability

The following table sets forth the Company's generating capability at December 31, 1985, its sources of electric energy for 1985, and certain corresponding information presently projected for 1986:

	Generating Capability — KW(1)		Generation — KWH (millions)	
	Actual December 31, 1985	Projected December 31, 1986	Actual 1985	Projected 1986
<u>Source</u>				
Coal.....	6,603,000	6,526,000	27,619	23,247
Nuclear (2)	6,085,000	7,170,000	33,700	39,817
Hydro and other	2,051,000	2,051,000	1,175	1,727
Total (2)	<u>14,739,000</u>	<u>15,747,000</u>	62,494	64,791
Less: Catawba Buyers ownership			3,827	8,237
Plus: purchases from Catawba Buyers....			3,769	7,863
Purchased power and net interchange....			<u>(1,742)</u>	<u>(1,666)</u>
Total			<u>60,694</u>	<u>62,751</u>

DUKE POWER COMPANY

PART I.

Item 1. *Business.*

Duke Power Company (the Company) is engaged in the generation, transmission, distribution and sale of electric energy in the central portion of North Carolina and the western portion of South Carolina, comprising the area in both States known as the Piedmont Carolinas. Its service area, approximately two-thirds of which lies in North Carolina, covers about 20,000 square miles with an estimated population of 4,400,000 and includes a number of cities, of which the largest are Charlotte, Greensboro, Winston-Salem and Durham in North Carolina and Greenville, Spartanburg and Anderson in South Carolina. During 1986, the Company's electric revenues amounted to approximately \$3.4 billion, of which about 70% was derived from North Carolina and 30% from South Carolina. The Company ranks seventh in the United States among investor-owned utilities in kilowatt-hour sales. Its executive offices are located in the Power Building, 422 South Church Street, Charlotte, North Carolina 28242 (Telephone No. 704-373-4011).

Service Area

The Company supplies electric service directly to approximately 1,483,000 retail customers in more than 200 cities, towns and unincorporated communities in North Carolina and South Carolina. Electricity is sold through contractual arrangements to North Carolina Municipal Power Agency Number 1 (NCMPA), North Carolina Electric Membership Corporation (NCEMC), Saluda River Electric Cooperative Inc. (Saluda) and Piedmont Municipal Power Agency (PMPA), each of which has purchased from the Company portions of the Catawba Nuclear Station (collectively, the Catawba Joint Owners). All constituent entities of the Catawba Joint Owners were formerly wholesale municipal or cooperative customers of the Company. Electricity is also sold at wholesale to 9 other incorporated municipalities and to several private utilities. The Company renders electric service in a total of 56 counties and is the principal supplier of electric energy in 44 of these counties.

The Company's service area is undergoing increasingly diversified industrial development. The textile, tobacco, furniture and chemical industries are of major significance to the economy of the area, and other industrial activity includes the manufacture of metal products, paper and allied products, food products and various other light and heavy manufacturing and service businesses. The largest industry served by the Company is the textile industry, which accounted for approximately \$472 million of the Company's revenues for 1986, representing 14% of electric revenues and 44% of electric industrial revenues.

Energy Requirements and Capability

The following table sets forth the Company's generating capability at December 31, 1986, its sources of electric energy for 1986, and certain corresponding information presently projected for 1987:

Source	Generating Capability — KW(a)		Generation — KWH (millions)	
	Actual December 31, 1986	Projected December 31, 1987	Actual 1986	Projected 1987
Coal.....	6,393,000	6,522,000	30,249	19,977
Nuclear (b).....	7,170,000	7,170,000	35,044	45,461
Hydro and other.....	2,051,000	2,051,000	785	1,701
Total (b).....	<u>15,614,000</u>	<u>15,743,000</u>	66,078	67,139
Less: Catawba Joint Owners' share.....			6,261	12,579
Plus: purchases from Catawba Joint Owners.....			5,953	11,421
Purchased power and net interchange.....			(822)	(528)
Total.....			<u>64,948</u>	<u>65,453</u>

(footnotes on next page)

comprising the area in both States known as the Piedmont Carolinas. Its service area, approximately two-thirds of which lies in North Carolina, covers about 20,000 square miles with an estimated population of 4,500,000 and includes a number of cities, of which the largest are Charlotte, Greensboro, Winston-Salem and Durham in North Carolina and Greenville, Spartanburg and Anderson in South Carolina. During 1987, the Company's electric revenues amounted to approximately \$3.7 billion, of which about 70% was derived from North Carolina and 30% from South Carolina. The Company ranks seventh in the United States among investor-owned utilities in kilowatt-hour sales. Its executive offices are located in the Power Building, 422 South Church Street, Charlotte, North Carolina 28242 (Telephone No. 704-373-4011).

Service Area

The Company supplies electric service directly to approximately 1,521,000 retail customers in more than 200 cities, towns and unincorporated communities in North Carolina and South Carolina. Electricity is sold through contractual arrangements to North Carolina Municipal Power Agency Number 1 (NCMPA), North Carolina Electric Membership Corporation (NCEMC), Saluda River Electric Cooperative Inc. (Saluda) and Piedmont Municipal Power Agency (PMPA), each of which has purchased from the Company portions of the Catawba Nuclear Station (collectively, the Catawba Joint Owners). All constituent entities of the Catawba Joint Owners were formerly wholesale municipal or cooperative customers of the Company. Electricity is also sold at wholesale to 9 other incorporated municipalities and to several private utilities. The Company renders electric service in a total of 56 counties and is the principal supplier of electric energy in 44 of these counties.

The Company's service area is undergoing increasingly diversified industrial development. The textile, tobacco, furniture and chemical industries are of major significance to the economy of the area, and other industrial activity includes the manufacture of metal products, paper and allied products, food products and various other light and heavy manufacturing and service businesses. The largest industry served by the Company is the textile industry, which accounted for approximately \$511 million of the Company's revenues for 1987, representing 14% of electric revenues and 44% of electric industrial revenues.

Energy Requirements and Capability

The following table sets forth the Company's generating capability at December 31, 1987, its sources of electric energy for 1987, and certain information presently projected for 1988:

Generation-KWH
Generating Capability-KW(a) (millions)

Stockholder Matters	14
6. Selected Financial Data	15
7. Management's Discussion and Analysis of Financial Condition and Results of Operations	16
8. Financial Statements and Supplementary Data	21
9. Changes in and Disagreements with Accountants on Accounting and Financial Disclosure	45

Part III.

10. Directors and Executive Officers of the Registrant	45
11. Executive Compensation	45
12. Security Ownership of Certain Beneficial Owners and Management	45
13. Certain Relationships and Related Transactions	45

Part IV.

14. Exhibits, Financial Statement Schedules, and Reports on Form 8-K	45
Signatures	47
Exhibit Index	48

[HARDCOPY PAGE 1]

DUKE POWER COMPANY

PART I.

ITEM 1. BUSINESS.

Duke Power Company (the Company) is engaged in the generation, transmission, distribution and sale of electric energy in the central portion of North Carolina and the western portion of South Carolina, comprising the area in both States known as the Piedmont Carolinas. Its service area, approximately two-thirds of which lies in North Carolina, covers about 20,000 square miles with an estimated population of 4,500,000 and includes a number of cities, of which the largest are Charlotte, Greensboro, Winston-Salem and Durham in North Carolina and Greenville, Spartanburg and Anderson in South Carolina. During 1988,

the Company's electric revenues amounted to approximately \$3.6 billion, of which about 70% was derived from North Carolina and 30% from South Carolina. The Company ranks seventh in the United States among investor-owned utilities in kilowatt-hour sales. Its executive offices are located in the Power Building, 422 South Church Street, Charlotte, North Carolina 28242 (Telephone No. 704-373-4011). In November 1988, the Company purchased all of the stock of Nantahala Power and Light Company. The statistics presented herein do not include this subsidiary. (See "Energy Requirements and Capability.")

Service Area

The Company supplies electric service directly to approximately 1,565,000 retail customers in more than 200 cities, towns and unincorporated communities in North Carolina and South Carolina. Electricity is sold through contractual arrangements to North Carolina Municipal Power Agency Number 1 (NCMPA), North Carolina Electric Membership Corporation (NCEMC), Saluda River Electric Cooperative Inc. (Saluda) and Piedmont Municipal Power Agency (PMPA), each of which has purchased from the Company portions of the Catawba Nuclear Station (collectively, the Other Catawba Joint Owners). All constituent entities of the Other Catawba Joint Owners were formerly wholesale municipal or cooperative customers of the Company. Electricity is also sold at wholesale to 9 other incorporated municipalities and to several private utilities. The Company renders electric service in a total of 56 counties and is the principal supplier of electric energy in 44 of these counties.

The Company's service area is undergoing increasingly diversified industrial development. The textile, tobacco, furniture and chemical industries are of major significance to the economy of the area, and other industrial activity includes the manufacture of metal products, paper and allied products, food products and various other light and heavy manufacturing and service businesses. The largest industry served by the Company is the textile industry, which accounted for approximately \$495 million of the Company's revenues for 1988, representing 14% of electric revenues and 43% of electric industrial revenues.

Energy Requirements and Capability

The following table sets forth the Company's generating capability at December 31, 1988, its sources of electric energy for 1988, and certain information presently projected for 1989:

Generation	
Generating Capability-	KWH
KW (a)	(millions)
Actual	Projected

PART II.

- 5. Market for the Registrant's Common Equity and Related Stockholder Matters 15
- 6. Selected Financial Data 16
- 7. Management's Discussion and Analysis of Financial Condition and Results of Operations 17
- 8. Financial Statements and Supplementary Data 22
- 9. Changes in and Disagreements with Accountants on Accounting and Financial Disclosure 45

PART III.

- 10. Directors and Executive Officers of the Registrant 45
- 11. Executive Compensation 45
- 12. Security Ownership of Certain Beneficial Owners and Management 45
- 13. Certain Relationships and Related Transactions 45

PART IV.

- 14. Exhibits, Financial Statement Schedules, and Reports on Form 8-K 45
- Signatures 47
- Exhibit Index 48

[HARDCOPY PAGE 1]

DUKE POWER COMPANY

PART I.

ITEM 1. BUSINESS.

Duke Power Company (the Company) is engaged in the generation, transmission, distribution and sale of electric energy in the central portion of North Carolina and the western portion of South Carolina, comprising the area in both States known as the Piedmont Carolinas. Its service area, approximately two-thirds of which lies in North Carolina, covers about 20,000 square miles with an estimated population of 4,500,000 and includes a number of cities, of which the largest are Charlotte, Greensboro, Winston-Salem and Durham in North Carolina and Greenville, Spartanburg and Anderson in South Carolina. During 1989, the Company's electric revenues amounted to approximately \$3.6 billion, of which about 70% was derived from North Carolina and 30% from South Carolina. The Company ranks seventh in the United States among investor-owned utilities in kilowatt-hour sales. Its executive offices

ITEM I. Business

Duke Power Company (the Company) is engaged in the generation, transmission, distribution and sale of electric energy in the central portion of North Carolina and the western portion of South Carolina, comprising the area in both States known as the Piedmont Carolinas. Its service area, approximately two-thirds of which lies in North Carolina, covers about 20,000 square miles with an estimated population of 4,500,000 and includes a number of cities, of which the largest are Charlotte, Greensboro, Winston-Salem and Durham in North Carolina and Greenville, Spartanburg and Anderson in South Carolina. During 1990, the Company's electric revenues amounted to approximately \$3.7 billion, of which about 70% was derived from North Carolina and 30% from South Carolina. The Company ranks seventh in the United States among investor-owned utilities in kilowatt-hour sales. Its executive offices are located in the Power Building, 422 South Church Street, Charlotte, North Carolina 28242 (Telephone No. 704-373-4011). The statistics presented herein do not include information relating to the Company's utility subsidiary, Nantahala Power and Light Company, unless otherwise indicated. (See "Energy Requirements and Capability.")

Service Area

The Company supplies electric service directly to approximately 1,632,000 retail customers in more than 200 cities, towns and unincorporated communities in North Carolina and South Carolina. Electricity is sold through contractual arrangements to North Carolina Municipal Power Agency Number 1 (NCMPA), North Carolina Electric Membership Corporation (NCEMC), Saluda River Electric Cooperative Inc. (Saluda) and Piedmont Municipal Power Agency (PMPA), each of which has purchased from the Company portions of the Catawba Nuclear Station (collectively, the Other Catawba Joint Owners). All constituent entities of the Other Catawba Joint Owners were formerly wholesale municipal or cooperative customers of the Company. Electricity is also sold at wholesale to 9 other incorporated municipalities and to several private utilities. The Company renders electric service in a total of 56 counties and is the principal supplier of electric energy in 44 of these counties.

The Company's service area is undergoing increasingly diversified industrial development. The textile, tobacco, furniture and chemical industries are of major significance to the economy of the area, and other industrial activity includes the manufacture of metal products, paper and allied products, food products and various other light and heavy manufacturing and service businesses. The largest industry served by the Company is the textile industry, which accounted for approximately \$476 million of the Company's revenues for 1990, representing 13% of electric revenues and 42% of electric industrial revenues.

Accounting and Financial Disclosure 43

PART III.

Item 10. Directors and Executive Officers of the
Registrant 43

Item 11. Executive Compensation 43

Item 12. Security Ownership of Certain Beneficial Owners
and Management 43

Item 13. Certain Relationships and Related Transactions 43

PART IV.

Item 14. Exhibits, Consolidated Financial Statement
Schedules, and Reports on Form 8-K 43

Signatures 45

Exhibit Index 46

[HARDCOPY PAGE 1]

DUKE POWER COMPANY

PART I.

Item I. Business.

Duke Power Company (the Company) is engaged in the generation, transmission, distribution and sale of electric energy in the central portion of North Carolina and the western portion of South Carolina, comprising the area in both States known as the Piedmont Carolinas. Its service area, approximately two-thirds of which lies in North Carolina, covers about 20,000 square miles with an estimated population of 4,800,000 and includes a number of cities, of which the largest are Charlotte, Greensboro, Winston-Salem and Durham in North Carolina and Greenville, Spartanburg and Anderson in South Carolina. During 1992, the Company's electric revenues amounted to approximately \$4.0 billion, of which about 70% was derived from North Carolina and about 30% from South Carolina. The Company ranks seventh in the United States among investor-owned utilities in kilowatt-hour sales. Its executive offices are located in the Power Building, 422 South Church Street, Charlotte, North Carolina 28242-0001 (Telephone No. 704-594-0887). The statistics

9	Changes in and Disagreements with Accountants on Accounting and Financial Disclosure	45
PART III		
10	Directors and Executive Officers of the Registrant	45
11	Executive Compensation	45
12	Security Ownership of Certain Beneficial Owners and Management	45
13	Certain Relationships and Related Transactions	45

PART IV		
14	Exhibits, Consolidated Financial Statement Schedules, and Reports on Form 8-K	45
	Signatures	47
	Exhibit Index	48

[HARDCOPY PAGE 1]

PART I.

ITEM 1. BUSINESS.

Duke Power Company (the Company) is engaged in the generation, transmission, distribution and sale of electric energy in the central portion of North Carolina and the western portion of South Carolina, comprising the area in both States known as the Piedmont Carolinas. Its service area, approximately two-thirds of which lies in North Carolina, covers about 20,000 square miles with an estimated population of 4.8 million and includes a number of cities, of which the largest are Charlotte, Greensboro, Winston-Salem and Durham in North Carolina and Greenville and Spartanburg in South Carolina. During 1993, the Company's electric revenues amounted to approximately \$4.3 billion, of which about 70 percent was derived from North Carolina and about 30 percent from South Carolina. The Company ranks sixth in the United States among investor-owned utilities in kilowatt-hour sales. Its executive offices are located in the Power Building, 422 South Church Street, Charlotte, North Carolina 28242-0001 (Telephone No.

Corporate Cash Management Policy

Applicability: Applies to Enterprise
Originator: Treasury - Corporate Cash Management
Approval: Senior Vice President & Treasurer

Effective Date: 04/01/2006
Revision Date: 06/01/2007
Reissue Date: 01/01/2008

Statement of Purpose and Philosophy

The purpose of this Policy is to confirm Duke Energy's Cash Management Objectives and to define the responsibilities and the authority within the Corporation for achieving those objectives.

Policy Expectations

This policy applies to the consolidated Corporation, which consists of Duke Energy Corporation and all of its consolidated or controlled subsidiaries and affiliates. Cash is a critical asset of the Corporation. It is the policy of Duke Energy that all cash assets of the Corporation be properly safeguarded and then managed to maximize value.

Accountability: Roles and Responsibilities

Duke Energy's Corporate Cash Management Group (Corporate Cash Management) is responsible for achieving Duke Energy's Cash Management Objectives which are as follows:

- Provide daily liquidity
- Safeguard cash assets
- Maximize the value of cash assets
- Minimize short-term interest expense
- Maximize short-term interest income
- Provide cost effective banking services

For those entities with non-Duke shareholders, Corporate Cash Management recognizes its fiduciary responsibilities and will optimize the cash assets of those entities using the above objectives. Corporate Cash Management is responsible for executing or directing all cash management activities within the consolidated Corporation.

Cash Management Activities

Cash management activities include:

- Prepare reliable cash forecasts
- Set cash position accurately and timely
- Consolidate cash, where appropriate (taking into consideration legal, regulatory, tax and any other appropriate considerations)
- Manage movement of funds through the money pool arrangement
- Borrow needed funds at attractive rates
- Maximize return on available cash within approved guidelines

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Memo

To: / Location: Duke Energy / State Tax Files

From: / Location: STC - Raleigh

Date: September 13, 2000

Subject: Inclusion of Gross Proceeds in North Carolina and South Carolina Sales Factors

The purpose of this memorandum is to determine the sales apportionment factors in North Carolina and South Carolina, under the circumstances described below, for Duke Energy Corporation and Duke Capital Corporation ("Duke").

Facts and Background Information

Like many taxpayers, Duke invests its liquid assets daily in a number of short-term securities (e.g. overnight repurchase agreements, certificates of deposit, etc.) throughout the year. As a result of these transactions, Duke has the opportunity in certain states to include the entire gross proceeds (including the return of principal from its overnight investments) in its sales factor denominators. The purpose of this memo is to analyze Duke's ability to take this position in both North Carolina and South Carolina.

Issue

The issue presented herein is the correct computation of Duke's North Carolina and South Carolina sales factors. More specifically, we must address whether the entire gross proceeds or simply the net gain from the sale or maturity of securities held by Duke should be included in the denominator of its North Carolina and South Carolina gross receipts factors. This issue may be better presented using an illustration. For example, assume Duke invests \$100 in an overnight repurchase agreement and earns \$5 in interest. Should Duke include \$105 (i.e., its gross proceeds) or only \$5 (i.e., its net gain) in the denominator of its North Carolina and South Carolina gross receipts factors?

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Conclusion

North Carolina

It is our understanding that Duke Energy is currently under audit by the Internal Revenue Service ("IRS"). As a result, North Carolina corporate income tax returns that would normally be closed to amendments may subsequently be opened as a result of an RAR expected to be issued soon by the IRS. For any years that may be reopened as a result of the federal corporate income tax audit, Duke Energy has a similar position under prior North Carolina law as in South Carolina. As a result of changes enacted on July 14, 2000, however, North Carolina law now requires only the net gain from investment activities to be included in the denominator of a taxpayer's gross receipts factor. Duke Energy, therefore, would be required to include only the net gain (not the gross receipts) from its investment activities in its North Carolina sales factor for transactions occurring on or after this date.

South Carolina

Duke has a position to include the gross proceeds of short-term investments in the denominator of its South Carolina single factor apportionment formula. Such a position, however, may be challenged by the South Carolina Department of Revenue on the grounds that inclusion of the gross proceeds greatly distorts Duke's South Carolina gross receipts factor in the State.

Analysis

The following is an analysis of the applicable law of North Carolina and South Carolina to the facts presented above.

North Carolina

Both excluded corporations and public utilities other than those for which apportionment provisions are specifically provided apportion their business income to North Carolina through the use of a single-factor gross receipts apportionment formula. *See N.C. Gen. Stat. § 105-130.4(a)(4)*. A public utility is defined as any corporation that (1) is subject to the control of either the North Carolina Utilities Commission, the Federal Communications Commission, the Interstate Commerce Commission, the Federal Power Commission, or the Federal Aviation Agency and (2) owns or operates for public use any plant, equipment, property, franchise, or license for the transmission of communications, the transportation of goods or persons, or the production, storage, transmission, sale, delivery or furnishing of electricity, water, steam, oil, oil products, or gas. *N.C. Gen. Stat. § 105-130.4(a)(6)*. Based upon these definitions and

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PRICEWATERHOUSECOOPERS

statutory provisions, Duke Energy apportions its net income to North Carolina using a single-factor gross receipts formula.

Under prior North Carolina law, the term 'sales' was defined to include "all gross receipts of the corporation except receipts from any casual sale of property" and except for certain receipts allocated under other provisions of state law. It was the Department of Revenue's administrative position, however, that a taxpayer was required to include in its sales factor only the net gain on the sale or maturity of securities. A Department of Revenue administrative rule, moreover, provides, in part as follows:

... Likewise, the "proceeds" from "rollover" of working capital invested in certificates of deposits, money market accounts, etc., on a short-term temporary basis are not considered gross receipts for sales factor purposes. The earnings of such investments whether labeled as gains or interest will be the only amounts includable in the sales factor.

Admin. Release (Apportionment Factors) §(1)(C)(2) (N.C. Dept. of Rev., Jan. 1, 1989).

The Department also secured a ruling from the North Carolina Attorney General in 1983 on this issue. In this memorandum the Attorney General opines that a taxpayer should include only the net gains from its investment activities in its North Carolina gross receipts factor. Despite the Department's interpretation and administrative position and the 1983 opinion of the Attorney General, Duke would have a position to argue that it should include in the denominator of its North Carolina sales factor the entire gross receipts from the sale or maturity of its investments based on a strict interpretation of the law prior to the change in the law occurring on July 14, 2000.

The North Carolina General Assembly, however, recently passed HB 1559, a bill signed into law by Governor Jim Hunt on July 14, 2000, as Session Law 2000-126. Although the introductory language of the bill states its intent is "to clarify the sales factor for determination of state corporate income and franchise tax," the language of the Act requires a multistate corporation to include in the denominator of its North Carolina sales factor only the net gain from the sale or maturity of securities and not the rolled-over capital or return of principal. While this amendment was meant to codify the administrative practice of the Department of Revenue, the language of the Act appears to be a substantive change in North Carolina law. Under the new law, North Carolina statutes specifically provide that the "portion of receipts realized from the sale or maturity of securities or other obligations that represents a return of principal" is not included in the definition of the term 'sales.' *N.C. Gen. Stat. § 105-130.4(a)(7)(d).*

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Based on the statutory and administrative provisions analyzed above, it appears that Duke would have a position to argue that its North Carolina sales factor should include the gross receipts from the sale or maturity of investments prior to July 14, 2000, the effective date of Session Law 2000-126. Subsequent to this date, however, Duke would probably only be allowed to include the net gain (not the entire gross proceeds) from its investment activities in its North Carolina sales factor. This conclusion is based both on the amended language of N.C. Gen. Stat. § 105-130.4(a)(7) and the administrative regulation.

South Carolina

South Carolina law provides, in part, as follows:

If the principal profits or income of a taxpayer are derived from sources other than those described in Section 12-6-2250 or Section 12-6-2310, the taxpayer shall apportion its remaining net income 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.

S.C. Code Ann. § 12-6-2290. A taxpayer whose principal business is manufacturing or any form of collecting, buying, assembling, or processing goods and materials within the State, or selling, distributing, or dealing in tangible personal property within the State, is required to make returns and pay annually an income tax which includes its income apportioned to South Carolina. Its income apportioned to the State is determined by a three-factor apportionment formula with a double-weighted sales factor. *S.C. Code Ann. § 12-6-2250.*

Additionally, South Carolina has special provisions for taxpayers who operations include railroad companies, motor carriers of property and passengers, telephone service companies, pipeline companies, airline companies and shipping lines. Their income is apportioned to the state through unique apportionment formulas. *S.C. Code Ann. § 12-6-2310.*

For companies whose operations are not included in one of these operations, the State utilizes a single factor gross receipts apportionment formula. For these taxpayers, South Carolina law requires the use of a formula in which the gross proceeds from the short-term investments are included in the Taxpayer's gross receipts formula unless a specific exclusion applies.

South Carolina's regulations are silent as to specific situations in which certain receipts are excluded from the single factor apportionment formula. Therefore, this analysis of existing South Carolina statutes, regulations, and related case law and rulings does not indicate any specific exclusions or limitations that would prevent the inclusion of gross receipts for the activities of the treasury department.

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For taxpayers employing the standard three-factor, double-weighted sales apportionment formula, the South Carolina Department of Revenue (the "Department") has held that sales of tangible and intangible business connected property should be included to the extent that the sales result in a gain ("net gain"). *S.C. Comm. Decision I-D 309* (S.C. Dept. of Rev., June 30, 1982). Additional research did not provide any support that the sales factor should use gross receipts versus net gain from the sale of short-term investments. Taxpayers, however, should be aware that for tax years beginning after 1995, South Carolina § 12-6-2280(B)(2) was updated to include sales of intangible personal property and from service to the extent the income-producing activity is performed in the state. Under prior law, the State used the greater proportion test and did not provide for the attribution of sales of services. Since *Decision I-D 309* was decided prior to the effective date of S.C. Code Ann. § 12-6-2280(B)(2), there may be an opportunity for the State to revisit the treatment of gross receipts from the sale of intangible property in the three-factor apportionment formula.

Based on the above law and analysis, it appears that Duke would be required to apportion its income to South Carolina using a single-factor gross receipts apportionment formula, since it is neither in the business of "manufacturing or any form of collecting, buying, assembling, or processing goods and materials within the State, or selling, distributing, or dealing in tangible personal property within the State" nor a specially treated business. *See S.C. Code Ann. §§ 12-6-2250, -2310*. The Department of Revenue's decision in *I-D 309*, therefore, should not apply to Duke. Thus, there is a position for Duke to include the gross proceeds from short-term investments in the denominator of its South Carolina single factor apportionment formula. It should be noted, however, that our experience has been that the South Carolina Department of Revenue may challenge such a position on examination on the grounds that inclusion of the gross proceeds in a taxpayer's sales factor denominator grossly distorts its activities in the State.

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Memo

To: / Location: Duke Energy / State Tax Files

From: / Location: STC - Raleigh

Date: November 20, 2000

Subject: Inclusion of Gross Proceeds in North Carolina and South Carolina Sales Factors

The purpose of this memorandum is to determine the sales apportionment factors in North Carolina and South Carolina, under the circumstances described below, for Duke Energy Corporation ("Duke" or "Duke Energy").

Facts and Background Information

Like many taxpayers, Duke Energy invests its liquid assets daily in a number of short-term securities (e.g. overnight repurchase agreements, certificates of deposit, etc.) throughout the year. As a result of these transactions, Duke has the opportunity in certain states to include the entire gross proceeds (including the return of principal from its overnight investments) in its sales factor denominators. The purpose of this memo is to analyze Duke Energy's ability to take this position in both North Carolina and South Carolina.

Issue.

The issue presented herein is the correct computation of Duke Energy's North Carolina and South Carolina sales factors. More specifically, what must be addressed is whether the entire gross proceeds or simply the net gain from the sale or maturity of securities held by Duke Energy should be included in the denominator of its North Carolina and South Carolina gross receipts factors. This issue may be better presented using an illustration. For example, assume Duke Energy invests \$100 in an overnight repurchase agreement and earns \$5 in interest. Should Duke Energy include \$105 (i.e., its gross proceeds) or only \$5 (i.e., its net gain) in the denominator of its North Carolina and South Carolina gross receipts factors?

Conclusion

It is our understanding that Duke Energy is currently under audit by the Internal Revenue Service. As a result, North Carolina corporate income tax returns that would normally be



closed to amendments may subsequently be opened as a result of a Revenue Agent Report ("RAR") expected to be issued soon by the Internal Revenue Service ("IRS"). For any years that may be reopened as a result of the federal corporation income tax audit, Duke Energy has a position under prior North Carolina law to include the gross proceeds of short-term investments in the denominator of its North Carolina gross receipts factor. As a result of changes enacted on July 14, 2000, however, North Carolina law currently requires that only the net gain from investment activities be included in the taxpayer's gross receipts factor. A copy of this legislation is attached hereto. Duke Energy, therefore, would be allowed to include only the net gain (not the gross receipts) from its investment activities in the denominator of its North Carolina gross receipts factor for transactions occurring on or after that date.

Duke Energy has a similar position in South Carolina; this position, however, may be challenged by the South Carolina Department of Revenue on several grounds, including an argument that inclusion of the gross proceeds (rather than the net gain) in the denominator greatly distorts Duke Energy's South Carolina gross receipts factor.

Analysis

The following is an analysis of the applicable law of North Carolina and South Carolina to the facts and background information provided above.

North Carolina

Generally

Both excluded corporations and public utilities, other than those for which apportionment provisions are specifically provided, apportion their business income to North Carolina by multiplying their income by their North Carolina sales factor. See *N.C. Gen. Stat. §§ 105-130.4(a)(4), (6), -130.4(l), -130.4(r)*. A public utility is defined as any corporation that (1) is subject to the control of either the North Carolina Utilities Commission, the Federal Communications Commission, the Interstate Commerce Commission, the Federal Power Commission, or the Federal Aviation Agency and (2) owns or operates for public use any plant, equipment, property, franchise, or license for the transmission of communications, the transportation of goods or persons, or the production, storage, transmission, sale, delivery or furnishing of electricity, water, steam, oil, oil products, or gas. *N.C. Gen. Stat. § 105-130.4(a)(6)*. Based upon these definitions and statutory provisions, Duke Energy should apportion its net income to North Carolina using a single-factor gross receipts formula.



North Carolina Sales Factor – Prior Law and Attorney General's Opinion

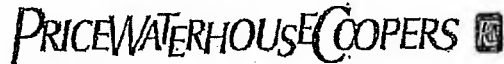
The North Carolina sales factor is a fraction, the numerator of which is the total sales of the taxpayer in the State during the year and the denominator of which is the taxpayer's total sales everywhere during the year. *N.C. Gen. Stat. § 105-130.4(1)(1)*. North Carolina regulations define the term "sales" generally to include gross receipts derived by a taxpayer from business transactions or activities which are incidental to its principal business activity and which are includable in business income. *N.C. Admin. Code* tit. 17, § 5C.1002(a). As applied to a taxpayer engaged in the sale, assignment, or licensing of intangible personal property, such as patents and copyrights, the term includes the gross receipts from these activities. *N.C. Admin. Code* tit. 17, § 5C.1003(4).

Prior to July 14, 2000, North Carolina law defined the term 'sales' to include "all gross receipts of the corporation except receipts from any casual sale of property" and except for nonbusiness income allocated under other provisions of state law. *N.C. Gen. Stat. § 105-130.4(a)(7)*. Prior to this date, it was the Department of Revenue's administrative position, however, that a taxpayer was required to include in its sales factor only the net gain (not the gross receipts) on the sale or maturity of securities. A North Carolina Department of Revenue administrative rule, moreover, provides in part as follows:

... Likewise, the "proceeds" from "rollover" of working capital invested in certificates of deposits, money market accounts, etc., on a short-term temporary basis are not considered gross receipts for sales factor purposes. The earnings of such investments whether labeled as gains or interest will be the only amounts includable in the sales factor.

Admin. Release (Apportionment Factors) §(1)(C)(2) (N.C. Dept. of Rev., Jan. 1, 1989).

The Department also secured a ruling from the North Carolina Attorney General in 1983 on this issue, a copy of which is attached hereto. In this memorandum, a taxpayer commercially domiciled in New York placed substantial sums of money in short-term investments, principally certificates of deposit. Upon maturity, the funds received were immediately reinvested in identical investments. In determining the amount of income apportionable to North Carolina, the taxpayer included in the sales factor the full face amount of the certificates. The Attorney General concluded that the certificates of deposit created a creditor-debtor relationship between the taxpayer and the financial institution, since the owner of the deposit (the taxpayer) had, in essence, made a loan to the bank. Referring to section 61 of the Internal Revenue Code, the Attorney General opined "that the reinvestment of funds derived from the maturity of a certificate of deposit into another similar instrument ... does not constitute an accession to wealth, gain, or other form of 'income' to be included in the sales



factor component of the apportionment fraction.” Since 1983, therefore, it has been the opinion of the Attorney General that a taxpayer should include only the net gains from its investment activities in the denominator of its North Carolina sales factor.

North Carolina Sales Factor – Recent Legislation

The North Carolina General Assembly recently passed HB 1559, a bill signed into law by Governor Jim Hunt on July 14, 2000, as Session Law 2000-126. Although the introductory language of the bill states its intent is “to clarify the sales factor for determination of state corporate income and franchise tax,” the language of the Act actually amends the definition of ‘sales’ provided for by North Carolina law. See *N.C. Gen. Stat. § 105-130.4(a)(7)*. Although apparently intended to codify the administrative practice of the Department of Revenue, the language of the Act appears to be a substantive change in North Carolina law. Under the new law, North Carolina statutes specifically provide that the “portion of receipts realized from the sale or maturity of securities or other obligations that represents a return of principal” is not included in the definition of the term ‘sales.’ *N.C. Gen. Stat. § 105-130.4(a)(7)(d)*. Under the terms of this legislation, therefore, state law now apparently requires a multistate corporation to include in the denominator of its North Carolina sales factor only the net gain from the sale or maturity of securities and not the rolled-over capital or return of principal.

Based on the statutory and administrative provisions analyzed above, it appears that Duke Energy would have a position to argue that its North Carolina sales factor should include the gross receipts from the sale or maturity of investments prior to July 14, 2000, the effective date of Session Law 2000-126, based on a strict interpretation of this prior law. In accord with recent legislation, the Department of Revenue’s administrative position, and the Attorney General’s opinion, however, Duke Energy would probably only be allowed to include the net gain (not the entire gross proceeds) from its investment activities in its North Carolina sales factor subsequent to this date. These conclusions are based both on the amended language of *N.C. Gen. Stat. § 105-130.4(a)(7)* and the administrative regulations cited above.

Sourcing of Receipts under North Carolina Law

A taxpayer’s receipts from intangible property, such as dividends and interest, are considered to be in North Carolina if they are received from sources within the State. *N.C. Gen. Stat. § 105-130.4(1)(3)(b)*. Based on the sourcing rule provided in North Carolina law, Duke Energy should include in its North Carolina gross receipts factor only those receipts from entities commercially domiciled in the State. Essentially, income from intangible property is included in the numerator of Duke Energy’s North Carolina gross receipts factor if those receipts are from payors commercially domiciled in the State. If derived from a non-North Carolina source, however, those receipts should be sourced outside the State. In such a situation, the gross receipts would be included in the denominator of Duke Energy’s gross receipts factor,



but not its numerator. Finally, if the state source is unknown, then the income should be sourced to the commercial domicile of the taxpayer, Duke Energy.

North Carolina Statute of Limitations

North Carolina law provides generally that corporate income and franchise tax returns are due on or before the fifteenth (15th) day of the third month following the close of the taxpayer's fiscal year. *N.C. Gen. Stat. §§ 105-130.17(b), -122(a)*. If the amount of taxable income of a corporation subject to tax in North Carolina is changed by the IRS, however, the taxpayer is required to file a return reflecting that amendment within two (2) years after receipt of the federal report. *N.C. Gen. Stat. § 105-130.20*. When the Department of Revenue receives an amended return reflecting changes made in the net income of a corporation, the Secretary may assess tax or additional tax based on the federal changes and may also make any other adjustments based on any facts or evidence brought to his attention whether or not such facts or evidence were considered by the IRS. This is the case regardless whether an adjustment has been made previously for the taxable year affected by the federal changes.

An overpayment of North Carolina corporate income or franchise tax must be discovered by the Department of Revenue or requested by the taxpayer within three (3) years after the date set by the statute for the filing of a return or within six (6) months after the payment of the tax alleged to be an overpayment, whichever is later. *N.C. Gen. Stat. §§ 105-266.1(a), -266(c)(1)*. If a taxpayer files a return that reflects a federal determination, and the return is filed within the required time, the period in which the refund must be demanded or discovered is one year after the return reflecting the federal determination is filed or three (3) years after the original return was filed or due to be filed, whichever is later. *N.C. Gen. Stat. § 105-266(c)(4)*.

It is our understanding that Duke Energy's federal tax returns for the years 1986 through 1998 are currently being audited by the Internal Revenue Service. Based on the above statutory provisions, any amendments made at the federal level and reported on an RAR would be considered "federal determinations" for North Carolina corporate income tax purposes. See *N.C. Gen. Stat. § 105-130.20*. Corrections to Duke Energy's taxable income made at the federal level, therefore, should allow Duke Energy to file amended North Carolina corporate income tax returns for these same years.

South Carolina

Generally

A taxpayer whose principal business is manufacturing or any form of collecting, buying, assembling, or processing goods and materials within the State, or selling, distributing, or dealing in tangible personal property within the State, is required to apportion its income to South Carolina using a three-factor apportionment formula that includes a double-weighted

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sales factor. *S.C. Code Ann. § 12-6-2250*. South Carolina law also includes special provisions for taxpayers who operations include railroad companies, motor carriers of property and passengers, telephone service companies, pipeline companies, airline companies and shipping lines. Their income is apportioned to the state through unique apportionment formulas. *S.C. Code Ann. § 12-6-2310*. For taxpayers whose operations are not engaged in one of these operations, the State utilizes a single factor gross receipts apportionment formula. In this regard, South Carolina law provides, in part, as follows:

If the principal profits or income of a taxpayer are derived from sources other than those described in Section 12-6-2250 or Section 12-6-2310, the taxpayer shall apportion its remaining net income 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.

S.C. Code Ann. § 12-6-2290. Public utilities and electric cooperatives, known generally as public service corporations, are required to compute their South Carolina taxable income using the standard three-factor, double-weighted sales apportionment formula. *See S.C. Code Ann. § 12-6-2290; see also Instructions to Form SC-1120*.

For taxpayers employing the standard three-factor, double-weighted sales apportionment formula, the South Carolina Department of Revenue (the "Department") has held that sales of tangible and intangible business connected property should be included to the extent that the sales result in a gain ("net gain"). *S.C. Comm. Decision I-D 309* (S.C. Dept. of Rev., June 30, 1982). Additional research did not provide any support that the sales factor should use gross receipts, not a taxpayer's net gain, in its sales factor denominator as a result of sales of short-term investments.

Based on the law and analysis above, it appears that Duke Energy should be required to apportion its income to South Carolina using the standard three-factor, double-weighted sales apportionment formula. Moreover, under a literal interpretation of the statutes discussed above, Duke Energy should have a filing position to include the gross receipts from its investment transactions in its sales factor denominator. It should be expected, however, that the South Carolina Department of Revenue will challenge this position based on several grounds, including its holding in *I-D 309*. These challenges are discussed in more detail below.

Duke Energy also has numerous subsidiaries doing business in South Carolina, some of which may be apportioning their income to the state using the single gross receipts factor described above. To those entities, the South Carolina Department of Revenue's decision in *I-D 309*, arguably should not apply. Thus, there is a position for certain subsidiaries of Duke Energy to



include the gross proceeds from short-term investments in the denominator of its South Carolina single factor apportionment formula.

Sourcing of Income in South Carolina

South Carolina law provides that receipts from sales of intangible property are sourced on the basis of the income-producing activity test of UDITPA section 17. *S.C. Code Ann. § 12-6-2280(C)(2)*. State law, however, does not provide rules for assigning interest or royalties from intangible property. It is the position of the South Carolina Department of Revenue, however, that receipts from intangible property are included in the numerator of the sales factor if they are derived from sources within South Carolina. *See Letter* (S.C. Tax Comm., Oct. 17, 1984). Moreover, receipts from intangible property are included in the numerator of the single-factor gross receipts formula if derived from South Carolina sources.

Potential Challenges by S.C. Department of Revenue

Despite the filing position analyzed above, our experience has been that the South Carolina Department of Revenue may challenge such a position on examination on the grounds that inclusion of the gross proceeds in a taxpayer's sales factor denominator grossly distorts its activities in the State. In essence, the Department considers only the interest earned (i.e., net gain) to be gross receipts. The Department's position is routinely supported by three arguments, each of which is discussed below.

The Department's first argument is that to include the return of principal in the denominator of the taxpayer's gross receipts factor distorts the apportionment formula by giving extraordinary weight to transactions that produce little or no income. The Department views this position as one whose abuse is limitless. While there is no case law in South Carolina which directly addresses this filing position, the Department argues it was granted broad authority by the General Assembly to employ any method necessary "to effectuate an equitable allocation and apportionment of a taxpayer's income." *See S.C. Code Ann. § 12-6-2320*. The Department, therefore, continues to look to other jurisdictions for guidance on this issue and routinely cites the decisions in *American Telephone & Telegraph Co. v. Director, Div. of Taxation*, 476 A.2d 800 (N.J. Sup. Ct. 1984) and *Sherwin-Williams Co. v. Johnson*, 989 S.W.2d 710 (Tenn. Ct. App. 1999), analyzed below, as precedence for its position.

The Department will also argue that Multistate Tax Compact ("MTC") regulation IV.18.(C)(3) states that interest received from the mere holding of intangibles is excluded from both the



numerator and denominator of the sales factor.¹ South Carolina often looks both to MTC Regulations and to the regulations and decisions of other jurisdictions for assistance in interpreting statutes and terms not clearly defined by South Carolina law. It is the Department's position that this Regulation² supports its position that the principal returned upon the sale or maturity of securities must be excluded from the denominator of the taxpayer's gross receipts ratio.

The Department's final argument focuses on Commission Decision I-D-309, which is discussed in more detail above. That Decision, in brief, held that sales of tangible and intangible business property are included in the sales ratio only to the extent that the sale results in a gain to the taxpayer. Although this has long been the administrative position of the Department, it was not confirmed until the decision in I-D-309. In this regard, the Department usually cites the South Carolina Court of Appeals' statement in *Lockwood Greene Engineers* for the proposition that the "purpose of the allocation statutes is to provide for imposition of South Carolina income tax 'upon a base which reasonably represents the proportion of the trade or business carried on within' the State." *Lockwood Greene Engineers, Inc. v. South Carolina Tax Comm.*, 361 S.E.2d 346 (S.C. Ct. App. 1987), quoting *Hertz v. South Carolina Tax Comm.*, 142 S.E.2d 445 (S.C. 1965). It is the Department's position that these decisions, along with the court's holding in *Hay v. S.C. Tax Comm.*, 255 S.E.2d 837 (S.C. 1979), require that its long-standing administrative interpretations of a statute be given great weight unless clearly erroneous. See also *Marchant v. Hamilton*, 309 S.E.2d 781 (S.C. 1983); *Ryder Truck Lines, Inc. v. South Carolina Tax Comm.*, 149 S.E.2d 435 (S.C. 1966); *Bowles v. Seminole Rock and Sand Co.*, 325 U.S. 410 (1945).

Case Law from Other Jurisdictions

In *Sherwin-Williams Co. v. Oregon Dept. of Rev.*, 996 P.2d 500 (Ore. Sup. Ct. 2000), the Oregon Supreme Court, in a case similar to the issue presented herein, held that, under the Oregon version of the Uniform Division of Income for Tax Purposes Act (UDITPA), gross receipts from the taxpayer's sales of its working capital investment securities, including the return of its capital, were "sales" subject to inclusion in the calculation of the taxpayer's total sales for purposes of that state's corporate excise tax. The taxpayer in *Sherwin-Williams* was a

¹ It should be noted that, although the state is an associate member of the MTC, South Carolina has not adopted MTC Regulation IV.18.(C)(3).

² Regulation IV.18.(C)(3) states that, where "business income from intangible property cannot readily be attributed to any particular income producing activity of the taxpayer, the income cannot be assigned to the numerator of the sales factor for any state and shall be excluded from the denominator of the sales factor. For example, where business income in the form of dividends received on stock, royalties received on patents or copyrights, or interest received on bonds, debentures, or government securities results from the mere holding of the intangible personal property by the taxpayer, the dividends and interest shall be excluded from the denominator of the sales factor."

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manufacturer of paint and related products operating in Oregon and several other states. Sherwin-Williams managed its working capital needs by, among other things, buying and selling short-term securities. Although its investment activities were carried out in Ohio, both parties agreed that the taxpayer's activities generated business income. The statute at issue in *Sherwin-Williams* defined the term "sales" as "all gross receipts of the taxpayer..." *Ore. Rev. Stat. § 314.610(7)*.³ After considering each party's arguments, the court held both that the taxpayer's receipts from the sale of securities met the definition imposed by Oregon law and that Oregon regulations provided no exclusions. As a result the court upheld the Oregon Tax Court's decision in favor of *Sherwin-Williams*.

Under identical facts for the same taxpayer, the Indiana Tax Court, however, found that Sherwin-Williams was not permitted to include the return of principal from its investment securities in the denominator of its sales factor under the Indiana apportionment formula. *The Sherwin-Williams Co. v. Indiana Dept. of State Rev.*, No. 49T10-9412-TA-00273 (Ind. Tax Ct., Dec. 2, 1996). As it did in Oregon, Sherwin-Williams attempted to include in its Indiana gross receipts both the interest and the principal from the sale of investments it financed with working capital. Sherwin-Williams then attempted to include the gross proceeds in the denominator of its sales factor but not in the numerator, since the sales of the securities occurred outside of Indiana. Similar to the statutory language in Oregon, the Indiana statute as issue defined the sales factor as "a fraction, the numerator of which is the total sales of the taxpayer in this state during the taxable year, and the denominator of which is the total sales of the taxpayer everywhere during the taxable year." *Ind. Code Ann. § 6-3-2-2(e)*. "Sales" were further defined as "all gross receipts of the taxpayer not allocated" under other provisions of Indiana Law. *Ind. Code Ann. § 6-3-1-24*; see also *Ind. Admin. Code* tit. 45, § 3.1-1-50. Administrative regulations further defined sales as "any business income of a corporate taxpayer . . . regardless of its actual source." *Ind. Admin. Code* tit. 45, § 3.1-1-34. The Tax Court, however, held that to include the principal its Indiana gross receipts factor would have distorted its apportionment formula because the taxpayer would have been allowed to rollover the same principal many times as it reinvested in short-term securities.

Sherwin-Williams litigated the same issue in Tennessee as well. See *Sherwin-Williams Co. v. Johnson*, 989 S.W.2d 710 (Tenn. Ct. App. 1999). The Tennessee Court of Appeals agreed with the taxpayer and ruled that, under Tennessee law, "sales" included all gross receipts of the taxpayer not allocated under other provisions of Tennessee law. The court stated that if the words of a statute plainly mean one thing, they cannot be given another meaning by

³ Subsequent to the Department of Revenue's assessment of the taxpayer in *Sherwin-Williams*, the Oregon legislature adopted a new statutory provision which provides that gross receipts arising from the sale, exchange, redemption, or holding of intangible assets are not to be treated as "sales" for purposes of calculating a taxpayer's apportionment formula unless the receipts were derived from the taxpayer's primary business activity. This legislative amendment, however, was not effective for Sherwin-Williams's tax years at issue herein.

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judicial construction. The court, however, held that even though a taxpayer's return of capital from cash investments was statutorily includable in the denominator of the sales factor, the Department properly exercised its discretion to exclude the taxpayer's return of capital from the denominator, since to allow otherwise would not fairly represent the taxpayer's business in the State.

C



Memo

To: / Location: Duke Energy / State Tax Files

From: / Location: STC - Raleigh

Date: December 4, 2000

Subject: Inclusion of Gross Proceeds in North Carolina and South Carolina Sales Factors

The purpose of this memorandum is to determine the sales apportionment factors in North Carolina and South Carolina, under the circumstances described below, for Duke Energy Corporation ("Duke" or "Duke Energy").

Facts and Background Information

Like many taxpayers, Duke Energy invests its liquid assets daily in a number of short-term securities (e.g. overnight repurchase agreements, certificates of deposit, etc.) throughout the year. As a result of these transactions, Duke has the opportunity in certain states to include the entire gross proceeds (including the return of principal from its overnight investments) in its sales factor denominators. The purpose of this memo is to analyze Duke Energy's ability to take this position in both North Carolina and South Carolina.

Issues

The first issue presented herein is the correct computation of Duke Energy's North Carolina and South Carolina sales factors. More specifically, what must be addressed is whether the entire gross proceeds or simply the net gain from the sale or maturity of securities held by Duke Energy should be included in the denominator of its North Carolina and South Carolina gross receipts factors. This issue may be better presented using an illustration. For example, assume Duke Energy invests \$100 in an overnight repurchase agreement and earns \$5 in interest. Should Duke Energy include \$105 (i.e., its gross proceeds) or only \$5 (i.e., its net gain) in the denominator of its North Carolina and South Carolina gross receipts factors?

The second issue for consideration and analysis is the impact of North Carolina and South Carolina state law regarding the statute of limitations on a taxpayer's refund claims.



Conclusion

Duke Energy has a position under prior North Carolina law to include the gross proceeds of short-term investments in the denominator of its North Carolina gross receipts factor. As a result of changes enacted on July 14, 2000, however, North Carolina law currently requires that only the net gain from investment activities be included in the taxpayer's gross receipts factor. A copy of this legislation is attached hereto. Duke Energy, therefore, would be allowed to include only the net gain (not the gross receipts) from its investment activities in the denominator of its North Carolina gross receipts factor for transactions occurring on or after that date. Furthermore, it is our understanding that Duke Energy is currently under audit by the Internal Revenue Service. As a result, North Carolina corporate income tax returns that would normally be closed to amendments may subsequently be opened as a result of a Revenue Agent Report ("RAR") expected to be issued soon by the IRS.

Duke Energy has a similar position in South Carolina; this position, however, may be challenged by the South Carolina Department of Revenue on several grounds, including an argument that inclusion of the gross proceeds (rather than the net gain) in the denominator greatly distorts Duke Energy's South Carolina gross receipts factor. The South Carolina statute of limitations, however, should restrict Duke Energy's ability to claim refunds of overpayment of South Carolina corporate income taxes to returns filed within the past three (3) years.

Analysis

The following is an analysis of the applicable law of North Carolina and South Carolina to the facts and background information provided above.

North Carolina

Generally

Both excluded corporations and public utilities, other than those for which apportionment provisions are specifically provided, apportion their business income to North Carolina by multiplying their income by their North Carolina sales factor. *See N.C. Gen. Stat. §§ 105-130.4(a)(4), (6), -130.4(l), -130.4(r)*. A public utility is defined as any corporation that (1) is subject to the control of either the North Carolina Utilities Commission, the Federal Communications Commission, the Interstate Commerce Commission, the Federal Power Commission, or the Federal Aviation Agency and (2) owns or operates for public use any plant, equipment, property, franchise, or license for the transmission of communications, the transportation of goods or persons, or the production, storage, transmission, sale, delivery or furnishing of electricity, water, steam, oil, oil products, or gas. *N.C. Gen. Stat. § 105-*



130.4(a)(6). Based upon these definitions and statutory provisions, Duke Energy should apportion its net income to North Carolina using a single-factor gross receipts formula.

North Carolina Sales Factor – Prior Law and Attorney General's Opinion

The North Carolina sales factor is a fraction, the numerator of which is the total sales of the taxpayer in the State during the year and the denominator of which is the taxpayer's total sales everywhere during the year. *N.C. Gen. Stat. § 105-130.4(1)(1)*. North Carolina regulations define the term "sales" generally to include gross receipts derived by a taxpayer from business transactions or activities which are incidental to its principal business activity and which are includable in business income. *N.C. Admin. Code* tit. 17, § 5C.1002(a). As applied to a taxpayer engaged in the sale, assignment, or licensing of intangible personal property, such as patents and copyrights, the term includes the gross receipts from these activities. *N.C. Admin. Code* tit. 17, § 5C.1003(4).

Prior to July 14, 2000, North Carolina law defined the term 'sales' to include "all gross receipts of the corporation except receipts from any casual sale of property" and except for nonbusiness income allocated under other provisions of state law. *N.C. Gen. Stat. § 105-130.4(a)(7)*. Prior to this date, it was the Department of Revenue's administrative position, however, that a taxpayer was required to include in its sales factor only the net gain (not the gross receipts) on the sale or maturity of securities. A North Carolina Department of Revenue administrative rule, moreover, provides in part as follows:

... Likewise, the "proceeds" from "rollover" of working capital invested in certificates of deposits, money market accounts, etc., on a short-term temporary basis are not considered gross receipts for sales factor purposes. The earnings of such investments whether labeled as gains or interest will be the only amounts includable in the sales factor.

Admin. Release (Apportionment Factors) §(1)(C)(2) (N.C. Dept. of Rev., Jan. 1, 1989).

The Department also secured an opinion from the North Carolina Attorney General in 1983 on this issue, a copy of which is attached hereto. In this memorandum, a taxpayer commercially domiciled in New York placed substantial sums of money in short-term investments, principally certificates of deposit. Upon maturity, the funds received were immediately reinvested in identical investments. In determining the amount of income apportionable to North Carolina, the taxpayer included in the sales factor the full face amount of the certificates. The Attorney General concluded that the certificates of deposit created a creditor-debtor relationship between the taxpayer and the financial institution, since the owner of the deposit (the taxpayer) had, in essence, made a loan to the bank. Referring to section 61 of the Internal Revenue Code, the Attorney General opined "that the reinvestment of funds derived

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from the maturity of a certificate of deposit into another similar instrument ... does not constitute an accession to wealth, gain, or other form of 'income' to be included in the sales factor component of the apportionment fraction." Since 1983, therefore, it has been the opinion of the Attorney General that a taxpayer should include only the net gains from its investment activities in the denominator of its North Carolina sales factor.

North Carolina Sales Factor -- Recent Legislation

The North Carolina General Assembly recently passed HB 1559, a bill signed into law by Governor Jim Hunt on July 14, 2000, as Session Law 2000-126. Although the introductory language of the bill states its intent is "to clarify the sales factor for determination of state corporate income and franchise tax," the language of the Act actually amends the definition of 'sales' provided for by North Carolina law. See *N.C. Gen. Stat. § 105-130.4(a)(7)*. Although apparently intended to codify the administrative practice of the Department of Revenue, the language of the Act appears to be a substantive change in North Carolina law. Under the new law, North Carolina statutes specifically provide that the "portion of receipts realized from the sale or maturity of securities or other obligations that represents a return of principal" is not included in the definition of the term 'sales.' *N.C. Gen. Stat. § 105-130.4(a)(7)(d)*. Under the terms of this legislation, therefore, state law now apparently requires a multistate corporation to include in the denominator of its North Carolina sales factor only the net gain from the sale or maturity of securities and not the rolled-over capital or return of principal.

Based on the statutory and administrative provisions analyzed above, it appears that Duke Energy would have a position to argue that its North Carolina sales factor should include the gross receipts from the sale or maturity of investments prior to July 14, 2000, the effective date of Session Law 2000-126, based on a strict interpretation of this prior law. In accord with recent legislation, the Department of Revenue's administrative position, and the Attorney General's opinion, however, Duke Energy would probably only be allowed to include the net gain (not the entire gross proceeds) from its investment activities in its North Carolina sales factor subsequent to this date. These conclusions are based both on the amended language of *N.C. Gen. Stat. § 105-130.4(a)(7)* and the administrative regulations cited above.

Sourcing of Receipts under North Carolina Law

A taxpayer's receipts from intangible property, such as dividends and interest, are considered to be in North Carolina if they are received from sources within the State. *N.C. Gen. Stat. § 105-130.4(l)(3)(b)*. Based on the sourcing rule provided in North Carolina law, Duke Energy should include in its North Carolina gross receipts factor only those receipts from entities commercially domiciled in the State. Essentially, income from intangible property is included in the numerator of Duke Energy's North Carolina gross receipts factor if those receipts are from payors commercially domiciled in the State. If derived from a non-North Carolina

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source, however, those receipts should be sourced outside the State. In such a situation, the gross receipts would be included in the denominator of Duke Energy's gross receipts factor, but not its numerator. Finally, it has been the Department's position that if the state source is unknown, then the income should be sourced to the commercial domicile of the taxpayer, Duke Energy.

North Carolina Statute of Limitations

North Carolina law provides generally that corporate income and franchise tax returns are due on or before the fifteenth (15th) day of the third month following the close of the taxpayer's fiscal year, *N.C. Gen. Stat. §§ 105-130.17(b), -122(a)*. If the amount of taxable income of a corporation subject to tax in North Carolina is changed by the Internal Revenue Service (the "IRS"), however, the taxpayer is required to file a return reflecting that amendment within two (2) years after receipt of the federal report. *N.C. Gen. Stat. § 105-130.20*. When the Department of Revenue receives an amended return reflecting changes made in the net income of a corporation, the Secretary may assess tax or additional tax based on the federal changes and may also make any other adjustments based on any facts or evidence brought to his attention whether or not such facts or evidence were considered by the IRS. This is the case regardless whether an adjustment has been made previously for the taxable year affected by the federal changes.

An overpayment of North Carolina corporate income or franchise tax must be discovered by the Department of Revenue or requested by the taxpayer within three (3) years after the date set by the statute for the filing of a return or within six (6) months after the payment of the tax alleged to be an overpayment, whichever is later. *N.C. Gen. Stat. §§ 105-266.1(a), -266(c)(1)*. If a taxpayer files a return that reflects a federal determination, and the return is filed within the required time, the period in which the refund must be demanded or discovered is one year after the return reflecting the federal determination is filed or three (3) years after the original return was filed or due to be filed, whichever is later. *N.C. Gen. Stat. § 105-266(c)(4)*.

It is our understanding that Duke Energy's federal tax returns for the years 1986 through 1998 are currently being audited by the Internal Revenue Service. Based on the above statutory provisions, any amendments made at the federal level and reported on a Revenue Agent Report (an "RAR") would be considered "federal determinations" for North Carolina corporate income tax purposes. See *N.C. Gen. Stat. § 105-130.20*. Corrections to Duke Energy's taxable income made at the federal level, therefore, should allow Duke Energy to file amended North Carolina corporate income tax returns for these same years.

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South Carolina

Generally

A taxpayer whose principal business is manufacturing or any form of collecting, buying, assembling, or processing goods and materials within the State, or selling, distributing, or dealing in tangible personal property within the State, is required to apportion its income to South Carolina using a three-factor apportionment formula that includes a double-weighted sales factor. *S.C. Code Ann. § 12-6-2250*. South Carolina law also includes special provisions for taxpayers whose operations include railroad companies, motor carriers of property and passengers, telephone service companies, pipeline companies, airline companies and shipping lines. Their income is apportioned to the state through unique apportionment formulas. *S.C. Code Ann. § 12-6-2310*. For taxpayers whose operations are not engaged in one of these operations, the State utilizes a single factor gross receipts apportionment formula. In this regard, South Carolina law provides, in part, as follows:

If the principal profits or income of a taxpayer are derived from sources other than those described in Section 12-6-2250 or Section 12-6-2310, the taxpayer shall apportion its remaining net income 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.

S.C. Code Ann. § 12-6-2290. Public utilities and electric cooperatives, known generally as public service corporations, are required to compute their South Carolina taxable income using the standard three-factor, double-weighted sales apportionment formula. *See S.C. Code Ann. § 12-6-2290; see also Instructions to Form SC-1120*. Moreover, for taxpayers employing this standard three-factor, double-weighted sales apportionment formula, the South Carolina Department of Revenue has held that sales of tangible and intangible business connected property should be included to the extent that the sales result in a gain ("net gain"). *S.C. Comm. Decision I-D 309* (S.C. Dept. of Rev., June 30, 1982).

Based on the law and analysis above, it appears that Duke Energy should be required to apportion its income to South Carolina using the standard three-factor, double-weighted sales apportionment formula. Moreover, under a literal interpretation of the statutes discussed above, Duke Energy should have a filing position to include the gross receipts from its investment transactions in its sales factor denominator. It should be expected, however, that the South Carolina Department of Revenue will challenge this position based on several grounds, including its holding in *I-D 309*. These challenges are discussed in more detail below.

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Duke Energy also has numerous subsidiaries doing business in South Carolina, some of which may be apportioning their income to the state using the single gross receipts factor described above. To those entities, the South Carolina Department of Revenue's decision in *I-D 309*, arguably should not apply. There may be a position for those entities, therefore, to include the gross proceeds from short-term investments in the denominator of their South Carolina single factor apportionment formula based on the alternative apportionment formulae mandated by South Carolina state law.

Sourcing of Income in South Carolina

South Carolina law provides that receipts from sales of intangible property are sourced on the basis of the income-producing activity test of UDITPA section 17. *S.C. Code Ann. § 12-6-2280(C)(2)*. State law, however, does not provide rules for assigning interest or royalties from intangible property. It is the South Carolina Department of Revenue's position that receipts from intangible property are included in the numerator of the sales factor if they are derived from sources within South Carolina. See *Letter* (S.C. Tax Comm., Oct. 17, 1984). Moreover, receipts from intangible property are included in the numerator of the single-factor gross receipts formula if they are derived from South Carolina sources.

South Carolina Statute of Limitations

South Carolina law provides generally that a request for refund of an overpayment of corporate income taxes must be made within three (3) years of the due date of the return or one (1) year of the payment of the tax, whichever is later. *S.C. Code Ann. §§ 12-54-85, 12-60-470*. Taxpayers, moreover, are required to notify the South Carolina Department of Revenue in writing of all changes in taxable income reported to the Internal Revenue Service when the taxable income is changed by the Internal Revenue Service. Notification to the Department must be made within one hundred eighty (180) days after a final determination is received from the Internal Revenue Service. *S.C. Code Ann. § 12-54-85(D)*. Notwithstanding any restrictions on filing a claim for refund, however, a taxpayer may file a claim for refund resulting from an overpayment due to changes in taxable income made by the Internal Revenue Service if the claim for refund is filed within one hundred eighty (180) days after the date a final determination of a tax adjustment is made by the IRS. See *S.C. Code Ann. § 12-54-85(D)(3)*.

Potential Challenges by S.C. Department of Revenue

Despite the filing position analyzed above, our experience has been that the South Carolina Department of Revenue may challenge such a position on examination on the grounds that inclusion of the gross proceeds in a taxpayer's sales factor denominator grossly distorts its activities in the State. In essence, the Department considers only the interest earned (i.e., net

PRICEWATERHOUSECOOPERS

gain) to be gross receipts. The Department's position is routinely supported by three arguments, each of which is discussed below.

The Department's first argument is that to include the return of principal in the denominator of the taxpayer's gross receipts factor distorts the apportionment formula by giving extraordinary weight to transactions that produce little or no income. The Department views this position as one whose abuse is limitless. While there is no case law in South Carolina which directly addresses this filing position, the Department argues it was granted broad authority by the General Assembly to employ any method necessary "to effectuate an equitable allocation and apportionment of a taxpayer's income." See *S.C. Code Ann. § 12-6-2320*. The Department, therefore, continues to look to other jurisdictions for guidance on this issue and routinely cites the decisions in *American Telephone & Telegraph Co. v. Director, Div. of Taxation*, 476 A.2d 800 (N.J. Sup. Ct. 1984) and *Sherwin-Williams Co. v. Johnson*, 989 S.W.2d 710 (Tenn. Ct. App. 1999), analyzed below, as precedence for its position.

The Department will also argue that Multistate Tax Compact ("MTC") regulation IV.18.(C)(3) states that interest received from the mere holding of intangibles is excluded from both the numerator and denominator of the sales factor.¹ South Carolina often looks both to MTC Regulations and to the regulations and decisions of other jurisdictions for assistance in interpreting statutes and terms not clearly defined by South Carolina law. It is the Department's position that this Regulation² supports its position that the principal returned upon the sale or maturity of securities must be excluded from the denominator of the taxpayer's gross receipts ratio.

The Department's final argument focuses on Commission Decision I-D-309, which is discussed in more detail above. That Decision, in brief, held that sales of tangible and intangible business property are included in the sales ratio only to the extent that the sale results in a gain to the taxpayer. Although this has long been the administrative position of the Department, it was not confirmed until the decision in I-D-309. In this regard, the Department usually cites the South Carolina Court of Appeals' statement in *Lockwood Greene Engineers* for the proposition that the "purpose of the allocation statutes is to provide for imposition of South Carolina income tax 'upon a base which reasonably represents the proportion of the

¹ It should be noted that, although the state is an associate member of the MTC, South Carolina has not adopted MTC Regulation IV.18.(C)(3).

² Regulation IV.18.(C)(3) states that, where "business income from intangible property cannot readily be attributed to any particular income producing activity of the taxpayer, the income cannot be assigned to the numerator of the sales factor for any state and shall be excluded from the denominator of the sales factor. For example, where business income in the form of dividends received on stock, royalties received on patents or copyrights, or interest received on bonds, debentures, or government securities results from the mere holding of the intangible personal property by the taxpayer, the dividends and interest shall be excluded from the denominator of the sales factor."

PRICEWATERHOUSECOOPERS

trade or business carried on within' the State." *Lockwood Greene Engineers, Inc. v. South Carolina Tax Comm.*, 361 S.E.2d 346 (S.C. Ct. App. 1987), quoting *Hertz v. South Carolina Tax Comm.*, 142 S.E.2d 445 (S.C. 1965). It is the Department's position that these decisions, along with the court's holding in *Hay v. S.C. Tax Comm.*, 255 S.E.2d 837 (S.C. 1979), require that its long-standing administrative interpretations of a statute be given great weight unless clearly erroneous. See also *Marchant v. Hamilton*, 309 S.E.2d 781 (S.C. 1983); *Ryder Truck Lines, Inc. v. South Carolina Tax Comm.*, 149 S.E.2d 435 (S.C. 1966); *Bowles v. Seminole Rock and Sand Co.*, 325 U.S. 410 (1945).

Case Law from Other Jurisdictions

In *Sherwin-Williams Co. v. Oregon Dept. of Rev.*, 996 P.2d 500 (Ore. Sup. Ct. 2000), the Oregon Supreme Court, in a case similar to the issue presented herein, held that, under the Oregon version of the Uniform Division of Income for Tax Purposes Act (UDITPA), gross receipts from the taxpayer's sales of its working capital investment securities, including the return of its capital, were "sales" subject to inclusion in the calculation of the taxpayer's total sales for purposes of that state's corporate excise tax. The taxpayer in *Sherwin-Williams* was a manufacturer of paint and related products operating in Oregon and several other states. Sherwin-Williams managed its working capital needs by, among other things, buying and selling short-term securities. Although its investment activities were carried out in Ohio, both parties agreed that the taxpayer's activities generated business income. The statute at issue in *Sherwin-Williams* defined the term "sales" as "all gross receipts of the taxpayer...." *Ore. Rev. Stat. § 314.610(7)*.³ After considering each party's arguments, the court held both that the taxpayer's receipts from the sale of securities met the definition imposed by Oregon law and that Oregon regulations provided no exclusions. As a result the court upheld the Oregon Tax Court's decision in favor of *Sherwin-Williams*.

Under identical facts for the same taxpayer, the Indiana Tax Court, however, found that Sherwin-Williams was not permitted to include the return of principal from its investment securities in the denominator of its sales factor under the Indiana apportionment formula. *The Sherwin-Williams Co. v. Indiana Dept. of State Rev.*, No. 49T10-9412-TA-00273 (Ind. Tax Ct., Dec. 2, 1996). As it did in Oregon, Sherwin-Williams attempted to include in its Indiana gross receipts both the interest and the principal from the sale of investments it financed with working capital. Sherwin-Williams then attempted to include the gross proceeds in the denominator of its sales factor but not in the numerator, since the sales of the securities

³ Subsequent to the Department of Revenue's assessment of the taxpayer in *Sherwin-Williams*, the Oregon legislature adopted a new statutory provision which provides that gross receipts arising from the sale, exchange, redemption, or holding of intangible assets are not to be treated as "sales" for purposes of calculating a taxpayer's apportionment formula unless the receipts were derived from the taxpayer's primary business activity. This legislative amendment, however, was not effective for Sherwin-Williams's tax years at issue herein.

PRICEWATERHOUSECOOPERS

occurred outside of Indiana. Similar to the statutory language in Oregon, the Indiana statute at issue defined the sales factor as "a fraction, the numerator of which is the total sales of the taxpayer in this state during the taxable year, and the denominator of which is the total sales of the taxpayer everywhere during the taxable year." *Ind. Code Ann. § 6-3-2-2(e)*. "Sales" were further defined as "all gross receipts of the taxpayer not allocated" under other provisions of Indiana Law. *Ind. Code Ann. § 6-3-1-24*; see also *Ind. Admin. Code* tit. 45, § 3.1-1-50. Administrative regulations further defined sales as "any business income of a corporate taxpayer . . . regardless of its actual source." *Ind. Admin. Code* tit. 45, § 3.1-1-34. The Tax Court, however, held that to include the principal its Indiana gross receipts factor would have distorted its apportionment formula because the taxpayer would have been allowed to rollover the same principal many times as it reinvested in short-term securities.

Sherwin-Williams litigated the same issue in Tennessee as well. See *Sherwin-Williams Co. v. Johnson*, 989 S.W.2d 710 (Tenn. Ct. App. 1999). The Tennessee Court of Appeals agreed with the taxpayer and ruled that, under Tennessee law, "sales" included all gross receipts of the taxpayer not allocated under other provisions of Tennessee law. The court stated that if the words of a statute plainly mean one thing, they cannot be given another meaning by judicial construction. The court, however, held that even though a taxpayer's return of capital from cash investments was statutorily includable in the denominator of the sales factor, the Department properly exercised its discretion to exclude the taxpayer's return of capital from the denominator, since to allow otherwise would not fairly represent the taxpayer's business in the State.

AGENDA
TAX MEETING – "SHORT-TERM INVESTMENTS"
FRIDAY – FEBRUARY 16, 2001
TUNICA, MS

- I. Objectives
 - A. Review previous action items
 - B. Updates on subsequent legal research
 - C. Revise and implement current action plan, including strategies going forward
- II. PriceWaterhouseCoopers
 - A. Status of PLR request with NC Department of Revenue
 - B. Status of summary of specific Duke Energy facts
 - C. Income numbers for South Carolina
 - D. Other relevant developments
- III. General Legal Review
 - A. Discussion of pertinent case law and potential effect or reliance thereon
 - B. Application of facts to law, analysis and discussion of how protest may be worded (with concentration on NC law due to greater NC law research)
 - C. Discussion of any further research required (such as UDIPTA?)
 - D. Brief discussion of obtaining attorney-client protection and how to preserve it
- IV. North Carolina Legal Review
 - A. Walk-through of procedural opinions
 - B. Walk-through of statutory construction opinion
 - C. Analysis of state political and economic landscape
 - D. Further research required?
 - E. Brief discussion of NC rules regarding attorney-client privilege
- V. South Carolina Legal Review
 - A. Discussion of waivers research
 - B. Discussion and update of any other legal research
- VI. Miscellaneous
 - A. Identification of witnesses and availability
- VII. Action Plan
 - A. Identification of optimal test year or period
 - B. Determination of when to file claims or amended returns
 - C. Internal review plan
 - D. Choose tentative follow-up meeting date
 - E. Miscellaneous

A

CASH RECEIPTS	ACCT. NO.	TODAY	MTD	CASH DISBURSEMENTS	ACCT. NO.	TODAY	MTD
CASH BAL. BEG. OF PERIOD		7,576,982.53	(48,317,058.82)	Payroll-FUNB	232.53	162,512.39	32,243,939.71
Branch Collection	131.30	18,384,837.56	83,464,132.98	Tax Payment	241.12		
Tax pymt	241.15			Dividends	238.00	13,293.59	80,018.65
General Office Deposit	131.40	363,483.74	1,933,478.39	Employee Drafts	232.37		2,030.00
Nantahala Payment	146.80			Claim Drafts	232.38	9,260.90	291,232.75
Int. Income	419.24			Customer Refund	232.14	27,629.51	145,649.66
NEIL	165.10			Eastover Mining	234.30	15,965.81	16,965.81
Tax pymt	236.73			Tax pymt.	241.11	1,950,033.77	1,950,033.77
Stock Purchase	242.44			Environmental tax	236.84		
Tax payment	241.16			Taxes			15,072,370.83
Dividends	238.00			Vouchers Payable		4,961,703.42	24,821,760.84
Interest-Long Term-Bonds	237.11			NC Tax	238.33		
Eastover Mining	234.30			Tax Payment	238.10		
Decommissioning Reimb.	128.80			Tax Payment	236.75		
				Nuclear Fuel	232.12		3,808,000.00
Dividend Reinvestment	242.48	83,839.69	445,042.22	Dividend Reinvestment	242.48	7,302.27	334,890.09
Tax payment "8912"	926.12			Pollution Control Interest	237.17		
Transfers	131.50	19,890,501.14	145,593,250.02	Transfers	131.50	19,890,501.14	145,593,250.02
Tax pymt	241.32			Tax Payment	236.76		
Nonemployee Directors Stock	DSOP			Saluda	143.75		
Interest S.T. Investment	171.10			Short Term Investments	138.10	14,982,900.00	14,982,900.00
Short Term Investment	138.10			Interest	171.10		
Commercial Paper	231.30			Commercial Paper	231.30		19,000,000.00
Discount-Commercial Paper	431.30			Discount-Commercial Paper	431.30		
\$130 M Financing CP	224.41			\$130 M Financing CP	224.41		
Discount-\$130 M Financing	427.41			\$130 M Finan CP Discount	427.41		
SPSP-Loans	242.66			Interest York County Bonds	237.18		
Catawba Proceeds NCMPA	143.71		18,103,593.40	SPSP-Loans	242.66	1,559,704.98	1,518,969.84
Catawba Proceeds NCMPA	143.72			PMPA	230.54		
Catawba Proceeds NCEMC	143.73		13,252,027.92	Voided MAPPS checks	232.11		
Catawba Intercon. Saluda R.	143.75		4,425,819.69	Service charge	186.33		
Catawba Interconnect PMPA	143.77		6,039,847.16	SPSP Commission "8912"	926.31		
Catawba Proceeds PMPA	143.78			DRS Commission	DRIP		
Interest York County Bonds	237.18			NC Sales Tax	241.32		
Catawba Proceeds NCMPA	230.51			Tax Payment	236.11		
Catawba Proceeds Saluda	230.53			G.O. Deposit Correction	131.40		90.00
Catawba Proceeds PMPA	230.54			Decommissioning	128.80		
Escheated checks	232.51			NCMPA	230.51		
Claim Drafts	232.38			Nonemployee Directors Stock	DSOP		
Employee Drafts	232.37			SC Electric Power Tax	236.46		
Bank Loan	231.20			Retirement	242.64		
Catawba Proceeds NCEMC	230.52			Clearing	184.45		5,035,584.39
Clearing	184.45		4,554,167.95	Interest-Long Term-Bonds	237.11		
Payroll	232.53		39,072,620.33	Supplemental Security	232.59		
Customer Refund	232.14			Stock Purchase	242.44	4,973,588.00	4,973,588.00
Void Checks			21,067.70	Void Checks			21,067.70
MAPPS Checks	232.11			Fees/Line of Credit "9544"	930221		71,000.00
Misc. Expenses "0193" "9544"	921.20			Misc Expense "0193" "9544"	921.20		
Supplemental Security	232.59			OPEB	228.31		
TOTAL RECEIPTS		38,722,862.13	316,904,847.76	TOTAL CASH DISBURSEMENTS		48,554,393.78	269,842,339.26
TOTAL BEGINNING BAL. & RECEIPTS			287,587,590.84	CASH BALANCE END OF PERIOD			(2,254,749.12)

DUKE POWER CASH STATEMENT AUGUST 7, 1998

DUKE POWER COMPANY

RECEIPTS & DISBURSEMENTS DETAIL

Date: 8/7/96

Bank Name: FUNB-NC

No: 0530-0021

Account Number	Description	Receipt Amount
193-13150	NB	4,900,000.00 ✓
193-13150	WBNC	7,000,000.00 ✓

Account Number	Description	Disbursement Amount
193-23253	Payroll	3069.71
193-23253	Payroll	159,442.68
193-23430	Natl City Bank	15,965.81 ✓
193-13610	ST Investment - Bankers-Merrill	14,982,900.00 ✓
193-23800	Dividends	13,293.59

TO DO FOR: 8/7/96

FIRST CHICAGO	
Balance	<3,752,435>
ACH	3,752,435
Checkfree	<22,897>
EFT	1,739,906
EFT Cancelled	0
Balance	<1,717,009>

Previous day ending balance
Receipt from WBNC
Deposit keyed on 2300 run
Next day amount on EFT rpt
From MAPPS check rpt
Pos. = no ACH; neg. = ACH

CHASE	
BALANCE:	
C P MATURING	
C P ISSUED	
DISCOUNT	
\$130 M MATURING	
\$130 M ROLL	
DISCOUNT	
OTHER:	
OTHER:	
TRANSFER FROM:	
TRANSFER TO:	
ENDING BALANCE:	

WIRE TO BE MADE:

CODE	TRANSFER FROM	DOLLAR AMOUNT	TRANSFER TO / EXPLANATION	CALL MARK/TIME
(1) ACH 790304	WB	1,717,000.00	1 st Chicago	1:42
(2) 2112	FU ✓	15,465.81	Natl City Bank (23430)	0627
(3) 7112	FU ✓	14,982,900.00	Bankers - Merrill	0630
(4) 0431F	NB ✓	4,900,000.00	FU -	1814
(5) 453571	WB ✓	7,000,000.00	FU	0074
(6)				
(7)				
(8)				
(9)				
(10)				

BOOKINGS TO BE DONE:

- Dividends - 13,293.59 ✓
- WBSC CD - 2,356,066.14 ✓
- Bank WBNC 4,973,586.00 ✓ SPSP Contributions (193-24244)
- WBNC 1,559,704.98 ✓ 401K loans (193-24266)
- WBNC 3,752,435.00 ✓ 1st Chicago ✓
- WBNC 1,950,033.77 ✓ Japer (193-24111) ✓
- WBNC 7302.27 ✓ Japer (193-24248) ✓

Date: Aug. 7, 1996

Please wire funds today as follows:

\$ 14,982,900.00 to Bankers Trust Co. - New York
ABA 021001033
A/C 00810775
N/O MLPF&S
SUB A/C 72M 07156
N/O Duke Power

\$ _____ to Chase Manhattan Bank - New York
ABA 021000021
A/C Goldman Sachs & Co.
A/C 930-1-011483

\$ _____ to Chemical Bank
ABA 021000128
For the account of Smith Barney
Account 066-198-038
Ref. Account 323-02243-1-7
Duke Power Company

These wires, totalling \$ 14,982,900.00 will cover today's investments
for Duke Power.

Dale Carpenter



Funds Transfer Consolidated Advice

1

2070484000777

5849



DUKE POWER GENERAL ACCOUNT
422 S, CHURCH ST
CHARLOTTE, NC 28242

Posting Date: 08/07/96

Account No: 2070484000777



Inquiries regarding this statement may be
phoned to (800) 222-3862

(Standard Fees as stated in the Schedule of Fees may apply to these transfers.)

Transfer Reference	USD Debit Amount	USD Credit Amount	Transaction Description
960807-005864		✓ 7,000,000.00	TIME STAMP: 11:44:47 LOC: MTRANS FED REF: 0874/DBT: A/053100494/WACHOVIA WINSTON/OBK: WB NC/ORP: DUKE POWER COMPANY/
960807-006271	15,965.81	✓	TIME STAMP: 12:01:13 LOC: MTRANS FED REF: 006271/CDT: A/083000056/NATIONAL CITY BANK KEN TUCKY/LOUISVILLE, KY/ORP: DUKE POWER GENERAL ACCOUNT/BN P: /70219468/UNDERWRITERS SAFETY & CLAIMS INC./
960807-006305	14,982,900.00	✓	TIME STAMP: 12:04:18 LOC: MTRANS FED REF: 006305/CDT: A/021001033/BANKERS TRUST COMPANY/ NEW YORK, NY/ORP: DUKE POWER GENERAL ACCOUNT/BNP: /008 10775/MLPF & S/OBI: SUB AC 72M 07156 N/O DUKE POWER/
960807-010864		✓ 4,900,000.00	TIME STAMP: 14:50:04 LOC: MTRANS FED REF: 05SE960807018144/DBT: A/053000196/NATIONSBANK NC/OBK: DUKE POWER CO/ORP: SAME/SE960807018144/

* Note: Code Descriptions described in following section

Funds Transfer Consolidated Advice

2

2070484000777

5850

Posting Date: 08/07/96

Account No: 2070484000777

Code Descriptions

<u>Code</u>	<u>Description</u>
BBK	Beneficiary Bank Name
BNP	Beneficiary Party Name and Reference
CDT	Credit Party Name or Bank
CNTL	Control Number Used by other First Union Systems to Track Transfer
CUR	Currency Code of the Foreign Currency Transaction
DBT	Debit Party Information
RATE	Exchange Rate applied to the Transaction
FED REF	Federal Reserve Sequence Number
FGN AMT	Amount of the Transaction in Foreign Currency
IBK	Intermediary Bank Name
LOC	Processing Location: MTRANS = Funds Transfer Dept, INTL = International Funds Transfer Dept, FUNDS = Capital Markets
OBI	Originator to Beneficiary Reference Information
OBK	Originating Bank Name
ORP	Originating Party Name
RRF	Related Reference Data
SBK	Sending Bank Name and Reference
SWF REF	S.W.I.F.T. Reference Number
TIME STAMP	Time the Transaction was posted to First Union Account
VALUE DATE	Value Date of the Foreign Currency Transaction
CHP REF	CHIPS System Sequence Number

NationsBank

WIRE TRANSFER ADVICE

PAGE: 1

NATIONSBANK, N.A.
WIRE TRANSFER DEPT NC1-003-09-03
CHARLOTTE, NC 28255

ACCOUNT: 000001545
DATE: 08/07/96

DUKE POWER CO
422 S. CHURCH STREET
ATTN DALE CARPENTER (PB036)
CHARLOTTE NC 28242

DIRECT INQUIRIES TO:
(800) 333-WIRE (9473)

THE FOLLOWING WIRE WAS DEBITED TODAY:

AMOUNT:

\$4,900,000.00 ✓

SEQUENCE NUMBER/ICN: 960807018144000
FED REFERENCE NUMBER: 05SE960807018144

ORIGINATOR:
RECEIVING BANK: 053000219
BENEFICIARY: 8400077

SAME
FIRST UN CHAR
DUKE POWER COMPANY

DETAILS OF PAYMENT:

EASLINK 6393737M001 7AUG96 14:21/14:22 EST
 FROM: 62069546
 NATIONS BANK
 TO: 7043827363
 ATTN: DUKE POWER

R3020-06/R2.0 NC PEP+ CASH CONCENTRATION AND DISBURSEMENTS 08-07-96 12:49 PAGE 1
 FILE NUMBER 19962200259 LOCATION SUMMARY FOR FROM DATE/WINDOW 08-07-96 1200
 TO DATE/WINDOW 08-07-96 1200
 POINT: DUPOWERF4 APPL: DIRECT TYPE: PROCESS DATE

COMPANY ID: 9220400000 COMPANY NAME: DUKE POWER COMPA ENTRY DESC: CCD EFF DATE: 960808 SEC: CCD

LOCATION	STATUS	AMOUNT	LOCATION	STATUS	AMOUNT	LOCATION	STATUS	AMOUNT	LOCATION	STATUS	AMOUNT
0120		276,000.00	0129		107,000.00	0200		4,000.00	0201		7,000.00
0202		17,000.00	0206		45,000.00	0222		21,000.00	0226		45,000.00
0230		132,000.00	0232		1,500.00	0234		642,500.00	0244		84,000.00
0268		310,500.00	0288		3,500.00	0300		2,000.00	0302		19,000.00
0303		6,500.00	0328		8,000.00	0334		7,000.00	0355		21,000.00
0358		92,000.00	0364		6,500.00	0367		11,500.00	0396		12,500.00

DEBIT ENTRIES

CREDIT ENTRIES

	COUNT	AMOUNT	COUNT	AMOUNT
ACH ENTRIES ()	24	1,882,000.00	0	.00
PRENOTES (*)	0	.00	0	.00
TOTAL ACH ACTIVITY	24	1,882,000.00	0	.00
PAPER ACTIVITY (P)	0	.00	0	.00
INPUT MISMATCHES (M)	0	.00	0	.00
REJECTS (R)	0	.00	0	.00
DROPPED (D)	0	.00	0	.00
TOTAL ACTIVITY	24	1,882,000.00	0	.00

B

CASH RECEIPTS	ACCT. NO.	TODAY	MTD	CASH DISBURSEMENTS	ACCT. NO.	TODAY	MTD
CASH BAL. BEG. OF PERIOD		(2,254,749.12)	(49,317,056.92)	Payroll-FUNB	232.53	83,587.27	32,327,528.98
Branch Collection	131.30	15,874,290.42	99,338,423.40	Tax Payment	241.12		
Tax pymt	241.15			Dividends	238.00	11,421.70	71,440.35
General Office Deposit	131.40	814,417.67	2,747,896.08	Employee Drafts	232.37	184.00	2,214.00
Nantahala Payment	146.80			Claim Drafts	232.38	128,872.91	418,105.88
Int. Income	419.24			Customer Refund	232.14	24,291.63	169,941.29
NEIL	165.10			Eastover Mining	234.30		15,985.81
Tax pymt	238.73			Tax pymt	241.11		1,950,933.77
Stock Purchase	242.44			Environmental tax	238.84		
Tax payment	241.16			Taxes			15,072,370.83
Dividends	238.00			Vouchers Payable		2,725,776.76	27,347,537.40
Interest-Long Term-Bonds	237.11			NC Tax	238.33		
Eastover Mining	234.30			Tax Payment	236.10		
Decommissioning Relmb.	128.80			Tax Payment	238.75		
				Nuclear Fuel	232.12		3,808,000.00
Dividend Reinvestment	242.48	97,359.83	542,402.05	Dividend Reinvestment	242.48		334,890.09
Tax payment "8912"	926.12			Pollution Control Interest	237.17		
Transfers	131.50	17,291,712.12	162,884,962.14	Transfers	131.50	17,291,712.12	162,884,962.14
Tax pymt	241.32			Tax Payment	238.78		
Nonemployee Directors Stock	DSOP			Saluda	143.75		
Interest S.T. Investment	171.10			Short Term Investments	136.10	12,000,000.00	28,982,900.00
Short Term Investment	138.10			Interest	171.10		
Commercial Paper	231.30			Commercial Paper	231.30		19,000,000.00
Discount-Commercial Paper	431.30			Discount-Commercial Paper	431.30		
\$130 M Financing CP	224.41			\$130 M Financing CP	224.41		
Discount-\$130 M Financing	427.41			\$130 M Finan CP Discount	427.41		
SPSP-Loans	242.66			Interest York County Bonds	237.18		
Catawba Proceeds NCMPSA	143.71		18,103,593.40	SPSP-Loans	242.66		1,618,969.64
Catawba Proceeds NCMPSA	143.72			PMPA	230.54		
Catawba Proceeds NCEMC	143.73		13,252,027.82	Voided MAPPS checks	232.11		
Catawba Intercon. Saluda R.	143.75		4,425,619.69	Service charge	186.33		
Catawba Interconnect PMPA	143.77		6,039,647.16	SPSP Commission "8912"	928.31		
Catawba Proceeds PMPA	143.78			DRS Commission	DRIP		
Interest York County Bonds	237.18			NC Sales Tax	241.32		
Catawba Proceeds NCMPSA	230.51			Tax Payment	238.11		
Catawba Proceeds Saluda	230.53			G.O. Deposit Correction	131.40		90.00
Catawba Proceeds PMPA	230.54			Decommissioning	128.80		
Escheated checks	232.51			NCMPA	230.51		
Claim Drafts	232.38			Nonemployee Directors Stock	DSOP		
Employee Drafts	232.37			SC Electric Power Tax	236.46		
Bank Loan	231.20			Retirement	242.84		
Catawba Proceeds NCEMC	230.52			Clearing	184.45		5,035,584.39
Clearing	184.45		4,554,187.95	Interest-Long Term-Bonds	237.11		
Payroll	232.53		39,072,620.33	Supplemental Security	232.59		
Customer Refund	232.14			Stock Purchase	242.44		4,973,588.00
Void Checks		2,847.97	23,715.67	Void Checks		2,847.97	23,715.67
MAPPS Checks	232.11			Fees/Line of Credit "9544"	930221		71,000.00
Misc. Expenses "0193" "9544"	921.20			Misc Expense "0193" "9544"	921.20		
Supplemental Security	232.59			OPEB	228.31		
TOTAL RECEIPTS		34,080,428.01	350,985,075.77	TOTAL CASH DISBURSEMENTS		32,286,494.36	302,106,834.32
TOTAL BEGINNING BAL. & RECEIPTS			301,688,018.85	CASH BALANCE END OF PERIOD			(40,815.47)

DUKE POWER CASH STATEMENT AUGUST 8, 1996

TO DO FOR: 8/8/96

FIRST CHICAGO			
Balance	<4,717,009>	Previous day ending balance	
ACH	1,17,009	Receipt from WBNC	
Checkfree	11,756	Deposit keyed on 2300 run	
EFT	<225,225>	Next day amount on EFT rpt	
EFT Cancels	0	From MAPPS check rpt	
Balance	193,469	Pos.= no ACH; neg.=ACH	

CHASE	
BALANCE:	
C P MATURING	
C P ISSUED	
DISCOUNT	
\$130 M MATURING	
\$130 M ROLL	
DISCOUNT	
OTHER:	
OTHER:	
TRANSFER FROM:	
TRANSFER TO:	
ENDING BALANCE:	

WIRES TO BE MADE:

	CODE	TRANSFER FROM	DOLLAR AMOUNT	TRANSFER TO / EXPLANATION	CALL MADE TIME
(1)	ACH 79204	WBNC	193,469.00	1st Chicago	11:54 11/11
(2)	7712	FU	5,000.00	Bankers Merrill	06595 11
(3)	7791	FU	12,000.00	Chase - Col. Amari	06650 11
(4)	0431F	11B	6,300,000.00	FU	19619 11
(5)	45357	WB	5,700,000.00	FU	00984 11
(6)					
(7)					
(8)					
(9)					
(10)					

BOOKINGS TO BE DONE:

- 1) Dividends - " 11,421.70 ✓
- 2) WBSC CD - 2,058,703.12 ✓
- 3) Book WBNC 1,717,009.00 1st Chicago ✓
- 4) Book GO ACH @ FU 597,197.69 (Entergy 131.40) ✓
- 5) Book GO ACH @ FU 86,400.00 (Commonwealth Ed 131.40) ✓

PAYABLE TO:
DUKE POWER COMPANY
422 SOUTH CHURCH STREET PB03G
CHARLOTTE, N.C. 28242-0001
OR YOUR LOCAL DUKE POWER OFFICE

INVOICE NO.
239584

TO: **ENTERGY SERVICES INC**
ATTN ACCTS PAYABLE
P O BOX 6100
PINE BLUFF AR 71611

CUSTOMER NUMBER	DATE OF BILL
11000000116	JUL 19 1996

DESCRIPTION	AMOUNT
ENTERGY	
PURCHASE AND	57654464
INTERCHANGE POWER	2065305
TOTAL BILL AMOUNT	59719769


KEEP THIS PORTION
FOR YOUR RECORD

FORM 612 (R3-92)

DE50031687

Date: Aug. 8, 1996

Please wire funds today as follows:

\$ 5,000,000.00 to Bankers Trust Co. - New York
ABA 021001033
A/C 00810775
N/O MLPF&S
SUB A/C 72M 07156
N/O Duke Power

\$ 10,000,000.00 to Chase Manhattan Bank - New York
ABA 021000021
A/C Goldman Sachs & Co.
A/C 930-1-011483

\$ _____ to Chemical Bank
ABA 021000128
For the account of Smith Barney
Account 066-198-038
Ref. Account 323-02243-1-7
Duke Power Company

These wires, totalling \$ 15,000,000.00 will cover today's investments
for Duke Power.

Dale Carpenter

EASLINK 68493451001 8AUG96 15:37/15:38 EST

FROM: 62069546

NATIONS BANK

TO: 7043827363

ATTN: DUKE POWER

R3020-06/R2.0 NC PEP+ CASH CONCENTRATION AND DISBURSEMENTS
FILE NUMBER 19962210213 LOCATION SUMMARY FOR

08-08-96 12:48 PAGE 1
FROM DATE/WINDOW 08-08-96 1200
TO DATE/WINDOW 08-08-96 1200

POINT: DUPOWERF4 APPL: DIRECT TYPE:

PROCESS DATE

COMPANY ID: 9220400000 COMPANY NAME: DUKE POWER COMPA ENTRY DESC: CCD

EFF DATE: 960809 SEC: CCD

LOCATION	STATUS	AMOUNT	LOCATION	STATUS	AMOUNT	LOCATION	STATUS	AMOUNT	LOCATION	STATUS	AMOUNT
0120		672,500.00	0129		74,500.00	0200		2,000.00	0201		3,000.00
0202		7,500.00	0206		34,500.00	0222		13,500.00	0226		30,000.00
0230		46,500.00	0232		1,500.00	0234		292,500.00	0244		34,000.00
0268		141,000.00	0288		2,000.00	0302		16,500.00	0303		8,000.00
0328		4,500.00	0334		1,500.00	0355		14,000.00	0358		36,000.00
0364		5,500.00	0367		8,000.00	0396		10,500.00			

DEBIT ENTRIES

CREDIT ENTRIES

	COUNT	AMOUNT	COUNT	AMOUNT
ACH ENTRIES ()	23	1,459,500.00	0	.00
PRENOTES (*)	0	.00	0	.00
TOTAL ACH ACTIVITY	23	1,459,500.00	0	.00
PAPER ACTIVITY (P)	0	.00	0	.00
INPUT MISMATCHES (M)	0	.00	0	.00
REJECTS (R)	0	.00	0	.00
DROPPED (D)	0	.00	0	.00
TOTAL ACTIVITY	23	1,459,500.00	0	.00

NationsBank

WIRE TRANSFER ADVICE

PAGE: 1

NATIONSBANK, N.A.
WIRE TRANSFER DEPT NC1-003-09-03
CHARLOTTE, NC 28255

ACCOUNT: 000001545
DATE: 08/08/96

DIRECT INQUIRIES TO:
(800) 333-WIRE (9473)

DUKE POWER CO
422 S. CHURCH STREET
ATTN DALE CARPENTER (PB03G)
CHARLOTTE NC 28242

THE FOLLOWING WIRE WAS DEBITED TODAY:

AMOUNT:

\$6,300,000.00 ✓

SEQUENCE NUMBER/ICN: 960808019619000
FED REFERENCE NUMBER: 05SE960808019619

ORIGINATOR:
RECEIVING BANK: 053000219
BENEFICIARY: 8400077

SAME
FIRST UN CHAR
DUKE POWER COMPANY

DETAILS OF PAYMENT:

C

CASH RECEIPTS	ACCT. NO.	TODAY	MTD	CASH DISBURSEMENTS	ACCT. NO.	TODAY	MTD
CASH BAL. BEG. OF PERIOD		3,730,445.95	(49,317,058.92)	Payroll-FUNB	232.53	70,254.52	95,743,184.80
Branch Collection	131.30	19,844,258.70	203,279,538.89	Tax Payment	241.12	1,300,704.80	1,300,704.80
Tax pymt	241.15			Dividends	238.00	4,800.68	105,248.73
General Office Deposit	131.40	33,513.58	10,459,997.31	Employee Drafts	232.37		22,214.00
Nantahala Payment	146.80			Claim Drafts	232.38	2,178.85	446,211.03
Int. Income	419.24			Customer Refund	232.14	30,651.83	321,878.30
NEIL	165.10			Eastover Mining	234.30		19,190.29
Tax pymt	236.73			Tax pymt.	241.11		1,884,598.27
Stock Purchase	242.44			Environmental tax	238.84		
Tax payment	241.18			Taxes			15,585,980.76
Dividends	238.00			Vouchers Payable		8,297,803.83	48,955,328.35
Interest-Long Term-Bonds	237.11			NC Tax	238.33		577,300.48
Eastover Mining	234.30			Tax Payment	238.10		
Decommissioning Reimb.	128.80			Tax Payment	238.75		
				Nuclear Fuel	232.12		3,808,000.00
Dividend Reinvestment	242.48	121,466.88	1,221,450.48	Dividend Reinvestment	242.48		723,874.39
Tax payment "8912"	928.12			Pollution Control Interest	237.17		
Transfers	131.50	17,202,967.93	272,637,690.41	Transfers	131.50	17,202,967.93	272,637,690.41
Tax pymt	241.32			Tax Payment	236.76		
Nonemployee Directors Stock	DSOP			Saluda	143.75		
Interest S.T. Investment	171.10	17,100.00	17,100.00	Short Term Investments	138.10	31,916,000.00	103,740,900.00
Short Term Investment	138.10	14,982,900.00	14,982,900.00	Interest	171.10		
Commercial Paper	231.30			Commercial Paper	231.30		19,000,000.00
Discount-Commercial Paper	431.30			Discount-Commercial Paper	431.30		
\$130 M Financing CP	224.41		130,000,000.00	\$130 M Financing CP	224.41		130,000,000.00
Discount-\$130 M Financing	427.41			\$130 M Finan CP Discount	427.41		594,855.58
SPSP-Loans	242.66			Interest York County Bonds	237.18		
Catawba Proceeds NCMPA	143.71		18,103,593.40	SPSP-Loans	242.66		1,847,280.82
Catawba Proceeds NCMPA	143.72			PMPA	230.54		
Catawba Proceeds NCEMC	143.73		13,252,027.82	Voided MAPPS checks	232.11		4,409.20
Catawba Intercon. Saluda R.	143.75		4,425,619.89	Service charge	188.33		
Catawba Interconnect PMPA	143.77		6,038,647.18	SPSP Commission "8912"	926.31		284.80
Catawba Proceeds PMPA	143.78			DRS Commission	DRIP		
Interest York County Bonds	237.18			NC Sales Tax	241.32		
Catawba Proceeds NCMPA	230.51			Tax Payment	238.11		
Catawba Proceeds Saluda	230.53			G.O. Deposit Correction	131.40		2,265.00
Catawba Proceeds PMPA	230.54			Decommissioning	128.80		
Escheated checks	232.51			NCMPA	230.51		
Claim Drafts	232.38			Nonemployee Directors Stock	DSOP		13,798.85
Employee Drafts	232.37			SC Electric Power Tax	238.46		
Bank Loan	231.20			Retirement	242.64		
Catawba Proceeds NCEMC	230.52			Clearing	184.45		31,239,258.83
Clearing	184.45	308,187.38	4,884,829.29	Interest-Long Term-Bonds	237.11		
Payroll	232.53		101,763,155.91	Supplemental Security	232.59		
Customer Refund	232.14			Stock Purchase	242.44		4,973,588.00
Void Checks		780.48	63,081.80	Void Checks		780.48	58,852.80
MAPPS Checks	232.11			Fees/Line of Credit "9544"	930221		71,000.00
Misc. Expenses "0193""9544"	921.20		0.58	Misc Expense "0193""9544"	921.20		516.84
Supplemental Security	232.59			OPEB	228.31		
TOTAL RECEIPTS		52,311,172.88	781,110,812.85	TOTAL CASH DISBURSEMENTS		58,828,143.70	734,578,288.59
TOTAL BEGINNING BAL. & RECEIPTS			731,783,755.93	CASH BALANCE END OF PERIOD			(2,784,523.66)

DUKE POWER CASH STATEMENT AUGUST 15, 1988

DUKE POWER COMPANY

RECEIPTS & DISBURSEMENTS DETAIL

Date: 8-15-96

Bank Name: FUNB-NC

No: 0530-0021

Account Number	Description	Receipt Amount
193-13150	Transfer to Nat.	3,600,000.00 ✓
193-13150	" " " " " "	11,200,000.00 ✓
193-18445	Parking Deck	308,187.36
193-13610	ST Dr.	14,982,900.00
193-17110	Int	17,100.00

Account Number	Description	Disbursement Amount
193-23253	Payroll	3,330.54
193-23253	" "	66,923.98
193-13610	ST Dr.	5,000,000.00 ✓
193-13610	ST Dr.	11,916,000.00 ✓
193-13610	" " roll	15,000,000.00
193-23800	Dividend	4,800.66

TO DO FOR: 8-15

FIRST CHICAGO	
Balance	Previous day ending balance
ACH	Receipt from WBNC
Check/free	Deposit keyed on 2300 run
EFT	Next day amount on EFT rpt
EFT Cancels	From MAPPS check rpt
Balance	Pos. = no ACH; neg. = ACH

8,354
 (3,377,766)
 (3,129,412)

CHASE	
BALANCE:	
C P MATURING	
C P ISSUED	
DISCOUNT	
\$130 M MATURING	
\$130 M ROLL	
DISCOUNT	
OTHER:	
OTHER:	
TRANSFER FROM:	
TRANSFER TO:	
ENDING BALANCE:	

WIRES TO BE MADE:				
CODE	TRANSFER FROM	DOLLAR AMOUNT	TRANSFER TO / EXPLANATION	CALL MADE/TIME
(1) ACT 799:04	WJWC	3,129,412.	1st Chic.	
(2) 7792	FU	5,000,000.	Bkuc MS	
(3) 7791	FU	11,916,000.	Chas. - Soldna	
(4) 0431E	WJWC	3,600,000	FU	
(5) 453571	WJWC	11,200,000	FU	
(6)				
(7)				
(8)				
(9)				
(10)				

BOOKINGS TO BE DONE:

- Dividends - 4,800.66
- WBSC CD - 578,922.93
- Dispositio. 308,187.36 @ FU for
- Book buy Pipel 1,300,704.80
- " 1st Chic 306,045.00
- Inv. rolld 14,982,900.00 int 17,100.00
- Inv. rolled 15,000,000

When short-term investment dollars are left at Merrill Lynch instead of being returned in full, please provide the following information:

Date: 8-15-96

Principal Maturing Today: 14,982,900.00 Book receipt to 136.10

Interest on Maturities: 17,100.00 Book receipt to 171.10

Total Maturing Today: 15,000,000.00 Sum of Principal & Interest

Rolled: 15,000,000.00 Book disbursement to 136.10

Amount Incoming: Total Maturing less Rolled amount
This amount will be sent by Merrill
to our general account at FUNB.

Date: August 15, 1996

Please wire funds today as follows:

\$ 5,000,000.00

to Bankers Trust Co. - New York
ABA 021001033
A/C 00810775
N/O MLPF&S
SUB A/C 72M 07156
N/O Duke Power

\$ 11,916,000.00

to Chase Manhattan Bank - New York
ABA 021000021
A/C Goldman Sachs & Co.
A/C 930-1-011483

\$ _____

to Chemical Bank
ABA 021000128
For the account of Smith Barney
Account 066-198-038
Ref. Account 323-02243-1-7
Duke Power Company

These wires, totalling \$ 16,916,000.00 will cover today's investments
for Duke Power.

Dale Carpenter

State of South Carolina
In the Administrative Law Court
No. 10-ALJ-17-0270-CC

DUKE ENERGY CORPORATION,)
)
Petitioner,)
)
vs.)
)
SOUTH CAROLINA DEPARTMENT OF REVENUE,)
)
Respondent.)
_____)

D E P O S I T I O N

WITNESS: JOE SOUTHARD
DATE: December 2, 2011
TIME: 9:00 a.m. - 12:50 p.m.
LOCATION: Willoughby & Hoefer
930 Richland Street
Columbia, South Carolina

TAKEN BY: Attorney for the Petitioner
REPORTED BY: KATHRYN J. LINDLER

COMPUSCRIPTS, INC.
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COLUMBIA, SOUTH CAROLINA 29202
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Joe Southard 12/2/2011

APPEARANCES:

Attorneys for the Petitioner:

Sutherland Asbill & Brennan LLP
999 Peachtree Street, NE
Atlanta, Georgia 30309-3996

By: Jeffrey a. Friedman, Esquire, and
Maria M. Todorova, Esquire, and

Nexsen, Pruet, Jacobs & Pollard
1441 Main Street
Columbia, South Carolina 29201

By: Burl F. Williams, Esquire,

Attorneys for the Respondent:

Willoughby & Hoefer, PA
930 Richland Street
Columbia, South Carolina 29201

By: Tracey C. Green, Esquire, and
John W. Roberts, Esquire, and

South Carolina Department of Revenue
301 Gervais Street
Columbia, South Carolina 29201

By: Harry A. Hancock, Esquire.

Attending: T. Cooper Monroe, Duke

1 STIPULATIONS

2

3 It is stipulated by and between counsel that
4 this deposition is being taken in accordance with the
5 South Carolina Rules of Civil Procedure, and that the
6 deponent does not waive the right to read and sign the
7 deposition transcript.

8 Thereupon,

9 JOE SOUTHARD,

10 being first duly sworn to tell the truth, the whole
11 truth and nothing but the truth, as hereinafter certified,
12 testified as follows:

13 EXAMINATION

14 BY MR. FRIEDMAN:

15 Q. Good morning. Is it Joe or Mr. Southard? Do you
16 have a preference?

17 A. Joe is fine. Just don't swear at me.

18 Q. And likewise. I'm going to run through some
19 preliminary stuff. Have you been through a deposition
20 before?

21 A. Been through a couple of them.

22 Q. Income tax case or what kind of case?

23 A. All income tax.

24 Q. Just some ground rules. If you don't understand
25 any of the questions that we are going to be asking you

1 A. No.

2 Q. In preparing for today's deposition, did you do
3 any preparation?

4 A. Some.

5 Q. What kind of preparation did you do?

6 A. Discussed with the DOR lawyer and representative.

7 Q. What did you discuss?

8 A. About the deposition. Some of the things that we
9 were going to discuss, bringing me up to date on some
10 things.

11 Q. Did you review any documents?

12 A. I probably did, but I couldn't even tell you what
13 they were right now.

14 Q. You don't remember the documents?

15 A. I don't remember specific documents, no.

16 Q. Did you guys meet or did you have a conference
17 call?

18 A. I looked at a book yesterday. I think it had the
19 waiver in it and there was some other documents in there,
20 but I couldn't tell you.

21 Q. Who provided you with the book?

22 A. Counselor Green, Tracey Green.

23 Q. Anyone else that you discussed today's deposition
24 with regarding the substance of today's deposition?

25 A. Harry Hancock.

1 Q. Anyone else?

2 A. No.

3 Q. Could you tell us a little bit about yourself.

4 I'll start off with your educational background. Tell us a
5 little bit about your educational background.

6 A. I graduated from high school in 1963 Princeton,
7 New Jersey. From there I went to Valley Forge Military
8 Junior College for two years and then I graduated from the
9 Citadel in 1969. In May of 1969 I worked for Owens-Corning
10 Fiberglass for six months. Then I went in the Army
11 January 25, 1970, infantry officer basic. And then I went
12 to Fort Gordon, Georgia. You want me to go through...

13 Q. Yeah, you're doing great. Saves me from asking
14 you a bunch of questions.

15 A. I went to Fort Gordon, Georgia. From there I
16 went to Panama Jungle School. And then from there I went
17 to Nam and I spent ten months over there. And then I got
18 out of the Army and went back to work for Owens-Corning
19 Fiberglass in Jackson, Tennessee. And then from there to
20 Toledo, Ohio, and then from there to Houston, Texas, where
21 I met my wife. And then I left Owens-Corning and I worked
22 for Bruce Harland and Associates for three years.

23 Q. What did you do with them?

24 A. I did sales tax, sales and used tax audits of all
25 companies that dealt with the oil industry, drilling rig

1 companies, drilling mud companies, oil field rental type
2 companies, rig companies. Anything to do with the oil
3 industry out of Louisiana. And then from there I joined
4 the Department, South Carolina Department of Revenue in
5 July 2, 1986, and then I retired in June of this year.

6 Q. Let's talk a little bit about your tenure with
7 the Department of Revenue of South Carolina. Can you tell
8 us a little bit about your titles and how long you held
9 them and your progression through?

10 A. My title for the entire 25 years was a foreign
11 corporate auditor. Well, I started out with sales tax for
12 three years and then I moved into corporate audit, all
13 foreign, foreign meaning that we audited the books and
14 records of the taxpayer that did business in the State but
15 had its books and records outside the State.

16 Q. Foreign would be non-South Carolina domicile
17 companies?

18 A. Right, non-South Carolina domicile companies.

19 Q. You did that for three years?

20 A. I did sales tax for three years and then the
21 balance of my tenure at the Department of Revenue was doing
22 corporate income tax audits.

23 Q. For how many years did you do corporate income
24 tax audits?

25 A. Probably 22 years, 21 years, something like that.

- 1 Q. A long time.
- 2 A. It was a long time.
- 3 Q. You had the same title the whole time?
- 4 A. Same title.
- 5 Q. The title again was?
- 6 A. Foreign corporate income tax auditor. Then you
- 7 had various steps, ABC, whatever it was, but at the time
- 8 that I joined, it was job grade 32, or whatever it was, 33
- 9 and then 34 and then 35 and 36 and then they changed it and
- 10 they went to this ABCD thing.
- 11 Q. Did those steps reflect increased compensation or
- 12 and increased responsibility?
- 13 A. Well, more -- probably -- well, they -- when they
- 14 instituted that, I was already at job grade, the highest
- 15 one anyway when they changed it. So. It involved some
- 16 training, additional training, and that was really about
- 17 it. A lot of the initial training was put on by the
- 18 auditors themselves and the managers, my training for
- 19 corporate income tax. So they had a big manual and
- 20 everything.
- 21 Q. They had an audit manual?
- 22 A. Had an audit manual.
- 23 Q. Do they still have an audit manual up until the
- 24 time you left?
- 25 A. If they can find it. Good luck to them.

1 Q. It hasn't been kept up to date?

2 A. I don't know whether it has or not.

3 Q. Did you work on the audit manual?

4 A. No.

5 Q. But you used it?

6 A. I used it to learn. It dealt with domestic audit
7 and then it went into foreign audit. Foreign audits were a
8 little bit different than doing, dealing with domestic.

9 Q. It sounds like you were the recipient of
10 training, but did you ever provide the training to other
11 folks?

12 A. No. Well, if we brought a new auditor on. I
13 never gave formal training like in a training class, but if
14 we brought a new auditor on and I was assigned to take him
15 or her with me, then I would teach them how to do foreign
16 audits.

17 Q. Did you do a lot of that kind of training of new
18 auditors coming on board you as the more senior auditor
19 would train the new auditors?

20 A. Yes.

21 Q. In the field?

22 A. In the field. It was OJT basically.

23 Q. I'm sorry, what is that?

24 A. OJT, on-the-job training.

25 Q. How many auditors would you say you trained over

1 the years using that kind of method I guess?

2 A. I couldn't give you an exact number.

3 Q. Ball park.

4 A. Three-four probably.

5 Q. Who did you report to during your time as an
6 auditor on the corporate income tax side?

7 A. My first boss was Harold Ingram and then there
8 was Ed Barwick. He was deputy audit manager until they
9 could replace Harold, and then there was John Swearingen.

10 Q. You reported to John?

11 A. I reported to John. And then Tim Donovan was the
12 last one.

13 Q. What was Tim's title?

14 A. Foreign corporate audit supervisor, foreign audit
15 supervisor I think it was. When I first started there,
16 they had foreign audit supervisor for sales tax and a
17 foreign audit supervisor for income tax. Then they
18 combined it into one foreign audit supervisor for both and
19 that's what they currently have now.

20 Q. You were always in the foreign audit side?

21 A. Was always in the foreign audit side.

22 Q. And you always reported to someone like a foreign
23 audit supervisor?

24 A. Right.

25 Q. Again what was the first year you started doing

1 corporate income taxes here for the State of South
2 Carolina?

3 A. Probably '90 or '91.

4 Q. Prior to that you were doing sales tax for three
5 years?

6 A. Right.

7 Q. The year in which you joined the Department of
8 Revenue?

9 A. Was July 2, 1986.

10 Q. You left the Department of Revenue or you're
11 currently --

12 A. I retired from the Department of Revenue.

13 Q. Congratulations. When did you retire?

14 A. June 17 was my last day this year.

15 Q. 2011?

16 A. 2011.

17 Q. Any professional licenses or certifications or
18 anything like that?

19 A. I have a private pilot's license, but other than
20 that, just a run of a mill guy.

21 Q. How many employees reported to you, Joe?

22 A. No one reported to me.

23 Q. Evaluation as an auditor, I want to ask a
24 question or two regarding that. I'm assuming that you were
25 evaluated in performing your job duties from time to time?

1 A. Yes.

2 Q. Typically what were the criteria used to evaluate
3 your performance as an auditor?

4 A. The ability to interact with the taxpayer, handle
5 sophisticated more difficult audits, there's mom and pop
6 places which are usually done locally, local law, but when
7 you're dealing with a major corporation, it's a much more,
8 it's not more difficult, it's more time consuming and
9 involved and more detailed and more intense, not more
10 intense, but more types of questions, probing type
11 questions. You want to learn what their business is. You
12 have to do your own research first before you audit the
13 taxpayer, the return, find out what they do. There's some
14 steps that you go through.

15 Q. In doing that preparation --

16 A. What the purpose of that is is to -- the first
17 thing you do, you want to determine is it worth auditing.
18 And if it is, then you look at the return or returns,
19 usually do three years, and you write your questions down
20 and that determines what you're going to put in your
21 appointment letter. Doesn't limit you, but you want to try
22 to get as specific as possible and then there are some
23 standard questions such as you would like to have the
24 federal returns and state returns for the audit period made
25 available and the apportionment work papers made available

1 and the papers dealing with the capital stock account,
2 those standard type questions for all taxpayers, and then
3 you get into the specifics for each one based on looking at
4 the return.

5 Q. Did you have any industry specialization or
6 expertise?

7 A. No.

8 Q. I know some auditors focus on a specific
9 industry. It doesn't sound like you had that.

10 A. No. Well, if there were -- I mean, we did all
11 kinds of audits for different industries according to the
12 law, you know, a taxpayer that's like a utility would be --
13 the capital stock would be calculated differently than it
14 would a normal C corporation, a manufacturer of widgets
15 let's say. And then there was transportation companies
16 that are audited differently. Sometimes if you never had
17 done one, you would go with someone that had the experience
18 and they would bring you along, show you how it's done.

19 Q. Did you do any of that?

20 A. I did that.

21 Q. Can you elaborate as to how you did that?

22 A. As a matter of fact, my first audits were with
23 Randy Wilson. He is the one that really taught me how to
24 do corporate audits and then you get to a point where you
25 have to go and do them by yourself, because that's

1 ultimately what we did. We tried to do them by ourselves,
2 but the large ones, sometimes two auditors would go and
3 then try to complete the thing. But again most of the time
4 you went by yourself, set it up yourself, contact the
5 taxpayer, you wrote the appointment letter, you did the
6 audit by yourself, you made the assessment, did everything
7 by yourself. Sort of like you're running your own little
8 business.

9 Q. You probably liked that independence.

10 A. I liked that. I liked that. I didn't like
11 people looking over my shoulder. I knew what the hell I
12 was doing.

13 Q. You didn't have an industry specialization
14 related to Duke Energy?

15 A. No. No. There wasn't any specific. It was just
16 you had experience auditing utilities and so, you know, go
17 do Duke or go do SCE&G or something else.

18 Q. It sounds like in preparing for these audits and
19 creating your list of questions that you would go in
20 with -- you would be responsible for keeping up as to the
21 development of South Carolina law and what issues are
22 arising out there today?

23 A. I didn't keep -- I kept up with South Carolina
24 law, because it changes every year all the time. But there
25 were other folks within the Department of Revenue that

1 would tell us what the changes were.

2 Q. They would?

3 A. They'd have a meeting and tell us what the
4 changes were, that it would affect corporate income tax,
5 sales tax, personal income tax, property tax, whatever tax
6 it was.

7 Q. They would bring the auditors in and the
8 Department of Revenue would have a training session?

9 A. Yes, they would have a training session to talk
10 about that.

11 Q. Would they usually hand things out at these
12 training sessions, materials and statute changes or cases?

13 A. Yeah, they might do that. Yes, definitely.

14 Q. Was that the primary method you used to stay on
15 top of the law changes in South Carolina?

16 A. Basically. Or do my own research. You can't
17 remember everything. You just cannot. It's impossible.
18 They used to publish a synopsis of the code dealing with
19 the corporate or the sales tax. You're doing sales tax or
20 you were doing corporate income tax, they used to publish a
21 synopsis of the important codes that you needed to know,
22 and so I always took them with me.

23 Q. You kept copies with you so you could refer to
24 them?

25 A. I took them with me on every audit. I couldn't

1 remember. I wanted to know specifically what it said. And
2 that was, that was to keep you up to date and if the
3 taxpayer wanted to know specifically what the law said,
4 well, here it is buddy, it's right there in writing and now
5 they did away with these booklets that I kind of like to
6 take. I'm a hard copy guy, old school. So now you can
7 look it up online. You don't need to take -- I can look up
8 the whole code online and look up the specific sections.

9 Q. They used to hand out hard copy like summaries of
10 the law changes that you would keep and refer to?

11 A. They would be the code as it was written.

12 Q. The statute.

13 A. And then there would be little notes that would
14 sort of show you the history of the changes and things. I
15 liked that.

16 Q. Who would prepare those --

17 A. They don't do that now.

18 Q. The Department would prepare those notes to help
19 the auditors?

20 A. Whoever published those codes. When they
21 published those things, they would put that down.

22 Q. They were provided to you from the Department?

23 A. They were provided to us.

24 Q. By the Department?

25 A. They would be downstairs in the basement. We'd

1 go down and get a copy.

2 Q. At the Department of Revenue?

3 A. But I didn't think about who published it. I
4 just need one.

5 Q. But you would get them at the Department of
6 Revenue?

7 A. Oh, yes.

8 Q. How often did you go to the Department of Revenue
9 building here? Because it sounds like you were out in the
10 field a lot?

11 A. If I was not on an audit, I would be at the
12 Department of Revenue.

13 Q. Out of a full work year, would you say half your
14 year was in the headquarter Department of Revenue building
15 or less than half?

16 A. A little bit more than half.

17 Q. The rest of the time would be out in the field?

18 A. Initially, and then as time progressed, I spent
19 more time in the field. I went back and looked at my
20 travel over the years and said damn I spent a lot of time
21 out there, but then as you -- and the audits got more
22 difficult. When they changed the law, you had more things
23 to consider and they got more difficult than they were 20
24 years ago.

25 Q. What do you mean more difficult? More complex?

1 A. Yes, more complex.

2 Q. In what way?

3 A. Dealing with the changes in the law. Changes in
4 how dividends are handled and the interpretations and so
5 forth. Taxpayers using various schemes to reduce their tax
6 liability.

7 Q. Did you run into a lot of that?

8 A. I ran into a lot of that. That's why Jeffrey
9 case came into being.

10 Q. You worked on that?

11 A. I didn't work on the case.

12 Q. That would have been probably before your time
13 maybe.

14 A. No, that was...

15 Q. It was decided in 1993.

16 A. Was it '83?

17 Q. '93 it was decided by the South Carolina Supreme
18 Court.

19 A. '93 it was decided. It went to the US Supreme
20 Court, but they did not review it so our court is the
21 standard basically.

22 Q. You had to apply that Jeffrey decision in a lot
23 of cases?

24 A. Yes. A lot of cases that I did there was an
25 obvious Jeffrey issue. Very easy to find that when you

1 look at a tax return, you're looking at -- first of all you
2 go to the other deductions and see, look at the anomalies
3 and they say trademark expense, well, that's a dead
4 giveaway right there, you know, 10, 20, 30 whatever million
5 dollars it is reducing the corporate income amount, the
6 taxable or the income amount.

7 Q. It was like an audit flag for you?

8 A. Yeah, it was an audit lead right there. So the
9 first question is where did it go, we want to know where it
10 went, what entity did it go to and then they tell you or
11 they don't tell you. If they do tell you, then we look
12 that entity up, see if they're filing and if they're not
13 filing, well, guess what, you're going to have to file and
14 then you're going to have to pay penalty and interest, but
15 it's just -- I don't make up the law, the legislature does.
16 I just apply it.

17 Q. Did you see a lot of these large corporations
18 engaging in these tax schemes?

19 A. Yes. And that's what made it more difficult.
20 That's part of the difficulty, the returns became more
21 difficult. Sometimes they would put it in other deductions
22 and sometimes they would put it in cost of goods sold
23 trying to -- but that's just the nature of the beast.

24 Q. What do you mean by nature of the beast?

25 A. It's just the nature of the job, the taxpayer is

1 trying to lower his tax liability and I don't blame him,
2 but you still have to -- you're doing business in the
3 state, you still have to file your return based on the law
4 as the legislature has passed.

5 Q. You viewed your role as ensuring compliance with
6 the law?

7 A. Simply compliance, if they filed the return
8 correctly. We're auditing the return is what we're doing
9 and that it was filed correctly and all the returns, all
10 the taxpayers of this particular entity have been filed
11 correctly and that they have reported their tax liability
12 correctly and they have apportioned the income correctly.
13 So you either filed four factor. When I first started it
14 was three factor and then it went to four factor and then
15 it was always gross receipts depending on the type of
16 business that you were involved in and now I think it's all
17 gross receipts. It's changed.

18 Q. Keeps evolving?

19 A. Well, gross receipts was kind of the more simpler
20 way to go.

21 Q. In what way was it simple?

22 A. It's just gross receipts received within the
23 state versus gross receipts everywhere.

24 Q. That's compared to other apportionment --

25 A. Compared to kind of figuring out the property

1 ratio and the payroll ratio. I could do it, but it's just
2 easier to deal with.

3 Q. In your point gross receipts being easier, I'm
4 interpreting that to mean simpler to audit?

5 A. Quicker. You don't have to spend a lot of time
6 with payroll and property. Property would probably take
7 more time to deal with.

8 Q. As opposed to the property factor which has
9 nuances about how to deal with rented property?

10 A. Just quicker to deal with it.

11 Q. Gross receipts would be something that you would
12 just look at the gross receipt amount, the full receipt
13 amount?

14 A. We look at the sales, because remember now we're
15 auditing the return that the taxpayer filed so to ensure
16 that did he allocate any income away from the state. Well,
17 then we would want to ask what did he allocate, what type
18 of income did he allocate, why did he allocate it and if we
19 feel it's business, of course, I'm going to ask him what it
20 is, and as the auditor if I feel that it's business
21 related, then I'm going to add it back as an adjustment.
22 I'm not going to add it back because it makes me feel good.
23 I'm going to add it back because it's the law. Here's the
24 interpretation and this is why I'm adding it back. They
25 may not agree, but that's fine, they have avenues that they

1 can use to take it beyond me which I don't have any problem
2 with that.

3 Q. Were you able to make those decisions on your own
4 or did you have to consult with a supervisor?

5 A. I generally made them on my own. Sometimes I
6 would consult and say what do you think about this issue.

7 Q. But you had a lot of authority it sounded like to
8 make your own determinations?

9 A. Yes.

10 Q. Back to your point on the allocation. It sounded
11 like you were looking for instances where taxpayers would
12 allocate income outside of the State and you would ask
13 questions around that?

14 A. Right.

15 Q. Would you also identify in that situation
16 receipts that were associated with that non-taxable income
17 and exclude them from the gross receipts factor?

18 A. Right. If we felt it was a legitimate
19 allocation, then we would allow it. For example, let's say
20 a taxpayer has a building that he is no longer
21 manufacturing anything in it and it's sitting on his
22 property, but he is renting it, it's in the budget, but
23 he's renting it to someone else, it's in some other
24 completely different type of business. That income, rental
25 income, we would say, we would not consider that business

1 related, we would go ahead and allocate that.

2 Q. Where the building is located?

3 A. Well, the rental income we would allocate.

4 Q. You would allocate it to South Carolina if the
5 building was in South Carolina?

6 A. If it was in South Carolina, it would be
7 allocated here. If it's outside, it would be allocated,
8 but then I would say, well, I need to know what the taxes
9 on the building were, what the insurance was, and all the
10 expenses associated with that building and I would say okay
11 now we're going to reduce your allocated income by the
12 amount of the expense and if they didn't, if they couldn't
13 come up with it, I'd usually get it as high as I could.
14 The taxpayer is the one that's supposed to provide that
15 information.

16 Q. If the income was allocated outside of the state,
17 the related expenses would be allocated outside?

18 A. Yes. See, if you're allocating income and you
19 got expense and apportionable, you're going to have to take
20 it out of apportionable and put in an allocation in both of
21 them.

22 Q. Would you also, Joe, make sure that the rental
23 receipts, the gross receipts, going back to the gross
24 receipts, were not included in the sales factor because the
25 income was outside of apportionable income?

1 A. The rental income would be there at gross,
2 because there's no, there's no net on rental. It's just
3 rental income period.

4 Q. But I was asking an exclusion question. If the
5 income was not apportionable, then the gross receipts
6 wouldn't be included in the factor?

7 A. If the income was not apportionable, then it
8 would be allocated and then the expense would go along with
9 it whatever that expense were. Usually it was
10 depreciation, insurance, taxes and repairs if we're talking
11 about a building.

12 Q. Sounds like you had a lot of experience dealing
13 with these kind of apportionable issues.

14 A. Yes.

15 Q. What is apportionable, non-apportionable?

16 A. Yes.

17 Q. And what goes into the gross receipts factor and
18 or not goes into the gross receipts factor?

19 A. Yes.

20 Q. Going back to a few topics ago. We were talking
21 a little bit about how you were evaluated as an auditor and
22 it sounds like as you progressed you were handling more and
23 more complex audits or larger audits, larger taxpayers, is
24 that fair?

25 A. Yes. Yes.

1 Q. Other than that, were there any other criteria
2 used to evaluate auditors?

3 A. Not that I'm aware of. They just basically --
4 they had their own evaluation sheets and you did audits on
5 your own. Generally you did audits on your own as a
6 corporate income tax auditor generally. As a sales tax
7 auditor, you usually went out in twos or threes, because it
8 was basically a flip job.

9 Q. More labor intensive?

10 A. It was more labor intensive, looking at invoices.
11 You didn't do that as a corporate auditor, because as I
12 said it was a different animal.

13 Q. After those first few years doing sales tax you
14 did exclusively income tax? You never got involved --

15 A. I was working -- my boss was a corporate income
16 tax supervisor and he was weaning me from sales tax.

17 Q. You said ultimately the foreign audits, income
18 and sales tax were ultimately merged into one group it
19 sounded like, is that right?

20 A. Well, it was the same group, but instead of
21 having two supervisors, one for foreign sales tax and one
22 for income tax, they just had a foreign audit supervisor.
23 One supervisor. I think that's what they have now.

24 Q. You had a peer that would do foreign sales tax
25 and you did foreign income tax only at that time?

1 A. Yes, I still did foreign income. I also did, I
2 qualify, did property tax audits. So I did some of those.

3 Q. You did some property tax?

4 A. I did some property tax audits.

5 Q. How about license taxes, any license taxes?

6 A. License taxes on the federal return 1120 is a
7 license tax. So you're basically doing two audits at once,
8 but the license tax is very easy to do.

9 Q. You would do that as well?

10 A. Oh, yes. Every single corporate audit you're
11 doing a corporate income audit and you're doing a license
12 tax audit.

13 Q. You had a lot of experience in doing license tax
14 audits although it sounds like the issues were less?

15 A. Yes, I didn't have many issues with license tax.
16 Occasionally I did, but I was right every time.

17 Q. Auditors weren't evaluated based upon how much
18 they assessed or how much tax they generated?

19 A. No. I was never assessed or evaluated on that
20 basis.

21 Q. Did you work with a John Comer?

22 A. John Comer. I remember that name, but I don't
23 think so. I don't recall working with him. John Comer.
24 Was he a DOR employee?

25 Q. Yes.

1 A. The name rings a bell, but I can't tell you.

2 Q. This is a document we got through discovery from
3 the Department of Revenue. It's stamped, the last four
4 digits are 1785. I'm not going to read the whole number
5 unless you would like me to.

6 (WHEREUPON, Petitioner's Exhibit
7 No. 1 was marked for
8 identification only.)

9 A. Oh, this is, okay.

10 Q. Does this document look familiar or something
11 like it?

12 A. Yes, not this writing, but this, this is the
13 netting of the corporate income tax that Randy and I did
14 and I think it was the sales tax audit that was done in
15 Rock Hill. I think Rock Hill did it.

16 Q. Was that like a field office for the Department
17 of Revenue?

18 A. Field office. They have a field office up there
19 now, Rock Hill office. For the Department of Revenue.
20 South Carolina Department of Revenue.

21 Q. There is a handwritten note here, and the last
22 sentence I was interested in or curious about. It says,
23 "Please make sure our auditors get credit for the
24 collection. Audit file will follow soon. Thanks. John
25 Comer."

1 A. I think he might have been the supervisor up in
2 Rock Hill at the time. He's probably talking about his
3 auditors. That's what he's talking about. And his
4 auditors were the sales tax people.

5 Q. So maybe the sales tax auditors would get credit
6 --

7 A. Yes.

8 Q. -- for assessment?

9 A. Yeah, because we have -- there is a report
10 showing our assessments and collections and number of
11 audits that we've completed and are in process that's
12 published monthly.

13 Q. Do you know Rita Murrah?

14 A. Yes. She processes the, she processes the sales
15 tax audits and I think personal income tax.

16 Q. Sales tax and personal income tax?

17 A. Yes, for the foreign -- well, we don't -- I think
18 she does -- I don't know whether she does personal income.
19 We don't do personal income tax. The foreign doesn't do
20 personal income tax.

21 Q. The foreign corporate auditors don't do personal
22 --

23 A. We don't do those. That's all done domestically.
24 But she processes the foreign sales tax.

25 Q. When you say process, like handle the accounting?

1 A. Yeah, handles the internal accounting of logging
2 them in and publishing them in this report, auditor report.

3 Q. For the Department of Revenue?

4 A. Yes, for the Department of Revenue.

5 Q. The next document I wanted to run by you is
6 another South Carolina Department of Revenue. I think the
7 last four digits are 1783.

8 (WHEREUPON, Petitioner's Exhibit
9 No. 2 was marked for
10 identification only.)

11 Q. There's an e-mail from several years ago where
12 Rita was saying to John. Can you read that e-mail to me,
13 that short?

14 A. "John, I need to give credit for this payment of
15 2,857,494.79. Do I give the six people on the front credit
16 at Perry 50 percent and the other five at 10 percent. I'm
17 just making sure."

18 Q. Do you know what kind credit she could be
19 referring to there?

20 A. The collection, credit for the collection.

21 Q. Auditors got credited for collection?

22 A. Right. They got credit for assessments when you
23 assess the taxpayer. It's not a collection, that's just an
24 assessment, and then when they actually, the taxpayer
25 actually pays the audit.

1 Q. They get credit for that as well?

2 A. They get credit for the collection, and, of
3 course, it could be adjusted between the assessment and the
4 collection, but if the taxpayer comes in with additional
5 information so we reduce it or he negotiates it with powers
6 above me to reduce it.

7 Q. You as well, Joe? Were you also given credit for
8 the collection and the assessment like you were describing?

9 A. Oh, yes, throughout my entire career. All
10 auditors are done that way.

11 Q. Were you provided with that kind of information
12 throughout the year?

13 A. Monthly. They used to publish it monthly. I
14 think they still do. I'm not sure.

15 Q. You would see that for your peers, for the other
16 auditors as well?

17 A. Sure.

18 Q. In addition to you?

19 A. Sure. It wasn't a secret document or anything.
20 Because the Department of Revenue wants to know how are
21 auditors are doing and...

22 Q. That's one way to see how they are doing?

23 A. One way I guess to evaluate you, but you're not
24 supposed to be evaluated based on that, but I'm sure that
25 they probably in the back of their minds probably do that.

1 Q. What about on the refund side, because you said
2 collections and assessment, but what about that refund?

3 A. There was a section in there in that report I
4 think that had refunds.

5 Q. Oh, there was?

6 A. If the taxpayer was entitled to a refund, then he
7 was entitled to a refund period.

8 Q. Was that in that same report, Joe, that you were
9 just referring to?

10 A. I think it was in the same report and then it all
11 netted out at the end of the line.

12 Q. Oh, it did. So you saw the net number after the
13 --

14 A. Yeah. And then they would carry it forward month
15 after month.

16 Q. When you would sit down with your supervisor at
17 the end of the year, you being an experienced auditor, you
18 would have your copy of that?

19 A. No, I never did that. He never -- only if he --
20 let's say if it was all zeros, then I would probably get a
21 talking to.

22 Q. You'll have a discussion?

23 A. We'll have a discussion.

24 Q. If it was a really big number, you'd probably
25 have a discussion too I would think?

1 A. No. Well, if it was a big audit we'd have a
2 discussion about it, but I mean that's kind of standard
3 practice. The supervisor wants to know what's going on
4 with these big audits and your discussions with the
5 taxpayer. Hey, fine.

6 Q. Would you go to like the Federation of Tax
7 Administrators or I think they used to be called the
8 National Association of Tax Administrator meetings?

9 A. I never went to those. My supervisor would go to
10 those types of things.

11 Q. You didn't go to any?

12 A. No.

13 Q. You didn't go to any association --

14 A. The only thing I went to was a class in Atlanta,
15 a three-day seminar, Orville Sharp and I, he was another
16 corporate income tax auditor.

17 Q. What was his name?

18 A. Orville Sharp. He and I went --

19 Q. Can you spell his first name?

20 A. O-R-V-I-L-L-E.

21 Q. I don't know him. That's why I wasn't sure.

22 A. He does corporate. He did sales tax for many
23 years and now he's doing corporate, foreign corporate
24 income. But it was a seminar dealing with corporate issues
25 from the taxpayer's point of view and it was very

1 informative, very interesting, and, of course, I remember
2 the first day they had to make an announcement that there
3 were two state auditors in the audience not for anybody to
4 say anything they might regret.

5 Q. Did you raise your hand at that?

6 A. They pointed us out, but it was kind of
7 beneficial to the rest of them, because they could get our
8 perspective when we do an audit.

9 Q. Do you remember who put on that meeting? Was it
10 IPT or COST, one of those kind of associations?

11 A. I don't know. It was a big -- cost quite a bit
12 of money, four figures.

13 Q. For a three-day conference?

14 A. For a three-day conference at a Hilton in
15 Atlanta.

16 Q. How long ago was that?

17 A. I can't remember.

18 Q. That was the only meeting you can recall that you
19 attended in your job function?

20 A. Other than my training at the Department of
21 Revenue.

22 Q. Other than South Carolina meetings?

23 A. Yeah, other than South Carolina. We did have --
24 well, there was one more before I left when they were
25 thinking about dealing with, what was it, consolidating,

1 consolidated returns.

2 Q. Consolidated returns.

3 A. Because normally we look at a taxpayer, it's a
4 separate entity state.

5 Q. South Carolina is?

6 A. South Carolina is a separate entity state. Each
7 entity stands on its own. And this was to -- this was to
8 bring us up to date on combining returns, combined returns
9 really. A true consolidation. We don't do a
10 consolidation. We do a separate entity and then we combine
11 the bottom line either taxable income or loss to one
12 number. For a tax taxpayer that has multiple entities.

13 Q. Multiple subsidiaries.

14 A. Multiple subsidiaries.

15 Q. We'll probably move off of employment and
16 educational background. Is there anything else that
17 strikes you as relevant to this case?

18 A. No, I can't think of any.

19 Q. Why don't we talk a little bit about the Duke
20 Energy audit. Duke Energy has been referred to or had
21 various names over the years, or at least one other name,
22 Duke Power I believe was the previous name. Does that
23 sound familiar?

24 A. Duke Power Company, yes.

25 Q. Same company?

1 A. Right.

2 Q. I'll use the word Duke, but I'll be referring to
3 that entity. Tell me a little bit about your knowledge of
4 the Duke audit, South Carolina Duke audit, what the issues
5 were, when it started, what your involvement was.

6 A. My initial involvement was as a tagalong learning
7 how to do a utility type entity. And so I was never in
8 charge of the audit. I just -- I went along when they
9 asked me to go, when Randy asked me to go.

10 Q. Randy?

11 A. Randy Wilson. He was the lead auditor.

12 Q. He was the lead auditor the entire time?

13 A. The entire time until -- of course, he retired.

14 Q. When did he retire approximately, do you recall?

15 A. I don't know the exact date. I can't tell you.

16 Q. A year or two ago?

17 A. No. No. Probably, well, I don't want to
18 speculate. Within the last ten years I guess. I am
19 speculating. But I don't know the specific date that he
20 retired.

21 Q. He was the senior auditor?

22 A. He was the senior auditor.

23 Q. You were mentioning before that typically foreign
24 corporate income tax audits were usually handled by one
25 auditor, but in this case it was more than one auditor?

1 A. It was him and I. He and I.

2 Q. There were two auditors for Duke. There were two
3 auditors?

4 A. I think he started it before I got involved in
5 it.

6 Q. He was by himself at that point?

7 A. He was by himself. And then he asked me to go
8 along. It was more of a training for me to do a utility of
9 this size.

10 Q. Do you remember when you first got involved in
11 that audit? How long ago that was?

12 A. It was a long time ago. I couldn't tell you the
13 exact date.

14 Q. It sounds like before you became a senior
15 corporate income tax auditor?

16 A. Yes. I had some years and experience already,
17 but you start out with a simple, doing a simple audit to
18 gain confidence in yourself and your ability to deal with
19 the taxpayer and then you move to more difficult, the more
20 sophisticated and different audits.

21 Q. Who made that decision as to when you were ready
22 to move on to a more challenging audit?

23 A. I kind of made it.

24 Q. You had a lot of flexibility in deciding who you
25 audited?

1 A. Yes.

2 Q. Would you pick your audit candidates out of
3 curiosity? Did you get to decide --

4 A. I would -- sometime I'd pick my own and then
5 others would be picked for me. Hey, we need to take a look
6 at Taxpayer X, go pull those returns. So I would do that.

7 Q. Then sometimes you would be able to decide well I
8 heard of this company and I know they're doing business
9 here, I think we need to audit them and you would decide
10 to?

11 A. Or you read in the newspaper. I mean there's
12 plenty of audit leads. Newspaper, so and so made ten
13 million dollars, well, let's see if he reported it on his
14 return.

15 Q. If you would see a company that made a lot of
16 money that would be one of the things you would be thinking
17 about deciding who to audit? You wouldn't be auditing
18 companies that were losing money?

19 A. Yes, I've audited companies that lost money.

20 Q. You would?

21 A. Oh, sure.

22 Q. Why would you do that?

23 A. We changed the NOL and operating loss.

24 Q. You would choose them, though? You would choose
25 a company losing --

1 A. I would choose them, yes.

2 Q. Just to audit the NOL?

3 A. Yes. A lot of guys didn't like it, because it
4 didn't look good on paper, but I said it doesn't make any
5 difference. It's just postponing the tax that would be due
6 in the future.

7 Q. Did you do that frequently or just once in
8 awhile.

9 A. Occasionally. But they were big audits. They
10 weren't small little Mickey Mouse, small entity type. It's
11 a materiality level you look at.

12 Q. Tell me about that materiality level. What does
13 that mean?

14 A. There was no standard per se. Doing foreign
15 audits, you're doing large corporations to begin with.

16 Q. So most all of your audits were large
17 corporations?

18 A. You do large entities to begin with versus
19 instate or doing smaller entities and we never did, we
20 never did instate audits. Although, I have done an instate
21 audit simply as a training tool for an individual.

22 Q. But the vast vast majority of your audits were --

23 A. Vast majority, 98 percent were foreign corporate
24 audits of a large magnitude.

25 Q. Going back to the Duke audit, you started off by

1 assisting Mr. Wilson with that audit?

2 A. Yes.

3 Q. That was early on in your auditing career of
4 foreign corporate income tax?

5 A. Probably sometime in the '90s I guess it was,
6 early to mid '90s.

7 Q. How long did you stay involved in that audit, do
8 you remember, approximately?

9 A. It was kind of off and on.

10 Q. For a year?

11 A. It seemed like it went on forever.

12 Q. From the length of this audit I can understand
13 why you would say that. Was that unusual by the way? Did
14 you have a lot of audits that lasted like this?

15 A. I didn't, but I didn't make the decisions on this
16 audit. You would have so many audits that were in process.
17 You didn't want to have a lot of audits, too many audits in
18 process where you forgot what in the world you did. I
19 never liked to have a lot of audits in process. I wanted
20 to get it and get it completed, give me the information I
21 asked for. When I come to you, I want you to give me the
22 information that I asked for and don't try to bull me,
23 because I've seen it all. And it's just a job. I'm here
24 to help you and you're glad to see me. It's not vindictive
25 or anything. It's just a job. It's not that bad and we're

1 auditing the return so just make it as easy as possible.
2 Of course, the taxpayer didn't want you there to begin
3 with. I didn't want to be there anyway, but it was my job.
4 Cooperate, give me the information, I'll get out of there,
5 leave you alone.

6 Q. You said you didn't make the decisions on this
7 audit. For the entire time you were involved or for a
8 limited time?

9 A. The entire time I was involved I didn't make the
10 decisions. I say tagalong.

11 Q. Who did? Who did make the decisions if it wasn't
12 you?

13 A. Probably, well, Randy and I guess, and our boss,
14 John Swearingen.

15 Q. John Swearingen was Randy's boss?

16 A. Was Randy's boss, yes.

17 Q. Was it unusual to have that kind of involvement
18 on an audit? Because I remember you saying --

19 A. From who?

20 Q. Most of the time you were involved in audits I
21 thought you had said you were by yourself. You were solo.
22 You said the sales tax auditors often were in pairs or
23 threes.

24 A. Right.

25 Q. Because that was a labor intensive activity, but

1 the income tax audits it was usually one auditor?

2 A. Usually one auditor.

3 Q. Was this unusual that there was more than one
4 auditor?

5 A. Not necessarily, because it was a training thing.

6 Q. The entire time you were involved it was a
7 training thing?

8 A. Well, no. Initially it was and then as I gained
9 experience I just went along to help him.

10 Q. You were assisting him the entire time?

11 A. Just assisting him basically, but I didn't run
12 the audit at all.

13 Q. Did you assist him with any other audits other
14 than the Duke audit?

15 A. We went on some other audits together. We went
16 to Cleveland to do some audits. That's when I first
17 started doing corporate.

18 Q. When you first started, he was training you?

19 A. He was training me basically, and these were
20 entities that were straight C corporations. They were
21 major entities. I don't remember the names.

22 Q. That's okay, I don't need to know.

23 A. But it was a training type session. Regular
24 audit for him, but a training session for me.

25 Q. That was in the first year or two that you were

1 auditing?

2 A. Yeah, probably.

3 Q. Your involvement in this audit does span more
4 than a year or two. It spanned a much longer --

5 A. This one spanned a long period of time. I
6 already gained experience, but I was never in charge of the
7 audit per se.

8 Q. After your training period ended, you still
9 stayed a part of this audit I guess is what I'm getting to.

10 A. Right.

11 Q. You were no longer a trainee auditor?

12 A. Because he retired, see, and so they didn't have
13 anybody else that had experience with this. So who are
14 they going to go to? They're going to go to me.

15 Q. You were already involved anyway?

16 A. I was involved in it.

17 Q. At that point when he retired and you were still
18 involved, you kind of took over?

19 A. I took it, yeah, I kind of took it over, but I
20 said I think when we -- when this, what is this exhibit,
21 Exhibit 1 here, because I considered this exhibit, hey,
22 those years are closed. This was settled. I'm not going
23 to worry about those years. So my last audit that I did
24 with Duke I think covered the tax years 2002, 3, 4 and 5 I
25 think. So I wanted to start fresh. So that's why --

1 Q. That was the last cycle that you did work on?

2 A. That was the last cycle I did. That's my audit.

3 Q. But you worked on cycles before that?

4 A. I did that one by myself.

5 Q. Prior to that you were with Mr. Wilson?

6 A. With Mr. Wilson on that audit.

7 Q. The only cycle that you were in charge of was
8 that last cycle you mentioned which was 2002 --

9 A. The last one was 2000 -- let's see. 2, 3, 4 and

10 5. Four years I think it was.

11 Q. Prior to that, let's focus on 2001 and prior.

12 A. Okay.

13 Q. 2001 and prior it was Mr. Wilson making all of
14 the decisions as to how the audit was going to be handled
15 and what was assessed --

16 A. How it was going to be handled --

17 Q. -- or not assessed?

18 A. Right. I'd do sections of it that he would tell
19 me what to do, just take a look at this or take a look at
20 that.

21 Q. He would direct you as to what to take a look at?

22 A. Yes.

23 Q. And you would then do that?

24 A. Sometimes I would probably do some things on my
25 own.

1 Q. You must have known each other for quite
2 sometime. So there was probably a fair amount of trust
3 between you and Mr. Wilson?

4 A. Oh, sure. Sure. We audited together. We were
5 experienced auditors.

6 Q. You liked working together?

7 A. But he was much more experienced than I was.
8 Very good auditor. He knew his stuff.

9 Q. But you enjoyed working with each other?

10 A. Oh, sure.

11 Q. The period 2001 and prior, years earlier than
12 2001, you were working with Mr. Wilson for a good chunk of
13 that time on the Duke audit?

14 A. Off and on whenever he would set it up and ask me
15 to go or sometimes I think he might've gone by himself a
16 few times. I don't know. I'd have to go back and see the
17 history, the total history.

18 Q. Did you ever go on your own without him?

19 A. I don't think that I did. I don't recall that I
20 did.

21 Q. You were always with him?

22 A. Generally I think I was with him.

23 Q. When you would either do stuff because he asked
24 you to look at a certain area of the audit of Duke or you
25 on your own decided to look at a certain part of the audit

1 of Duke, when you'd reach a finding, you'd present it to
2 him first?

3 A. Yeah, we'd go over it and then we eventually
4 would go over it with the taxpayer.

5 Q. Did he generally agree with whatever you --

6 A. Yeah, I don't think he disagreed with anything
7 that I came up with.

8 Q. You were at that time an experienced auditor?

9 A. I had the experience. I knew what I was doing.
10 And it was to help him trying to settle this damn audit.

11 Q. Sure.

12 A. That's French.

13 Q. We all speak it. You were working with him for a
14 long period of time on this audit starting off as a junior
15 auditor, but maturing in your expertise?

16 A. Yes.

17 Q. But still working with Mr. Wilson the entire
18 time?

19 A. Right.

20 Q. Until he retired for that last cycle, that 2002
21 cycle?

22 A. Right, yes.

23 Q. But prior to 2002 you were with Mr. Wilson the
24 whole time?

25 A. When you say the whole time?

1 Q. The whole time from the beginning of your
2 involvement on the Duke audit which was early 1990s through
3 2001?

4 A. He initiated it. He initiated the audit and was
5 doing it and then I was already on board with Romey, was it
6 Romey? I can't remember.

7 Q. Who is Romey?

8 A. My boss, Harold Ingram, called him Romey. That's
9 what they called him.

10 Q. I'm sure there's a story there.

11 A. There is. But he -- either he was on it by
12 himself or he was on it with another auditor and then I got
13 involved in it.

14 Q. Anyone else involved in this audit that you can
15 recall?

16 A. I don't think so.

17 Q. How about Mr. Swearingen, was he involved in the
18 audit?

19 A. He was involved in it from the supervisory point
20 of view.

21 Q. What does that mean?

22 A. He didn't -- he just told us to whatever we -- he
23 really didn't get involved in the audit itself. We just
24 told him what was going on or he might get some RAR that
25 involved Duke or any other entity and he would pass it on

1 to us whoever was doing, whoever was working on whatever
2 entity, he would just pass it on. Or maybe some
3 correspondence that he might've had with the Duke people.
4 I don't know.

5 Q. But in terms of actually doing field work, he
6 wouldn't; be going out to Duke?

7 A. No, he never did.

8 Q. That wasn't his job?

9 A. No.

10 Q. That was your job and Randy Wilson's?

11 A. That was Randy Wilson's and I's job, my job.

12 Q. Any particular issues you recall that Mr. Wilson
13 asked you to get involved in or you decided to get involved
14 in? Anything that was your issue or that you were heavily
15 involved in on the Duke audit?

16 A. I was looking at the license tax calculation.

17 Q. License fee?

18 A. License fee calculation. I was dealing with the
19 entity that held the real estate.

20 Q. Another subsidiary of Duke?

21 A. I can't think of the name off the top of my head,
22 but it held all the real estate, held a lot of the real
23 estate of Duke. It was a part of Duke. It was a separate
24 audit and I did that entire audit.

25 Q. On your own?

1 A. For that particular taxpayer. I wish I could
2 remember the name.

3 Q. Without Randy Wilson's involvement on that one?
4 That one was all yours?

5 A. We reviewed it, but they filed separately at that
6 time. Duke was one audit and this, this taxpayer.

7 Q. Was another.

8 A. Was another audit, but owned by Duke.

9 Q. You handled that or you were involved in that
10 one?

11 A. Right.

12 Q. Was that pre-2001? Do you recall the timing of
13 that?

14 A. It was, yeah.

15 Q. No other issues come to mind other than the
16 license fee issue you mentioned and the separate real
17 estate subsidiary audit you mentioned? Any other issues in
18 the Duke audit come to mind that you were involved in?

19 A. No, other than just routine auditing of various
20 aspects of the return. But nothing out of the ordinary
21 that we wouldn't audit with any other taxpayer.

22 Q. You looked at the routine things that you would
23 typically look at especially as part of a large audit?

24 A. Right.

25 Q. Like the tax base calculation? How they compute

1 a taxable income?

2 A. Yeah, how they arrived at the taxable income.

3 Any income that was allocated.

4 Q. Allocable income?

5 A. Allocable income. Look at that.

6 Q. Anything else?

7 A. See if they had any Jeffrey companies, you know,
8 those standard things that we look at.

9 Q. What about apportionment, would you look at their
10 apportionment?

11 A. Apportionment, looked at that.

12 Q. You did look at that. What would you typically
13 do? Do you recall what you did on the Duke audit looking
14 at their apportionment?

15 A. I can't remember specifically. I can talk in
16 generalities about what we would look at.

17 Q. Sure.

18 A. Look at the property factor. We would look to
19 see what was concluded in the property factor, if there was
20 any construction of progress in there, then we would remove
21 it, because that's not part of the property factor. We
22 want to be sure all of the property is apportionable and
23 not allocable. If we found any allocable property in the
24 apportionment, we would take it out and adjust the property
25 factor. Be sure they calculated the rental value.

1 Q. And the property factor again?

2 A. The property factor. Collect --

3 Q. Is it rental times eight?

4 A. Rental times eight, exactly. And be sure they
5 calculated the property factor correctly. Same thing with
6 payroll, what did they put in payroll.

7 Q. Did you reconcile like the payroll to their
8 employment payroll reporting or how would you look at
9 payroll?

10 A. We didn't do that. That's what IRS does. They
11 do that kind of stuff. IRS does the detail, nitty gritty,
12 did they classify this expense or this income in the right
13 period, that kind of stuff. They did all that. We don't
14 do that. We do apportionment audits.

15 Q. The payroll factor, how would you take a look at
16 the payroll factor?

17 A. They would give as a sheet that said gross
18 payroll, whatever it was.

19 Q. They meaning the taxpayer?

20 A. Yes. And verify, try to verify that with the
21 return.

22 Q. Which return?

23 A. The tax return that we were auditing.

24 Q. You look at the return and the underlying report?

25 A. Yes, you look at line whatever it was in the

1 expenses of labor and then we look at cost of goods sold
2 which has labor in there and any labor and other
3 deductions, we would add those up and if it was reasonably
4 close, you know, a lot of times it's not going to be to the
5 penny, I'm not going to worry about that. As long as it's
6 close enough.

7 Q. In fact, that's the purpose of the apportionment
8 factor is not to be precise, right?

9 A. You want to be reasonably close. You're auditing
10 a major corporation so you have to give them some
11 credibility for being truthful. We don't go in there
12 thinking they're lying to us. Just give us some basic
13 back-up to the numbers that you have and we will run with
14 that unless we have information in advance that you are not
15 being kosher with us. But I never ran into that with any
16 taxpayer.

17 Q. With the payroll factor?

18 A. Yeah. I never ran into. I've adjusted the
19 payroll factor, because they had officers compensation in
20 there and I've adjusted that out, because that's not part
21 of the calculation.

22 Q. That's property factor, payroll factor.

23 A. And then the sales factor.

24 Q. Sales factor, what goes into that one?

25 A. The sales factor is the sales in line 1, the gain

1 or loss on the sale of -- or the gain on the sale of real,
2 but not the loss. You don't put losses in the calculation
3 of the sales factor.

4 Q. I was going to question you about that. I'm glad
5 you corrected it.

6 A. And the reason is because the loss doesn't
7 address that. It just says gains.

8 Q. That's what the statute says.

9 A. That's what the statute says. Don't ask me to
10 quote it, because I can't, but I know that's what it says,
11 and I know it hasn't been changed and so it's gains only.

12 Q. Gross or net gains going to the sales factor?

13 A. Net gains.

14 Q. Net gains of?

15 A. Net gains of --

16 Q. If I sold --

17 A. Schedule D which is capital gains would be net
18 gains like stocks and stuff like that.

19 Q. What about if I sold a building?

20 A. That would be net gain. That would be 4797.
21 That's schedule 4797. That's another schedule. It goes
22 into a different line than the schedule D.

23 Q. What about sales of services or goods, gross or
24 net?

25 A. Sales of services would be, would be up in line 1

1 at gross and then there would be returns and allowances,
2 but I don't think there's any returns and allowances for
3 electricity.

4 Q. That would be a trick.

5 A. That would be a very good trick.

6 Q. Generally gross sales of electricity would go
7 into the sales factor?

8 A. Gross sales. It could be -- whatever they
9 reported on line 1 and then they would give us a schedule
10 of where they got the number from.

11 Q. Who is they?

12 A. They meaning the taxpayer.

13 Q. Sales of accounts receivable if a taxpayer or
14 Duke were to sell accounts receivable?

15 A. But that wouldn't be in line 1. That would be in
16 one of the other lines.

17 Q. Would that get included in the sales factor or
18 not?

19 A. If there was a gain on it, yes.

20 Q. Gross gain or net gain?

21 A. Net, only net.

22 Q. Was there a law change that changed that
23 treatment in South Carolina? Do you recall that treatment
24 changing?

25 A. No, we always audited that way.

1 Q. You always included accounts receivable at net?

2 A. That was -- you didn't see a lot of that. I
3 didn't see a lot of that auditing on selling accounts
4 receivable. If that was the case, then we would -- they
5 would probably put that in other deductions and you would
6 review -- not other deductions, other income.

7 Q. Other income.

8 A. Other income. Then you would review that. You
9 accept it on its face.

10 Q. But generally sales or sales at gross were
11 tangible property and for services?

12 A. Tangible property, it's net gain.

13 Q. Of? If I'm selling widgets?

14 A. If you're in that business, then it's gross sales
15 which is line 1, but if you're not, if you're not, you
16 are -- if you are in line whatever it is on the return, I
17 don't have the return in front of me, a return 1120, but
18 schedule D and 4797 is where the net gains and losses
19 appear and they also could appear in line, it's either 9 or
20 10 which is other income, that could be net gain or loss in
21 there. There's net gain and loss in those three areas, but
22 we would only include the net gain in the calculation of
23 the sales factor.

24 Q. That's what you were mentioning before, your job
25 was just to enforce the statute, that's what the statute

1 required and that's what you did?

2 A. That's the way I was taught and that would make
3 sense, because we were auditing the return.

4 Q. When you were taught, that refers back to your
5 training, that's how you were trained to audit?

6 A. Yes, that's the way I was trained.

7 Q. Are you familiar with the dispute here between
8 South Carolina and Duke?

9 A. Yes.

10 Q. Tell me a little bit about your understanding of
11 the dispute. I'm interested to hear your view of it.

12 A. I think there's two main issues. First is the
13 apportionment method. I think Duke feels that it should be
14 using the gross receipts method and they are -- we've
15 always handled them as a four factor or three factor and
16 now four factor taxpayer.

17 Q. Because?

18 A. Because they are a manufacturer of electricity.

19 Q. That was the long standing view?

20 A. As far as the eye can see.

21 Q. Was that memorialized anywhere? Is that like in
22 one of the training materials or the audit manual you
23 mentioned before?

24 A. Well, all manufacturers are four factors.

25 Q. Right, but the fact that Duke was a manufacturer

1 or electricity providers were manufacturers, was that
2 memorialized anywhere? In legislation or audit manual or
3 internal document?

4 A. God, if it was, I couldn't tell you which one it
5 was.

6 Q. You don't remember seeing anything?

7 A. No. No. Other than they were considered a
8 manufacturer. Always been considered a manufacturer.

9 Q. That's how you were trained?

10 A. Yes.

11 Q. Other than that, you can't think of anything,
12 anything written, regulation or revenue procedure?

13 A. No. No. There's no way off the top of my head.
14 God, they write so many legislations, you can't remember.

15 Q. That's one of the issues in this?

16 A. That's one of the issues. The other issue is
17 gross proceeds that they are putting in -- they're using
18 gross proceeds rather than net gain in the calculation of
19 the sales factor. I think those are the two main issues of
20 the entire audit.

21 Q. What was your involvement or how are you familiar
22 with those issues? How did you know about them?

23 A. They filed a protest.

24 Q. Were you involved in those protests? Did you
25 evaluate them or review them?

1 A. I looked at them and then I passed them on.
2 Q. Before you retired?
3 A. Oh, yes. Yes.
4 Q. Did you do a write-up or express an opinion about
5 the protest or your view of it?
6 A. No.
7 Q. Or any analysis or opinions?
8 A. If they asked me to I would. Probably verbally
9 talking with my boss.
10 Q. Who would that be again?
11 A. John Swearingen at the time.
12 Q. You most likely talked to John Swearingen about
13 this protest and what your thoughts were regarding it?
14 A. Right. Right.
15 Q. Do you remember any specific conversations about
16 it?
17 A. I couldn't remember any specific conversations
18 other than I felt they didn't have a lick to stand on.
19 Q. Did anyone in the Department feel differently
20 than you?
21 A. Nobody that I know of.
22 Q. Nobody took a different view?
23 A. Because we've always, we've always audited that
24 way and we've always treated -- I always treat the
25 taxpayers the same way. I don't differentiate in my

1 interpretation of the law. We never, have never since I
2 worked there put gross proceeds in the calculation of the
3 sales factor. Because the reason is we are auditing the
4 tax return and the tax return does not have gross proceeds.
5 Gross proceeds is simply a way to calculate whether there's
6 a net gain or net loss. You have to have a basis first.
7 Then you sell it and you have gross proceeds and then you
8 do your calculation. You take all your expenses away from
9 that and whatever is left over is either net gain or it's
10 net loss period.

11 Q. Just so I understand. You said you never include
12 gross proceeds in the sales factor?

13 A. Not when we are talking about the sell of
14 tangible personal property. For instance, a desk or a
15 chair or a building or something like that. Well, a
16 building would be allocated. So that wouldn't appear in
17 there.

18 Q. Because that's real property?

19 A. That's real property.

20 Q. But tangible personal property you wouldn't --

21 A. Any tangible personal is always treated as net
22 gain in the calculation of the sales factor.

23 Q. Never gross?

24 A. Never. Never ever ever gross.

25 Q. But if you were manufacturing tangible personal

1 property and selling it, then you would include it?

2 A. It would be in sales in line 1. So the only
3 thing that's deducted from line 1 is returns and
4 allowances.

5 Q. All sales in line 1 are included in the sales
6 factor except for deduction like returns and allowances?

7 A. Right.

8 Q. I want to jump back for a minute. Sorry about
9 this. Here's another document. The last four digits are
10 1695.

11 (WHEREUPON, Petitioner's Exhibit
12 No. 3 was marked for
13 identification only.)

14 Q. Do you know what that document is or could you
15 describe what it is for me?

16 A. It's a chronological worksheet 6036, that's the
17 corporate income code.

18 Q. Where do you see that?

19 A. Right there.

20 Q. Did you handwrite that? Is that your
21 handwriting?

22 A. That looks like my writing, yes.

23 Q. What is that again, 6036 that you handwrote on
24 that document?

25 A. That's the code where -- if you're doing an audit

1 that's what you charge your direct time to.

2 Q. Is that a code associated with Duke Power, Duke
3 Energy?

4 A. No.

5 Q. It's associated with a specific tax type?

6 A. It's corporate income. 6034 would be corporate
7 license.

8 Q. That's the tax type?

9 A. Tax type, yeah.

10 Q. You recorded your travel and your work time, et
11 cetera, associated with this audit?

12 A. Yes.

13 Q. Is that how generally you did things, you tracked
14 your time?

15 A. Yes, generally.

16 Q. Is that something that you were required to do?

17 A. That was just part of the job as an auditor is to
18 do this.

19 Q. The Department was able to track how much time
20 each person spent on a particular audit?

21 A. Right.

22 Q. This would be a tool to help them do that?

23 A. Tool to help them in their evaluation and their
24 statistics that they come out with and whoever they report
25 them to at the end of the year or monthly too.

1 Q. There's another one, Joe. It looks like a
2 similar -- actually I'll stay with the same one for now.
3 On this one it notes that you returned from Houston, Texas,
4 it looks like on the bottom there on December 5, '03. Do
5 you see that entry, that last entry on the paper?

6 A. Hm-hmm.

7 Q. You spent sometime in Houston, Texas, auditing
8 Duke?

9 A. Yes.

10 Q. Do you remember anything about that experience,
11 going to Houston to audit Duke, what you were doing there
12 or what you worked on when you went to Houston?

13 A. I worked on that entity, oh, golly, that dealt
14 with the real property.

15 Q. Not Duke Power, but a different?

16 A. Some Duke Power, but I couldn't tell you exactly
17 what I worked on.

18 Q. Did you go to Duke's facility in Houston when you
19 went to Houston?

20 A. Yes. Duke at that time I think was -- either
21 Duke bought this entity in Texas or the entity in Texas
22 bought Duke. I don't remember what it was, but where you
23 were going to audit them, audit Duke, had to be done in
24 Texas, because that's where the tax manager was. So that's
25 where we would go.

1 Q. You did field work in Houston?

2 A. Field work in Houston.

3 Q. Do you remember going to Houston more than once
4 or was this the only time?

5 A. I did go more than once, two or three times as I
6 recall.

7 Q. Did you like that kind of travel?

8 A. Didn't bother me. I used to live in Houston. It
9 was actually Cypress, Texas, which is outside, just outside
10 of Houston.

11 Q. That's where you lived?

12 A. Well, not at the time. I lived in South
13 Carolina.

14 Q. What was in Cypress, Texas?

15 A. That's where I bought my house.

16 Q. Duke was in Houston downtown.

17 A. Long before I moved.

18 Q. But Duke was in Houston, not in Cypress?

19 A. No, it was downtown.

20 Q. You remember going there?

21 A. Well, not exactly downtown. It was outside the
22 610 loop as I recall. Near the Galleria shopping mall.

23 Q. I've been there. It's a nice area. If we were
24 to take a look at all the time you spent on this Duke audit
25 compared to the times you spent on other audits, would you

1 say that this was a large audit from the perspective of how
2 much time Joe spent on it?

3 A. Yeah, it was probably large, a large audit.

4 Q. Year after year you would spend a fair amount of
5 time working on it?

6 A. I spent sometime on it, yes.

7 Q. Would you say more than 20 hours?

8 A. Probably.

9 MR. GREEN: Objection as to form.

10 Q. Anything else regarding your field work on the
11 Duke audit in terms of your experiences? Were they
12 helpful? Cooperative?

13 A. Yes, Duke was cooperative. I don't remember any
14 problem with Duke. They generally answered the questions
15 that we had.

16 Q. If you asked for information you generally got
17 it?

18 A. Generally got it. I didn't get -- well, you're
19 talking about -- which audit are you talking about?

20 Q. I'm talking about the Duke audit that started --

21 A. You're talking about my audit or the audit prior
22 to mine?

23 Q. The audit prior to 2001 or 2002, I'm sorry.
24 Prior to 2002.

25 A. We'd give them a list of questions and then they

1 either answered them or provided the information, but it
2 was sent to Randy. It wasn't...

3 Q. Randy Wilson?

4 A. Yeah, generally sent to Randy.

5 Q. You would have heard from Randy if there was a
6 problem?

7 A. Oh, sure. Sure.

8 Q. You don't remember any problems?

9 A. Yes, he would have brought me up to date on
10 whatever they were doing.

11 Q. I'm sure you had all kinds of experiences as an
12 auditor with taxpayers that were cooperative, taxpayers
13 that were not cooperative?

14 A. Sure.

15 Q. Would you label Duke a cooperative taxpayer?

16 A. Yes, I would label them cooperative. Sure.
17 Always like cooperative taxpayers.

18 Q. You must have worked with a fair number of people
19 on the Duke audit on the Duke side?

20 A. Yes.

21 Q. You were in Houston, you were here. You audited
22 various areas of Duke.

23 A. Right.

24 Q. You must have interacted with different folks.
25 Do you remember any of the individuals you worked with on

1 the Duke side?

2 A. There was a tax manager in Charlotte, I can't
3 remember his name. CPA. Nice gentleman.

4 Q. Was his name Pat Hopson?

5 A. No, no. He was after Duke was purchased or Duke
6 purchased this company in Houston. He was afterward. It
7 was another gentleman. This was when it was just Duke
8 Power Company.

9 Q. This is going back some.

10 A. Yes. This is when I first got involved.

11 Q. Was his name Rick McCarver?

12 A. Yes, that's him. Rick McCarver.

13 Q. You worked with him for quite sometime more than
14 a year or two?

15 A. Probably. Going back and forth doing the audits.
16 And then at some point as I said Duke was either purchased
17 or Duke purchased this entity in Texas and then Pat Hopson
18 became the tax manager or was the tax manager for the
19 entity. I don't remember, but, and then we would do the
20 audits there.

21 Q. You worked with Pat, you worked with Rick.
22 Anyone else you remember working with on the Duke side?

23 A. Then I think -- and then after Pat it was Cooper
24 and the tax manager, what was his name.

25 MR. MONROE: John Litchow (phonetic)?

1 A. Yeah, John Litchow. John Litchow. I dealt with
2 John Litchow more than I did with Cooper.

3 Q. Nice guy.

4 A. Yes, very nice. Very nice gentleman.

5 Q. Was Cooper cooperative?

6 A. Yeah. Reasonably cooperative, yes.

7 Q. John Litchow, was John Litchow cooperative?

8 A. Yes. John was as cooperative, I mean, I
9 requested certain information that he probably couldn't, he
10 couldn't get, because I think he came from another entity
11 in Cincinnati. He was kind of a new guy there and trying
12 to find all this information and then dealing with our law
13 was probably quite burdensome to him.

14 Q. Couple more questions regarding the length of
15 time of this audit, something that we touched on earlier.
16 This audit strikes me, Joe, as one that took longer than
17 most, is that fair?

18 A. I would agree with that.

19 Q. Did you have any audits longer than this one?
20 Were you involved with any other audits longer than this
21 one?

22 A. I don't recall one. I've had some long audits,
23 but those are very large taxpayers. Probably one other,
24 but I don't think any that was this long.

25 Q. This might have been the longest?

1 A. Probably the longest. I would agree with that.

2 Q. If you had to guess how many audits you were
3 involved in in your years.

4 A. Yeah, I was involved with a lot. I would say
5 this was probably the longest.

6 Q. Share with you another letter addressed to you
7 from Duke. The last four digits are, another South
8 Carolina Department of Revenue document 9731.

9 (WHEREUPON, Petitioner's Exhibit
10 No. 4 was marked for
11 identification only.)

12 A. There's the name of that entity.

13 Q. Noticed the same thing. Look familiar?

14 A. Yes.

15 Q. In this letter, Joe, this letter from Pat Hopson
16 to you, he mentions quote unquote Joe's IDR which were
17 verbal. Sometimes your IDRs were verbal, sometimes they
18 were written?

19 A. Yes.

20 Q. You can take a minute to read it if you want to.
21 I didn't mean to rush you, Joe.

22 A. No. That's fine. Sometimes the questions were,
23 you'd walk into his office can you tell me about this. And
24 some taxpayers want you to write every single question
25 down.

1 Q. That's not how Duke operated, though, right?

2 A. Well, not, not until Pat got involved. I think
3 before it was -- sometimes we would write, I think we would
4 even write questions down that we had.

5 Q. Sometimes you would give --

6 A. Sometimes just to refresh, to remember, because
7 we ask them and if he doesn't write it down, he's not going
8 to remember the next day and we're not going to remember so
9 we write it down. Just the issues that were probably
10 present at the time, whatever they were. I couldn't tell
11 you.

12 Q. IDR, what does that stand for again?

13 A. Information document request.

14 Q. Sometimes the IDR was verbal, sometimes written?

15 A. Right.

16 Q. Randy and you worked pretty closely it sounds
17 like based upon your earlier description, is that right?
18 On this audit, you worked closely together on this audit?

19 A. Yes. We were there. He did his thing and I did
20 mine.

21 Q. But he was the senior auditor?

22 A. He was always in charge.

23 Q. He was involved in what your work was, the
24 results of your work, is that right?

25 A. I don't...

1 Q. If you reached a conclusion in the Duke audit,
2 would he know about that conclusion?

3 A. Yes.

4 Q. It was his job to review it in fact?

5 A. Right.

6 Q. It sounds like based upon our earlier discussion,
7 Joe, he would routinely agree with your conclusions, is
8 that right?

9 A. Yes.

10 Q. On the second page, the second page of this
11 letter to you, Joe, it says Randy's IDR, do you see that on
12 the bottom of the second page?

13 A. Hm-hmm.

14 Q. It says copy of all waivers and then there's a
15 reply. It says, "a copy of the last waiver given for
16 December 31, 1978 to December 31, 1999, parenthetical
17 income, and then December 31, 1984 through December 31,
18 '00, parenthetical license, through 12/31/02 is attached."
19 Do you know what that means? Those periods with the income
20 and license behind it?

21 A. The periods that he was auditing.

22 Q. Who is he?

23 A. Randy. Randy and I.

24 Q. Right. Randy and you were auditing, is that
25 right?

1 A. Right.

2 Q. You're involved in audits of both those periods
3 for the income tax and the license fee?

4 A. Right.

5 Q. You were provided with this letter, at least it
6 was addressed to you. Does it look familiar to you?

7 A. Yes, I remember this.

8 Q. The rest of that response, "As discussed during
9 the audit if you needed any previous waivers, you were to
10 indicate which one specifically and Pat would locate them."
11 Do you remember you or Randy asking for any waivers in
12 response to this?

13 A. I don't remember really. Don't remember.

14 Q. Then the last sentence of that response, now I'm
15 at the top of page 3, Joe. "Otherwise, the last waiver is
16 comprehensive of all periods with claims outstanding and
17 should suffice for those periods." What do you think Pat
18 meant by that? What's the meaning of that sentence?

19 A. Includable, all the periods are includable.

20 Q. For?

21 A. For these, for these periods that he says a copy
22 of the last waiver given for.

23 Q. What is meant, Joe, by a wavier in this context,
24 this letter directed to you?

25 A. Well, a waiver to me gives the auditor the

1 opportunity to review the return and the questions and so
2 forth and gives the taxpayer, not the taxpayer, gives the
3 auditor the chance to make either an assessment or refund.
4 That's the way I always look at a waiver.

5 Q. It sounds like based on this response that the
6 waiver, the waivers, I think it's plural, were noted here
7 for the entire period, is that right, Joe? That's what Pat
8 was trying to get across to you?

9 A. I guess. I don't -- it looks like that's what
10 he's saying. It says comprehensive of all periods with
11 claims outstanding.

12 Q. Do you remember following up on that IDR?

13 A. I don't remember. I really don't remember.

14 Q. You don't remember following up on that?

15 A. No.

16 Q. As an auditor were waivers important to you?

17 A. Yes.

18 Q. Why is that?

19 A. The taxpayer did not have to sign a waiver.
20 There was no requirement that he sign it. Simply allowed
21 the auditor time to review the audit or review the returns
22 in a period, period of time so we could get it either
23 assessed or refunded.

24 Q. Without a waiver what would happen if a waiver
25 was not signed?

1 A. Either we would lose that year.

2 Q. Because?

3 A. To the statute.

4 Q. Statute of?

5 A. Three year statute of limitations or we would
6 just assess it based on current information that we might
7 have that would hold it.

8 Q. Just so I understand what you are saying, Joe.
9 If there was no waiver and the statute of limitations was
10 about to close, the year would either close because the
11 statute is expired or you would assess it? You would
12 assess the taxpayer for that period?

13 A. Right.

14 Q. By assessing the taxpayer you wouldn't have to
15 worry about the statute closing?

16 A. Right.

17 Q. Waivers were something you ordinarily dealt with
18 in an audit?

19 A. It was a tool. You try to audit, you try to do a
20 three-year audit, any taxpayer. Try to do three years,
21 because you want to be productive and efficient, because
22 the State of South Carolina is spending money for you to go
23 to the taxpayer and so you don't want to do one year and
24 then go back and do it another year and then go back, that
25 would be ridiculous. It would be three plane trips and

1 all. So you want to do three years.

2 Q. That's more efficient.

3 A. The statute of limitations is three years.

4 Q. Statute of limitations is three years, so you
5 would audit a taxpayer for a three-year period typically?

6 A. We generally try to audit them for three years.

7 Q. The number of years here under audit was far more
8 than three?

9 A. Yes.

10 Q. This again made it unusual, is that right, Joe?

11 A. It was unusual to say the least.

12 Q. Yes. Who signs a waiver?

13 A. Well, the auditor would fill it out and, but I
14 would have to get somebody above me to approve it.

15 Q. Would you sign the waiver?

16 A. I would sign the waiver, yes.

17 Q. On behalf of the Department of Revenue, is that
18 right?

19 A. I would sign it and then I would get my -- I
20 can't remember, either my boss -- no, maybe somebody above
21 him might sign it. Somebody with a higher level within the
22 Department of Revenue would sign it, but I can't remember
23 who it is.

24 Q. The point being or a point being would be that
25 both the taxpayer and the Department of Revenue, a

1 representative from each, would sign the same waiver? They
2 both needed to sign the waiver?

3 A. Oh, yes, they both needed to sign. Always.

4 Q. Otherwise it's not an effective waiver?

5 A. No.

6 Q. Ask you to take a look at another document. This
7 is Duke document 7311.

8 (WHEREUPON, Petitioner's Exhibit
9 No. 5 was marked for
10 identification only.)

11 Q. Is this a waiver?

12 A. Yes.

13 Q. Who signed it on behalf of the Department of
14 Revenue?

15 A. Joseph P. Southard.

16 Q. For somebody else?

17 A. Marvin Davant was the, what was he? He was the
18 field audit manager. He's one of the big wigs. He was
19 above my boss's boss.

20 Q. He's your boss's boss. That high up.

21 A. Yes, or even higher. I don't know.

22 Q. Would you normally sign like that for Marvin
23 Davant or for somebody else or is that unusual?

24 A. No, it's not unusual.

25 Q. It's not? Why wouldn't you just sign it? Why

1 did you sign it on behalf of or for Marvin Davant?

2 A. I mean that's just the way we did it.

3 Q. That was routine in other words? That's how you
4 sign waivers?

5 A. If I couldn't find him, then I understood I had
6 the authority to sign for him or the secretary would sign
7 or we would track him down and get him to sign it.

8 Q. What tax type does this waiver relate to?

9 A. Corporate income and corporate license.

10 Q. Those were the areas you were auditing?

11 A. Yes.

12 Q. For Duke? For the State on Duke?

13 A. Right.

14 Q. Do you remember sending other waivers in addition
15 to this one?

16 A. No. Never signed another -- this is the only one
17 and I think I was probably -- Randy couldn't do it at the
18 time so I did it.

19 Q. But this is something you did in other audits as
20 well, you'd get waivers signed when you were auditing?

21 A. Sure. We were bumping up against the statute,
22 then we would try to get the taxpayer to sign the waiver.

23 Q. Marvin Davant you mentioned was your boss's boss,
24 is that right?

25 A. Well, that was my boss's boss's boss's boss I

1 think. I don't have the structure, but he was --

2 Q. He was superior to you?

3 A. He was in charge of all the field -- he was field
4 audit manager I think. I think foreign and domestic.

5 Q. He would sign other waivers in other audits you
6 were involved in?

7 A. I'm sure. I guess he would.

8 Q. Other audits you were involved in?

9 A. Yes, other than what I was involved. Many
10 others.

11 Q. My question, Joe, is, that you audited companies
12 other than Duke?

13 A. Oh, sure.

14 Q. And you got waivers in those audits and would
15 Marvin sign some of those waivers?

16 A. Sure.

17 Q. This waiver was executed it looks like in 1995,
18 Joe, is that right?

19 A. Yes.

20 Q. Was Marvin an experienced income tax person
21 within the Department of Revenue? Did he have a lot of
22 experience with corporate income tax?

23 A. I don't know.

24 Q. You didn't work with him that closely?

25 A. No. I was -- he was up here and I'm down here.

1 Q. Did you know if he had experience in operations
2 of the Department of Revenue and procedures of the
3 Department of Revenue regarding audits?

4 A. As far as I know he did.

5 Q. But you didn't work closely with him?

6 A. No.

7 Q. You mentioned something before that caught my ear
8 regarding refunds and waivers. I think what you said, I'm
9 asking, was your description that the waiver keeps the
10 statute of limitations open?

11 A. For the -- yeah, it kept it open as far as --
12 from the auditor point of view so it would give him time to
13 review the return and make either the assessment or the
14 refund.

15 Q. But only the auditor could make the assessment or
16 the refund, not the taxpayer?

17 A. That's the way I looked at it, yes.

18 Q. You viewed it that the taxpayer could not make a
19 refund --

20 A. I never really thought about it from the
21 taxpayer's point of view. I always thought it was
22 beneficial to the Department of Revenue and either the
23 taxpayer had the authority or to either -- not authority,
24 but he could either at his discretion either sign it or not
25 sign it. Strictly up to him. He didn't --

1 Q. And the State too? The State didn't have to sign
2 it either?

3 A. The State didn't have to sign it. As I say it
4 was a tool to help the auditor.

5 Q. Do you ever remember executing a waiver in one of
6 your audits, Joe, where a taxpayer would seek a refund
7 after the waiver was signed for that period?

8 A. I couldn't tell you. I don't --

9 Q. You don't remember that happening?

10 A. I don't remember that happening. They might
11 have, but if they did, I don't recall.

12 Q. You don't recall that happening in one of your
13 audits where a taxpayer sought a refund after signing?

14 A. I don't remember.

15 Q. You don't remember?

16 A. No.

17 Q. If a taxpayer were to seek a refund after signing
18 a waiver, would you have told them that they couldn't seek
19 a refund after signing the waiver?

20 A. No. I don't see why I would.

21 Q. You're familiar with I imagine based upon the
22 training and keeping up to date with South Carolina law
23 with South Carolina revenue procedures generally?

24 A. Generally.

25 Q. When a new one would come out, you would

1 generally read it at some point?

2 A. If it applied to my area of expertise.

3 Q. Your area being?

4 A. Corporate income tax.

5 (WHEREUPON, Petitioner's Exhibit

6 No. 6 was marked for

7 identification only.)

8 Q. This is a South Carolina revenue procedure 95-5.

9 Have you seen this one before?

10 A. I probably have, but I couldn't tell you when.

11 Q. As part of your job if this related to corporate
12 income tax, this is something that you would generally be
13 aware of, is that right, Joe?

14 A. We would look at it, yes.

15 Q. Joe, this revenue procedure, the subject of it on
16 the top there, can you read that?

17 A. "Claims for refund and correction of errors in
18 tax year barred by the statute of limitations."

19 Q. Do you see the references further down that page,
20 the South Carolina code sections?

21 A. Yes.

22 Q. Are those corporate income tax code sections?
23 I'm sorry, do they apply to the corporate income tax?

24 A. I don't know unless I looked at them. I know
25 that 12-54-85 I think deals with penalties.

1 Q. That relates to corporate income tax?

2 A. That relates to any, I think any tax.

3 Q. Including corporate income tax?

4 A. Yeah, I think so.

5 Q. In the introduction on the bottom of that first
6 sentence, Joe, "The South Carolina Code of Laws sets forth
7 time limits within which the Department of Revenue may
8 assess and collect taxes and within which taxpayers may
9 file claims for refunds." Is that something that generally
10 would apply to corporate income tax?

11 A. Yes.

12 Q. Something therefore that would be relevant, this
13 revenue procedure would be relevant to what you were doing
14 as a corporate income tax auditor for South Carolina?

15 A. Yes.

16 Q. If you turn the page, Joe, the second paragraph
17 on page 2. Do you see where it talks about the purpose of
18 this document is twofold?

19 A. Yes.

20 Q. What does that second sentence say? Can you read
21 that for us?

22 A. Revenue's authority for granting refunds.
23 Second, this document briefly --

24 Q. Could you read that first sentence where it says
25 first comma?

1 A. "First, this document sets forth the Department
2 of Revenue's authority for granting refunds."

3 Q. Do you remember applying this revenue procedure
4 or you don't recall?

5 A. I don't recall.

6 Q. Turn to page 5 please. Same revenue procedure,
7 same document number.

8 A. Yes.

9 Q. The second full sentence, I believe it begins
10 with in so, do you see that? Actually why don't we read it
11 from the very first sentence. It will probably be easier
12 anyway. I'll read it. "If the taxpayer agrees to the
13 Department of Revenue's request that a waiver of the period
14 of statute of limitations on assessments be extended, then
15 the time the Department may mail a notice of assessment
16 pursuant to Code Section 12-54-85 will be extended." What
17 does that sentence mean, do you know, Joe?

18 A. Read that again.

19 Q. I'll do it a little slower this time even. "If
20 the taxpayer agrees to the Department of Revenue's request
21 that a waiver of the period of statute of limitations on
22 assessments be extended, then the time the Department may
23 mail a notice of assessment pursuant to Code Section
24 12-54-85 will be extended."

25 A. It means that if the taxpayer signs a waiver and

1 it has a date on it where it expires, then you have to send
2 the notice, the notice would automatically be extended
3 also. So they would have up until that...

4 Q. Extended date?

5 A. Window to send an assessment or a refund.

6 Q. This generally describes the Department of
7 Revenue's ability to assess during that extended time
8 period, is that right, Joe?

9 A. Right.

10 Q. Now I'll tackle the second sentence with you.
11 "In so doing, the time within which a taxpayer may file a
12 claim for refund will also be extended until the agreed
13 upon date." What do you think that means, Joe? I can read
14 it again if you would like.

15 A. It means that the taxpayer can file a claim for
16 refund.

17 Q. During what period of time?

18 A. During the period of time of the waiver.

19 Q. Does this mean, Joe, that the waiver extends the
20 period of time for the Department to assess and for the
21 taxpayer to seek a refund?

22 A. I don't know. I always thought it meant that the
23 auditor had the ability to -- I mean, if this is what it
24 says then that's --

25 Q. Is that your --

1 A. I didn't write this.

2 Q. No, I understand. Is that how you interpret
3 these words though?

4 A. But that's, if that's what it says, that's what
5 it says. The taxpayer may claim a, file a claim for refund
6 and will -- may file a -- let me read this. "In so doing,
7 the name within which a taxpayer may file a claim for
8 refund will also be extended until the agreed upon date."

9 Q. So the waiver extends the period of time for
10 assessment --

11 A. That's what they're saying, yes.

12 Q. Let me ask it one cogent way. This says on page
13 5 paragraph number 1 that if a waiver is signed, then the
14 Department has an extended period to assess and the
15 taxpayer has an extended period to seek a refund, is that
16 correct?

17 A. According to what this says, yes.

18 Q. Thank you.

19 (Break.)

20 Q. I want to go back to a document you already
21 looked at, Joe, and that was the waiver document that we
22 were talking about before, the one that you signed. Were
23 there any internal procedures that you are aware of
24 regarding how to, when to, why to execute these documents?
25 Was it in the audit manual you referred to before or any

1 kind of advice that the Department gave its auditors or any
2 other form?

3 A. Not that I'm aware of, not any other form. I
4 always looked at the waiver as it gave the auditor
5 additional time to review the returns and the apportionment
6 work papers and you either make an assessment or a refund
7 strictly.

8 Q. But there was no other instructions given to you
9 as an auditor by the Department of Revenue that you can
10 remember?

11 A. No.

12 (WHEREUPON, Petitioner's Exhibit
13 No. 7 was marked for
14 identification only.)

15 Q. This is another one, 5753. This, Joe, is another
16 South Carolina Department of Revenue procedural bulletin.

17 A. Okay.

18 Q. By the way, how did you view South Carolina
19 Department of Revenue bulletins like this one or others?

20 A. How did I?

21 Q. Yes, in terms of were they something you would
22 follow in performing your duties as an auditor?

23 A. Yes. These were published by the Department of
24 Revenue we would have to follow them if we knew about them.

25 Q. If you could turn to page 4 of that document, the

1 very last paragraph on page 4. Can you read that for us?

2 A. "Consistent with its longstanding administrative
3 position, the Department will continue to interpret the
4 time limitations in Code Section 12-54-85 consistent with
5 the following rules."

6 Q. When you see something like consistent with its
7 longstanding administrative position, the words that it
8 says there, how do you interpret that in performing your
9 duties as an auditor? This isn't a change or this is a
10 change?

11 A. I didn't think it was a change other than my
12 interpretation as I explained of the waiver.

13 Q. But the author of this document is describing a
14 change of position or a longstanding position that's not a
15 change?

16 A. To continue to interpret, it sounds like not a
17 change consistent with the following rules.

18 Q. Why don't we turn the page to page 5 and we'll
19 again make this quick. On number 1, can you read that
20 first sentence?

21 A. "If the taxpayer agrees to the Department's
22 request that a waiver of the time limitations on
23 assessments be extended, then the time the Department may
24 mail a notice of assessment pursuant to Code Section
25 12-54-85 will be extended."

1 Q. Again what does that mean to you, Joe? It sounds
2 like it's similar language --

3 A. Similar language to that other one, the other
4 document, Exhibit 6.

5 Q. That language again means for us?

6 A. Means for us --

7 MR. GREEN: Objection as to form.

8 Q. That first sentence, what does that mean to you?
9 How would you interpret it in performing your duties as an
10 auditor?

11 A. That's from the Department. It seems like that's
12 from the Department's point of view that extends the time
13 that the Department meaning may mail a notice of assessment
14 pursuant to that Code Section 12-54-85.

15 Q. This second sentence, "In so doing, the
16 Department will also consider the time within which a
17 taxpayer may file a claim for refund to be extended until
18 the agreed upon date." What does that language mean to
19 you, Joe, in performing your duties as an auditor? Take
20 your time in reading it.

21 A. I guess it means that the taxpayer can file a
22 claim for refund.

23 Q. During what period of time?

24 A. During the period of the waiver.

25 Q. I'm done with that document.

1 (WHEREUPON, Petitioner's Exhibit
2 No. 8 was marked for
3 identification only.)

4 Q. This is another document. This one has no
5 document number.

6 MS. TODOROVA: It does have a document number,
7 but not on the first page.

8 Q. I'm sorry. It's Duke document, the last four
9 digits being -- you can read it, Joe. What are the last
10 four digits?

11 A. DE00015337.

12 Q. Thank you. On the first page of that document,
13 it's from Marvin Davant and it's to -- can you say who it
14 is to and the cc's are? Do you see who this email is to?

15 A. Cc Burney Maybank.

16 Q. Do you remember Burney Maybank?

17 A. Yes.

18 Q. Who is he?

19 A. He was the director of the Department of Revenue
20 for a period of time. Very nice gentleman. Very brilliant
21 gentleman.

22 Q. I agree on both accounts.

23 A. Very easy going, very easy to get along with.
24 Can write law out of his head.

25 Q. Really knows South Carolina law well, Joe, is

1 that right?

2 A. As far as I'm concerned he does.

3 Q. In this body of the e-mail he notes, "In answer
4 to the waiver question of recent discussion please find
5 attached my thoughts at per your request." This is an
6 e-mail from Marvin Davant to Rick and Burney.

7 A. Hm-hmm.

8 Q. Can you turn to the last page where he signs off
9 on that document?

10 A. Yes.

11 Q. He signs it as Marvin Davant, field services
12 director, retired. Is that the role you recall working
13 with him in?

14 A. Yes, field services director.

15 Q. That's what we were talking about before I think,
16 is that right?

17 A. Couldn't think of the last term.

18 Q. This is the title that you recall?

19 A. Yeah.

20 Q. He's retired from the Department. He's talking
21 about waivers in this e-mail, Joe, and he makes this
22 statement here, I was wondering what you thought about it.
23 I was wondering if I could ask you a question about it.
24 It's on the last page. There is a sentence there towards
25 the top that begins, "The form does not specifically

1 determine which party is requesting the waiver, but in
2 point of fact if the taxpayer had any reason to believe he
3 may be entitled to a refund and by signing this waiver it
4 would preclude him from doing so and obtaining the correct
5 tax due I can't conceive of many reasons the taxpayer would
6 agree to sign a waiver that would allow the taxing
7 authority to continue to look for audit changes producing
8 additional taxes while he gives away his right to a
9 rightful refund. That is clearly nonsensical. I do not
10 believe that the purpose of the waiver is for anything
11 other than extending the time of an audit whether the
12 results be additional taxes; a refund; or no change audit."
13 Would you agree with that statement?

14 A. Yes. That's what I said.

15 Q. You agree with this, this language I just read?

16 A. Yes.

17 (WHEREUPON, Petitioner's Exhibit
18 No. 9 was marked for
19 identification only.)

20 Q. This is a letter addressed to two folks on top.
21 Do you know who these two folks are?

22 A. John Swearingen, audit supervisor, and he was my
23 boss. Jan Crangle, she was manager of office of appeals,
24 that's correct.

25 Q. These were people senior to you in the Department

1 of Revenue or were they not senior to you?

2 A. Oh, they were -- she was senior to John.

3 Q. Jan Crangle was senior to John Swearingen?

4 A. Yes. He's got audit supervisor. Actually he was
5 the audit manager, but they didn't call him that. Probably
6 didn't want to pay him any salary. I don't know. But he
7 was the audit supervisor and she was the manager of
8 appeals.

9 Q. In this letter if you turn the page where it was
10 sent by and signed by Burney Maybank?

11 A. Yes.

12 Q. Same Burney Maybank we were talking about before?

13 A. Correct.

14 Q. On that first paragraph on the top of page 2 on
15 this letter that's dated March 20, 2002, Duke is examining
16 the possibility of filing amended returns for the purposes
17 of claiming tax incentives as well as possibly other
18 adjustments. Second sentence reads, "In addition, the
19 files are so stale and the number of years open are so
20 large that Duke is reluctant to close out some 16 years
21 without at least some due diligence which they have not
22 performed." What do you think Burney meant by that? What
23 is the meaning of that language in this letter addressed to
24 John Swearingen and Jan Crangle?

25 A. Let me read that again.

1 MR. GREEN: Objection as to form.

2 Q. Do you want me to ask the question again, Joe?
3 Will that be helpful?

4 A. I'm reading this to myself. All right. Ask the
5 question.

6 Q. On page 2 of this letter that's dated March 20,
7 2002, from Burney Maybank addressed to John Swearingen and
8 Jan Crangle, the letter says Duke is examining the
9 possibility of filing amended returns for the purposes of
10 claiming tax incentives as well as possibly other
11 adjustments. Why don't we take it one sentence at a time.
12 What does that sentence mean, the one I just read, that
13 first one on page 2?

14 A. It's on Duke's part, they're thinking of doing
15 exactly what they're saying filing amended returns and
16 claiming, claiming things that will benefit them as far as
17 the return is concerned. Other adjustments, whatever those
18 are.

19 Q. Would a refund claim be --

20 A. Refund claims, additional credits. I don't know.

21 Q. It looks like in 2002, Joe, when this letter was
22 written and sent, at that time it looks like in the second
23 sentence Burney notes that this audit is 16 years old, is
24 that how you read it too?

25 A. Right.

1 Q. Has to be one for the record book, right, Joe?

2 A. Amen.

3 Q. On the previous page of the same letter, last
4 question on this document I believe, it talks about the
5 income tax section of this letter towards the bottom. I'm
6 sure you see it in bold there.

7 A. Hm-hmm.

8 Q. That's the corporate income tax that we are
9 talking about?

10 A. Right.

11 Q. "Subject to verifying the figures as stated
12 above, Duke proposes accepting the DOR's proposal except
13 that it would agree to execute a SC870 rather than
14 SC870AD." Do you know what SC870 and SC870AD are?

15 A. I cannot tell you. I do not know.

16 Q. That's fine.

17 (WHEREUPON, Petitioner's Exhibit
18 No. 10 was marked for
19 identification only.)

20 Q. The next document, a South Carolina Department Of
21 Revenue document, last four are 1667. Another two-page
22 letter, Joe.

23 A. That's correct.

24 Q. Another two-page letter. Who sent this one, Joe?

25 A. Who sent this letter?

- 1 Q. Yes, who sent the letter?
- 2 A. Looks like Nexsen Pruet, Burney.
- 3 Q. Burney Maybank?
- 4 A. Yes.
- 5 Q. Same Burney Maybank we've been talking about?
- 6 A. Same Burney Maybank, yes.
- 7 Q. This one to the same two folks as the prior
- 8 letter, Joe, it looks like. John Swearingen --
- 9 A. Yes, John and Jan.
- 10 Q. Same positions?
- 11 A. John Swearingen and Jan Crangle, same positions.
- 12 Q. The section of the letter entitled income and
- 13 license taxes, that last sentence on the first page, "As
- 14 previously indicated, Duke is examining the possibility of
- 15 filing amended returns."
- 16 A. Okay.
- 17 Q. What does that tell you, Joe? How do you
- 18 interpret that language?
- 19 A. They're looking at the possibility of filing
- 20 these amended returns based on the waiver. You got to read
- 21 the prior.
- 22 Q. Prior sentence?
- 23 A. Prior sentences to figure that out.
- 24 Q. For the period? For the prior period?
- 25 A. It doesn't say really. It says the end of the

1 waiver period unless the.

2 Q. The letter is dated July 2, 2002, right?

3 A. Right.

4 Q. This letter could not have been referring to that
5 audit period you were talking about before, the one you
6 were the lead guy on, the 2002 to '05 period, because --

7 A. Oh, right. Right. Correct.

8 Q. Had to relate to a prior period?

9 A. Right.

10 Q. The very first opening of that letter says, "Duke
11 offers the following settlement proposal." Did you know
12 anything about a settlement proposal between Duke and the
13 Department of Revenue?

14 A. I can't recall for sure. Probably after the
15 fact, but I wouldn't have entered into any -- this kind of
16 discussion at this level. I would not have been involved.

17 Q. You wouldn't have been involved? You might have
18 heard about it?

19 A. I might've heard about it, them talking about it,
20 because we auditors talk to each other.

21 Q. Of course, just like lawyers do. But you never
22 heard about a settlement between Duke and the Department of
23 Revenue for this period?

24 A. When you say this period?

25 Q. The period prior to the period that you took the

1 lead role in the 2002 to '05 period.

2 A. Yes. Prior to my audit, yes.

3 Q. You never heard of a settlement?

4 A. Other than this settlement between the sales tax
5 and the income tax. That's the only settlement I ever
6 heard of.

7 Q. For the period prior to 2002, did you hear that
8 the Department of Revenue and Duke settled the income tax
9 issues?

10 A. Yes, and that would be when they got the check
11 for the -- when they combined the sales tax audit and the
12 income tax audit. That's what I...

13 Q. Did you have a role in that settlement
14 discussion?

15 A. No, absolutely none.

16 (WHEREUPON, Petitioner's Exhibit
17 No. 11 was marked for
18 identification only.)

19 Q. This is another document, Joe. Take a minute and
20 take a look at it if you could. Have you ever seen this
21 form before?

22 A. Yes.

23 Q. What is the form?

24 A. It's a SC870AD.

25 Q. What does it do? What is the effect of the form?

1 A. The title of it is offer of waiver of
2 restrictions on assessment and collection of additional tax
3 or acceptance of overassessment.

4 Q. Do you know what the purpose of this form is?

5 A. I think the purpose of it is to, as a final
6 settlement of the audit. That's the way I look at it.

7 Q. Have you ever used one of these before?

8 A. I don't use these.

9 Q. What is the type of tax noted on this form?

10 A. Sales and use. Looks like sales and use type.

11 Q. Does it apply to any other types of South
12 Carolina taxes?

13 A. No, it doesn't mention it. It just says sales
14 and use.

15 Q. When was it executed? Do you see it signed?

16 A. Let's see. August 13, 2002.

17 Q. In reviewing this form, does this form indicate a
18 settlement of the sales and use tax between South Carolina
19 and Duke?

20 A. That's what it looks like to me, yes.

21 Q. What about for the income tax, does it have any
22 effect on the income tax?

23 A. I don't see the income tax on here.

24

25

1 (WHEREUPON, Petitioner's Exhibit
2 No. 12 was marked for
3 identification only.)

4 A. There's a lot of them here. 60, 61.

5 Q. You can just start with 63, South Carolina
6 document 1663.

7 A. Okay.

8 Q. This is an e-mail, the top part of this first
9 page, Joe, looks like an e-mail from Harley Priesmeyer to
10 Jan Crangle?

11 A. Hm-hmm.

12 Q. Is that right?

13 A. That's what it looks like, yes.

14 Q. Do you know who Harley Priesmeyer is, was?

15 A. I never heard of him.

16 Q. You've never heard of him?

17 A. No.

18 Q. You're unfamiliar with SC870 form, Joe, is that
19 right?

20 A. It's not a document that I would use when I do an
21 audit or when I do an assessment. That would be -- that
22 would be done administratively when they sign and finalize
23 the assessment or the collection.

24 Q. You didn't use it?

25 A. No, I don't use it to send to the taxpayer.

- 1 Q. Were you familiar with it?
- 2 A. I've seen it.
- 3 Q. Were you familiar with 870AD?
- 4 A. Yes, I've seen that.
- 5 Q. You don't know --
- 6 A. Like I say that's administratively, like Rita or
- 7 my bosses would handle, send it to the taxpayer in a
- 8 package that they send the taxpayer. The audit, the --
- 9 whatever other documents.
- 10 Q. I'm sure there's a lot of those documents.
- 11 You're not familiar with the differences between an 870 and
- 12 870AD, is that right, Joe?
- 13 A. No.
- 14 Q. You can just put those to the side. We don't
- 15 have to spend any more time if you're not familiar with
- 16 them. Do you recall receiving any notification from the
- 17 folks you worked with in the Department, your superiors,
- 18 Randy Wilson or anyone else, regarding Duke settling with
- 19 the Department of Revenue on the corporate income tax
- 20 dispute?
- 21 A. Other than verbally?
- 22 Q. Including verbally.
- 23 A. Maybe verbally or I'd see a copy of the check or
- 24 the -- that was cut within the system or something like
- 25 that I guess. I probably didn't even know that at the

1 time.

2 Q. You wouldn't need to know?

3 A. But I would want to know. They told me it was
4 settled.

5 Q. Told you it was settled?

6 A. Yeah, it was settled. They combined the
7 corporate income tax that Randy and I did with the sales
8 tax that was done in Rock Hill, because the sales tax was
9 an assessment and the income tax was a refund.

10 Q. But you never saw an 870 or 870AD or a closing
11 agreement or any other documentation?

12 A. No, I didn't see any of that.

13 Q. For the corporate income tax?

14 A. For the corporate income tax.

15 (WHEREUPON, Petitioner's Exhibit
16 No. 13 was marked for
17 identification only.)

18 Q. Joe, have you ever seen a document like this
19 before?

20 A. Yes.

21 Q. Can you describe what it is?

22 A. It looks like a decision by the administrative
23 law judge regarding some issue.

24 Q. Let's look at the first paragraph first sentence.
25 I'll read it. It's long. "This matter came before the

1 Court from an appeal by the Petitioner, Anonymous taxpayer,
2 of a final agency determination of the Respondent, the
3 South Carolina Department of Revenue or the Department,
4 regarding the calculation of interest on an agreed refund
5 of corporate income tax due to Petitioner for periods prior
6 to September 1, 1985." That paragraph, Joe, do you
7 interpret that paragraph to mean in this consent order that
8 the parties agreed to an interest calculation?

9 A. Yes, that's what it looks like to me.

10 Q. Related to what?

11 A. Related to some refund of corporate income tax.

12 Q. Joe, when you would audit a company, a taxpayer,
13 and ultimately settle the matter between the State
14 Department of Revenue and the taxpayer, how would you
15 effectuate that settlement or was that somebody else? Was
16 that not you?

17 A. It was not me. If you, I'm talking in generality
18 now. If I'm doing an audit and I make my adjustments, of
19 course, I go over them with the taxpayer before I leave if
20 he's provided me all the information I need that I've
21 requested and if he agrees, then fine. Basically it's
22 settled at that point and he's just billed. I don't do the
23 billing. I don't bill the taxpayer.

24 Q. No other documentation in that situation would be
25 needed, Joe?

1 A. No, just my audit. And then it would be taken
2 from there and then it would be billed, whatever the
3 procedure is, they would bill it, bill the taxpayer, send
4 him his little package and then he'd have to sign some
5 documents he agreed or disagreed.

6 Q. In a situation where you and the taxpayer did not
7 agree, the taxpayer did not agree with your assessment, but
8 ultimately the taxpayer settled the matter with the
9 Department of Revenue, you would not have a role in that?

10 A. No.

11 Q. In other words, other folks in the Department of
12 Revenue would handle that?

13 A. My boss would ask me what I think about the issue
14 and I would tell him, but I would not be in a position to
15 make the final decision.

16 Q. You wouldn't have a role in the drafting of the
17 settlement agreement or the documentation associated with
18 the settlement?

19 A. No.

20 (WHEREUPON, Petitioner's Exhibit
21 No. 14 was marked for
22 identification only.)

23 Q. This document number is South Carolina Department
24 of Revenue document number last four digits 1800 from
25 Burney Maybank to the same two folks we were talking about

1 before, John Swearingen and Jan Crangle?

2 A. Yes.

3 Q. Turn the page of this two-page fax, taxpayer is?

4 Who is the taxpayer, Joe?

5 A. Duke Energy Corporation.

6 Q. The type of tax?

7 A. Sales and use.

8 Q. The period covered by this?

9 A. January 1, 1991 through December 31, 2001.

10 Q. This is another SC870AD, is that right?

11 A. Yes.

12 Q. What would be the effect of this SC870AD?

13 A. That the sales tax portion is finalized and
14 completed and both parties are in agreement as to the
15 results.

16 Q. Does it serve as a settlement agreement?

17 A. Yes.

18 Q. Switching gears.

19 (WHEREUPON, Petitioner's Exhibit

20 No. 15 was marked for

21 identification only.)

22 Q. I'll give you an opportunity to read it and I'll
23 ask you if it looks familiar.

24 A. 12-7-1190. Okay. Go ahead and ask me.

25 Q. Does it look familiar to you, Joe?

1 A. Yes.

2 Q. Is it something that you used or relied on when
3 you were performing audits as a South Carolina auditor?

4 A. Yes.

5 Q. Tell me about it.

6 A. 12-7-1190, computations in regards to remaining
7 income of other taxpayers.

8 Q. What does it relate to in the corporate income
9 tax world?

10 A. It relates to those that are required to file
11 gross receipts formula, using the gross receipts formula.

12 Q. Apportionment formula?

13 A. Apportionment formula, right.

14 Q. Not all taxpayers got to use the gross receipts
15 formula, is that right?

16 A. Right.

17 Q. Which ones got to use the gross receipts formula?

18 A. Those who are in the service business.

19 Q. Joe, this relates to apportionment of certain
20 taxpayers as you described, not all taxpayers. What kind
21 of method does this reflect, apportionment method, does
22 this reflect?

23 A. Single factor method.

24 Q. What is that single factor comprised of?

25 A. Single factor is gross receipts.

1 Q. Gross receipts related to?

2 A. That's a term we use, gross receipts.

3 Q. Is that term gross receipts defined anywhere?

4 A. I don't know. I can't tell you off the top of my
5 head.

6 Q. How would you define gross receipts, Joe?

7 A. Gross receipts received by the taxpayer on the
8 tax return.

9 Q. What tax return?

10 A. On the federal tax return.

11 Q. Gross receipts reflected on the taxpayer's
12 federal tax return?

13 A. Federal tax return. One of those, one of those
14 lines that are on the federal -- well, line 1 through 9 or
15 10, I can't remember, would be considered gross receipts if
16 you're doing a single factor entity.

17 Q. Was that written down, those line numbers, was
18 there any kind of internal documentation provided to state
19 auditors that you are to look to the federal tax return and
20 those specific line numbers you just described to define
21 gross receipts? Is there any kind of direction to auditors
22 regarding that?

23 A. Other than my training, this is how we audit an
24 entity that's required to file gross receipts, look to line
25 1 through 9 or 10.

1 Q. Was it in that audit manual that you mentioned
2 earlier?

3 A. Probably.

4 Q. Probably was?

5 A. Probably was, but I don't remember.

6 Q. In looking at this statute at least in the use of
7 gross receipts here, does it mention any deductions from
8 gross receipts, in calculating gross receipts or does it
9 just say gross receipts?

10 A. It says gross receipts.

11 (WHEREUPON, Petitioner's Exhibit
12 No. 16 was marked for
13 identification only.)

14 Q. Do you remember or does this document look
15 familiar to you, Joe, the statute?

16 A. 12-6-2280, I'd have to read 2280. And 2295, no
17 that's the new one I think.

18 Q. If you turn the page, Joe, it will give you the
19 history.

20 A. 12-7, 12-6, yeah. Yeah. There we go. Okay.

21 Q. This does look familiar to you?

22 A. Right.

23 Q. Tell me about it. How is this provision
24 different than the last one we were just looking at?

25 A. I guess they were clarifying, whoever wrote this

1 was clarifying some issues with 12-7-1190.

2 Q. With the apportionment factor?

3 A. Yes.

4 Q. Including the receipts factor, gross receipts
5 factor, we were talking about before?

6 A. Yes.

7 Q. If you look at the previous document, Joe, the
8 one we were looking at, that's 12-6-2290 and if we go back
9 to the document we're now looking at, it's referenced in
10 that first line, 12-6-2290, do you see that?

11 A. Yes. Yes. You mean A, section A here?

12 Q. Yes. Sales, do you see that?

13 A. Yes.

14 Q. Do you recall this law change?

15 MR. GREEN: Objection as to form.

16 Q. This statute that we are looking at is a South
17 Carolina statute, is that correct?

18 A. Yes.

19 Q. Did this statute always exist while you were an
20 auditor in South Carolina?

21 A. Yes.

22 Q. It always existed?

23 A. It changed its -- changed the number I think, but
24 it's always been there.

25 Q. All these provisions existed the whole time you

1 were an auditor, Joe? Is that right?

2 A. I don't think all these provisions were there.

3 Q. Some of them were?

4 A. I think it just basically said what 12-7-1190
5 says. I think that's what it said, and they kind of
6 clarified it a little bit more, trying to make it more
7 clear, but we would've, we would've -- I say we're auditing
8 a tax return and we're auditing, putting in the enumerator
9 what was earned in South Carolina which is sales and which
10 is -- and then we would look at the components of income
11 and the net gains.

12 Q. You were describing before earlier for me what
13 you meant by net gains. I'll come back to that --

14 A. Which is the net gain of an item that was sold.
15 Every item sold has a basis. So in order to determine the
16 net gain or loss, you have to know what the basis is and
17 you have to know what the sale amount is. The difference
18 is either the net gain or the net loss, so, and we would
19 put the net gain in the calculation of the sales factor.

20 Q. Only the net --

21 A. Always.

22 Q. Not the gross?

23 A. Never the gross. Never the gross. Never done
24 that.

25 Q. Never did it. Looking at this statute, if you

1 turn the page, Joe, it looks like under the history
2 section, actually page 2, looks like it's a 2007 act. That
3 was the point in which this statute changes. Does that
4 sound familiar to you? Is that consistent with your
5 recollection of the statutory change?

6 A. Yes.

7 Q. Why don't we go back to the first page for a
8 moment. Sales, in cap A there, the term sales as used in
9 12-6-2280 and gross receipts as used in Section 12-6-2290
10 include but are not limited to the following items if they
11 have not been separately allocated. What does that lead in
12 sentence mean before we get into the specifics here?

13 A. The term sales?

14 Q. Yes.

15 A. As used in 12-6-228 I think it means the sales of
16 the taxpayer. The gross sales of the taxpayer, the last
17 returns and allowances. I think that's that line 1 on the
18 federal tax return is what they are talking about.

19 Q. I remember you mentioned that before. As used in
20 Section 12-6-2290, that's the provision we were looking at
21 together?

22 A. Right.

23 Q. So the term sales include but are not limited to
24 the following items?

25 A. Right.

1 Q. That last part if they have not been separately
2 allocated, do you know what that means?

3 A. Probably income that hasn't been allocated,
4 that's not business related is what they are kind of
5 referring to. In other words, all non-business income is
6 allocated.

7 Q. Those receipts aren't included in the
8 apportionment factor then if it's not business income?

9 A. Right, because you cannot include allocable items
10 in an apportionment calculation.

11 Q. The first item that's a gross receipt, where
12 that's included as a gross receipt, do you see that number
13 1?

14 A. Yes.

15 Q. "Receipts from the sale or rental of property
16 maintained for sale or rental to customers in the ordinary
17 courses of the taxpayer's trade or business including
18 inventory."

19 A. Right.

20 Q. Would those sales be included, the ones described
21 in paragraph 1, at gross or net?

22 A. They would be included probably at gross.

23 Q. Gross receipts from those sales?

24 A. Gross. Because that would appear in line 1 on
25 the federal return.

1 Q. Let's look at number 2 together. "Receipts from
2 the sale of accounts receivable acquired in the ordinary
3 course of trade or business for services rendered or from
4 the sale or rental of property maintained for sale or
5 rental to customers in the ordinary course of the
6 taxpayer's trade or business if the accounts receivable
7 were created by the taxpayer or a related party. For
8 purposes of this item, a related person includes a person
9 that bears a relationship to the taxpayer as described in
10 Section 267 of the Internal Revenue Code." This one, Joe,
11 sounds like it talks about sales of accounts receivable.
12 Is that how you read that?

13 A. Yes.

14 Q. Would the sales of accounts receivable be
15 included in the sales factor at gross or net?

16 A. That would be at net. It would be a gain or
17 loss, because they would discount their accounts receivable
18 and that discounted amount is basically the gain that would
19 be included in probably line 10. And the reason is, is
20 because you've already recorded the sales. You've recorded
21 the sales. So you can't do it twice. When you sell your
22 accounts receivable, you're not going to sell it at a loss,
23 you're going to sell it at a discounted rate or net gain.

24 Q. If I had an accounts receivable of \$100 and I had
25 a basis in those accounts receivable of 90 and I sold them

1 for \$100, that would be a \$10 gain, \$10 net?

2 A. \$10 gain.

3 Q. How much would go into the sales factor?

4 A. \$10.

5 Q. Not 100?

6 A. No.

7 Q. Number 3. "Receipts from the use of intangible
8 property in this State including, but not limited to,
9 royalties from patents, copyrights, trademarks and trade
10 names." Those are sales that go into the sales factor
11 also, the gross receipts factor, is that right?

12 A. Yes. Yes.

13 Q. Do those go in at gross or net? Are they
14 included in the factor at gross or net?

15 A. Those would go in at gross.

16 Q. At gross.

17 A. Right, because there's no net gain that's
18 applicable or loss to those. Those are always at gross.

19 Q. If I had a trade name worth a hundred, but I have
20 a basis of 10.

21 A. Well, you don't really have a basis. You just --
22 you don't have a basis --

23 Q. You don't have a tax basis?

24 A. -- on royalty.

25 Q. No, no. I'm talking about a trade name like

1 Jeffrey Friedman Company would be a trade name and I sold
2 the name Jeffrey Friedman Company if somebody were willing
3 to buy it for \$100 and I have a basis in Jeffrey Friedman
4 Company of \$5.

5 A. Oh, in that particular -- if you're selling your
6 trade name.

7 Q. Right.

8 A. Outright, yes, you would have a basis and then
9 whatever the difference is would be a gain or a loss.

10 Q. I would have a basis in my hypothetical of 5 in
11 Jeffrey Friedman and Company and I sold it for 100, does
12 100 go in the factor or 5 go in the factor or 95?

13 A. 95.

14 Q. 95, because that would be the net, Joe?

15 A. That would be the net gain.

16 Q. Net on the trade names?

17 A. Right.

18 Q. Let's turn the page, Joe, to Part B. The terms
19 sales as used in 12-6-2280 and gross receipts as used in
20 12-6-2290 did not include. The first item, number 1 listed
21 is the repayment, maturity or redemption of the principal
22 of a loan, bond or mutual fund or certificate of deposit or
23 similar marketable instrument. So if I were to sell an
24 item that qualified in that list in number 1, it's called a
25 marketable instrument, and I had a fair market value, sold

1 it for 100, I had a basis of 90, I had a gain of 10, net of
2 10.

3 A. Net of 10.

4 Q. Which amount goes into the sales factor?

5 A. Ten.

6 Q. So the net goes in?

7 A. The net goes in.

8 Q. I'll jump down to number 3. Proceeds from the
9 taxpayer's stocks or from sale of treasury stock. The same
10 kind of example, Joe, in terms of numbers at least. I'm
11 going to sell some treasury stock for 100, I have a basis
12 in it of 90, because I acquired it originally for 90, so
13 gain of 10. Does it go in the sales factor at one of those
14 numbers or how would you include it in the sales factor?

15 A. Go in as 10.

16 Q. That's how you read the statute?

17 A. Yes. How we've always interpreted the statute
18 that way.

19 Q. We have one more document to give you, Joe,
20 related to this topic. At least one more.

21 (WHEREUPON, Petitioner's Exhibit
22 No. 17 was marked for
23 identification only.)

24 Q. This is actually 12-6-2290, the statute we were
25 talking about before. Does this one look familiar to you?

1 Is this one that you applied as an auditor for South
2 Carolina?

3 A. The gross receipts factor or the single factor
4 method of apportionment, it's an apportionment method.

5 Q. Look familiar?

6 A. Yes.

7 Q. Who does this one apply to?

8 A. The single factor method, gross taxpayers that
9 don't qualify for four factor.

10 Q. Generally what were those types of taxpayers that
11 didn't qualify?

12 A. Taxpayers that sold tangible personal property.
13 (WHEREUPON, Petitioner's Exhibit
14 No. 18 was marked for
15 identification only.)

16 Q. Does this look familiar? This provision?

17 A. Yes.

18 Q. Can you describe it for us in terms of how you
19 applied it?

20 A. Dealing with license fees of corporations, State
21 of South Carolina.

22 Q. What's the license fee? Is it a tax that you
23 audited or a fee that you audited?

24 A. When we do a taxpayer, we do two audits. It's a
25 corporate income tax audit and a license tax audit and in

1 the case of a utility -- or let me say, in a normal C
2 corporation, we look at the capital stock, paid in capital,
3 capital stock and just simply total those amounts and
4 multiply that times the apportionment ratio. So that would
5 give South Carolina, and it's measured, it's 1 mill I
6 think, point 00.

7 Q. You audited it, Joe?

8 A. Yes.

9 Q. You had significant experience with this?

10 A. Yes.

11 Q. What's the tax base for this or the fee base?

12 A. Utility there is two sections, one you start with
13 the value of the property used in the manufacture of the
14 product within the State of South Carolina, whatever the
15 property tax is times, I think it's times 1 mill, I think.

16 Q. That's one calculation?

17 A. That's one calculation. And then in the second
18 section you look at the regulated gross receipts and you
19 multiply that times 3 mills, I think it's 3 mills and then
20 you add those two together and that's the license fee.

21 Q. That second part of the calculation I want to
22 talk with you a little about and I think it's mentioned in
23 this provision here. You use the term gross receipts.
24 That's the tax base for that second calculation, gross
25 receipts? It says right here, I can read it.

1 A. Where are we here?

2 Q. I'll read the beginning. "In addition to the
3 license fee provided by 12-19-100 and all other license
4 taxes and fees or taxes of whatever kind, there is levied
5 an annual license fee of 3 mills upon the gross receipts
6 derived from services rendered from regulated business
7 within the State during the calendar year next preceding by
8 every express company, street railway company, navigation
9 company, waterworks company, power company", and then there
10 are some others.

11 A. Hm-hmm.

12 Q. This was a fee that Duke was paying, is that
13 right, subject to them paying?

14 A. Correct.

15 Q. During your audit period?

16 A. Correct.

17 Q. That we've been talking about up to 2001 today?

18 A. Yes.

19 Q. It's imposed on the gross receipts of Duke. What
20 gross receipts are included in that license fee base? Is
21 it certain gross receipts or all of Duke's gross receipts?

22 A. It was regulated gross receipts, although you
23 could make a case if you were a lawyer.

24 Q. We're coming to that.

25 A. It really says regulated business. And since

1 Duke is a regulated business, you would include everything,
2 but I think there is somewhere along the line they said
3 we're not going to put interest income in there, that's not
4 really regulated. And gain or loss on the sale of real
5 property, not real property, but gain or loss of sale of
6 tangible property down there in line where the 4797 is.

7 Q. What about if Duke were to sell a power plant,
8 produced a big gain, would that be subject to the license
9 fee?

10 A. That may be subject to the license fee.

11 Q. Why is that?

12 A. Well, I'd have to read the definition again
13 totally. Well, it may not now that I think about it. I'd
14 have to read it again. I've been away from it for a while.
15 It's probably dealing with the sales of the product is what
16 they are talking about, regulated gross receipts. Sale of
17 a plant. Probably not. Probably not now that I'm thinking
18 about it it's refreshing my memory. Get my computer banks
19 set. It probably wouldn't be, because that's not something
20 that's regulated. State of South Carolina doesn't regulate
21 the sale of a plant. But they do if you want to sell
22 electricity in the State. You're going to have to get
23 permission from the Public Service Commission. So.

24

25

1 (WHEREUPON, Petitioner's Exhibit
2 No. 19 was marked for
3 identification only.)

4 Q. This is South Carolina document number last four
5 digits 2452. The first page is actually 2449. Look at the
6 first few paragraphs on the first page of this document. I
7 will give you a moment to read it, Joe. I'm assuming you
8 haven't seen it before.

9 A. I started the year after this was written. I can
10 read it.

11 Q. Sure, take a moment. Just read the first three
12 paragraphs on that first page.

13 A. (Reading.) Okay.

14 Q. Based upon this, Joe, do you agree that looks
15 like Duke sold a power plant in South Carolina?

16 A. They sold an interest.

17 Q. Interest in a power plant?

18 A. Yes. They didn't sell the whole thing. They
19 just sold an interest in it.

20 Q. The gross receipts from that sale of their
21 interest in the power plant, do you see how much that was,
22 Joe?

23 A. Gross receipts from the sale totalled 528
24 million.

25 Q. Over 528 million.

1 A. Okay.

2 Q. Would that 528 million be included in its license
3 fee tax basis of gross receipts?

4 A. I don't know. Did they do that?

5 Q. Duke took the position that they didn't, but what
6 would you have done as an auditor?

7 A. I don't think I would have included it
8 personally, because that's in the course of their business.
9 They're not, they're not in the business of selling plants.
10 They're in the business of manufacturing electricity. So
11 selling -- there's no difference. Besides this is a --
12 selling a plant is selling real property which would be
13 allocable anyway.

14 Q. The definition of gross receipts for purposes of
15 this license fee and the definitions or application of
16 gross receipts for purposes of that apportionment factor
17 for the corporate income tax we were talking about before,
18 do you view them as similar or different?

19 A. Say that again slowly.

20 Q. The license fee as imposed on gross receipts.

21 A. License fee imposed on gross receipts.

22 Q. Do you agree in part?

23 A. Yes.

24 Q. The sales factor is calculated by reference to
25 gross receipts, do you agree?

1 A. Yes.

2 Q. The gross receipts that are used for the license
3 fee and the gross receipts that are used for the sales
4 factor, gross receipts factor, gross receipts are used in
5 both we just established, do they mean the same thing for
6 both?

7 A. There's differences and that's...

8 Q. Tell me about those.

9 A. The difference is we never include -- when you're
10 selling tangible personal property such as a desk, a chair,
11 something like that, you only include the gain and the
12 calculation of the sales factor, but when you're in
13 business --

14 Q. Gain meaning net?

15 A. Meaning net gain.

16 Q. Is that right?

17 A. Right. Right. But when you're selling
18 electricity or you're selling widgets and that's your
19 business, then that's what we consider -- we look at it as
20 gross sales. We don't look at it as gross receipts. It's
21 gross sales.

22 Q. Sometimes gross receipts means net and sometimes
23 gross receipts means gross, is that right?

24 A. It could, yes.

25 Q. I think I'm done with this section.

1 (WHEREUPON, Petitioner's Exhibit
2 No. 20 was marked for
3 identification only.)

4 Q. I just want to draw your attention, Joe, to that
5 provision, the last one on the page, 12-7-1200. It's the
6 last part of our session here today, last subject. It's
7 entitled basing returns on accounts and records of
8 taxpayer. Is that a section that looks familiar to you?

9 A. Yes.

10 Q. Can you describe the purpose of that section and
11 what tax it relates to?

12 A. I would like to read it.

13 Q. Take your time.

14 A. (Reading.) Okay. What about it?

15 Q. What tax does this relate to, this provision, do
16 you recall?

17 A. It's corporate income it looks like, because it
18 says 12-7.

19 Q. Do you remember its purpose? How you applied it
20 as an auditor?

21 A. Well, we assume the taxpayer is filing the
22 correct return and we're seeing that he's filed it and then
23 we review the return to make any adjustments that we feel
24 are necessary based on the other sections of the code.

25 Q. It gives you as an auditor the ability to make

1 adjustments to a taxpayer's income, is that right?

2 A. Right. Right. Exactly.

3 Q. Did you ever apply it as an auditor?

4 A. To make adjustments to it? All the time.

5 Q. To taxpayers?

6 A. Every time we did an audit.

7 Q. You would make adjustments to taxpayers' income
8 using this provision?

9 A. No. We would use the other provision. This is a
10 kind of general statement this is. I mean I didn't read
11 this every time I went to a taxpayer. I concerned myself
12 with the allocation and apportionment sections of the law.
13 I didn't -- I don't remember the last time I read this.

14 Q. You don't have a lot of experience reading it and
15 applying it?

16 A. Well, it's not something that we would read every
17 time we went to a taxpayer. I mean it was just kind of
18 understood that this gave us the authority to look at a
19 taxpayer's books and records.

20 Q. The authority to look at a taxpayer's books and
21 records to determine what, Joe?

22 A. To determine, to determine that he filed the
23 correct taxable income to the State of South Carolina,
24 because we are doing an apportionment audit.

25 Q. Joe, it looks like on the second line, let me

1 read it. "When a taxpayer maintains books of accounts and
2 records in such manner as to clearly reflect the true net
3 income accruing or arising from sources within this State
4 the return may, with the approval of the Commission, be
5 based upon such books of account or records and the tax
6 paid upon the net income so determined." Then it goes on
7 to say, Joe, "When the Commission finds the books of
8 account and records sufficiently clear, in its opinion, to
9 show the true net income arising from sources within this
10 State, it may require the return to be filed upon such
11 basis and calculate the tax due upon the net income so
12 determined." It seems like it gave the State or auditors
13 working for the State certain authority but using certain
14 standards and that's what I want to talk to you about. It
15 sounds like you agree, Joe, that this provision gave you as
16 an auditor for South Carolina authority to adjust the
17 taxpayer's income, is that right?

18 A. Right.

19 Q. What standard in the statute would you be
20 required to apply in determining a fair amount of income?
21 You can read the words right out of the statute if you
22 want.

23 A. Run that question again please.

24 Q. In determining whether to apply this provision or
25 not, what standard would you apply? What criteria?

1 A. What standard? I don't understand that. We
2 approach every taxpayer the same. We didn't look at it --
3 we didn't think of a standard. The standard being that we
4 accepted the return as filed and then we would make
5 adjustments based on the allocation and apportionment
6 sections of the code.

7 Q. In determining when to make an adjustment at
8 least under this provision, how would you know when you
9 should or should not make an adjustment? That's what I
10 mean by standard.

11 A. You can't, you can't based on what this says.

12 Q. There is no standard?

13 A. It's impossible. It's impossible to make.
14 That's why you have the other code sections to clarify
15 that. Allocation and apportionment sections.

16 Q. This 12 dash --

17 A. This is just a general discussion.

18 Q. This general discussion in 12-7-1200 doesn't have
19 a standard in it?

20 A. Well, other than the taxpayer's net income which
21 is that reflected on the tax return that's filed, that
22 would be the standard if you're looking for a standard.

23 (WHEREUPON, Petitioner's Exhibit
24 No. 21 was marked for
25 identification only.)

1 Q. I believe this is our last document. This
2 section is 12-6-2320. Does this look familiar to you?

3 A. Yes.

4 Q. Is this a provision that you were accustomed to
5 applying or using as an auditor?

6 A. Yes. Absolutely.

7 Q. Tell me a little bit about it. What is the
8 purpose of this section.

9 A. Allocation and apportionment section.

10 Q. In part A, 12-6-2320 part A, tell me about that
11 subsection, Joe, that subsection A. What is the purpose of
12 that?

13 A. Let me read it. A means to me that if the
14 allocation and apportionment provisions don't fairly
15 represent the taxpayer's business income, then, or his
16 income, then the taxpayer can request a different method or
17 the Department, meaning the South Carolina Department of
18 Revenue, may use one of these methods to see to it that his
19 income is fairly apportioned or is equitable. You want to
20 be equitable is what it's driving at.

21 Q. Did you ever apply this 12-6-2320A as an auditor?

22 A. I probably have, yes.

23 Q. When would you determine when you should apply
24 it? How would you determine when to apply it?

25 A. It would depend on what was done on the return,

1 what he was apportioning and what he was allocating. You
2 have to take each case on its own merits as to whether or
3 not you would apply this.

4 Q. If you were looking at a specific taxpayer and
5 specific facts in trying to determine when to apply this or
6 not apply this, how would you determine whether to apply it
7 or not apply it?

8 A. Well, for instance, if a taxpayer had a trademark
9 company and normally, normally a trademark company has very
10 large income, very little expenses. Normal trademark or
11 Jeffrey Company as we would call it. So therefore as it
12 would stand out there, large income very little expense,
13 almost minute compared to the income. Now if the taxpayer
14 says, combines that, that income is intangible income. If
15 he combines that with another one of his entities and
16 says -- and then that would go in another entity, let's say
17 doesn't do business in the State of South Carolina, the
18 only income they receive is from trademarks that are within
19 the State. He's using that to basically distort his ratio.
20 So I would then apply, I would say no you're not going to
21 be able to do that. We're only going to take this income
22 and not this other tangible income that doesn't have
23 anything to do with the State and all these expenses didn't
24 have anything to do with the State either by the way. It
25 all applied to that tangible income. So therefore we're

1 going to take it at 100 percent unless you can prove, show
2 me, any expenses that would have applied to that intangible
3 income. That's the way you would -- that would be an
4 instance where you would use this code section.

5 Q. You would use it as an anti-abuse provision,
6 because you would view that holding company structure as
7 abusive?

8 A. I don't want to say abusive.

9 Q. How would you describe it?

10 A. Creative, creative accounting or whatever you
11 want to say.

12 Q. Planning?

13 A. Tax planning.

14 Q. Tax planning?

15 A. Tax planning, yes.

16 Q. This was a provision aimed to deal with tax
17 planning?

18 A. Probably, yes. Yes. Definitely.

19 Q. When you used it, when you applied it, Joe, as an
20 auditor in that situation or in other situations, did you
21 have a burden to show that it was required to apply
22 12-6-2320A or did you just do it and the taxpayer had to
23 rebut it?

24 A. I would gather the facts of the situation what
25 the taxpayer was doing and this is my position and I would

1 state what my position was and he either had the
2 opportunity to rebut it or not.

3 Q. You would typically show the taxpayer --

4 A. I would tell, yeah, definitely I would tell him
5 here's what I'm doing and here's why I'm doing what I'm
6 doing and you have the opportunity to rebut which is -- I
7 would change his apportionment, it would be a single
8 factor, by the way, method, and I would change --

9 Q. In the example you were referring to would be
10 single factor?

11 A. In other words, what he would do he would have --
12 his denominator would be so huge and the numerator would
13 be what it was. That wouldn't change.

14 Q. Whenever you saw a large denominator and a small
15 numerator, you viewed that as something that needed --

16 A. Not necessarily. I would want to review the
17 return first before I made a decision like that. In that
18 case I'd say you're distorting the apportionment factor
19 which is distorting the revenue and your business
20 activities in the State of South Carolina and I would use
21 this code section.

22 Q. In saying distorting, what do you mean by
23 distorting? What does that word mean in this context?

24 A. In other words you're distorting what your
25 business activity would be. You got intangible income and

1 you got tangible income in this entity. Well, what did you
2 do. That's the first question you ask the taxpayer. What
3 did you do in the State of South Carolina. What is your
4 business activity in the State.

5 Q. And you compare that?

6 A. Even if I knew what it was, I want him to tell
7 me. And so once he tells me and I say okay the only thing
8 that you're doing in here is receiving, you're receiving
9 trademark income which is gross receipts or single factor
10 type situation. Well, then I would say okay we're going to
11 take the gross receipts earned within the State, reverse
12 its gross receipts everywhere, we're not going to include
13 all this other income that wasn't earned within the State,
14 this tangible income.

15 Q. In making that adjustment you would be relying on
16 this provision that we are looking at?

17 A. Yes.

18 Q. Any other provisions in North Carolina law you
19 would be applying or is it this one in making that
20 adjustment?

21 A. Not North Carolina. I'm not...

22 Q. I'm sorry, South Carolina. Excuse me.

23 A. Well, the allocation, the other allocation and
24 apportionment sections.

25 Q. Which ones?

1 A. Which is the ones that deal with four factor and
2 the ones that deal with gross receipts.

3 Q. Those provisions provide the authority to make
4 the adjustment like this provision does, is that right?

5 A. They allow me to make adjustments to review the
6 tax return and make adjustments to the tax return based on
7 what they say.

8 Q. Right, but I'm talking about adjusting the
9 taxpayer's apportionment formula, the authority to adjust a
10 taxpayer's apportionment formula to use an alternative
11 method of apportionment formula.

12 A. It would be this.

13 Q. Would be this. Any other provisions?

14 A. Not that I'm aware of.

15 Q. Before this provision was enacted, Joe, what did
16 you rely on to make those kind of adjustments? This
17 provision meaning 12-6-2320.

18 A. How long has that been in there? I don't know.

19 Q. If you turn the page, Joe, there is a history on
20 the next page on the bottom just like we saw the last time.
21 The history of this one is 1995 act number 76.

22 A. I think that has been in there for a long time.

23 Q. Any other provisions come to mind that you relied
24 on?

25 A. No, no, I can't think of any.

1 Q. Thank you, gentlemen, I appreciate it. Thank
2 you, Joe, for your patience.

3 MR. GREEN: No questions.

4

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7

8 FURTHER THE DEPONENT SAYETH NOT.

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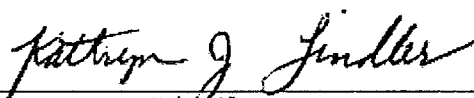
CERTIFICATE OF REPORTER

I, Kathryn J. Lindler, Court Reporter and Notary Public for the State of South Carolina at Large, do hereby certify:

That the foregoing testimony was taken before me on the date and at the time and location stated on Page 1 of this transcript; that the witness was duly sworn to testify to the truth, the whole truth and nothing but the truth; that the testimony of the witness and all objections made at the time of the examination were recorded stenographically by me and were thereafter transcribed; that the foregoing deposition as typed is a true, accurate and complete record of the testimony of the witness and of all objections made at the time of the examination to the best of my ability.

I further certify that I am neither related to nor counsel for any party to the cause pending or interested in the events thereof.

Witness my hand, I have hereunto affixed my official seal this 13th day of December, 2011, at Columbia, Richland County, South Carolina.


Kathryn J. Lindler
Notary Public for South Carolina
My commission expires June 4, 2018



1	INDEX	
2		PAGE
3	STIPULATIONS	.3
4	CERTIFICATE OF REPORTER	.132
5	SIGNATURE OF DEPONENT	.134

6		
7	INDEX OF WITNESSES	
8	JOE SOUTHARD	
9	EXAMINATION BY MR. FRIEDMAN	.3

10		
11	PETITIONER EXHIBITS	
12	NO DESCRIPTION PAGE	
13	1 27	
14	Department of Revenue Form with handwritten note	
15	2 29	
16	Email from Rita Murrah to John Comer - 8/19/02	
17	3 59	
18	SC DOR Chronological Worksheet	
19	4 67	
20	December 16, 2004 Letter	
21	5 74	
22	DOR Consent to Extend the Time to Assess Tax	
23	6 79	
24	SC Revenue Procedure #95-5	
25	7 84	
	SC Revenue Procedural Bulletin #00-3	

Joe Southard 12/2/2011

1			
2	8	Email from Marvin Davant to Rick Reames	87
3			
4	9	Letter to John Swearingen and Jan Crangle - March 20, 2002	89
5			
6	10	Letter to John Swearingen and Jan Crangle - July 2, 2002	92
7			
8	11	Offer of Waiver Document SC870AD	95
9			
10	12	Email from Harley Priesmeyer	97
11	13	Consent Order	99
12			
13	14	Memorandum from Burnet Maybank to John Swearingen and Jan Crangle - August 12, 2002	101
14			
15	15	Code 1976 12-7-1190	102
16			
17	16	Code 1976 12-6-2295	105
18	17	Code 1976 12-6-2290	113
19			
20	18	SC Code Ann. 12-19-110	114
21			
22	19	May 17, 1985 letter to William Booth	118
23			
24	20	Code 12-7-1180	121
25	21		125

Joe Southard 12/2/2011

1 SIGNATURE OF DEPONENT

2

3 I, the undersigned, JOE SOUTHARD,
4 hereby certify that I have read the foregoing
5 deposition and find it to be a true and accurate
6 transcription of my testimony, with the following
7 corrections, if any:

8

9	PAGE	LINE	CHANGE	REASON

10

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24 JOE SOUTHARD

25 DATE

FS-54

DEPARTMENT OF REVENUE
IIT: INCOME TAX & LICENSE FEETAXPAYER: DUKE POWER COMPANY
ADDRESS: 422 S. CHURCH ST.
CHARLOTTE, NC 28242-001FEI #: 56-0205520
FILE #: 20090024-9
PERIOD: 12/78-12/94
DATE: 8/8/02

INTEREST COMPUTED TO:

8/14/02

00/36/ 5258

DUKE POWER COMPANY

78-94

TAX	INTEREST	PENALTY	TOTALS
1,189	(7,434,600)	0	(9,385,789)
1,685	\$2,757,796		\$3,593,481
504	-\$4,676,804	\$0	-\$5,792,308
	-\$132,889		-\$132,889
504	-\$4,809,693	\$0	-\$5,925,197
66	\$1,070,657		\$2,796,623
	\$60,871		\$60,871
TOTAL THRU 8/14/02		\$1,131,528	\$2,857,494
INCOME & LICENSE NETTED AGAINST SALES & USE TAX:			-\$3,067,703

net refund

Rita: this assessment for sales/use tax was netted against a refund of corp. income tax and license fee that we issued to Duke on 8/14/02. Please make sure our auditors get credit for the collection. Audit file will follow soon.

Thanks,
John Comer



From: JOHN COMER
To: MURRAH, RITA
Date: 8/19/02 2:11PM
Subject: Re: DUKE ENERGY

That is correct.

From: RITA MURRAH
To: COMER, JOHN
Date: 8/19/02 2:02PM
Subject: DUKE ENERGY

JOHN

I NEED TO GIVE CREDIT FOR THIS PAYMENT OF 2,857,494.79 DO I GIVE THE 6 PEOPLE ON THE FRONT CREDIT AT PERRY 50% AND THE OTHER FIVE AT 10%? I AM JUST MAKING SURE.

THANKS
RITA



6036

STATE OF SOUTH CAROLINA
SC DEPT OF REVENUE
FIELD SERVICES DIVISION
CHRONOLOGICAL WORKSHEET

FS-56
(Rev. 03/97)
2033

Name : Duke Energy Corp
Control #: 200900249
Address : - Charlotte, NC
Auditor : Joseph P Southard

File Number :
Telephone : ()
Case Percentage : 0.50

DATE	TIME	DIGEST OF ACTIVITIES
07/28/03	7.50	Travel with Randy Wilson to Charlotte to perform field audit.
07/29/03	3.75	
07/30/03	3.75	
07/31/03	3.75	
08/01/03	5.75	
11/18/03	3.00	Return Columbia from field audit.
11/29/03	7.50	Travel to Houston, TX to get ready to audit Duke Energy Corp with Randy Wilson.
11/30/03	7.50	
12/01/03	6.00	Staying in Houston, TX for field audit of Duke Energy Corp.
12/02/03	6.00	
12/03/03	6.00	
12/04/03	6.00	
12/05/03	7.50	
		Return Columbia from Houston, TX for audit of Duke Power with Randy.
11/08/04	1.00	
03/02/06	4.50	
03/03/06	6.50	



SCDOR00011695



DUKE ENERGY CORPORATION
5400 Westheimer Court
Houston, TX 77056-5310

Mailing Address:
P. O. Box 1642
Houston, TX 77251-1642

December 16, 2004

Mr. Joe Southard
South Carolina Department of Revenue
P. O. Box 125
Columbia, SC 29214

RE: Duke Energy Corporation and Affiliates
Income/License Tax Audit
Tax Period 1978 - 2001

Dear Mr. Southard:

The attached information is provided in reply to all your outstanding information requests and verbal requests that I had noted during your last visit to our office in December, 2003. We apologize for the long time in our responding to your questions, however, some of the information requested is now 10 years old and required extensive effort to retrieve the relevant information. Also as you see there is a lot of information that was requested. It should be noted that "Joe's IDR" response is in reference to Joe's verbal questions left open for response during the field audit. Randy's questions were written questions given us during the field audit. Some, or part of these questions were answered during the field audit. We believe our attached response answers any remaining questions, or parts thereof, that have not already been answered.

Please contact me at (713) 989-3291 to confirm receipt of this information and to discuss how we will need to proceed with the audit. Thank you for your patience and assistance in this matter.

Sincerely,

Pat Hopson
Manager, Corporate Tax



www.duke-energy.com

SCDOR00009731

Joe's IDR:

1. Need support for ITC additions for 1999-1995

Reply: As we had discussed during the audit, in lieu of a providing hundreds or possibly thousands of invoices, attached are the account balances by detailed property account for the qualifying ITC property. This information supplements the detailed information previously provided during the audit. The reports are presented for 1994 (the first years ending account balances) through 2001 ending balances.

98-01 Crescent Resources:

1. Crescent Resources – gross receipts. What is the gross receipt or sales on Fed. 1120 line 1 and if sale of real estate, how much is SC net gain or loss?

Reply: Line 1 of the Federal 1120 includes gross proceeds from developed lot sales. The amount of SC net gain or loss related to developed lot sales is shown on the Crescent SC allocation schedules previously provided to you and also included in the Crescent by year allocable income detail attached.

2. Crescent Resources – What is line 6 Fed. 1120 gross rents?

Reply: Gross rents include commercial rents, recreational leases, hunt leases, and farm rent. Differences between the Federal 1120 and state apportionment are from Federal M-1 adjustments. State apportionment follows book balances.

3. Crescent Resources – How much capital gain is SC:

- Line 8 Fed. 1120?
- Line 9 is 4797? Is that all tangible and not real property loss? What is the net gain or losses?

Reply: See the attached allocation and apportionment schedules of Crescent Resources for the amount of capital gain allocated to SC. The detail is provided in the Crescent SC allocation schedules previously provided to you and also included in the Crescent by year allocable income detail attached.

Randy's IDR:

1. Copies of all waivers.

Reply: A copy of the last waiver given for 12/31/78-12/31/99 (income) & 12/31/84-12/31/00 (license) through 12/31/02 is attached. As discussed during the audit, if you needed any previous waivers, you were to indicate which one specifically and I

would locate. Otherwise, the last waiver is comprehensive of all periods with claims outstanding and should suffice for those periods.

2. Explanation for the license tax adjustments on the "1st Amended" returns filed 9/24/02.

Reply: See the attached memo that explains the license tax adjustments on the "1st Amended" returns filed 9/24/02.

3. Need ratio work papers for CLT Development, Inc. Had SC receipts in '99, work papers for 2000 showed interest receipts, but not included in ratio on return, 2001 only partial work paper – 0% SC ratio.

Reply: The sourcing of interest income was incorrect in the 1999 and 2000 work papers. SC interest income of CLT Development, Inc. should be zero for all years as it is 100% North Carolina sourced because the income producing activity is solely within North Carolina (S.C. Code Sec. 12-6-2280(C)(2)). As such, CLT Development, Inc. did not have nexus in SC for the periods under audit.

4. Need details on all allocated items for all companies in SC for 1999, 2000, & 2001 (I have given you list for 2000). Also, any related expenses to allocations.

Reply: See attached detail.

5. Please provide detailed schedule for Crescent Resources SC net income including allocation adjustments schedules for 2000 & 2001 (like we gave for 1998 & 1999 amended returns).

Reply: See attached detail.

6. What is the status of RAR's? In July, 2002, you told us 3 years were in appeals & latest 3 years were under audit. Has anything been resolved yet?

Reply: No change to date.

7. Need work papers for ratio that include all states (not just SC) for all companies for 1999, 2000, 2001. (I will look & let you know what companies I already have this information on).

Reply: See attached 50 state apportionment schedules for all companies.

8. FERC – (FER.COM) – I will look up '99.

Reply: FERC reports are available on the web site www.ferc.gov.

SCDOR00009733

9. Net gain on swaps by state.

Reply: Swaps are Delaware sourced and only included in the 2001 apportionment of Duke Energy Corporation from flow-through of Duke Energy Merchants, LLC. The amount included in the sales factor denominator for 2001 was \$5,783,161,741. Detail on swaps is attached.

10. How was 1999 1st amended return reported for federal return for casualty loss? If 1120X, need copy.

Reply: An 1120X was filed and a copy of it is attached.

Duke 2001 original:

1. Detail on real gains & losses including location, cost, depreciation, sale price, ~~expenses of sales, gain or loss.~~
-

Reply: See reply to Randy's IDR question 5.

2. FERC report to verify revenues, etc.

Reply: FERC reports are available on the web site www.ferc.gov.

3. Detail list of assets for "BIZ" ITC (\$385,496).

Reply: ITC reports are attached for 1994 through 2001.

4. Duke Energy dividends = \$7,521,698 – dividend \$5,844,140 = \$1,677,558 (balance to allocate). What are expenses related to dividend income? (i.e. what is negative dividend of \$5,844,140 above?)

Reply: See the detail of allocable income for 2001. From the Schedule C detail of the Federal 1120, \$1,172,669 is the 70% deduction for dividends received from less than 20% owned domestic corporations and \$4,671,471 is the 100% deduction for qualifying dividends under I.R.C. §243(a)(3).

5. Schedule A & B – what is "other deduction" \$1,498,451?

Reply: See attached detail of SC income adjustments. The deduction is related to depreciation adjustments resulting from SC nonconformity and RARs.

6. What is the business of Duke Energy companies:

- DE GTC 76-0632855

SCDOR00009734

- Pelmar 74-1864531
- DEGT Holding Co. 76-0687370
- DE Reg. Serv. 97-0622575
- DE Cap Texas 76-0636723
- Crescent Land & Timber
- CLT Develop. 56-1393851
- Duke Proj. Serv. 56-0858436
- DEFS Invest Co
- DESEPLC 76-0598401
- DE Design Supp 76-060336
- DE Lee Hld 76-0622199
- DE Tex Fund 76-06367
- DEGT Invst. Inc 76-0649512
- DEGT Fund, Inc. 76-0649511
- DEGT Res, Inc. 76-0649513
- DCCLUX, Inc 52-2279948
- TPC Gas St. Inc. 76-0287870
- TIIGA Gas Stor 76-0450803
- Ventures, LLC 31-1743975

Most of these companies have large net incomes but don't appear to be actual operating companies. Can we see apportionment data on these companies?

Reply: Descriptions were provided during field work.

7. Need net gain from swaps & everywhere. Question is if amended returns adjustment all that needs reversing to disallow?

Reply: Swaps are Delaware sourced and only included in the 2001 apportionment of Duke Energy Corporation from flow-through of Duke Energy Merchants, LLC. The amount included in the sales factor denominator for 2001 was \$5,783,161,741. Detail on swaps is attached.

Randy Wilson IDR 7/31/03:

1. Need detail on interest expense by purpose of the loan for 1999, 2000, & 2001. Were any funds borrowed to purchase other companies for example?

Reply: Funds were generally used to finance operations and retire debt.

2. Need detail on SC Sch A&B "other addition #2", "other addition #3", & "other deductions" for 99, 00, 01.

Reply: See attached detail of SC income adjustments.

3. Need detail on gain/loss on sales of real property for 99, 00, 01 including: date of sale, sales price, depreciation, cost, location, gain/loss.

SCDOR00009735

- Pelmar 74-1864531
- DEGT Holding Co. 76-0687370
- DE Reg. Serv. 97-0622575
- DE Cap Texas 76-0636723
- Crescent Land & Timber
- CLT Develop. 56-1393851
- Duke Proj. Serv. 56-0858436
- DEFS Invest Co
- DESEPLC 76-0598401
- DE Design Supp 76-060336
- DE Lee Hld 76-0622199
- DE Tex Fund 76-06367
- DEGT Invst. Inc 76-0649512
- DEGT Fund, Inc. 76-0649511
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Reply: See attached detail of SC income adjustments.

3. Need detail on gain/loss on sales of real property for 99, 00, 01 including: date of sale, sales price, depreciation, cost, location, gain/loss.

SCDOR00009735

Reply: See attached detail of allocable income.

4. What happened to Crescent Resources after 2000? I don't see it in 2001 return.

Reply: Crescent Resources, Inc. converted to a single member limited liability company. For 2001, Crescent Resources, LLC flows to Duke Ventures, LLC. Duke Ventures, LLC checked-the-box to be taxed as a corporation for federal income tax purposes.

5. What does Duke Energy Global Markets do?

- What do D.E. companies & other companies collecting large amounts of interest do?
- From whom do they receive their interest?

Reply: Duke Energy Global Markets, Inc. ("DEGM") owns investments in merchant (non-regulated) power plants primarily through single member limited liability companies, none of which are located in South Carolina. DEGM is included in the South Carolina consolidated return beginning in 2001 because two of its single member limited liability companies (taxed as divisions for Federal income tax purposes) qualified in South Carolina in 2001. The companies are Duke Energy Fossil-Hydro, LLC and Duke Energy Generation Services, LLC. Both companies were inactive in South Carolina during 2001.

Duke Energy & Subs 2000:

1. Need details on allocated items & related expenses (by state)

- Duke Energy = \$3,894,274
- Crescent Resources = \$(29,147,609)
- DukeNet = \$406,741,049

Reply: See attached detail of allocable income and an explanation of the non-business income from DukeNet's sale of its limited partnership interest in BellSouth PCS LP.



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 Company
Name of Taxpayer(s)

SSN FEI #56-0205520

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. Lilius
(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 Devant
(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.



State of South Carolina
Department of Revenue
301 Gervais Street, P. O. Box 125, Columbia, South Carolina 29214

SC REVENUE PROCEDURE #95-5 (TAX)

SUBJECT: Claims for Refund and Correction of Errors in Tax Years
Barred by the Statute of Limitations

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.

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.

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, Commission Decisions #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:

(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 12-60-1750¹, 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:

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.

(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.

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 suspended 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.

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.

3. CODE SECTION 12-60-470(G)

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 Argent Lumber 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 a hearing; (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, Commission Decisions #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.
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

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, for the 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.

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,
 - 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.

South Carolina Department of Revenue

s/Burnet R. Maybank III
Burnet R. Maybank, III, Director

Columbia, South Carolina
October 19, 1995

State of South Carolina
Department of Revenue
301 Gervais Street, P.O. Box 125, Columbia, South Carolina 29214

SC REVENUE PROCEDURAL BULLETIN #00-3

SUBJECT: Claims for Refund and Correction of Errors in Tax Years
Barred by Time Limitations

EFFECTIVE DATE: Applies to all periods open under the statute.

SUPERSEDES: SC Revenue Procedure #95-5
Commission Decision #93-1
All other previous documents and any oral directives in
conflict herewith.

REFERENCES: S. C. Code Section 12-60-470 (2000)
S. C. Code Section 12-60-2150 (2000)
S. C. Code Section 12-54-85 (As Amended August 2000)
S. C. Code Section 12-60-40 (2000)

AUTHORITY: S. C. Code Ann. Section 12-4-320 (2000)
S. C. Code Ann. Section 1-23-10(4) (Supp. 1999)
SC Revenue Procedure #99-4

SCOPE: The purpose of a Revenue Procedural Bulletin is to provide procedural guidance to the public and Department personnel. It is a written statement issued to assist in the administration of laws and regulations by providing guidance that may be followed in order to comply with the law. **A Revenue Procedural Bulletin does not have the force or effect of law, and is not binding on the public.** It is, however, binding on agency personnel until superseded or modified by a change in statute, regulation, court decision, or advisory opinion.



SCDOR00015753

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. The United States Supreme Court in Rothensies v. Electric Storage Battery Co., 329 U.S. 296 (1946) noted that 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 advisory opinion is to set forth the Department's authority for granting refunds and briefly describe the remedies provided by law which may be available to taxpayers and the Department, where appropriate, that allow correction of errors that would otherwise be barred by time limitations.

GENERAL RULE FOR CLAIM FOR REFUND - CODE SECTIONS 12-60-470, 12-60-2150, and 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:

(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 12-60-1750¹, 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.

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.

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, 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 timely filed return, including extensions, 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 item (2) or (3), as the case may be, as if a claim were filed on the date the credit or refund is allowed.

² Notwithstanding any restrictions on filing a claim for refund provided in subsection (F), subsection (D)(3) allows a person to file a claim for refund resulting from an overpayment due to changes in taxable income made by the Internal Revenue Service within one hundred and eighty days after the date a final determination of tax adjustment (i.e. the federal assessment date) is made by the Internal Revenue Service. The refund described in this subsection applies only to the overpayment of taxes resulting from adjustments of the Internal Revenue Service.

SUSPENSION OF TIME LIMITATIONS FOR CLAIM FOR REFUND OR CREDIT - CODE SECTION 12-60-40

As stated above, Code Section 12-60-470 grants the Department the authority to issue refunds provided such claims are submitted within the time limitations of Code Section 12-54-85. These time limitations, however, may be extended or suspended as authorized by Code Section 12-60-40 which provides:

(A) A taxpayer may waive his rights under this chapter [Chapter 60 - The South Carolina Revenue Procedures Act], providing the waiver is in writing and is signed by the taxpayer or his representative. The department may extend any time limitations provided by this title and for any other taxes. 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 Procedures] of this chapter.

(B) Time limitations provided under this chapter [Chapter 60 - The South Carolina Revenue Procedures Act] and Chapter 54 [Uniform Method of Collection and Enforcement of Taxes Levied and Assessed by the Department] are suspended during a stay ordered by the Taxpayers Rights Advocate.

See also Code Section 12-54-85(G) which provides for a suspension of the time limitations provided in subsections 12-54-85 (A), (B), (C), (D), and (E) in certain situations, such as for 90 days after the date of a proposed assessment, or during the pendency of a stay ordered by the Taxpayers' Rights Advocate.

CLARIFICATION TO THE GENERAL RULE FOR CLAIM FOR REFUND

As discussed above, Code Section 12-60-470 grants the Department authority to issue a credit or refund for taxes, other than property taxes, provided such claims are submitted within the time limitations provided in Code Section 12-54-85.

Consistent with its longstanding administrative position, the Department will continue to interpret the time limitations in Code Section 12-54-85 consistent with the following rules:

1. If the taxpayer agrees to the Department's request that a waiver of the time 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 Department will also consider the time within which a taxpayer may file a claim for refund to 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 position only applies to effective extensions agreed to in writing with the Department.
2. A taxpayer must file a claim for refund within the time limitations and state the reasons for that request. Code Section 12-60-470(B)(5) requires a claim for refund to state the amount claimed, but, if 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, but only if the adjustment is based upon issues raised in the timely filed claim for refund. No additional refund is allowed for new issues raised after the time limitations has expired.

-
3. 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.

In the Department's opinion it does **not** otherwise have the authority to allow correction of errors that are barred by the time limitations for any reason, including situations where:

1. A mistake is made calculating the expiration date of the time 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. A taxpayer in a situation where it is undetermined which state is due the tax should file a protective claim with the Department within the time limitations. See item 2 above.

Code Section 12-60-470(G) 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.

Code Section 12-60-2150(G) similarly provides that:

Even if a taxpayer has not filed a claim for refund, where no question of fact or law is involved, and it appears from the record that money has been erroneously or illegally collected from a taxpayer or other person under a mistake of fact or law, the department may, subject to the limitations in Section 12-60-1750, within the period specified in Section 12-54-85 and upon making a record in writing of its reasons, order a refund to the taxpayer or other person.

The Department uses Code Section 12-60-470(G)³ and 12-60-2150(G) when it audits a taxpayer and determines that the taxpayer is entitled to a refund. It has been and is the Department's longstanding administrative opinion that its right to grant a refund to a taxpayer pursuant to this section is limited by time limitations, *i.e.*, that it cannot grant a refund unless at the time the Department grants the refund, the taxpayer could have filed a timely claim for refund. In 1995, the General Assembly enacted Code Section 12-54-85(F)(4) which is consistent with this opinion. In the opinion of the Department, if it refuses to grant a refund pursuant to this section a taxpayer is not entitled to a hearing, and the taxpayer is not entitled to appeal the Department's decision. However, if the taxpayer files a claim for refund before the expiration of the time limitation, the taxpayer is entitled to a hearing and an appeal of the Department's decision.

SUMMARY OF SETOFF, DOCTRINE OF EQUITABLE RECOUPMENT, AND MITIGATION PROVISIONS

SETOFF. 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.

³This provision was previously contained in Code Section 12-54-30 which was repealed and replaced by Code Sections 12-60-470(G) and 12-60-2150(G) in 1995. 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 Argent Lumber 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...."

Setoff may be used by the Department 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 time limitations on assessments is closed, the Department 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 time limitation on assessments under Code Section 12-54-85(C)(1), (2), or (3). The taxpayer discovers an error, the correction of which would result in a refund, for the period under audit. Since the time 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 time 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 time 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.

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 time 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 time 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 time 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 time 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,
 - 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.

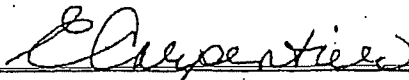
If all of the required conditions are met, then the mitigation provisions apply and the error period is reopened for a limited period of time. The adjustment may be made to correct errors that relate to a single item or to an affected item. No other items are reopened. Internal Revenue Code Section 1314 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 12-60-470, 12-54-85, and 12-60-40, and, as provided in this advisory opinion.

Be advised that this advisory opinion 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.

SOUTH CAROLINA DEPARTMENT OF REVENUE



Elizabeth A. Carpentier, Director

December 24, 2000
Columbia, South Carolina

Reames, Rick III

From: Marvin Davant <DavantM@dnr.sc.gov>
Sent: Friday, January 28, 2011 11:16 AM
To: Reames, Rick III
Cc: Maybank, Burnet R. III
Subject: FW:
Attachments: Maybank document0001.jpg; Maybank document0002.jpg

In answer to the waiver question of recent discussion please find attached my thoughts as per your request. I look forward to seeing you again soon. Thanks.

Sincerely,

Marvin N. Davant



I was the Director of the Field Services Division of the South Carolina Department of Revenue for 13 years. I retired in the year of 2000. This Division was responsible for all tax audits and collection of delinquent taxes, both foreign and domestic. When I became the director in 1987 the Division embarked on a complete retraining of the audit and field staff. The Division subsequently was awarded an award of national recognition from the NATA, the National Association Of Tax Administrators, for its training program. Part of the training curriculum was designed to remove the appearance that taxation and in particular, tax audits, were adversarial processes between the government taxing authority and a taxpayer. What we worked to attain was a high level of knowledge of taxation principles; audit procedures; and a fair and equitable approach to dealing with taxpayers who had been selected for audit. Our audit staff was taught that their job was not to create or seek out additional taxes from an audit but to ascertain that the returns, in regards to whatever taxes were being audited were, correct. The auditors were instructed that the audit done correctly would produce whatever results it was supposed to. In other words, if a refund was due to the taxpayer then that should be the result. At no time were they ever directed to solely seek out additional taxes or to not issue a refund or at any time to forego an audit in process if it looked like it was not going to produce additional taxes. At no time were the auditors graded or promoted based on collection of additional taxes. Some where in this same time frame the Department adopted the Taxpayer Bill of Rights that further delineated the rights of a taxpayer to be treated fairly and in accordance with the tax statutes. The mission of the Agency is simply to collect what is rightfully owed by the taxpayer.

A waiver of time to complete an audit is sometimes issued by agreement with the taxpayer and the Department of Revenue when circumstances warrant this agreement generally because of data control or because of time constraints with the Statute of Limitations. There can be a number of items to be considered in making this agreement. Whether the sole outcome of the audit is to be additional taxes owed or a refund to the taxpayer is due is not a consideration in a Waiver of Agreement. Again, the purpose and objective is to complete the audit in a timely manner in accordance with the statutes. If the end result is a refund then it should be given in fairness as long as the Waiver is timely signed by both parties notwithstanding any other issues unresolved. In the cases where the Statute of Limitations is an issue and the taxpayer would not agree with the waiver then the Department could simply issue an assessment which would then extend the statute for collection. The taxpayer would have no similar remedy except to protest the audit and send it to a higher resolution or to file Amended returns if the Statute still gave them time to do so, either way at considerable expense to the taxpayer.

The waivers in question that I have looked at all appear to have been timely signed so that does not seem to be an issue. The form heading stipulates that the agreement is "Consent to Extend the Time to Assess Tax." Item(1) stipulates the consent and agreement to determine the AMOUNT of any State tax DUE on any return..... In my opinion that means to assess the tax that is due and payable. It does not say "additional taxes due" but to assess the tax due. I do not believe that it means specifically to assess

any additional taxes due but simply to assess the correct amount due whatever it may be. In fact, midway through the form it specifically refers to "extending the time for mailing the notice of assessment OR refund of the taxpayer". The form does not specifically determine which party is requesting the waiver but in point of fact, if the taxpayer had any reason to believe he may be entitled to a refund and by signing this waiver it would preclude him from doing so and obtaining the correct tax due I can't conceive of many reasons the taxpayer would agree to sign a waiver that would allow the taxing authority to continue to look for audit changes producing additional taxes while he gives away his right to a rightful refund. That is clearly non sensical. I do not believe that the purpose of this waiver is for anything other than extending the time of an audit whether the results be additional taxes; a refund; or a no change audit.

I would certainly tell you that the ones signed by my designee while in my tenure as Director of Field Services were intended to do just that and not to unduly jeopardize any position of the taxpayer to a fair and correct audit outcome.

This is given for the sole purpose of relaying to you my opinion on these waivers as I personally see it. I look forward to seeing you again soon.

Respectfully,

Marvin N. Davant

Field Services Director, Retired

**NEXSEN PRUET
JACOBS POLLARD & ROBINSON, LLC
ATTORNEYS AND COUNSELORS AT LAW**

Burnel R. Maybank
MEMBER

DIRECT DIAL
(803) 253-8228
(843) 720-1768
BMaybank@NPJP.COM

March 20, 2002

Mr. John A. Swearingen
Audit Supervisor
Department of Revenue
301 Gervais Street
Columbia, SC 29201

Jan Steensen Crangle, CPA
Manager, Office of Appeals
South Carolina Department of Revenue
Post Office Box 125
Columbia, SC 29214

Re: Selected Duke State and Local Tax Issues.

Dear John and Jan:

~~The Duke crowd and I met in Charleston (natch) to discuss the settlement proposals contained in your fax of March 18. We have the following counter-proposal.~~

First, Duke naturally needs to check your figures. (They had not seen your fax prior to the meeting.) I know there have been issues in the past regarding the calculation of interest, but assuming Duke confirms your figures, we offer the following:

SALES TAX

Duke would like to settle the sales tax liability though 2001, using the methodology and quarterly tax liability contained in your fax. (This has the effect of reducing the amount of our refund.) Duke proposes to execute a SC870AD regarding the sales and use tax liability through 2001.

LICENSE TAXES

Subject to verifying the figures, as stated above, Duke proposes accepting the DOR's proposal and executing a SC870AD for license taxes for the years contained in your proposal. (December 1984 to December 1994.)

INCOME TAXES

Subject to verifying the figures, as stated above, Duke proposes accepting the DOR's proposal except that it would agree to execute a SC870, rather than a SC870AD. This would have the effect of keeping the years open for both the DOR and the State until the end of this year, unless the DOR and Duke jointly agree to execute another waiver.

NPCHAR11-(1)-

1441 MAIN STREET, SUITE 1500, COLUMBIA, SC (29201) • POST OFFICE DRAWER 2426, COLUMBIA, SC (29202)
803-771-8900 • FAX 803-253-8277
www.NPJP.com

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GREENVILLE, SC

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CHARLOTTE, NC

HILTON HEAD, SC

MYRTLE BEACH, SC

SCDOR00021809



March 20, 2002
Page 2

Duke is examining the possibility of filing amended returns for the purposes of claiming tax incentives, as well as possibly other adjustments. In addition, the files are so stale and the number of years open are so large that Duke is reluctant to close out some 16 years without at least some due diligence, which they have not performed.

CONCLUSION

Duke is actively in the process of verifying the figures contained in your fax, which verification is expected to be completed in the next few days. Please let me know what you think about the other points.

Yours very truly,

Burnie

Burnet R. Maybank

BRM/nwl

cc: Mr. Harley Priesmeyer/Duke Energy

NPCHAR1:181282.1-LT-(BRM) 011413-00041

SCDOR00021810

NEXSEN PRUET JACOBS & POLLARD, LLC
ATTORNEYS AND COUNSELORS AT LAW

BURNET R. MAYBANK III
MEMBER

DIRECT DIAL
803-253-8228
BMaybank@NPJP.com

July 2, 2002

Mr. John A. Swearingen
Audit Supervisor
Department of Revenue
301 Gervais Street
Columbia, South Carolina 29201

Jan Steensen Crangle, CPA
Manager, Office of Appeals
South Carolina Department of Revenue
Post Office Box 125
Columbia, South Carolina 29214

Re: Proposed Duke Settlement

Dear John and Jan:

Duke offers the following settlement proposal:

SALES TAX

Duke would like to settle the sales tax liability though 2001, using the methodology and quarterly tax liability contained in your fax. (See attached Exhibit 1.) This includes accepting the DOR's interest rate calculation. Duke proposes to execute a SC870AD regarding the sales and use tax liability through 2001. We understand this equals approximately (\$2,796,623) with interest calculated through April 5, 2002.

INCOME AND LICENSE TAXES

Duke proposes accepting the DOR's proposal except that it would agree to execute a SC870, rather than a SC870AD. We understand this would have the effect of keeping the years open for both the DOR and the State until the end of the waiver period (12/31/2002), unless the DOR and Duke jointly agree to execute another waiver. As previously indicated, Duke is examining the possibility of filing amended returns.



John A. Swearingen
Jan Steensen Crangle, CPA
July 2, 2002
Page 2

We understand that this equals a refund of \$5,891,208 (with interest calculated through July 2, 2002.)

We would also like to accept your proposal that the DOR would issue a FAD (at our request) on the calculation of interest on the income and license taxes so that we could contest the interest rate calculations. (Duke may not contest the matter, but we would like to retain the option.)

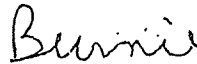
CONCLUSION

We have pretty well agreed to all of the DOR proposals, so I trust you find this satisfactory. Duke would like to have the attached schedule (Exhibit 2) re-calculated with interest brought forward to no later than July 15th. Additionally, Duke would like for all these matters to be combined for settlement purposes and the DOR issue a refund in a timely manner for the net amount.

If the attached accurately reflects your understanding, please execute a copy of this letter and return it to us. We look forward to receiving the 870 and the 870AD which we will execute and return to you.

With kind regards, I am

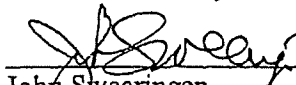
Yours very truly,



Burnie R. Maybank III

BRM/kc

cc: Mr. Harley Priesmeyer/Duke Energy


John Swearingen
DOR

July 8, 2002



STATE OF SOUTH CAROLINA
DEPARTMENT OF REVENUE
**OFFER OF WAIVER OF RESTRICTIONS ON
ASSESSMENT AND COLLECTION OF ADDITIONAL
TAX OR ACCEPTANCE OF OVERASSESSMENT**

SC870AD

(Rev. 7/97)
3310

Taxpayer Name(s) Duke Energy Corporation
(Please type or print)
Doing Business As _____
Street Address PO Box 1642
City Houston State Texas ZIP Code 77251-1642
Identification Number (SSN, FEI, etc.) 56-0205520

Increase (Decrease) in Tax, Interest and Penalties (Use separate section for each type of tax)	
Type of Tax <u>Sales & Use</u>	
Period Covered <u>1/1/1991 through 12/31/2001</u>	
Tax \$ <u>\$1,725,466.09</u>	Penalties \$ _____
Type of Tax _____	
Period Covered _____	
Tax \$ _____	Penalties \$ _____

Total due \$ 2,857,494 if paid by August 14, 2002 including interest.

This information was prepared by Ian Steensen Crangle, CPA Telephone Number 803.898.6616

**Consent To Assessment and Collection of Additional Tax
or Acceptance of Refund Determination**

The undersigned consents to the assessment and collection of any additional tax and penalties or accepts any decrease in tax and penalties shown above, plus any interest provided by law. This offer is subject to acceptance by the Department of Revenue. If this offer is accepted, no claim for refund can be filed or pursued and it will not be reopened in the absence of conditions stated in the general information and instructions.

Taxpayer's Signature _____ Date _____

Spouse's Signature _____ Date _____

Corporation Name (if applicable) Duke Energy Corporation

By [Signature] Title Sr. Vice President Date August 13, 2002
Signature

Commission Approval of Waiver by [Signature]

(See reverse side)



SCDOR00021800

From: "Harley H Priesmeyer" <hhpriesmeyer@duke-energy.com>
To: <cranglj@sclax.org>
Date: 7/10/02 4:16PM
Subject: Form SC870

Jan - alternatively, we could do without the SC870 for income/license fee if you guys are agreeable to pay us the net amount of approximately \$3 million and we get a FAD for the interest calculation. If you are in agreement with this arrangement, let me know and we'll revise the settlement letter.

Harley Priesmeyer
Director, State and Local Taxes
Duke Energy Corporation
P. O. Box 1642
Houston, Texas 77251-1642

Office: 713-989-3285
Fax: 713-989-3280
Cell: 713-501-0725
email: hhpriesmeyer@duke-energy.com

----- Forwarded by Harley H Priesmeyer/Tax/PSC/PEC on 07/10/2002 12:04 PM

Harley H
Priesmeyer To: cranglj@sclax.org
cc: bmaybank@nplp.com
07/10/2002 Subject: Form SC870
11:06 AM

Jan - I received your voice mail re why we needed to do a SC870 instead of a SCAD870 form. There are two reasons for it. One, Duke wants to reserve the right to contest the interest computation on the income/license fee and secondly, Duke is planning on filing amended returns for some credits and other deductions/adjustments that were previously not taken for these years.

Hopefully, this will aid you re this matter. I remember seeing some previous correspondence from Burney in which you were ok with Duke signing an 870 form.

If you need anything else on this, please let me know.

Harley Priesmeyer
Director, State and Local Taxes
Duke Energy Corporation
P. O. Box 1642
Houston, Texas 77251-1642



SCDOR00021663

From: JAN CRANGLE
To: URBAN, RON
Date: 7/11/02 11:34AM
Subject: Duke settlement proposal

Would you have some time to discuss this with John and I. The taxpayer is in full agreement with the sales and use tax audit with a balance due of \$2.7 million. They want to net this against the refund due on the income and license fee audit, however the tp disagrees with our interest calculations on the income and license audit. The question involves whether simple interest and tax are combined on 9/1/85 (when we adopted compounded interest) and the compounded interest computed on the total. We feel strongly that the DORs administrative practice of compounding only on the outstanding tax balance as of 9/1/85 is proper; however, the taxpayer would like to preserve their right to protest this issue.

The taxpayer also wants preserve their right to file a claim for refund for other deductions and credits. We wanted to close up these years and have them execute an SC870AD so we don't see them again. Since the periods involved date back to 1978 as the result of outstanding IRS RAR adjustments, and most of the early years involve refunds, I want to make sure we are in agreement on how the statute of limitations on refund claims will apply if they don't execute an 870AD.

Thanks.

CC: ANDERSON, ROBERT; COMER, JOHN; SWEARINGEN, JOHN

SCDOR00021660

From: JAN CRANGLE
To: Priesmeyer, Harley H
Date: 7/10/02 5:08PM
Subject: Re: Form SC870

Harley,

Generally we would use an SC870AD at this level and I'm receiving some serious questions about why we should make an exception and execute an SC870.

If I remember correctly, we discussed this back in March or thereabouts and you indicated that you needed additional time to review some of the later years computations. Generally we would be expected to have resolved these issues during the 3 months that have passed and the matter has been under review.

I don't have a problem with respect to adding language that will hold the periods open to address the interest computation question. It would however be unusual for us to hold all periods open for other credit or deduction adjustments.

I suggest that we arrange a conference call for Thursday morning. (John Swearingen will be leaving on vacation later on Thursday, so we need to resolve it in the morning if possible to avoid additional delay.) Would 10:30AM EDT work for you? If so, please call or e-mail me and I'll set it up at this end and see if we can get this closed.

Thanks.

Jan

>>> "Harley H Priesmeyer" <hhpriesmeyer@duke-energy.com> 07/10/02 12:06PM.>>>

Jan - I received your voice mail re why we needed to do a SC870 instead of a SCAD870 form. There are two reasons for it. One, Duke wants to reserve the right to contest the interest computation on the income/license fee and secondly, Duke is planning on filing amended returns for some credits and other deductions/adjustments that were previously not taken for these years.

Hopefully, this will aid you re this matter. I remember seeing some previous correspondence from Burney in which you were ok with Duke signing an 870 form.

If you need anything else on this, please let me know.

Harley Priesmeyer
Director, State and Local Taxes
Duke Energy Corporation
P. O. Box 1642
Houston, Texas 77251-1642

Office: 713-989-3285
Fax: 713-989-3280
Cell: 713-501-0725
email: hhpriesmeyer@duke-energy.com

7/11/2002 - Harley Priesmeyer, John Swearingen, & Jan Crangle conference call. TP wants to hold all periods open for income & license. I indicated that our earlier understanding was they only needed to review later years. I added we would agree to 870AD on sales & use however it is not prepared to cut a check for \$4M. They want until 12/31/02 to complete review. Requested that they study position & get back with us.

SCDOR00021661 |

----- Forwarded by Harley H Priesmeyer/Tax/PSC/PEC on 07/10/2002 11:02 AM -----

Harley H
Priesmeyer To: cranql@sctax.org
cc: bmaybank@nplp.com
07/09/2002 Subject: Form SC870
05:34 PM

Jan - my lawyers would feel much more comfortable if we can add the following to the instructions on the back of the SC870 form:
"Executing this document does not prevent you from seeking a refund of State taxes paid. The refund claim must be filed within three years from the date the return was filed, (strikethrough: or)two years from the date of payment of the tax or anytime before the expiration of the waiver (12/31/2002), whichever is later.

I think this was the intention of both parties, but I wanted to run this by you before we make this change. Other than this small change, we are prepared to sign the forms and send over to you, probably by tomorrow, if I can find an officer to sign them.

Harley Priesmeyer
Director, State and Local Taxes
Duke Energy Corporation
P. O. Box 1642
Houston, Texas 77251-1642

Office: 713-989-3285
Fax: 713-989-3280
Cell: 713-501-0725
email: hhpriesmeyer@duke-energy.com

CC: bmaybank@NPJP.com; SWEARINGEN, JOHN

SCDOR00021662

Office: 713-989-3285
Fax: 713-989-3280
Cell: 713-501-0725
email: hhprismeyer@duke-energy.com

----- Forwarded by Harley H Prismeyer/Tax/PSC/PEC on 07/10/2002 11:02 AM -----

Harley H
Prismeyer To: cranglj@sctax.org
 cc: bmaybank@npj.com
07/09/2002 Subject: Form SC870
05:34 PM

Jan - my lawyers would feel much more comfortable if we can add the following to the instructions on the back of the SC870 form:
"Executing this document does not prevent you from seeking a refund of State taxes paid. The refund claim must be filed within three years from the date the return was filed, (strikethrough: or)two years from the date of payment of the tax or anytime before the expiration of the waiver (12/31/2002), whichever is later.

I think this was the intention of both parties, but I wanted to run this by you before we make this change. Other than this small change, we are prepared to sign the forms and send over to you, probably by tomorrow, if I can find an officer to sign them.

Harley Prismeyer
Director, State and Local Taxes
Duke Energy Corporation
P. O. Box 1642
Houston, Texas 77251-1642

Office: 713-989-3285
Fax: 713-989-3280
Cell: 713-501-0725
email: hhprismeyer@duke-energy.com

CC: <bmaybank@npj.com>

SCDOR00021664

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 issues of the

FILED

AUG 08 2003

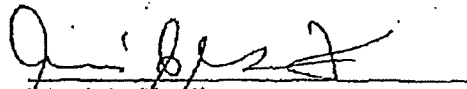


DE00009356

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.

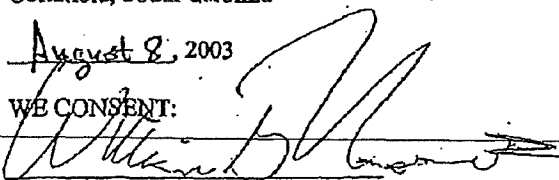
IT IS SO ORDERED.


Marvin F. Kittrell
Chief Administrative Law Judge

Columbia, South Carolina

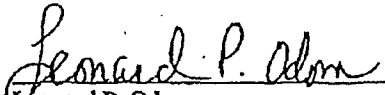
August 8, 2003

WE CONSENT:


William G. Newsome III
Nexsen Pruet Jacobs & Pollard, LLC
1441 Main Street, Suite 1500
Columbia, SC 29201
(803) 771-8900

(2)
pr

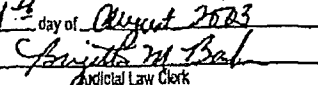
Attorney for Petitioner


Leonard P. Odom
Counsel for Revenue Litigation
State of South Carolina
Department of Revenue
Law & Compliance Division
301 Gervais Street
Columbia, SC 29214

Attorney for Respondent

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: 
Judicial Law Clerk

NEXSEN PRUET JACOBS & POLLARD, LLC
MEMORANDUM

TO: John Swearingen
Jan Crangle

CLIENT-MATTER NO.: 11413-41

FROM: Burnet R. Maybank III

DATE: August 12, 2002

RE: Duke Settlement

Attached is a fax executed copy of the SC 870AD (Sales and Use Taxes.) I should have
the original to you shortly.

BRM/kc
Attachment



NPCOL1:582135.1-MM-(BRM) 011413-00041

SCDOR0002178



STATE OF SOUTH CAROLINA
DEPARTMENT OF REVENUE
**OFFER OF WAIVER OF RESTRICTIONS ON
ASSESSMENT AND COLLECTION OF ADDITIONAL
TAX OR ACCEPTANCE OF OVERASSESSMENT**

SC870AD
(Rev. 7/97)
3310

Taxpayer Name(s) Duke Energy Corporation
(Please type or print)
Doing Business As _____
Street Address PO Box 1642
City Houston State Texas ZIP Code 77251-1642
Identification Number (SSN, FEI, etc.) 56-0205520

Increase (Decrease) in Tax, Interest and Penalties (Use separate section for each type of tax)	
Type of Tax <u>Sales & Use</u>	
Period Covered <u>1/1/1991 through 12/31/2001</u>	
Tax \$ <u>\$1,725,966.09</u>	Penalties \$ _____
Type of Tax _____	
Period Covered _____	
Tax \$ _____	Penalties \$ _____

Total due \$ 2,857,494 if paid by August 14, 2002 including interest.

This information was prepared by Jan Steensen Crangle, CPA Telephone Number 803 898-5616

**Consent To Assessment and Collection of Additional Tax
or Acceptance of Refund Determination**

The undersigned consents to the assessment and collection of any additional tax and penalties or accepts any decrease in tax and penalties shown above, plus any interest provided by law. This offer is subject to acceptance by the Department of Revenue. If this offer is accepted, no claim for refund can be filed or pursued and it will not be reopened in the absence of conditions stated in the general information and instructions.

Taxpayer's Signature _____ Date _____

Spouse's Signature _____ Date _____

Corporation Name (if applicable) Duke Energy Corporation

By [Signature] Title Sr. Vice President Date August 13, 2002
Signature

Commission Approval of Waiver by [Signature]

(See reverse side)

SCDOR00021809

Westlaw.

Page 1

Code 1976 § 12-7-1190

CODE OF LAWS OF SOUTH CAROLINA 1976 ANNOTATED
 COPYRIGHT (c) 1990 BY THE STATE OF SOUTH CAROLINA
 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

EDITOR'S NOTE--

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--

As to 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.

ANNOTATIONS

CASE NOTES

Quoted in *Hertz Corp. v South Carolina Tax Comm.*, 246 SC 92, 142 SE2d 445 (1965).

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 346C.

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Code 1976 § 12 -7 -1190

SC ST § 12 -7 -1190

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Code 1976 § 12-6-2295

Page 1

C

Code of Laws of South Carolina 1976 Annotated Currentness

Title 12. Taxation (Refs & Annos)

Chapter 6. South Carolina Income Tax Act

Article 17. Allocation and Apportionment

→ → § 12-6-2295. Items included and excluded from terms "sales" and "gross receipts".

(A) The terms "sales" as used in Section 12-6-2280 and "gross receipts" as used in Section 12-6-2290 include, but are not limited to, the following items if they have not been separately allocated:

(1) receipts from the sale or rental of property maintained for sale or rental to customers in the ordinary course of the taxpayer's trade or business including inventory;

(2) receipts from the sale of accounts receivable acquired in the ordinary course of trade or business for services rendered or from the sale or rental of property maintained for sale or rental to customers in the ordinary course of the taxpayer's trade or business if the accounts receivable were created by the taxpayer or a related party. For purposes of this item, a related person includes a person that bears a relationship to the taxpayer as described in Section 267 of the Internal Revenue Code;

(3) receipts from the use of intangible property in this State including, but not limited to, royalties from patents, copyrights, trademarks, and trade names;

(4) net gain from the sale of property used in the trade or business. For purposes of this subsection, property used in the trade or business means property subject to the allowance for depreciation, real property used in the trade or business, and intangible property used in the trade or business which is:

(a) not property of a kind that properly would be includible in inventory of the business if on hand at the close of the taxable year; or

(b) held by the business primarily for sale to customers in the ordinary course of the trade or business;

(5) 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;

(6) receipts from the sale of intangible property which are unable to be attributed to any particular state or

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Code 1976 § 12-6-2295

Page 2

states are excluded from the numerator and denominator of the factor.

(B) The 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;

(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.

CREDIT(S)

HISTORY: 2007 Act No. 110, § 51.A, eff June 21, 2007, applicable for taxable years beginning after 2006; 2007 Act No. 116, § 56.A, eff June 28, 2007, applicable for taxable years beginning after 2006.

EDITOR'S NOTE

2007 Acts 110 and 116 added identical versions of this section.

Code 1976 § 12-6-2295, SC ST § 12-6-2295

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Code 1976 § 12-6-2295

Page 3

Current through End of 2010 Reg. Sess.

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Page 1

Code 1976 § 12-6-2290

CODE OF LAWS OF SOUTH CAROLINA 1976 *ANNOTATED*
 TITLE 12. TAXATION
 CHAPTER 6. SOUTH CAROLINA INCOME TAX ACT
 ARTICLE 17. ALLOCATION AND APPORTIONMENT
 COPYRIGHT (C) 2000 BY THE STATE OF SOUTH CAROLINA

§ 12-6-2290. Apportionment of remaining net income where principal profits or income derived from sources not otherwise described by this chapter.

If the principal profits or income of a taxpayer are derived from sources other than those described in Section 12-6-2250 or Section 12-6-2310, the taxpayer shall apportion its remaining net income 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.

HISTORY: 1995 Act No. 76, § 1.

RESEARCH AND PRACTICE REFERENCES—

Taxation  1005.
 WESTLAW Topic No. 371.
 C.J.S. Taxation § 1096.

CASE NOTES

Construction 1

1. Construction

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." (Interpreting former § 12-7-1190.) *Lockwood Greene Engineers, Inc. v. South Carolina Tax Com'n* (S.C.App. 1987) 293 S.C. 447, 361 S.E.2d 346.

Code 1976 § 12 -6 -2290
 SC ST § 12 -6 -2290

END OF DOCUMENT



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1 of 3 DOCUMENTS

CODE OF LAWS OF SOUTH CAROLINA ANNOTATED
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*** ARCHIVE DATA ***

*** THIS SECTION IS CURRENT THROUGH THE 1995 SUPPLEMENT (1995 SESSION) ***

TITLE 12 Taxation
CHAPTER 19 License Fees of Corporations

S.C. Code Ann. § 12-19-110 (1995)

12-19-110. Repealed by 1995 Act No. 76, §24, eff for corporate annual reports and license fees required for taxable years beginning after 1995 Additional license tax on utilities and electric cooperatives to be based on gross receipts; payment; reports.

In addition to the license fee provided by Section 12-19-100 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 express company, street railway company, navigation company, waterworks company, power company, distribution electric cooperative, light company, gas company, telegraph company, and telephone company. However, where a consolidated return pursuant to Section 12-7-1570 is filed, the phrase the gross receipts derived from services rendered from regulated business' does not include gross receipts arising from any transactions between any of the separate members of the consolidated return group. The license fee provided for by this section must be paid at the time of filing the reports required by this chapter. Electric cooperatives subject to the license fee imposed by Section 12-19-100 and distribution electric cooperatives subject to the license fee provided by this section shall file reports pursuant to the provisions of Sections 12-19-20 and 12-19-130.

HISTORY: HISTORY: 1962 Code §65-607.1; 1962 (52) 2172 ; Repealed by 1995 Act No. 76, §24, eff with respect to corporate annual reports and license fees required for taxable years beginning after 1995.

NOTES: Editor's comment: Comparable provisions under estate tax legislation applicable to persons dying on or before June 30, 1991 appear at §12-15-590

Effect of Amendments: The 1985 amendment added the provisions in the first and second sentences dealing with gross receipts "derived from services rendered from regulated business" and the application of such phrase where a consolidated return is filed The 1994 amendment deleted references to railroad company and various types of car companies



Mr. Taylor

State of South Carolina
South Carolina Tax Commission

JOHN T. WEEKS
CHAIRMAN



P. O. BOX 125

Columbia
May 17, 1985

S. HUNTER HOWARD, JR.
JOHN H. RUCKER
JOHN T. WEEKS
COMMISSIONERS

Mr. William E. Booth, III
Griffith, Mays, Foster and Kittrell
Attorneys and Counselors at Law
2512 Devine Street
Columbia, South Carolina 29205

Re: A Finding Concerning The License Fee
Liability Under Section 12-19-110 of
Duke Power Company.

Dear Mr. Booth:

The Tax Commission has given careful consideration to the above referenced appeal which was presented to the Commission on November 13, 1984.

We have today issued our Finding, copy of which is enclosed, herewith.

Yours very truly,

A handwritten signature of John T. Weeks in dark ink.
John T. Weeks

JTW:lgm

Enclosure

CC: Mr. Edward Marsh, Jr.
Assistant Tax Counsel
Duke Power Company
Tax Department
Post Office Box 33189
Charlotte, North Carolina 28242



SCDOR00002449

STATE OF SOUTH CAROLINA
BEFORE THE
SOUTH CAROLINA TAX COMMISSION

In Re:

A Finding Concerning The License Fee
Liability Under § 12-19-110 Of Duke
Power Company.

FINDINGS OF FACT

On November 27, 1963, Duke Power Company was incorporated as a utility in North Carolina. Shortly thereafter, on February 24, 1964, it qualified to do business in South Carolina.

As part of its operations, Duke owned a nuclear power plant located in York County, South Carolina. This property was used by Duke in the production of electricity and is identified as the Catawba Nuclear Station.

In 1981, Duke sold 75% of unit 1 of its Catawba Nuclear Station and 37½% of the plant's support facilities to the Saluda River Electric Cooperative and the North Carolina Electric Membership Cooperative. Included within these transactions were various contractual entitlements and other assets not located in this State. While the gross receipts from these sales totaled \$528,313,853, the amount attributable to the sale of the real property and improvements situated in South Carolina was \$295,205,499.

When the Field Services Division of the South Carolina Tax Commission audited Duke, it determined that Duke had failed to include the above-mentioned

SCDOR00002450

\$295,205,499 within its tax base for purposes of computing its 1982 corporate license fee liability as required by § 12-19-110. In view of such, the Division proposed an additional license fee assessment against Duke based upon this amount. The additional liability arising from the proposed assessment is as follows:

License Tax:	\$ 886,722
Interest:	257,141
Total:	<u>\$1,143,863</u>

Duke has excepted to the Division's proposed assessment and is now before this Commission contesting the same pursuant to § 12-47-440. Its exception is based upon four distinct points.

Duke first argues that South Carolina's corporate license fee on utilities is not imposed upon the receipts received from the sale of assets. Rather, it maintains that the fee is limited to the receipts it receives from customers for the furnishing of electricity.

Secondly, Duke contends that the receipts from the sale of unit 1 and its support facilities are not receipts from business within South Carolina. In making this contention, Duke notes that a majority of such property was sold to an out-of-state purchaser, North Carolina Electric Membership Cooperative, and that the sale itself was consummated in North Carolina.

Next, Duke states that if the receipts from this sale are subject to South Carolina's corporate license fee, then the amount includable in the tax base should be limited

to the net derived therefrom. Duke claims that it netted very little on the transactions.

Finally, Duke questions the constitutionality of South Carolina's corporate license fee scheme. In doing so, it alleges that § 12-19-110 violates the equal protection clauses of both the United States and South Carolina Constitutions.

CONCLUSION

Chapter 19 of Title 12 of the Code of Laws of South Carolina, 1976, imposes an annual license fee upon certain corporations that are organized under South Carolina law or that are qualified to do business in South Carolina. The measure of the fee depends upon the nature of the corporation itself. In the instant situation, § 12-19-110 levies the license fee that gives rise to the issues raised by Duke. The relevant portion of that provision states:

"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"

The above language clearly indicates that the license fee on power companies, such as Duke, is based on entire gross receipts and not just receipts from customer charges. Where a statute is clear and unambiguous, there is not 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) and Green v. Zimmerman, 269 S.C. 535, 238 S.E.2d 323 (1977).

Although Duke argues that the use of the word "operations" in § 12-19-110's original enactment¹ indicates that the subject fee is to be limited to customer charges, we do not give the word such a narrow interpretation. The term "operations" implies more and usually relates to the whole process of planning for and operating a business. Liller v. Logsdon, 261 Md. 367, 275 A.2d 469 (1971).

It should also be noted that the Tax Commission has long interpreted § 12-19-110 as applying to more than the mere receipts from customer charges. This interpretation has been promulgated into Tax Regulation 117-89.1 wherein it is stated:

"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."

We are likewise of the opinion that the receipts arising from the sale of the subject property are receipts from business in this State. The assets themselves are business assets located in South Carolina. The fact that

¹See Act No. 269, Acts of 1904.

one of the purchasers was from out-of-state and that the transaction itself was consummated out-of-state does not distract from the local situs of the property. In point of fact, if the situation was reversed and Duke sold similar assets located in North Carolina to a South Carolina purchaser after consummating the transaction in this State, we would not include the gross receipts derived therefrom in Duke's corporate license fee base.

We are aware of the fact that while the gross receipts from the subject sale were large, Duke's net was minimal. Unfortunately, however, we cannot ignore the language of § 12-19-110. The license fee must be levied upon gross receipts, not net receipts. The two are something separate and apart. "Gross receipts" have been defined to mean the whole receipts as opposed to net receipts. Taylor v. Rosenthal, 308 Ky. 4, 213 S.W.2d 435 (1948) and First Trust Co. of St. Paul v. Commonwealth Co., C.C.A.S.D., 98 F.2d 27 (1938).

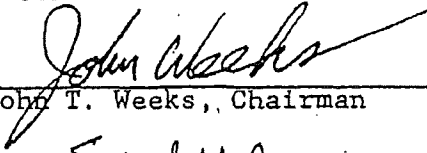
Further, the fact that Tax Regulation 117-89.1 makes reference to "profit and loss items" does not imply that the fee levied by § 12-19-110 is based on net receipts. That language is used to identify certain items and does not relate to the manner of taxation. To interpret 117-89.1 otherwise would ignore the broad language of § 12-19-110. A regulation cannot change the meaning of a statute. Heyward v. South Carolina Tax Commission, 240 S.C. 347, 126 S.E.2d 15 (1962).

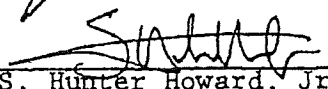
Finally, although this Commission does not have the authority to decide the constitutionality of § 12-19-110, we do note that the General Assembly has the power to make reasonable discriminations between various kinds of corporations for tax purposes. Whether such discrimination is reasonable in the instant situation is not for us to decide.

Based upon the foregoing, it is our conclusion that the Field Services Division's audit adjustments should be upheld.

AND IT IS SO FOUND AND ORDERED.

SOUTH CAROLINA TAX COMMISSION


John T. Weeks, Chairman


S. Hunter Howard, Jr., Commissioner

Columbia, South Carolina
May 17, 1985

§ 12-7-1180. Remaining income of certain manufacturers, processors, dealers and others; election of method under preceding sections; change.

An election by the taxpayer under § 12-7-1140 through § 12-7-1170 must be adhered to unless and until written permission has been obtained from the Commission to make a change. The method used by the taxpayer in his first return under the provisions of this article shall constitute an election.

HISTORY: 1962 Code § 65-279.9; 1958 (50) 1574; 1959 (51) 363; 1964 (53) 2437.

§ 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.

CASE NOTES

Quoted in *Hertz Corp. v South Carolina Tax Comm.*, 246 SC 92, 142 SE2d 445 (1965).

§ 12-7-1200. Basing returns on accounts and records of taxpayer.

When a taxpayer maintains books of accounts and records in such manner as to clearly reflect the true net income accruing or arising from sources within this State the return may, with the approval of the Commission, be based upon such books of account or records and the tax paid upon the net income so determined. When the Commission finds the books of account and records sufficiently clear, in its opinion, to show the true net income arising from sources within this State it may require the return to be filed upon such basis and calculate the tax due upon the net income so determined.

HISTORY: 1962 Code § 65-279.11; 1958 (50) 1574.





SOUTH CAROLINA CODE OF LAWS ANNOTATED BY LEXISNEXIS(R)

*** This document is current through all legislation enacted in the 2010 session ***

*** The most current annotation is dated October 21, 2011 ***

TITLE 12. TAXATION
CHAPTER 6. SOUTH CAROLINA INCOME TAX ACT
ARTICLE 17. ALLOCATION AND APPORTIONMENT

GO TO SOUTH CAROLINA ARCHIVE DIRECTORY

S.C. Code Ann. § 12-6-2320 (2010)

§ 12-6-2320. Allocation and apportionment of taxpayer's income when provisions unfairly represent taxpayer's business activity; agreement with taxpayer; provision for taxpayer constructing or operating qualified recycling facility.

(A) 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.

(B)(1) For the purposes of this chapter, the department may enter into an agreement with the taxpayer establishing the allocation and apportionment of the taxpayer's income for a period not to exceed five years, if the following conditions are met:

- (a) the taxpayer is planning a new facility in this State or an expansion of an existing facility;
- (b) the taxpayer asks the department to enter into a contract under this subsection reciting an allocation and apportionment method; and
- (c) after reviewing the taxpayer's proposal and planned new facility or expansion, the Advisory Coordinating Council for Economic Development certifies that the new facility or expansion will have a significant beneficial economic effect on the region for which it is planned and that its benefits to the public exceed its costs to the public. It is within the Advisory Coordinating Council for Economic Development's sole discretion to determine whether a new facility or expansion has a significant economic effect on the region for which it is planned.



(2) For the purposes of this subsection the word "taxpayer" includes any one or more of the members of a controlled group of corporations authorized to file a consolidated return under *Section 12-6-5020*. Also, the word "taxpayer" includes a person who bears a relationship to the taxpayer as described in *Section 267(b) of the Internal Revenue Code*.

(3) Notwithstanding the provisions of item (1), the department may enter into an agreement with the taxpayer establishing the allocation and apportionment of the taxpayer's income for a period not to exceed ten years if the following conditions are met:

(a)(i) the taxpayer is planning a new facility in this State or an expansion of an existing facility and the new or expanded facility results in a total investment of at least ten million dollars and the creation of at least two hundred new full-time jobs, with an average cash compensation level for the new jobs of more than three times the per capita income of this State at the time the jobs are filled which must be within five years of the Advisory Coordinating Council for Economic Development's certification. Per capita income for the State shall be determined by using the most recent data available from the Board of Economic Advisors; or

(ii) the taxpayer is planning a new facility in this State and invests at least seven hundred fifty million dollars in real or personal property or both in a single county in this State and creates at least three thousand eight hundred full-time new jobs, as those terms are defined in *Section 12-6-3360(M)*, within the county. The taxpayer has seven years from the date it makes the notification provided for in subitem (b) of this item to make the required investment and create the required number of jobs;

(b) the taxpayer asks the department to enter into a contract under this subsection reciting an allocation and apportionment method; and

(c) after reviewing the taxpayer's proposal and planned new facility or expansion, the Advisory Coordinating Council for Economic Development certifies that the new facility or expansion will have a significant beneficial economic effect on the region for which it is planned and that its benefits to the public exceed its costs to the public. It is within the Advisory Coordinating Council for Economic Development's sole discretion to determine whether a new facility or expansion has a significant economic effect on the region for which it is planned.

(4) The taxpayer may begin operating under the agreement beginning with the tax year in which the agreement is executed. If the taxpayer fails to meet the requirements of subitem (3)(a)(ii), the department may assess any tax due as a result of the taxpayer's failure to meet the requirements of subitem (3)(a)(ii). For any subsequent year that the taxpayer fails to maintain three thousand eight hundred full-time new jobs, then the department may assess any tax due for that year.

(C) Notwithstanding the provisions of this section, a taxpayer who is constructing or operating a qualified recycling facility as defined in *Section 12-6-3460* may petition the department for the use of separate accounting with respect to all or any part of the taxpayer's or taxpayer's subsidiaries' business activities or for the use of any other method to determine the taxpayer's or taxpayer's subsidiaries' taxable income. The department shall forward the petition with its comments concerning the economic impact of the suggested method to the Advisory Coordinating Council for Economic Development. The department may approve the petition upon certification of the Advisory Coordinating Council for Economic Development that the benefits to the public exceed the costs to the public.

HISTORY: 1995 Act No. 76, § 1; 1996 Act No. 462, § 8A; 1999 Act No. 100, Part II, § 57; 2009 Act No. 124, § 1.A, eff November 1, 2009.

NOTES: Code Commissioner's Note

This section was previously designated as section 12-7-1200, repealed by 1995 Act No. 76. It was redesignated as § 12-6-3320 at the direction of the Code Commissioner on September 27, 1995.

Editor's Note

2009 Act No. 124, § 1.B, provides as follows:

"This section is effective on November 1, 2009, and item (3)(a)(ii) only applies to a taxpayer entering into an agreement prior to October 31, 2015."

Effect of Amendment

The 2009 amendment, in subsection (B), in paragraph (2) added the second sentence referencing § 267(b) of the *Internal Revenue Code*, designated subparagraph (3)(a)(i) and added subparagraph (3)(a)(ii), and added subparagraph (4) relating to a taxpayer investing at least seven hundred and fifty million dollars in a single county.

NOTES:

LexisNexis (R) Notes:

CROSS REFERENCES.-- 12-6-3365. effective July 1, 2005, see *S.C. Code Ann. § 12-6-3365-r*.

Moratorium on corporate income and insurance premium taxes for certain companies investing and creating jobs in State, see *S.C. Code Ann. § 12-6-3367*.

Income tax allocation and apportionment agreement authorization, see *S.C. Code Ann. § 12-15-40*.

CASE NOTES

1. Under former S.C. Code Ann. § 12-7-1200 (now *S.C. Code Ann. § 12-6-2320*), there is provision for the use of separate accounting by a multistate taxpayer under specific circumstances; this method may be used, when, in the opinion of the South Carolina Tax Commission, the taxpayer maintains books of accounts and records which reflect true net income arising from sources within this state. *Texaco, Inc. v. Wasson*, 269 S.C. 255, 237 S.E.2d 75, 1977 S.C. LEXIS 294 (S.C. 1977).

2. Under former S.C. Code Ann. § 12-7-1200 (now *S.C. Code Ann. § 12-6-2320*), there is provision for the use of separate accounting by a multistate taxpayer under specific circumstances and, absent a finding by the South Carolina Tax Commission that the taxpayer's records reflect the true net income arising from sources within this state, the Commission is not empowered to allow or require separate accounting; if the Commission allows or requires separate accounting without such a finding, it is acting beyond the scope of authority granted it by the statute. *Texaco, Inc. v. Wasson*, 269 S.C. 255, 237 S.E.2d 75, 1977 S.C. LEXIS 294 (S.C. 1977).

3. In calculating income from intangible assets of multistate, related corporations, the plain language of *S.C. Code Ann. § 12-6-2320(A)(4)* allowed the state department of revenue to use the combined entity apportionment method to determine the taxpayers' income tax liability, as it fairly measured the taxpayers' business activity in the state. *Media Gen. Communs., Inc. v. S.C. Dep't of Revenue*, 388 S.C. 138, 694 S.E.2d 525, 2010 S.C. LEXIS 212 (S.C. 2010).

LexisNexis 50 State Surveys, Legislation & Regulations

Income Taxes
