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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Ralph K. Anderson III, Administrative Law Judge

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

Duke Energy Corporation.....Appellant,

v.

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

RECORD ON APPEAL

VOLUME VI

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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 he's going to further evaluate whether he's
2 going to become an expert in an area which he's
3 already said he's not going to be an expert in.
4 But the degree of surprise, same thing. And
5 then the prejudice to the opposing party, which
6 that's the one I'm struggling with is, I'm a --
7 I may as well, at least at this point in time,
8 comment somewhat upon my view of the law.

9 I mean, a bankruptcy judge's evaluation of what
10 electricity is in the context of a tax case
11 doesn't carry a whole lot of weight with me.

12 I recognize that the UCC does step into the
13 arena of interpreting what "goods" are. And
14 whether we're going to go into what "goods" are
15 in this case, I'm not so sure. I hadn't heard
16 it yet.

17 I recognize that the standard of 2250 -- I said
18 that there was two "or's," "manufacturing or,"
19 and then you get into the goods, goods and
20 materials. I haven't really heard a whole lot
21 about us going into the goods and materials
22 aspect of that.

23 MR. TRESH: Your Honor, it is -- that piece of it is
24 mentioned in Mr. Green's brief, as well.

25 THE COURT: Okay. But the problem is, you know, the

1 belated aspect of it. I could continue this
2 case, but that places me in a difficult
3 position of getting this case heard. And so at
4 this point in time, I'm going to -- my ruling
5 is going to be to deny his testimony, unless we
6 can work at the -- and there would have to
7 be -- Duke Energy would have to pay the cost of
8 the Department of Revenue deposing this witness
9 and being able to get an expedited transcript
10 of that deposition sometime or another before
11 this case ends on Friday. So is that a
12 possibility?

13 MR. TRESH: Your Honor, we'd be happy -- we don't
14 want to continue the case.

15 THE COURT: And one more issue is, it was only going
16 to be -- if he testified, it would only be on
17 the narrow issue -- at least so far to me, I
18 think the Court -- this Court needs is the
19 narrow issue of -- and I hadn't gone through
20 the cases yet.

21 Now, I've read them and, honestly, the reason
22 I don't think they sunk in is they didn't mean
23 a whole lot to me. You may be bringing
24 attention to something that was -- should have
25 been left unemphasized. But the narrow issue

1 of the policy of considering cases that are not
2 within the tax arena.

3 MR. TRESH: Would it also apply to other taxes
4 outside of income taxes and how -- and the
5 policy behind extrapolating other taxes, be it
6 property taxes or some other tax law, and
7 layering that onto income tax analysis?

8 THE COURT: Well, the problem I have with that is --
9 and, of course, if we went through the
10 deposition again, that would open that door.
11 But, honestly, when you bring that up, that
12 brings me back to the degree of surprise and
13 prejudice.

14 I mean, just looking at this case -- and I
15 recognize what it looks like to practice law --
16 but it's just clear that that aspect of the
17 case was implied the whole time. Whether
18 somebody had cited a case at that time --
19 certainly you cite cases as the case moves
20 along. I don't see that as anything that's
21 new --

22 MR. TRESH: If --

23 THE COURT: -- warranting bringing him out.

24 Go ahead. Respond to that.

25 MR. TRESH: Your Honor, we had no intention of

1 calling Professor Pomp up until having
2 considered Mr. Green's brief and how much
3 emphasis his brief said upon those other cases
4 and those other theories.

5 Mr. Green's whole brief, in fact, his whole
6 case kind of rests on extrapolating other taxes
7 and other states' law to South Carolina income
8 taxes. A lot of what he put in this brief in
9 terms of what he planned to present at trial
10 was indeed surprising.

11 I mean, his -- Mr. Green's original position
12 was, "Hey, this is relatively simple" --

13 THE COURT: South Carolina law.

14 MR. TRESH: -- "South Carolina law," and Your Honor
15 obviously denied that. And so then we
16 introduced all these new theories about ten, 12
17 days ago. We had a lot of work to prepare for
18 trial and once we kind of dug in and we said,
19 you know, that this would be a good idea --

20 now, we -- to put Professor Pomp on and have
21 the Court hear his testimony.

22 Now, we had always noticed Professor Pomp as an
23 expert in state tax -- the state tax policy of
24 electricity. That's what he was originally
25 noticed on. So it's not like we took something

1 that he was -- kind of expanded the scope of
2 what we originally noticed him on.
3 Of course, you heard the deposition did
4 conclude and right after the discussion on
5 electricity, you know, there was this idea that
6 if other papers were filed and briefs were
7 filed, he would consider those.

8 THE COURT: Well ...

9 MR. TRESH: We certainly didn't intentionally mislead
10 anybody about --

11 THE COURT: Well, I just -- as you were talking -- I
12 know you didn't. Y'all seem to be very good
13 lawyers and -- but when you were talking, it
14 did dawn on me one thing that Mr. Green said
15 and that is, that depending on his testimony,
16 he may would want to call another witness.
17 So when you say "continuance," that is another
18 issue that I -- that you did testify -- or
19 state that, didn't you, Mr. Green?

20 MR. GREEN: Depending on what he said in his
21 deposition, I might very well have named
22 another expert. There were other experts named
23 in different issues by -- certainly by them.
24 I think by both sides after that point. I
25 mean, I didn't have a chance to explore his

1 testimony because at the time it looked like
2 they weren't going to use him for that.

3 THE COURT: At this point in time -- I do not like
4 excluding witnesses from lawyers. I really
5 don't. I'll always try to dance around it
6 somehow or another, but in light of that and in
7 light of the fact that we need to go ahead and
8 hear the case, I'm going to deny calling
9 Professor Pomp on that issue.

10 MR. TRESH: (Nods head affirmatively.)

11 THE COURT: All right. Thank you.

12 MR. TRESH: Your Honor, one more thing, too. For
13 the record, probably sometime after lunch, we
14 have spoken with Tracey and -- opposing
15 counsel, and we'd like to submit excerpts from
16 Professor Pomp's deposition, as well as the
17 interrogatory response where we named Professor
18 Pomp on what we named him for into the record
19 as new exhibits. They were not previously
20 offered. And I think that's going to be agreed
21 to?

22 MR. GREEN: I think he wants to do that for
23 preserving the record and I don't -- subject to
24 me working through it and stuff, I think we can
25 reach an agreement on that, if the Court is

1 comfortable with that.

2 THE COURT: All right.

3 MR. GREEN: Thank you, Your Honor.

4 MR. TRESH: Thank you, Your Honor.

5 THE COURT: Hold on one moment.

6 See, you've already started off on making me --
7 having me make a ruling that I don't like to
8 make.

9 MR. TRESH: We apologize, Your Honor.

10 MR. GREEN: Sorry, Your Honor.

11 THE COURT: Well, no, you didn't -- it's Mr. Green's
12 fault.

13 MR. GREEN: It's my fault. I'm sorry, Your Honor.

14 THE COURT: All right. Okay. Are we ready to go
15 now?

16 MR. GREEN: I think we are.

17 One more thing. I don't think this -- but I've
18 talked to Counsel about this, though.

19 THE COURT: Are we ready to go now? Yes, we are.

20 MR. GREEN: I apologize.

21 THE COURT: One more thing.

22 MR. GREEN: I'm sorry. I don't mean to be like
23 Columbo, "Just one more question."
24 Depending on -- and I don't know the nature of
25 their testimony today. I had spoken with

1 Mr. Tresh about this. We have a witness that
2 we might need to take out of order,
3 Mr. Southard. We had discussed that based on
4 some scheduling issues that he has. And so
5 depending on where we are, we might like to
6 call him at around 3:30 this afternoon, because
7 he cannot be here easily tomorrow. Mr. Tresh
8 has agreed to that. He has no problem. I just
9 want to make the Court aware that might be a
10 timing issue, if that's all right.

11 THE COURT: All right.

12 MR. TRESH: We agree with that, Your Honor.

13 THE COURT: Okay.

14 MR. GREEN: Thank you.

15 THE COURT: All right.

16 MR. TRESH: Your Honor, brief opening statement.

17 And then if it's -- pleases the Court, we'll
18 call our first witness.

19 OPENING STATEMENT BY MR. TRESH:

20 MR. TRESH: Your Honor, a few moments ago you made a
21 point that in your ruling we have this
22 disjunctive or conjunctive nature of the two
23 "or's" in the statute at issue.

24 THE COURT: Well, "or" is considered a disjunctive
25 participle..

1 MR. TRESH: Disjunctive participle, yes, Your Honor.

2 But when looking at the entire statute, we'd
3 like to focus the Court's attention and a lot
4 of our testimony on the beginning of that
5 statute that speaks to -- or the statute I'm
6 speaking to is 12-6-2250, which speaks to a
7 taxpayer's principal business.

8 Similarly, 12-6-2290 begins and says --

9 THE COURT: Same fashion.

10 MR. TRESH: -- "principal profits or income." And
11 so while it could be possible that a business
12 would be in the business of manufacturing
13 something or producing something and also be in
14 the business of selling services, the South
15 Carolina statutes recognize that we're going to
16 look to what their principal business is and
17 that has been noted by principal profits and
18 income. And I think you'll hear a lot of
19 testimony around what Duke's principal receipts
20 are from. They're from the sale of services.

21 The principal business that you --

22 THE COURT: You said principal receipts?

23 MR. TRESH: Yes.

24 THE COURT: When you say "receipts," that doesn't
25 include cost? When you say "principal

1 business," does cost enter into that from your
2 perspective?

3 MR. TRESH: It does not, Your Honor. The statute
4 uses two terms. 2250 says "principal
5 business"; 2290 says "principal profits or
6 income."

7 The South Carolina Department of Revenue has
8 consistently interpreted the term "principal
9 business" and "principal profits or income" by
10 two tests. The first test relates to the
11 taxpayer's gross receipts.

12 You'll hear testimony that you look to the
13 gross receipts, look to what 50 percent --
14 greater than 50 percent of those gross receipts
15 are from, and if they're from selling services,
16 one is required to apportion using a single-
17 factor gross receipts method. If the principal
18 gross receipts are from selling tangible
19 personal property, then one is required to go
20 ahead and source their income using a three- or
21 four-factor formula.

22 THE COURT: Okay.

23 MR. TRESH: I think you'll see that test -- it's a
24 long-standing agency policy. It's consistent
25 with the statutes' use of the term "principal"

1 in reference to either business or the single
2 factor -- the gross receipts method actually
3 says not "business" but "principal profits or
4 income," and, again, not with any relation to
5 cost.

6 THE COURT: Okay.

7 MR. TRESH: And so I think you'll also hear

8 testimony or you will also hear testimony that
9 the Department of Revenue, the Legislature in
10 other contexts, and all of the experts have
11 stated at one point or another that the sale of
12 electric service is just that: It's a sale of
13 a service.

14 And so it kind of begs the question. Well, if
15 I've got a long-standing Department
16 interpretation that says that if my principal
17 business, as measured by receipts or income, is
18 related to the sale of services, single factor;
19 sale of tangible personal property, three
20 factor, and the Department has acknowledged
21 that Duke is in the business of selling a
22 service, why are we here?

23 The Department's primary line of reasoning is
24 based on a case that's -- I guess it's 90 years
25 old or something at this point. I think it was

1 decided in 19 -- two cases decided in '26 and
2 '28 -- in the context of the now nonexistent
3 Manufacturer's Tax Act, that goes ahead and
4 said that based upon a charter that Duke filed,
5 I believe originally back in the late 1800's --
6 Your Honor was referring to older cases
7 earlier; that certainly predates all of us --
8 charter filed in the 1800's that set forth a
9 myriad of businesses that Duke may or may not
10 be in.

11 You'll hear testimony that that's what the
12 Department bases its position on, that somehow
13 the analysis of this charter, followed by a
14 ruling in a completely irrelevant tax context,
15 somehow should control for income taxes, when
16 I have all of these long-standing policies and
17 these statutes that are directly on point. We
18 don't think that can be the case. We don't
19 think you can extrapolate a charter written in
20 the 1800's and some old property tax cases to
21 this decision.

22 THE COURT: Well, if they clearly could have, you
23 wouldn't be here today.

24 MR. TRESH: Yes, Your Honor.

25 Now, we think for other contexts and we know

1 for other contexts, you'll hear testimony that
2 the Department has treated Duke as providing a
3 service. So to the extent that any other taxes
4 are relevant, I think we could say at best in
5 South Carolina it's mixed.

6 THE COURT: Well, it's interesting what you just
7 said because there is a -- I forget how you
8 worded it earlier -- whether Duke Energy you
9 could say provides a service or is in the
10 business of providing a service. There's
11 different definitions of "service" and one of
12 them is fulfilling a public need.

13 MR. TRESH: (Nods head affirmatively.)

14 THE COURT: Well, I guess I'll hear about that as
15 time goes on.

16 MR. TRESH: Absolutely, Your Honor. You'll hear
17 that there are many service providers that,
18 perhaps, fulfill a public need, like
19 telecommunication service providers, for
20 example. You'll hear -- I think you'll hear
21 how similar that process is to the process of
22 providing electric service. I think a lot of
23 the experts will -- will admit and testify to
24 the fact that there are analogies there.
25 At the end of the day, what I think we'll be

1 left with is a whole bunch of competing law in
2 other states on income taxes and other taxes,
3 inconsistent law in the nonincome tax area in
4 South Carolina, and then this very simple
5 policy, that I think everybody would agree, is
6 in place that the way to test for what you do
7 for income taxes is you look to 50 percent or
8 more of where their business's receipts are and
9 we'll show testimony that that's from providing
10 services.

11 THE COURT: Okay.

12 MR. TRESH: With that, Your Honor, if there's no
13 objections, I'd like to call our first witness.

14 THE COURT: Well, I'll allow him to -- a chance to
15 respond, if you wish.

16 MR. GREEN: Thank you, Your Honor. Just briefly.

17 OPENING STATEMENT BY MR. GREEN:

18 MR. GREEN: I think you'll hear testimony today that
19 shows that the generation of electricity --
20 there is a lot of information in the record
21 about other states, other taxes. I think the
22 point for the Court's consideration in this
23 hearing is whether the generation, production
24 of electricity could be constituted a
25 manufacturing process. We submit that it is

1 and we submit that the testimony today will
2 show all of this. We'll show that it is a
3 manufacturing process, Your Honor.

4 Duke Energy has the burden to prove that it is
5 not a manufacturer, that it should be filing
6 not under 2250, 12-6-2250 as it did in its
7 originally filed returns, but 12-6-2290, gross
8 receipts factor that it asserted in its amended
9 returns.

10 And we'd submit for the matter submitted in the
11 brief, as well as the testimony you'll hear
12 today, Your Honor, that they can't meet that
13 burden and the Department's policy in that
14 regard should be upheld.

15 Thank you, Your Honor.

16 THE COURT: All right. Call your first witness.

17 MR. TRESH: We'd like to call Mr. Cooper Monroe to
18 the stand, please.

19 THOMAS COOPER MONROE, III, C.P.A., having been duly
20 sworn, testifies and examines as follows:

21 MR. MONROE - DIRECT EXAMINATION BY MR. TRESH:

22 Q: Good morning, Mr. Monroe.

23 A: Good morning.

24 Q: Can you please state and spell your full name
25 for the record, please?

1 A: It's Thomas Cooper Monroe, III. T-H-O-M-A-S
2 C-O-O-P-E-R M-O-N-R-O-E.

3 Q: And can you please provide your business
4 address for the Court?

5 A: 550 South Tryon Street, Charlotte, North
6 Carolina 28202.

7 Q: And, Mr. Monroe, what is your current
8 employment position?

9 A: I am director of state and local tax for Duke
10 Energy Corporation.

11 Q: And can you please provide a summary of your
12 educational background?

13 A: Yes. I have a Bachelor of Business
14 Administration degree in accounting from the
15 University of Texas at Austin. I have a
16 Master's of Accounting in tax from the
17 University of North Carolina, Charlotte.

18 Q: Do you hold any professional credentials,
19 Mr. Monroe?

20 A: I'm a certified public accountant licensed in
21 Texas.

22 Q: And you mentioned a moment ago that you are the
23 managing director of state and local tax for
24 Duke Energy. How long have you been in that
25 position?

1 A: I've been in that position since 2006.

2 Q: And when -- were you employed by Duke Energy
3 prior to that?

4 A: Yes, I was.

5 Q: What position?

6 A: I was a manager doing tax research and
7 planning, mainly in federal and our unregulated
8 businesses.

9 Q: And how long were you employed in those
10 positions for Duke Energy?

11 A: From 1995 to 2006, approximately, I was doing
12 that type of work. I came from a company
13 called PanEnergy Corp., which is an interstate
14 gas pipeline company that merged with Duke in
15 1997.

16 Q: So you've spent your entire career, 20-some-odd
17 years, working in the field of taxation?

18 A: That's right. Twenty-four years, except one
19 year I was in the controllers department
20 working on fixed asset accounting, so 23 of the
21 24 years.

22 Q: Okay. Thank you. Mr. Monroe, what is Duke
23 Energy's primary business?

24 A: Primary business is energy service production
25 in the Carolinas. We also have businesses,

1 real estate development business. We have a
2 telecom business. Those are the primary ones
3 that -- like I said, for a time Duke Energy
4 also was in the interstate gas pipeline
5 business.

6 Q: Okay. And so today Duke Energy's primary
7 business is the provision of electricity?

8 A: That's correct. We also have South American
9 energy service businesses.

10 Q: Okay. You mentioned that Duke Energy has a
11 number of businesses, so we've got primarily
12 electricity. How do you measure primary
13 business? What leads you to conclude that Duke
14 Energy's primary business is the sale of
15 electric service?

16 A: The vast majority of receipts for Duke Energy's
17 business are from power -- energy service
18 delivery in the Carolinas. There's a -- you
19 know, the guidance from South Carolina that we
20 saw was an '87 Revenue Ruling that gave us that
21 test.

22 Q: You mentioned receipts. What about the profit?
23 Where does the vast majority of Duke's profit
24 come from?

25 A: Again, the same, energy service production in

1 the Carolinas.

2 Q: Okay. And -- so you mentioned a moment ago
3 that Duke also has a telecommunications company
4 or provides telecommunication service?

5 A: That's correct. We have a smaller business
6 that does wholesale fiberoptic long-haul
7 business, mainly in the Southeast.

8 Q: Does Duke Energy manufacture a
9 telecommunication service?

10 A: We do not manufacture a service, no.

11 Q: Okay. I believe you mentioned that at some
12 point Duke may have provided or sold
13 appliances?

14 MR. GREEN: Excuse me. Your Honor, I don't want to
15 object every time the word "service" or
16 "manufacturing" is used. Obviously, we're
17 going to hear that word today a number of
18 times, but that is part of the issue here
19 before you today.

20 And so I sort of want to just -- I assume
21 they'll object when we call it "manufacturing;"
22 they'll have an objection to that. We have an
23 objection sort of when they call it "service."
24 I don't want to -- I don't want to be -- I
25 don't want to object every time the word

1 "service" comes out of somebody's mouth, but I
2 don't want to not have my record preserved,
3 that I have waived any objection by not raising
4 this issue.

5 I'm just sort of raising this to try to deal
6 with the issue that he can testify to
7 "service," I guess, and that's fine, but I am
8 not -- by not objecting, I am not going along
9 with his testimony in that regard.

10 THE COURT: Any response?

11 MR. TRESH: I guess Mr. Green is free to disagree
12 and Mr. Monroe is certainly free to testify as
13 having been employed at Duke for over 20 years
14 as his view of Duke's business and what it
15 sells.

16 THE COURT: Well, I would take that long-winding
17 objection --

18 MR. GREEN: And I apologize.

19 THE COURT: -- to mean that you do not want him
20 testifying to the legal definition of
21 "service," but that you're not specifically
22 objecting to the general definition of
23 "service" as employed by his business.

24 MR. GREEN: No. I mean, I don't -- the Department
25 doesn't agree, obviously, but I think he can

1 testify and talk about it as far as his view.
2 And I'm not really objecting to that. I just
3 don't want by not objecting to that to -- I am
4 then not objecting to the ultimate issues for
5 the Court's consideration. I'm protecting my
6 record.

7 THE COURT: Did you hear what I just said?

8 MR. GREEN: Yes, I think I did. And, yes, I'm just
9 making -- I'm trying to make clear that I
10 understand that our understanding is the same
11 and that I am in agreement with that.

12 THE COURT: I think your response was more
13 convoluted than mine.

14 MR. GREEN: I apologize, Your Honor.

15 THE COURT: I'll go with my original ...

16 MR. GREEN: That would be fine. Okay. That would
17 be fine. I just want to keep the record clear.

18 THE COURT: Okay.

19 (Off the Record)

20 Q: Mr. Monroe, I think you said at some point Duke
21 was involved in the appliance business. Did
22 Duke ever manufacture appliances?

23 A: Duke never manufactured appliances. For a time
24 period, you could buy white goods from a Duke
25 Energy retail store, but we're not that

1 business anymore. We also had a water company,
2 I believe. At one point we probably ran street
3 cars, too, I believe.

4 Q: Okay. But none of these -- the revenue or the
5 profits from any of these businesses, none of
6 them eclipsed the revenue and the profits from
7 the business of providing electric services; is
8 that correct?

9 A: That's correct. The vast majority were from
10 our energy services.

11 Q: Okay. And, Mr. Monroe, as a state tax director
12 at Duke Energy, are you responsible for filing
13 Duke Energy Corporation's state income tax
14 returns?

15 A: That's correct.

16 Q: Okay. And did Duke Energy file original
17 state -- South Carolina state income tax
18 returns during the years at issue in this case?

19 A: They did.

20 Q: Okay. As part of making those filings, did you
21 have to make a determination as to what Duke
22 Energy's primary business was?

23 A: I guess not me personally, but somebody did.

24 Q: Did that person report up through the Duke
25 Energy tax department?

1 A: Absolutely, yes.

2 Q: Okay. Mr. Monroe, are you familiar with the
3 North American Industry Classification System
4 codes?

5 A: Yes, I am.

6 Q: Mr. Monroe, you said also you're familiar with
7 Duke Energy's federal income tax returns; is
8 that correct?

9 A: That's correct. I was in charge of preparing
10 federal tax returns at one point.

11 MR. TRESH: Your Honor, if I may approach the
12 witness at the bench.

13 THE COURT: Yes, you may.

14 Q: Mr. Monroe, I'd like you to take a look at what
15 I've just handed you, which is the instructions
16 to Internal Revenue Code Form 1120. Are you
17 familiar with this document?

18 A: Yes, I am.

19 Q: I'd ask you to take a look at page 18 of this
20 document entitled "Schedule K, Other
21 Information."

22 A: (Witness complies.) Yes.

23 THE COURT: What is the exhibit marked as?

24 MR. TRESH: We won't be entering this into --

25 THE COURT: Oh, okay.

1 MR. TRESH: -- the record as an exhibit.

2 THE COURT: All right.

3 MR. TRESH: Just asking Mr. Monroe to read it.

4 Q: Mr. Monroe, if you can look at question number
5 two. So these are the instructions on how you
6 prepare your federal income tax return; is that
7 correct?

8 A: That is correct.

9 Q: And your federal income tax return is required
10 to be filed with your South Carolina income tax
11 return and made a part of that return; is that
12 correct?

13 A: That is correct.

14 Q: If I can ask you to look at question two. Can
15 you read the highlighted portion of question
16 two?

17 A: Yes. "Using the list of codes and activities,
18 determine from which activity the corporation
19 derives the highest percentage of its total
20 receipts."

21 Q: Okay. Thank you, Mr. Monroe. Can you then go
22 to page 21, please?

23 A: (Witness complies.)

24 Q: Is that -- that section -- is that section
25 entitled "Principal Business Activity Codes"?

1 A: That's right. It's a listing of all the
2 principal activity codes.

3 Q: And can you please read the highlighted
4 section?

5 A: "Using the list of activities and codes below,
6 determine from which activity the company
7 derives the largest percentage of its total
8 receipts."

9 Q: Thank you, Mr. Monroe. Okay. Next --

10 MR. TRESH: If I may approach, Your Honor?

11 THE COURT: (Nods head affirmatively.)

12 MR. TRESH: Again, Your Honor, these are not

13 exhibits. These are just informational to
14 assist Mr. Monroe.

15 Q: Mr. Monroe, you mentioned this a moment ago,
16 that you're familiar with the North American
17 Industry Classification System; is that
18 correct?

19 A: That's correct.

20 Q: I've handed you a document entitled "North
21 American Industry Classification System, 2012
22 NAICS, N-A-I-C-S, Definition." Is this the
23 NAICS code that Duke included on its federal
24 income tax return? Or includes on its federal
25 income tax returns?

1 A: That's correct. This is what we include on our
2 federal income tax return.

3 Q: And those federal income tax returns were filed
4 with the State of South Carolina and made a
5 part of the South Carolina income tax returns?

6 A: Yes.

7 Q: Can you read what's entitled "What the
8 definition of the code is"?

9 A: Sure. We file as code 2211, which is under the
10 "utilities" section. And the utilities
11 section, there's two levels. The top level is
12 "utilities" under 221. It's "Industries in the
13 utilities subsector provide electric power,
14 natural gas, steam supply, water supply, and
15 sewage removal through a permanent
16 infrastructure of lines, mains and pipes.
17 Establishments are grouped together based on
18 the utility service provided and the particular
19 system or facilities required to perform the
20 service."

21 Q: Thank you, Mr. Monroe. And there's a
22 further -- there's a further section one can
23 drill deeper into the NAICS code; is that
24 correct?

25 A: That is correct.

1 Q: And if one were to drill deeper into the NAICS
2 code that Duke used, one would get to code
3 2211; is that correct?

4 A: That is correct.

5 MR. GREEN: Objection, leading.

6 MR. TRESH: Rephrase, Your Honor?

7 THE COURT: (Nods head affirmatively.)

8 Q: What would the deeper code under the NAICS
9 classifications be --

10 A: Right.

11 Q: -- for utilities, Mr. Monroe?

12 A: As I said, the second level classification is
13 2211, Electric Power Generation, Transmission
14 and Distribution.

15 Q: And what does that code state?

16 A: Sure. It's an "industry group that comprises
17 establishments primarily engaged in generating,
18 transmitting and/or distributing electric
19 power." And it's "Establishments in this
20 industry group may perform one or more of the
21 following activities: operate generation
22 facilities that produce electric energy;
23 operate transmission systems that convey the
24 electricity from the generating -- generation
25 facility to the distribution system; and

1 operate distribution systems that convey
2 electric power received from the generation
3 facility or the transmission system to the
4 final consumer."

5 Q: And, Mr. Monroe, what's your -- so what's your
6 understanding of the relationship between
7 section -- between 221 and 2211?

8 A: 221 is all types of utilities; 2211 is electric
9 power service utilities.

10 Q: Okay. Third document I handed you is entitled
11 "North American Industry Classification System
12 2012 NAICS Definition;" is that correct?

13 A: Yes.

14 Q: And what -- on the third document, what
15 category is listed there?

16 A: This is section 31, which is "manufacturing."

17 Q: So is "manufacturing" for the purposes of the
18 North American Industry Classification System
19 codes that are included in the federal return,
20 which is included in the South Carolina return,
21 "manufacturing" -- is "manufacturing" a
22 different category than "utility service
23 providers"?

24 A: Yes, "manufacturing" is a totally separate
25 primary category.

1 Q: And that's the way that Duke Energy has always
2 filed its returns under the "utility" category.

3 A: That is correct.

4 Q: Okay. Mr. Monroe, does South Carolina, the
5 State of South Carolina, use federal taxable
6 income as the starting point for computing its
7 South Carolina taxable income?

8 A: Yes, it does.

9 Q: Mr. Monroe, did -- so you mentioned earlier
10 that Duke Energy timely filed -- or Duke Energy
11 filed its corporate income tax returns in South
12 Carolina for the periods at issue. After that,
13 did Duke Energy amend its corporate income tax
14 returns?

15 A: Yes.

16 Q: And what years did they amend those income tax
17 returns for?

18 A: We've amended all the years, 1978 through 2001.

19 Q: Okay. And why did Duke Energy amend its income
20 tax returns for the years 1978 through 2001?

21 A: There's various reasons why you would amend.
22 One of the more recurrent ones is because of
23 federal audit adjustments, since federal
24 taxable income is the starting point for state
25 taxable income in South Carolina. Anytime

1 there's a change for federal purposes, we have
2 to reflect the final determinations from the
3 IRS to the State of South Carolina.

4 Q: But in this case, Mr. Monroe, why did Duke
5 Energy amend the returns -- the specific
6 returns for the periods 1978 through 2001 in
7 this case?

8 A: In this case it's because we incorrectly used
9 an apportionment method for those years.

10 Q: When you say --

11 A: We had to correct it.

12 Q: When you say "we incorrectly used incorrect
13 apportionment method," can you elaborate on
14 that?

15 A: Yeah, we initially used either a three-factor
16 or four-factor apportionment method when we
17 should have used the single gross receipts
18 factor for service companies.

19 Q: And has Duke Energy amended its South Carolina
20 income tax returns before, separate and apart
21 from the reason why you amended '78 through
22 2001 in this case?

23 A: Yes.

24 Q: What would be a reason why you would have?

25 A: As I said, federal tax changes is another

1 routine reason why we amend our tax returns.

2 Q: Have you ever amended your state income tax
3 returns where it resulted in additional tax,
4 where Duke Energy had to pay additional tax?

5 A: Absolutely.

6 Q: So you file amended returns that reflect both
7 refunds due to Duke Energy and reflect
8 additional tax due to Duke Energy.

9 A: That's correct.

10 Q: In this case did any of the returns that you
11 filed reflect a refund or did they reflect
12 additional tax to South Carolina?

13 A: In this case all the years reflected refunds.

14 MR. TRESH: Okay. Your Honor, we've stipulated to
15 entering into the record Duke's income tax
16 returns -- excuse me, Duke's amended income tax
17 returns for the years 1978 through 2001. We'd
18 like to move those into the record.

19 MR. GREEN: I have no objection. I believe the
20 original returns are attached to the amended
21 returns, in fact. Yes, no objection.

22 THE COURT: They are marked as?

23 MR. TRESH: (No response.)

24 THE COURT: They're marked as?

25 MR. TRESH: May I approach?

1 Exhibits One through Twenty-four, Your Honor.

2 THE COURT: They're admitted.

3 (Petitioner's Exhibit Numbers One through Twenty-four
4 were admitted into evidence.)

5 MR. TRESH: May I approach?

6 (Off the Record)

7 Q: Mr. Monroe, I'd like to direct your attention
8 to what's been marked as Petitioner's Exhibits
9 One through Twenty-four, the Duke Energy's
10 amended corporation state income tax returns.
11 Do you recognize these documents?

12 A: Yes.

13 Q: Okay. And you're familiar with these
14 documents, correct?

15 A: Yes, I am.

16 MR. TRESH: Your Honor -- excuse me..

17 Q: Mr. Monroe, fast forwarding. So after you
18 filed these refund claims, these amended income
19 tax returns -- I'll refer to them as "refund
20 claims" -- what did the Department do? How did
21 the Department react to these refund claims?

22 A: They issued a denial within about a month or
23 so.

24 Q: Okay. So they denied the refund claims. And
25 I'd like to direct your attention now to what's

1 been marked as Petitioner's Exhibit

2 Twenty-five.

3 MR. TRESH: May I approach, Your Honor?

4 THE COURT: (Nods head affirmatively.)

5 Q: Mr. Monroe, have you seen the document I've
6 just handed you before?

7 A: Yes, I have.

8 Q: And what is that document?

9 A: This is a letter from the South Carolina
10 Department of Revenue dated February 12th,
11 2003, to Duke Energy Corporation acknowledging
12 receipt of our amended returns for 1978 through
13 2001 and denying those same claims.

14 Q: Okay. And how are you familiar with this
15 document?

16 A: Whenever I became the head of state tax in
17 2006, I reviewed all open matters and this is
18 one of the matters I reviewed.

19 Q: Is this the type of document that Duke Energy
20 would keep in its ordinary course of business?

21 A: Yes.

22 MR. TRESH: Your Honor, I'd like to offer the
23 Department's denial of the refund claims into
24 evidence as Exhibit Number Twenty-five.

25 MR. GREEN: No objection.

1 THE COURT: It's admitted.

2 (Petitioner's Exhibit Number Twenty-five was admitted
3 into evidence.)

4 Q: Mr. Monroe, prior to the date that the
5 Department issued that denial letter, sent Duke
6 Energy the denial letter, did the Department of
7 Revenue ever conduct an audit of Duke Energy's
8 refund claims, '78 through 2001?

9 A: No, they did not.

10 Q: Did they ever call you up and ask you any
11 questions or call anybody at Duke Energy up and
12 ask any questions about the refund claim?

13 A: I see nothing in the records that Duke kept,
14 that are fairly extensive, that indicated any
15 kind of questions from the DOR.

16 Q: Did the Department inquire into what Duke
17 Energy's primary business was?

18 A: No.

19 Q: Did the Department look into any of the facts
20 related to how Duke Energy provides electric
21 service?

22 A: No.

23 Q: Mr. Monroe, have you been filing state income
24 tax returns and managing state audits for a
25 number of years?

1 A: Yes.

2 Q: How many years would you say?

3 A: I've been in charge of state and local tax
4 since 2006, so that's, you know, going on seven
5 years now and -- five years. And before that,
6 I was involved with our federal audits and also
7 some other state audits, so more than ten
8 years.

9 Q: So in your more than ten years of audit
10 experience, have Departments of Revenue ever
11 denied refund claims in this manner, without
12 auditing them or without asking any questions?

13 A: I've never seen that.

14 Q: Okay. And, Mr. Monroe, what was Duke Energy's
15 response after the Department summarily denied
16 the refund claims?

17 A: We immediately protested and appealed.

18 MR. TRESH: Your Honor, if I may approach?

19 THE COURT: You may.

20 Q: Mr. Monroe, the document that I've just handed
21 you, have you seen this document before?

22 A: Yes, I have.

23 Q: And what is this document?

24 A: This is Duke Energy's Application for Appeal,
25 Form C-245, submitted to the Department of

1 Revenue on March 12th, 2003, asking -- or
2 seeking an appeal of 1978 through 2001 amended
3 returns..

4 Q: And are you familiar with this document?

5 A: Yes.

6 Q: And is this document of the type that's kept in
7 the regular course of Duke Energy's business?

8 A: Yes.

9 MR. TRESH: Your Honor, I'd like to move the protest
10 to the Department's denial into evidence as
11 Petitioner's Exhibit Number Twenty-six.

12 MR. GREEN: Just one second, Your Honor. I
13 apologize.

14 No objection, Your Honor.

15 THE COURT: It's admitted.

16 MR. TRESH: Thank you, Your Honor.

17 (Petitioner's Exhibit Number Twenty-six was admitted
18 into evidence.)

19 Q: Mr. Monroe, after you submitted this protest,
20 how did the Department respond to this protest?

21 A: We received a letter from the appeals division
22 saying, among other things, that they were
23 going to send out auditors to audit the claim.

24 Q: So after they had denied the refund claim, then
25 you protested, only then the Department said

1 they were going to send out auditors to audit
2 the claim.

3 A: That's correct.

4 MR. TRESH: May I approach, Your Honor.

5 THE COURT: You may. However, with this witness you
6 don't have to ask any further on that request.

7 MR. TRESH: Thank you, Your Honor.

8 Q: Mr. Monroe, have you seen the document that
9 I've just handed you before?

10 A: Yes.

11 Q: And what is it?

12 A: It's a letter from Jan Crangle at the South
13 Carolina Department of Revenue, who is the
14 manager at the Office of Appeals, to Duke
15 Energy dated April 30th, 2003, stating that the
16 protest from Duke had been forwarded to her
17 office and that as part of their review, the
18 Office of Appeals had asked the auditors to
19 confirm the amended returns and that auditors
20 would be contacting Duke to schedule an
21 appointment.

22 Q: Okay. And is this letter of the type that Duke
23 Energy would keep in its ordinary course of
24 business and maintain?

25 A: That is correct.

1 MR. TRESH: I'd like to offer this letter into
2 evidence as Petitioner's Exhibit Number
3 Twenty-seven.

4 THE COURT: That was "no objection"?

5 MR. GREEN: No objection, Your Honor. I'm sorry.

6 THE COURT: It's admitted.

7 MR. TRESH: Thank you, Your Honor.

8 (Petitioner's Exhibit Number Twenty-seven was
9 admitted into evidence.)

10 Q: So, Mr. Monroe, this letter came after the
11 denial. And so after you received this letter,
12 did Duke Energy have any further contact with
13 the Department?

14 A: Yes. The auditors contacted us and there were
15 scheduled two separate site visits to -- a week
16 a piece -- during 2003.

17 Q: And did they actually come out and do those
18 site visits?

19 A: They did.

20 Q: And do you recall what occurred during those
21 site visits? What did the auditors look at or
22 ask?

23 A: I wasn't personally at those visits, but I
24 imagine they requested information; we provided
25 it.

1 MR. GREEN: Objection, Your Honor, hearsay.

2 THE COURT: Well, hearsay, speculation, that gets
3 all kind of imagining. I'll have to sustain
4 that.

5 MR. TRESH: Understood, Your Honor.

6 Q: Mr. Monroe, are you -- are you -- do you
7 have -- are you aware of what the Department's
8 auditors did? Do you have personal knowledge
9 of what the Department's auditors did?

10 A: I did see in the records that they requested
11 certain documents that we did provide and I do
12 have records of those.

13 Q: And can you summarize for the Court what those
14 records that they requested would have related
15 to?

16 A: I know part of our claims also included
17 correcting our receipts for short-term
18 investments and I know they requested copies of
19 records around their short-term investments for
20 the audit period that we provided.

21 Q: Is there anything in Duke's records, which I
22 believe you testified to which were extensive,
23 that would indicate that the Department
24 inquired into what Duke Energy's primary
25 business was?

1 A: No.

2 Q: Is there anything in the record that -- in Duke
3 Energy's records that would indicate that the
4 Department ever conducted any kind of site
5 visit to any of Duke's electric service
6 facilities?

7 A: No.

8 Q: Okay. Mr. Monroe, I've handed you two
9 documents. One is entitled "SAT Field Work"
10 and one is entitled "State Audit Tracker."
11 Have you seen these documents before?

12 A: Yes, I have.

13 Q: And are you familiar with these documents?

14 A: Yes.

15 Q: And how are you familiar with these documents?

16 A: These come out of a system that Duke corporate
17 tax maintains where we log our audits and these
18 are two separate entries showing field visits
19 by the auditors on two separate occasions.

20 Q: And does Duke Energy keep these types of
21 records in their regular course of business?

22 A: That's our standard procedure for all audits.

23 MR. TRESH: Your Honor, we'd like to move these into
24 evidence as Exhibits Twenty-eighty-One and
25 Twenty-eight-Two?

1 MR. GREEN: No objection, Your Honor.

2 THE COURT: They're admitted.

3 (Petitioner's Exhibit Numbers Twenty-eight-One and
4 Twenty-eight-Two were admitted into evidence.)

5 Q: Okay. So -- Mr. Monroe, so Department -- Duke
6 Energy files its amended income tax returns,
7 the Department summarily denies them, then Duke
8 Energy files a protest, auditors come out, they
9 conduct some sort of evaluation. What happens
10 next? What did Duke Energy do or what did the
11 Department do?

12 A: Nothing ever came from the Department. We
13 never received a determination.

14 Q: For how long?

15 A: Well, I became the head of state tax in 2006
16 and when I came into the job, no determination
17 had been issued at that time.

18 Q: So the Department scheduled field visits in or
19 around March 12th of 2003 and came out,
20 according to the tracker that you just
21 testified to, in December of 2003 and as of
22 2006 they had not issued any sort of decision?

23 A: That's correct.

24 Q: Did they ultimately issue a decision?

25 A: Yes, they did.

1 Q: And around when?

2 A: They issued one in 2010.

3 Q: Mr. Monroe, I've just handed you a document
4 entitled "Department Determination," along with
5 a cover letter saying the same. Have you seen
6 this document before?

7 A: Yes, I have.

8 Q: And are you familiar with this document?

9 A: Yes.

10 Q: How are you familiar with this document?

11 A: I was head of the state and local tax function
12 at Duke Energy when this was issued.

13 Q: And what is this document? Can you describe it
14 for us?

15 A: Yeah, it's the DOR's determination rejecting
16 our appeal of the 1978 through 2001 refund
17 claims, stating their determination and their
18 analysis.

19 Q: So from the time that the Department's folks
20 came out in 2003, this was issued -- this was
21 issued in February 2010?

22 A: That's correct.

23 Q: Do you know why it took the Department seven
24 years to issue a determination in this matter?

25 A: I do not know.

1 Q: Is that common for a state tax agency to take
2 seven years to review an income tax claim?

3 A: It's unprecedented.

4 Q: Okay. And you don't know why the Department
5 took seven years.

6 A: I do not know.

7 MR. TRESH: Okay. Your Honor, I'd like to move the
8 Department's determination into evidence and
9 mark it as Petitioner's Exhibit Number
10 Twenty-nine.

11 THE COURT: You're saying mark it. Is it already
12 marked?

13 MR. TRESH: Oh, we've already marked it. I'm sorry.

14 MR. GREEN: No objection.

15 THE COURT: It's admitted.

16 (Petitioner's Exhibit Number Twenty-nine was admitted
17 into evidence.)

18 Q: Mr. Monroe, can you please turn to page three
19 of this determination?

20 A: (Witness complies.)

21 Q: And if you would, could you please read the
22 first three lines after the block quote
23 including the footnote?

24 A: "The taxpayer's contention that is not
25 described by Section 12-6-2250 is incorrect.

1 The taxpayer is a manufacturer within the
2 meaning of the statute and must apportion its
3 income according to the prescribed three-factor
4 formula."

5 "Moreover, the taxpayer's contention that it
6 does not sell tangible personal property should
7 also fail. 'Tangible personal property' is
8 specifically defined to include 'services such
9 as sales of electricity'" -- citing 12-36-60 of
10 the South Carolina code. "Thus, while the
11 taxpayer is correct that it provides a service,
12 its service is statutorily defined as tangible
13 personal property."

14 Q: So the Department stated in its denial that
15 Duke Energy is correct that it provides a
16 service; is that accurate?

17 A: That's what it says.

18 Q: Mr. Monroe, are you familiar -- you mentioned
19 a moment ago that the Department cited to
20 Section 12-36-60 of the South Carolina code in
21 its denial. Are you familiar with that code
22 section?

23 A: I am.

24 Q: And how are you familiar with that code
25 section?

1 A: I'm familiar with that code section because
2 it's the chapter on sales and use tax in South
3 Carolina and I have had those duties at Duke
4 Energy.

5 Q: And what does Section 12-36-60 do?

6 A: 12-36-60 defines --

7 Q: It's up on the monitor.

8 A: -- defines "tangible personal property" --

9 THE COURT: It should be on your monitor.

10 THE WITNESS: It is. Thank you.

11 A: It defines "tangible personal property" for the
12 sales and use -- sales and use tax code
13 purposes. And, specifically, it defines it as
14 "personal property which may be seen, weighed,
15 measured, felt, touched or which is any other
16 manner perceptible to the senses. It also
17 includes services and intangibles including
18 communications and sales of electricity."

19 Q: So the Department denied Duke Energy's refund
20 claim on the basis -- at least in part on the
21 basis of a sales and use tax statute, correct?

22 A: That's correct.

23 Q: And that sales and use tax statute says that
24 the sales of electricity or sales of services;
25 is that correct?

1 A: That's correct.

2 Q: So after the Department issued this Final
3 Agency Determination denying Duke Energy's
4 refund claim, what did Duke Energy do next?

5 A: We filed suit in the Administrative Law Court.

6 Q: Mr. Monroe, the document that I've just handed
7 you, have you seen this document before?

8 A: Yes.

9 Q: What is it?

10 A: It is a request for a contested case hearing
11 dated March 3rd, 2010.

12 Q: Are you familiar with this document?

13 A: Yes.

14 Q: And is it maintained in the regular course of
15 Duke Energy's business?

16 A: Yes.

17 MR. TRESH: Your Honor, I would like to move this
18 document into evidence. It's been marked
19 Petitioner's Exhibit Thirty.

20 MR. GREEN: No objection.

21 THE COURT: It's admitted.

22 (Petitioner's Exhibit Number Thirty was admitted into
23 evidence.)

24 Q: Mr. Monroe, after Duke Energy filed a request
25 for a contested case hearing, did the parties

1 file any prehearing statements?

2 A: Yes.

3 Q: Did the Department file a prehearing statement?

4 A: Yes, we both did.

5 Q: And did the Department later amend its
6 prehearing statement?

7 A: It did.

8 Q: Mr. Monroe, first, I'd like to direct your
9 attention to the document -- I've handed you
10 two. First one is marked "Respondent's
11 Prehearing Statement." Do you have that
12 document?

13 A: Yes, I do.

14 Q: And have you seen this document before?

15 A: I have.

16 Q: And what is this document?

17 A: It is the prehearing statement of the South
18 Carolina Department of Revenue for this
19 proceeding.

20 Q: Okay. And I'd ask you to take a look at the
21 second document.

22 A: (Witness complies.)

23 Q: It contains a cover letter attached to it. Do
24 you have that?

25 A: Yes, I do.

1 Q: Okay. And in that document -- what is that
2 document?

3 A: It is the South Carolina Department of
4 Revenue's Amended Prehearing Statement.

5 Q: Okay. And in that amended prehearing
6 statement, if I can direct your attention to
7 the last paragraph in the Amended Prehearing
8 Statement.

9 A: Which page?

10 Q: Second to the last paragraph, excuse me, on the
11 first page.

12 A: First page, okay.

13 Q: Second to the last paragraph begins, "Because
14 Petitioner..."

15 A: Yes. You want me to read it?

16 Q: Can you read that paragraph?

17 A: "Because Petitioner is a manufacturer of
18 electricity and a power service provider, it is
19 required to use the three-factor apportionment
20 formula in computing its South Carolina taxable
21 income," citing to 12-6-2250.

22 Q: So the Department of Revenue said that Duke
23 Energy was a manufacturer of electricity and a
24 power service provider?

25 A: That's what it says.

1 Q: And did the Department ever throughout this
2 entire process that went on for a fairly long
3 period of time inquire into whether Duke's
4 primary business, as measured by gross
5 receipts, profit or otherwise, was as a
6 manufacturer of electricity or a power service
7 provider, acknowledging that they thought you
8 were both?

9 A: They did not.

10 Q: Mr. Monroe, you've been employed at Duke Energy
11 for quite some time; is that correct?

12 A: That's right; 24 years, two months.

13 Q: Okay. We've talked a lot about the sale of --
14 Duke Energy's sale of electric service. I'd
15 like to talk a little bit about how you provide
16 that electric service with you. Does Duke
17 Energy sell that electric service on a metered
18 basis?

19 A: It does.

20 Q: And what would be your definition of "metered"?

21 A: The energy flows through a meter and we read
22 the meter periodically and send a bill to the
23 customer.

24 Q: Okay. And does Duke Energy provide electric
25 service on a flat-fee basis?

1 A: Yes, we do.

2 MR. TRESH: Your Honor, if I can go back one moment.

3 We would like to enter the prehearing statement

4 and the amended prehearing statement into the

5 record as Exhibits Thirty-one and Thirty-two.

6 MR. GREEN: No objection.

7 THE COURT: They're admitted. I'll take judicial

8 notice of it, but ...

9 MR. TRESH: Thank you, Your Honor.

10 (Petitioner's Exhibit Numbers Thirty-one and

11 Thirty-two were admitted into evidence.)

12 Q: Mr. Monroe, I've handed you a few documents.

13 Are you familiar with these documents that I've

14 just handed you?

15 A: Yes, I am familiar with these.

16 Q: And what are they?

17 A: This is a -- this is a screen shot of our Duke

18 Energy South Carolina webpage showing products

19 and services.

20 Q: And how are you familiar with these documents?

21 Where have you seen them before?

22 A: I've seen them on the Internet.

23 Q: On Duke Energy's website?

24 A: Duke Energy's website, that's correct.

25 Q: Okay. And does Duke Energy regularly and

1 continually update its website?

2 A: It does.

3 Q: Including the document you have in front of
4 you?

5 A: It does.

6 Q: Is it part of Duke Energy's regular business to
7 publish this information on its website?

8 A: We regularly publish this information, yes.

9 Q: Okay. Direct your attention to the document
10 that's been labeled DE, four zeros, 6786.
11 Could you please read the description of
12 "outdoor lighting"?

13 A: Yes. "Our complete turnkey services includes
14 equipment, installation, operation and
15 maintenance, all for one monthly fee."

16 Q: Okay. Direct your attention to the second
17 document, DE and 6787.

18 A: (Witness compiles.)

19 Q: Excuse me, 6819. Sorry, flip one more page.

20 A: (Witness complies.)

21 Q: Can you read the second and third paragraphs on
22 that page?

23 A: Sure. "We offer quality lighting solutions at
24 an affordable price. Our complete turnkey
25 service includes equipment, installation,

1 operation and maintenance, all for one monthly
2 fee that can be added to your existing power
3 bill. Get everything you need from a single
4 source. Our outdoor lighting program includes
5 equipment, installation, project management,
6 design, procurement, electricity, dusk to dawn
7 lighting (photocell controlled), ongoing
8 maintenance and repair service, all covered by
9 one monthly fee on your regular power bill."

10 Q: So Duke Energy provides these services, along
11 with electric service, for a single monthly
12 fee; is that correct?

13 A: That's correct.

14 MR. TRESH: Your Honor, I'd like to move these
15 documents into evidence as Exhibit
16 Thirty-three.

17 MR. GREEN: No objection, Your Honor.

18 THE COURT: It's admitted.

19 (Petitioner's Exhibit Number Thirty-three was
20 admitted into evidence.)

21 MR. TRESH: No further questions, Your Honor.

22 THE COURT: I do have a question for you. Exhibit
23 Twenty-six, are there some pages missing? Are
24 you looking at the one that we've got?

25 MS. TODOROVA: May I approach?

1 THE COURT: Yeah.

2 (Off the Record)

3 MR. GREEN: We're missing them in ours, as well.

4 MR. TRESH: Just one moment.

5 Your Honor, we're comfortable moving into
6 evidence what's been submitted in Twenty-six
7 thus far.

8 THE COURT: All right.

9 MR. GREEN: Your Honor, I think it ought to be
10 complete.

11 MR. TRESH: We're happy to supply additional copies.
12 We're happy to have copies made for tomorrow
13 and substitute in a new Twenty-six into the
14 existing Twenty-six, if that's --

15 MR. GREEN: I mean, I don't -- yeah, I don't know --

16 THE COURT: It's fine. He can submit the evidence
17 and you can request under the Rules of Evidence
18 that -- at this time, in fact, that it be
19 complete.

20 So my ruling is that Exhibit Twenty-six is
21 admitted subject to them submitting a full and
22 complete exhibit, of which if that does not
23 occur Exhibit Twenty-six will be denied.

24 MR. GREEN: Thank you, Your Honor.

25 MR. TRESH: Thank you, Your Honor.

1 THE COURT: All right?

2 MR. GREEN: Bear with me just one moment, please,

3 Your Honor.

4 MR. MONROE - CROSS-EXAMINATION BY MR. GREEN:

5 Q: Good morning, Mr. Monroe.

6 A: Good morning.

7 Q: Let's go back a little bit. Counsel referenced
8 with you the instructions for Form 1120,
9 correct?

10 A: Correct.

11 Q: Those are the instructions for the 2011 Form
12 1120, correct?

13 A: That is correct.

14 Q: And that is not one of the years at issue here
15 in this proceeding; is that correct?

16 A: That is correct.

17 Q: And the reference on page 18 to selecting a
18 principal business activity, it says, "You are
19 to determine from which activity the
20 corporation" --

21 THE COURT: Wait a second. Where I can be clear,
22 the question was Form 1120 of what year?

23 MR. GREEN: 2011.

24 THE COURT: Okay. Go ahead.

25 Q: So I'll repeat the question. On page 18 of

1 that document, I believe the statement was,
2 "Using the list of codes and activities,
3 determine from which activity the corporation
4 derives the highest percentage of its total
5 receipts." Is that correct?

6 A: That's what it says.

7 Q: And that is a decision that Duke Energy makes
8 when it files its return; isn't that correct?

9 A: Based upon that instruction, yes.

10 Q: So the answer is "yes"?

11 A: Yes.

12 Q: Okay. And, again, on page 21 it says, "Using
13 the list and activities of the codes below,
14 determine from which activity the company
15 derives the largest percentage of its total
16 receipts." Is that correct?

17 A: Yes.

18 Q: And is that a decision that Duke Energy makes
19 on its return?

20 A: Yes.

21 Q: Federal auditors don't particularly bring up
22 that issue when they audit your return, do
23 they?

24 A: I've never seen it.

25 Q: Okay. Thank you. I believe you referenced

1 some documents which were not introduced into
2 evidence -- I'll just refer to them in the same
3 way -- regarding the North American Industry
4 Classification System; is that correct?

5 A: Yes.

6 Q: And I may go out a little out of order. I'm
7 going to look at the thinner documents first.

8 A: Okay.

9 Q: "221 Utilities," that's the page I'm looking
10 at. Are you with me?

11 A: (No response.)

12 Q: It says, "Sector 22 - Utilities. 221
13 Utilities."

14 A: Yes.

15 Q: Okay. And that says the "2012 NAICS
16 Definition," correct?

17 A: That's correct.

18 Q: And it says last revised November 7th, 2011; is
19 that correct?

20 A: (No response.)

21 Q: At the very bottom of paragraph --

22 A: Yes.

23 Q: Okay. And the next sheet, which was "Sector 22
24 - Utilities, 2211 Electric Power Generation."

25 And it says also "2012 NAICS Definition;" is

1 that correct?

2 A: Yes.

3 Q: And it says "last revised November 7th, 2011;"
4 is that correct?

5 A: It is correct.

6 Q: Now, what is the last year at issue here in
7 this case based on your understanding?

8 A: 2001.

9 Q: So this is last revised about ten years after
10 the last year at issue in this case; is that
11 correct?

12 A: Correct.

13 Q: And the years at issue in this case involve
14 about 23 years; is that correct?

15 A: Yes.

16 Q: Well, totally at issue what's filed, not really
17 what's for consideration here today; is that
18 correct?

19 A: Yes.

20 Q: You have no knowledge of what the NAICS
21 standard was in 1978, do you?

22 A: I do not.

23 Q: Thank you. And then you were referenced --
24 referred to a larger document. And that also
25 says "2012 NAICS Definition;" is that correct?

1 A: Correct.

2 Q: And if you will look at the last page of that
3 document.

4 A: (Witness complies.)

5 THE COURT: Hold on one moment.

6 Go ahead.

7 MR. GREEN: Thank you, Your Honor.

8 Q: And on the last page of that document, the last
9 revision date is November 7th, 2011; is that
10 correct?

11 A: That's correct.

12 Q: Again, after the years that we're talking about
13 here today; is that correct?

14 A: Correct.

15 Q: Thank you. Now, again, the issue -- all the
16 amended returns that originally were filed
17 started in 1978; is that correct?

18 A: That's correct.

19 Q: And in each one of those originally filed
20 returns from 1978 to 2001, the company filed
21 using a three-factor or four-factor
22 apportionment formula; is that correct?

23 A: On the original returns, that's correct.

24 Q: And I think you categorized it as filing the
25 amended returns was the correction of an error;

1 is that correct?

2 A: Yes.

3 Q: Now, does Duke Energy, and previously Duke
4 Power, when it is -- its state tax returns were
5 being prepared, does it have a quality control
6 process it goes through?

7 A: Yes.

8 Q: And did it have a quality control process to
9 your understanding in all the years at issue?

10 A: I don't know.

11 Q: You don't know. In your experience with the
12 company, however, has there always been a
13 quality control process?

14 A: In my experience, yes.

15 Q: And -- but your testimony here today is that
16 despite that quality control process, an error
17 went on for 23 years; is that correct?

18 A: Yes.

19 Q: Now, you have -- you are presently the director
20 of state and local taxes for Duke Energy; is
21 that correct?

22 A: Yes.

23 Q: And you are familiar with the records
24 maintained, I think you testified, on the
25 filing of state tax returns.

1 A: Yes.

2 Q: Is that correct?

3 A: Correct.

4 Q: And are you familiar with the
5 document -- strike that. Are you aware that a
6 request was made of the Department of Revenue
7 in two-thousand -- about 2004 or five to use
8 the three-factor formula as part of an economic
9 development process right under statute?

10 A: I'm --

11 Q: Are you aware of that?

12 A: I'm aware of an economic development agreement.
13 I don't believe it says what you just said.

14 Q: You do not believe that it provided for use of
15 a three-factor formula?

16 A: It does not -- the agreement does not provide
17 for that.

18 Q: You do not think that it does?

19 A: It makes a statement about the way the company
20 currently filed.

21 Q: But it does not say during the years that the
22 agreement is in place you will file using a
23 three-factor formula?

24 A: I'd have to recollect -- refresh my memory on
25 that, but I don't believe it says that.

1 MR. GREEN: Bear with me one moment.

2 Q: Okay. I'll move on. I think you -- I think
3 you testified that the vast majority of the
4 income earned by Duke Energy is from
5 power -- sales of power, energy and service
6 delivery in South Carolina and North Carolina;
7 is that correct?

8 A: That's correct.

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

11 A: Yes.

12 Q: If Duke Energy doesn't sell that electricity,
13 there's no market -- it can't do any -- it
14 can't make any money for it, can it?

15 A: Correct.

16 MR. GREEN: Bear with me one moment, please, Your
17 Honor. Sorry, my exhibits had gotten a bit
18 intermixed.

19 Q: Let me refer you to Petitioner's Exhibit
20 Twenty-nine, the determination.

21 MR. GREEN: Do I have that number right? It's
22 Twenty-nine?

23 MS. TODOROVA: Uh-huh (affirmatively responds).

24 Q: Do you have that in front of you?

25 A: Yes.

1 Q: And let me refer you to the page right after
2 the cover letter.

3 A: Okay.

4 Q: And if you'll look down under there -- you see
5 the heading marked "determination"?

6 A: Yes.

7 Q: And what does number one say?

8 A: It says, "The taxpayer is not entitled to
9 utilize a single-factor formula for
10 apportioning its taxable income."

11 Q: Okay. If you'll turn to page three of the
12 determination:

13 A: (Witness complies.)

14 Q: And you testified on this page a moment ago, I
15 believe; is that correct?

16 A: That's correct.

17 Q: If you -- if you see at the top of the page,
18 there's a indented paragraph and then there is
19 a paragraph -- full paragraph that starts
20 underneath that. Do you see where I'm talking
21 about?

22 A: I do.

23 Q: And would you recite the second sentence of
24 that paragraph?

25 A: "The taxpayer is a manufacturer within the

1 meaning of the statute and must apportion its
2 income according to the prescribed three-factor
3 formula."

4 Q: Thank you. And then is there a footnote
5 attached to the end of that sentence?

6 A: Yes.

7 Q: And did you read from that footnote a few
8 moments ago?

9 A: Yes, I did.

10 Q: But that was a footnote, correct?

11 A: Indeed.

12 Q: Let me refer you now to --

13 MR. GREEN: Give me, again, one moment as I flip
14 through some documents.

15 Q: On Exhibit Thirty, is this a document filed by
16 Duke Energy?

17 A: Yes.

18 Q: And on page -- there's a very tiny "three" at
19 the right-hand corner of the contested case
20 hearing, "Issues in this case." It's a Roman
21 numeral two at the top, "Issues in this case"?

22 A: Yes.

23 Q: Are you with me?

24 A: Yes.

25 Q: Okay. Good. And it says, "Is Petitioner" --

1 it states "issues" at the top -- "Is Petitioner
2 required to compute its South Carolina income
3 tax liability using the single-factor
4 apportionment method?" Is that correct?

5 A: That's correct.

6 Q: Let me refer you to -- let me refer you to
7 exhibit -- I think exhibit -- bear with me,
8 again, I apologize. I have a lot of -- Exhibit
9 Thirty-one, yes, I apologize. I have a lot of
10 papers to shuffle.

11 A: Okay.

12 Q: And do you see item three on the front page
13 there?

14 A: Yes.

15 Q: "The issues presented for the determination"?

16 A: Yes.

17 Q: Does "A" say, "Is the Petitioner entitled to
18 utilize a single-factor apportionment formula
19 to calculate its South Carolina taxable
20 income?"

21 A: Yes.

22 Q: And then in Exhibit Thirty-two? And the first
23 page behind the cover letter?

24 A: Okay.

25 Q: And, again, item 3-A. Are you with me?

1 A: Yes.

2 Q: Okay. And does it say, "Is Petitioner entitled
3 to utilize a single-factor apportionment
4 formula to calculate its South Carolina taxable
5 income?"

6 A: Yes.

7 Q: Thank you.

8 MR. GREEN: Bear with me one moment, please, Your
9 Honor.

10 Q: Let me refer you to Exhibit Thirty-three. Are
11 you with me?

12 A: Yes.

13 Q: Okay. What is the date at the bottom
14 right-hand corner of that document?

15 A: July 26, 2010.

16 Q: And what about the next page?

17 A: Same, July 26, 2010.

18 Q: And the last page -- oh, excuse me, the next
19 page?

20 A: July 26, 2010.

21 Q: And the same for the last page?

22 A: Correct, July 26, 2010.

23 Q: Okay. And I think you referenced the "outdoor
24 lighting;" is that correct?

25 A: That is correct.

1 Q: And you said it's for one monthly fee; is that
2 correct?

3 A: Yes.

4 Q: Doesn't Duke Energy have an idea on how much a
5 light will use in a given month?

6 A: I don't know.

7 Q: You don't know. So you're testifying about the
8 plan, but you don't know whether Duke Energy
9 has that knowledge or not.

10 A: (No response.)

11 Q: Is that correct?

12 A: I know that this service is not metered, so I
13 don't know how they would get that information.

14 Q: Okay. So you know it's not metered, so you
15 don't -- but you do not know if Duke Energy has
16 an idea of how much a light -- energy a light
17 would consume in an average month?

18 A: I do not know.

19 MR. GREEN: Okay. Bear with me one moment.

20 Q: And that is for --

21 MR. GREEN: I'm sorry. Going back and forth, I
22 apologize.

23 Q: That is for -- I think it says on page three of
24 Exhibit Thirty-three. Are you with me?

25 A: No.

1 Q: I think it would be the third page back. It
2 says "Outdoor Lighting, South Carolina."

3 A: Okay.

4 Q: Okay. And if you look down at the bullet
5 points, it says "dusk to dawn lighting;" is
6 that correct?

7 A: That's correct.

8 MR. GREEN: Okay. Sorry. Bear with me one moment.
9 Your Honor, I don't have any more questions of
10 this witness at this time.

11 Thank you, Mr. Monroe.

12 THE COURT: Redirect?

13 MR. TRESH: Short redirect, Your Honor.

14 MR. MONROE - REDIRECT EXAMINATION BY MR. TRESH:

15 Q: Mr. Monroe, talking about the NAICS codes that
16 we were just discussing, did Duke Energy prior
17 to its use of NAICS codes -- you've been
18 employed by Duke Energy for 20-something years
19 in the tax department, correct?

20 A: That's right, 24 years.

21 Q: And prior to the use of NAICS codes, were SIC
22 codes used?

23 A: Yes, Standard Industry Classification codes
24 were used.

25 Q: And so was the NAICS classification, is it the

1 new version, if you will, of the SIC codes?

2 A: That's my understanding.

3 Q: Okay. And for federal income tax purposes for
4 1978 through the current year, Duke Energy
5 would have been required to put either an SIC
6 code or an NAICS code on its federal income tax
7 return?

8 A: Yes.

9 Q: And would the federal -- and would that -- the
10 SIC codes, referring to those, did SIC
11 classifications also have separate
12 classifications for manufacturers versus
13 electric service utilities?

14 A: Yes.

15 Q: Okay. And how would Duke Energy or how did
16 Duke Energy file its returns from 1978 forward
17 with respect to the requirement to put in
18 either an SIC code or an NAICS code?

19 A: We used the SIC equivalent to the NAICS code
20 for electric utility.

21 Q: And that code would have been code 4911?

22 A: That is correct, yes.

23 Q: And was there a separate code other than 4911
24 in the SIC world for manufacturers?

25 A: Yes.

1 MR. TRESH: Thank you, Your Honor. No further
2 questions.

3 MR. GREEN: Nothing from me, Your Honor.

4 THE COURT: You may step down.

5 (Witness excused.)

6 THE COURT: We're going to either take a short break
7 or break for lunch.

8 MR. TRESH: Your Honor, I think our next witness may
9 take a little bit of time. Depending upon
10 everybody's stomachs and what the Court would
11 like, we could either break for lunch or
12 continue on with a short break, whatever the
13 Court prefers.

14 THE COURT: Well, the emphasis that you gave to "a
15 little bit of time" leads me to think that a
16 little bit of time is like under the current
17 vernacular "a minute." So I think I'll go with
18 a lunch break.

19 If we can be back at 1:30?

20 MR. TRESH: Thank you, Your Honor.

21 (Lunch break from 12:10 to 1:30 p.m.)

22 THE COURT: All right. Call your next witness.

23 MR. TRESH: Thank you, Your Honor. Your Honor, Duke
24 would like to call Dhiaa Jamil to the stand,
25 please. Dhiaa Jamil.

1 THE COURT: Okay.

2 DHIAA M. JAMIL, P.E., having been duly sworn,

3 testifies and examines as follows:

4 MR. JAMIL - DIRECT EXAMINATION BY MR. TRESH:

5 Q: Good afternoon, Mr. Jamil.

6 A: Good afternoon.

7 Q: Can you please state and spell your full name
8 for the record, please?

9 A: Yes, it's Dhiaa Jamil. D-H-I-A-A. Last name
10 is Jamil, J-A-M-I-L.

11 Q: Thank you. Mr. Jamil, what is your business
12 address?

13 A: Recently moved. It is 550 South Tryon Street,
14 Charlotte, North Carolina 28202.

15 Q: Mr. Jamil, what is your current occupation?

16 A: I am executive vice president of nuclear
17 generation and the chief nuclear officer for
18 Duke.

19 Q: Mr. Jamil, I've just handed you a document. Do
20 you recognize that document?

21 A: Yes, I do.

22 Q: And can you describe what that document is?

23 A: That is basically my bio.

24 Q: And is your bio listed on Duke Energy's
25 website?

1 A: Yes, it is.

2 Q: Is it accurate?

3 A: Yes, it is.

4 Q: Have there been any changes in the information
5 in that biography since you last looked at it?

6 A: No.

7 Q: Okay. Can you please describe your educational
8 background for the Court?

9 A: I have a Bachelor's degree in electrical
10 engineering and I am also a graduate of the
11 Harvard Business School Advanced Management
12 Program.

13 Q: Thank you. And do you hold any professional
14 licenses or certifications?

15 A: Yes, I do. I am a professional engineer in the
16 State of North Carolina and in the State of
17 South Carolina. I have also have a technical
18 nuclear certification, which is a certification
19 required by ANSI -- ANSI is the American
20 National Standards Institute -- required for
21 anyone that manages large nuclear
22 organizations.

23 Q: Okay. And do you hold any certifications that
24 are issued by Duke Energy?

25 A: Yes, actually, the technical nuclear

1 certification is a certification that is issued
2 by Duke Energy.

3 Q: Okay. And, Mr. Jamil, do you hold any
4 memberships or leadership roles in any
5 organizations?

6 A: Yes, I -- starting with the current ones, I am
7 a member of the EAG, which is the Executive
8 Advisory Group for INPO, which is the Institute
9 of Nuclear Power Operators. I am also a member
10 of the NSIAC, which is the Nuclear Initiative
11 Strategic Committee for NEI, Nuclear Energy
12 Institute.

13 I am a trustee of the UNC of Charlotte. I
14 chair the EPIC center, which is the Energy
15 Infrastructure and Production Center at UNC
16 Charlotte. Previously been on the boards of
17 several companies; typically, safety boards,
18 nuclear safety review boards of the Tennessee
19 Valley Authority, for Dominion Energy, an
20 equivalent board, and for Pacific Gas and
21 Electric Company, as well.

22 Q: Thank you. And you mentioned a moment ago that
23 you are vice president and chief nuclear
24 officer at Duke Energy. Have you been in that
25 position for very long?

1 A: The current title since July of this year, but
2 I have been the chief nuclear officer for the
3 company since February of 2008.

4 Q: And prior to February of 2008, can you
5 summarize for the Court your employment
6 history?

7 A: Yes. I've been with the company for 31 years.
8 I started as an electrical engineer, moved into
9 engineering management in the late eighties,
10 became an engineering manager over the
11 electrical system in the nineties, became
12 maintenance manager of McGuire Nuclear Station,
13 station manager at McGuire Nuclear Station,
14 site V.P. at McGuire Nuclear Station, site V.P.
15 at Catawba Nuclear Station, senior V.P. of
16 nuclear support, which included the variety of
17 functions including nuclear engineering, and
18 then chief nuclear officer in 2008.

19 And then in 2009, I assumed the role of chief
20 generation officer, which I am -- I was
21 responsible for all the generation, regulated
22 generation across five states for the company.

23 Q: And so that -- your responsibilities associated
24 with regulated generation, that would have
25 included all types of Dukes's provision of

1 electricity, whether that was coal, hydro or
2 nuclear; is that accurate?

3 A: That is correct. Any type of generation,
4 whether it's coal, hydro, solar, wind, any
5 aspect in the regulated business, I manage.

6 MR. TRESH: Okay. Your Honor, we'd like to move
7 that Mr. Jamil's CV be entered into the record
8 as Exhibit Thirty-four.

9 MR. GREEN: No objection.

10 THE COURT: It's admitted.

11 (Petitioner's Exhibit Number Thirty-four was admitted
12 into evidence.)

13 Q: Mr. Jamil, can you please describe for the
14 Court the process of Duke's electricity
15 generation processes?

16 A: Well, the process involves generation stations,
17 power stations, that convert energy into
18 electromagnetic energy that is efficiently
19 transmitted on transmission lines and then
20 distributed to customers where it is available
21 for access at the right specification for
22 customer use.

23 Q: And what are the different processes by which
24 Duke Energy generates electricity?

25 A: Well, there are several. There are the steam

1 cycle, which is the most commonly used, which
2 basically relies on converting energy from a
3 source that contains potential energy, such as
4 coal or oil or nuclear; that is the most common
5 form.

6 There are the combustion turbine where we would
7 basically use a combustion cycle to generate
8 energy, kinetic energy, which is then converted
9 to electric energy.

10 There are the hydro plants where you use the
11 energy stored in water. And then you have
12 solar cells where you harness the energy in the
13 sun, from the sun, and convert that into
14 electric energy, or wind, which use propellers
15 to do the same.

16 Q: And so in each of those processes, is
17 the -- it's used to produce electricity; is
18 that correct?

19 A: Yes.

20 Q: And is there any difference in the electricity
21 that is provided to a customer whether that
22 electricity comes from the sun or the wind or
23 the water or the steam?

24 A: No, it's the same electric energy.

25 Q: It's the same electric energy. Is the

1 generation process the same for each of those?

2 A: On a macro level, yes, but in details, no; it's
3 all different, slightly different.

4 Q: Once the -- once the energy is produced using
5 whichever mechanism, whichever process that
6 Duke has chosen to be most efficient, is that
7 electricity provided -- is the electric service
8 provided to the customer in much the same
9 manner?

10 A: Yes.

11 Q: And would that involve transmission lines and
12 distribution lines? Can you kind of summarize
13 that process a bit?

14 A: Yes. So the energy is basically converted into
15 electric energy and from that point on, we use
16 the most efficient method to get it to the
17 customer. That would involve transmission
18 system, pretty elaborate transmission system,
19 to step the voltage of the electrical energy
20 such that we minimize the losses.

21 And then that is delivered to the distribution
22 system, which is typically closer to the
23 customer base, where the components of the
24 electric energy is manipulated for the
25 specification of the devices that are typically

1 used by customers. And that is done closer to
2 the customers' house.

3 Q: So it sounds like Duke Energy has developed
4 this very elaborate system to go ahead and
5 provide its customers with this electric
6 service; is that accurate?

7 A: Oh, yes, that's accurate.

8 MR. GREEN: Leading, Your Honor. Objection,
9 leading.

10 MR. TRESH: I'll restate.

11 Q: Has Duke Energy developed -- what type of
12 process -- how would you describe the process
13 in the facilities by which Duke Energy provides
14 electricity to its customers?

15 A: Well, it's basically three parts. It's the
16 conversion part, which is called power
17 plants --

18 Q: Uh-huh (affirmatively responds).

19 A: -- an efficient transmission system, and then
20 a distribution system. That is how we provide
21 electricity to our customers.

22 Q: And you need all three to provide the electric
23 service?

24 A: Yes, you need all three.

25 Q: And, in theory, could Duke Energy put a solar

1 panel on top of everybody's house and sell
2 electric energy -- and sell the customers'
3 electric energy that way?

4 A: Yes, we can, actually, and we actually do that.
5 We have solar energy sites distributed
6 throughout our system to where electricity is
7 generated by conversion of sun energy into
8 electrical energy. That electrical energy is
9 manipulated at that location to be suited for
10 customer use.

11 Q: And is Duke Energy -- Duke Energy -- is Duke
12 Energy a regulated utility in the State of
13 South Carolina?

14 A: Yes, we are.

15 Q: And as part of its regulated nature, is it
16 obligated to provide electric service to South
17 Carolina residents?

18 A: Yes, we are obligated to provide energy --
19 electric energy to its customers.

20 Q: So you could provide the energy -- you
21 testified you could provide the energy by
22 sticking a solar panel on people's roofs and,
23 in fact, do at times, but you also use these
24 other processes to provide electric service.
25 Why the multiple processes? Why not stick a

1 solar panel on everybody's roof?

2 A: The answer to that is, we have to provide an
3 efficient, cost effective system and it has to
4 be resilient to ensure that it withstands
5 market changes for the source of fuel.

6 So diversity of fuel becomes very important and
7 that is why we use multiple types of -- not
8 every location has -- is blessed with the
9 ability to use hydro, for example. So
10 geographical/environmental conditions also
11 dictate what we can use.

12 In addition, we are required by law to meet
13 certain quotas of certain renewable energy;
14 therefore, we would choose to do wind and sun,
15 for example, to meet those requirements. So a
16 variety of reasons why we have a diverse
17 system.

18 Q: Thank you. And -- okay. Thank you. You
19 heard -- I believe you were in the courtroom
20 when you heard Mr. Monroe testify about flat
21 fee and on how Duke provides electric service.
22 Let me ask you. Does Duke Energy provide
23 electric service on a metered basis?

24 A: Typically, yes, but not always.

25 Q: How else would Duke Energy provide electric

1 service?

2 A: There are services that we provide electric
3 energy service on a flat base -- a flat-rate
4 basis.

5 Q: I'm previously going to -- I'm going to show
6 you what's been previously marked as -- and
7 entered into the record as Petitioner's Exhibit
8 Thirty-three. Have you seen this document
9 before?

10 A: Yes, I have.

11 Q: And can you summarize for the Court what this
12 document is indicative of?

13 A: It's indicative of a service that's provided by
14 the company for outdoor lighting at a flat fee.

15 Q: Okay. And when Duke Energy provides service
16 for a flat fee or on a metered basis, is there
17 any difference in the electric service that's
18 provided on these two bases, flat fee versus
19 metered?

20 A: No, it's the same.

21 Q: And when a flat fee -- when a fixed-fee service
22 is provided, if you billed for it on a flat
23 fee, each month the customer gets a charge --
24 \$50 a month, for example -- on their electric
25 bill?

1 A: That's true, yeah.

2 Q: And on a metered basis, I assume that means
3 based upon usage; is that accurate?

4 A: Yes, that is accurate.

5 Q: What would happen if a customer didn't turn on
6 their lights? If it was billed on a metered
7 basis, would the customer not get charged for
8 electric service that month?

9 A: No, they would still be charged.

10 Q: And why is that?

11 A: Well, because your power bill for a typical
12 customer, while -- which you get in the mail
13 represents one number that represents all the
14 components that made up what you owe for that
15 service. It's really made up of two parts.
16 One part represents the capacity charge.
17 Since we are obligated by law to serve, we are
18 the provider of last resort in our service
19 territory. We have to build an infrastructure
20 to support your anticipated use of that
21 service.
22 We do projections of load growth and
23 projections of heating days and cooling days to
24 determine the infrastructure that's needed to
25 serve you, the customer, and add some reserve

1 on top of that.

2 For that infrastructure that we build, we have
3 to get paid for. We get paid for through --
4 the Public Service Commission decides what is
5 a fair return on that investment and there's a
6 flat charge that is applied to every customer
7 class, regardless of usage.

8 In addition to that, there's a second component
9 that is equivalent to your usage level. It's
10 basically -- we call it a "fuel cost." So that
11 is a passthrough and it depends entirely on
12 your usage level.

13 So your -- if you use a lot, we have burned a
14 lot of coal or used a lot of nuclear fuel to
15 supply you, and that would be reflected on that
16 component.

17 So, going back to your question, if you don't
18 use any electricity, unplug all your devices
19 for a month, you would still get a monthly
20 because -- a monthly bill because that capacity
21 charge never goes away. It's a flat charge
22 that we are obligated to bill and, therefore,
23 you're charged for it as a customer.

24 Q: So -- so my bill -- this bill for electric
25 service, it contains a single monthly line

1 item: \$100, \$150 dollars. And so that bill
2 is -- and I guess the receipts that Duke Energy
3 would generate from the bill, are they directly
4 linked in any way to Duke's generation -- are
5 they entirely linked to Duke Energy's provision
6 of electricity --

7 (Cell phone interruption.)

8 Q: Excuse me, generation of electricity? Is the
9 entire charge on the customer's bill linked to
10 Duke's generation of electricity?

11 A: No, it's not.

12 THE COURT: Say that again.

13 MR. TRESH: I'm sorry?

14 THE COURT: Ask that again.

15 THE WITNESS: Yeah.

16 THE COURT: I got distracted a little bit.

17 THE WITNESS: I had to think about it, too.

18 Q: Is the monthly charge that a customer receives
19 for their electricity linked entirely to the
20 generation of electricity? I think you
21 testified that there were these infrastructure
22 charges.

23 A: The answer to that is "no." In fact, the
24 charge will be there even if I don't generate
25 anything from any of my generating units that

1 I oversee.

2 Q: So Duke would still have some level, perhaps a
3 lot of --

4 A: A significant level of your bill --

5 Q: -- receipts --

6 A: -- comes from the fixed charge that you have to
7 carry because I'm obligated to be there for you
8 in case you need it.

9 Q: And by "be there for you," would that include
10 not just Duke's generation facilities, does it
11 include the transmission and the distribution
12 facilities, as well?

13 A: Certainly. It's all of that. It's a service
14 that we are allowed to charge and it's
15 regulated by utility commissions and they
16 decide what is -- whether -- they decide two
17 things, whether that infrastructure was,
18 indeed, needed and whether -- what's the return
19 on that infrastructure, is the second one.

20 Q: You testified a moment ago that Duke Energy
21 provides electricity on a flat-fee basis and we
22 referred you to Exhibit Thirty-three that's in
23 front of you. It was noted earlier that that
24 document is dated, I believe, 2010. Has Duke
25 Energy provided flat-fee, fixed-fee based

1 electric service for some period of time?

2 A: Yes.

3 Q: How long would you say?

4 A: I would not have a precise but for a very long
5 time.

6 Q: A very long time. Ten years, perhaps?

7 A: Yes, or longer.

8 Q: Or longer? Twenty years?

9 A: That's -- that would be possible. I don't have
10 a precise date, but I've been with the company
11 31 years and I've known about these types of
12 services my entire career.

13 Q: Thank you. We talked a lot about electricity
14 and electric energy, that Duke provides
15 electric service. What is electric service and
16 what is electricity and electric service? If
17 you can describe those.

18 A: Electricity is electromagnetic energy. So
19 providing electricity to you, as a customer,
20 we're providing access. The service we provide
21 is access to the electromagnetic field.

22 Q: And is that electromagnetic field tangible?

23 A: No.

24 Q: Does Duke Energy actually create any electrons
25 as part of that, its use of this or creation of

1 this electromagnetic field?

2 A: No.

3 Q: When I get electric service, when I get this
4 access as you described, to the electromagnetic
5 field, what does that do for me? In the common
6 vernacular, I don't think of my electric
7 provider as giving me access to an

8 electromagnetic field. But what does that
9 access do for me, in my home, for example?

10 A: Yeah. So you need the energy that we give you
11 access to because you want to operate devices:
12 toasters, ovens, air conditioners. The method
13 of operating those utilize electrons that are
14 already in those devices that are already in
15 your homes.

16 We -- the service we provide allows energy to
17 be transmitted to allow those electrons to
18 oscillate. When they oscillate, they
19 create -- they can perform work. The energy is
20 transmitted to those devices through the motion
21 of the oscillation of the electrons. So the
22 electromagnetic field is transmitted in that
23 manner.

24 Q: And when I -- when Duke Energy provides access
25 to the electricity, the electromagnetic field,

1 does it provide anything tangible to a customer
2 as part of that access?

3 A: No.

4 Q: I've been told that in order to provide the
5 electric -- access to the field, that Duke
6 Energy steps up and steps down voltage. Can
7 you describe the process or why Duke Energy
8 does -- and why Duke Energy steps up and steps
9 down voltage of the field?

10 A: Yes. So now we're shifting from the generation
11 phase of the business into the transmission
12 phase of the business.

13 Because power stations are typically located at
14 a distance from the load, the customers --
15 typically, in order to get the energy to the
16 customer the most efficient way, we need to
17 manipulate the properties of the electric field
18 such that we don't lose much of it on the way
19 to getting it to the customers.

20 One way of doing that is to raise the voltage
21 significantly to a very high level. Given that
22 power is constant, when you raise the voltage,
23 the current, which is the intensity of the
24 field, drops to a very small value.

25 So power is the product of voltage and current.

1 So when you raise the voltage, current, or the
2 equivalent level of power, is dropped
3 significantly. And we transmit very low
4 current on those wires that you see on the
5 transmission wires.

6 And the reason we do that is because as the
7 field travels on that line, it is -- remember
8 we talked about the electrons are now
9 oscillating. When they oscillate, they create
10 heat because they collide with other atoms.
11 The more intense the current, the more heat you
12 generate and, therefore, since energy is
13 constant, we're losing energy in the process of
14 getting it to customers.

15 So one way to minimize that is to raise the
16 voltage to a very high level, reduce the
17 current, therefore, and the energy lost getting
18 it to the customer would be minimized.

19 On the other end of the transmission system, as
20 you enter into the distribution system now, we
21 do the opposite. We drop the voltage down to
22 a level that is usable to the customer --
23 typically 120 volts; sometimes 220 volts -- and
24 the reverse will happen. The intensity of the
25 current will go up allowing many users to use

1 it at the same time.

2 Q: And are these processes necessary to provide
3 electric service in the manner that Duke does
4 it?

5 A: Well, not -- this is not the only way to do it.

6 Q: Uh-huh (affirmatively responds).

7 A: This is -- we have learned this is a very
8 efficient way of doing it. So it's required in
9 the sense that it is the most efficient way of
10 delivering the service.

11 Q: This is the most efficient way of providing the
12 electric service. And is the provision of
13 electric service -- does the provision of
14 electric service entail all of these processes
15 that you've discussed?

16 A: Yes, all of them are necessary for us to
17 provide access to the service.

18 Q: And is providing access to the electromagnetic
19 field, providing electricity, is that Duke
20 Energy's primary business?

21 A: That is our primary business.

22 Q: And how would you define "primary business"?

23 A: It is our core business. This is where -- this
24 is the reason why we exist, is to provide...

25 Q: To provide access to the electromagnetic

1 field --

2 A: Yes.

3 Q: -- and provide electricity.

4 A: To provide electricity in the form of access to
5 the electromagnetic field.

6 Q: Okay. Does Duke Energy buy electricity, access
7 the electromagnetic field, if you will, from --
8 that it doesn't generate?

9 A: Certainly.

10 Q: Where does it get that electricity?

11 A: From other providers. We are obligated to
12 provide the least cost service. So while
13 hydroelectric plants are typically the most
14 efficient from the source of energy -- nuclear
15 is next -- if the load is higher and the demand
16 is higher, we have to evaluate all the time
17 what is the most cost effective way of
18 delivering that service.

19 Coal, large coal plants, typically are the next
20 in the dispatch order. Currently, because of
21 the prices of gas, gas is competing very
22 favorably currently; however, that could
23 change, of course. And then we have to
24 evaluate whether we operate some of the older
25 plants, less efficient plants, or buy in the

1 open market.

2 So, essentially, we could deliver energy to our
3 customers, and still charge, without
4 generating. If somebody is offering -- if my
5 nukes are down and there's a drought, for
6 example, I can't use hydro, then it's
7 conceivable that I'm buying power from somebody
8 else and, you know, passing it on to you as the
9 cheapest option; yet I'm still charging you
10 because my infrastructure is still there.

11 Q: So during the time periods at issue, let's say
12 1978 through 2001, is it fair to say that Duke
13 Energy did not actually generate all the
14 electricity that it sold?

15 A: Oh, it's most certainly we did not generate all
16 the electricity that we sold.

17 Q: So you would have bought this electricity on
18 the open market; is that accurate?

19 A: Yeah, that's accurate.

20 Q: And then you would have sold access to the
21 electromagnetic field and collected monthly
22 receipts from your customers?

23 A: Commensurate with the agreement that we've had
24 with the Public Utility Commission.

25 Q: Okay. And is it conceivable that Duke Energy

1 could provide electric service to the customers
2 in South Carolina without generating any
3 electricity? Could it still provide the same
4 electric service and get paid?

5 A: Yes, that's -- that's possible.

6 Q: And I understand that may not be the most cost
7 efficient --

8 A: The most -- yeah.

9 Q: -- but is it possible?

10 A: We have very efficient plants in the State of
11 South Carolina, so we typically would complete
12 with anybody.

13 Q: I want to go back to -- earlier you testified
14 when you said that Duke Energy doesn't provide
15 anything tangible to its customers as part of
16 its provision of electric service. I want to
17 talk a little bit about the electricity. Does
18 electricity have any weight --

19 A: No.

20 Q: -- to it? Can you touch electricity?

21 A: No.

22 Q: Can you see electricity?

23 A: No.

24 Q: Can you feel electricity?

25 A: No.

1 Q: Mr. Jamil, when I stick my hand in a socket,
2 don't I feel the electricity?

3 A: You are feeling the impact of electricity on a
4 device and that device is your body. So if I
5 may elaborate.

6 Q: Yes, please.

7 A: If you plug a radio into that socket, you hear
8 music. I don't think anyone can claim that is
9 electricity, but that is the impact of the
10 electromagnetic field on that device. If
11 you're insulated and you touch a line -- the
12 transmission line that we spoke about?

13 Q: Yes.

14 A: You are touching an object that has
15 electromagnetic field in it, but you don't feel
16 anything. You would not feel anything. That's
17 why a bird can sit on a transmission line.
18 They're not feeling anything.
19 So it is only when you conduct. You are the
20 conductor of electromagnetic field, that the
21 way your body breaks down to that source of
22 energy gives you that burning sensation that we
23 call "shock." So you're feeling the impact of
24 the energy on your body, but you're really not
25 feeling.

1 In fact, there's electromagnetic energy right
2 now all around us. We're not feeling it. So,
3 back to the question, it's -- no, you cannot
4 feel electromagnetic energy.

5 Q: When I pay my monthly power bill and Duke
6 Energy gets receipts from the provision of
7 electric service, access to the electromagnetic
8 field, do I own that -- can I possess that
9 electromagnetic field? Do I own it? Do I have
10 any rights in it?

11 A: No, you have access to an electromagnetic
12 field. You don't own it. You cannot keep it.
13 No one can keep it.

14 THE COURT: You say no one can keep it. You can set
15 up a system whereby you could store it if you
16 wished when it came into your house.

17 THE WITNESS: You cannot store electromagnetic
18 energy. You cannot store electricity. When
19 you're thinking of -- Your Honor, if you're
20 thinking about a battery, the battery actually
21 stores a charge. A charge is different than an
22 electromagnetic field. So there is no device
23 that stores electricity.

24 THE COURT: So electricity can produce a charge
25 which can be stored.

1 THE WITNESS: The electricity -- one form of
2 generating electricity is to flow charge.

3 THE COURT: When you say "producing," I'm saying on
4 the other end, receiving it. You can receive
5 it and upon receiving it you can utilize the
6 reception of that electricity to store a
7 charge.

8 THE WITNESS: That -- yeah, that's possible. You
9 could store a charge, but you can store a
10 charge in many different ways.

11 THE COURT: Yeah, I understand.

12 THE WITNESS: Okay.

13 Q: Mr. Jamil, I've handed you a lengthy document
14 a moment ago. Can you tell me what that
15 document is?

16 A: Okay. This is our 10-K, Duke Energy's 10-K..
17 10-K is the -- it's an annual report that we
18 file required by the Security and Exchange
19 Commission.

20 MR. TRESH: Your Honor, the 10-K that we've handed
21 Mr. Jamil has been stipulated to prior and it's
22 been marked as Exhibit Thirty-five. I'd like
23 to enter it into the record.

24 THE COURT: It's admitted.

25 (Petitioner's Exhibit Number Thirty-five was admitted.

1 into evidence.)

2 Q: Mr. Jamil, on page marked -- if you can turn
3 the pages, you can see on the bottom right-hand
4 corner there are markings DE --

5 A: Yeah.

6 Q: -- 2009. Can you turn to the page that's
7 marked DE2012?

8 A: (Witness complies.) Yep.

9 Q: Can you please read the first paragraph on page
10 one?

11 A: The one that -- under "General"?

12 Q: "General: Duke Energy Corp" -- begins "Duke
13 Energy Corporation..."

14 A: "Duke Energy Corporation (collectively with its
15 subsidiaries, Duke Energy) an integrated
16 provider of energy and energy services, offer
17 physical delivery and management of both
18 electricity and natural gas throughout the U.S.
19 and abroad. Duke Energy provides these and
20 other services through seven business
21 segments."

22 Q: Is this statement consistent with your
23 understanding of Duke's business, Duke's
24 primary business of providing electric service?

25 A: Yes, it is.

1 Q: Thank you. Mr. Jamil, I've just handed you
2 another document. Have you seen this document
3 before?

4 A: Yes, I have.

5 Q: And can you tell me what this document is?

6 A: This is a document that describes mission
7 values and the purpose of the Public Service
8 Commission of South Carolina who regulates Duke
9 Energy.

10 Q: Is it entitled "Public Commission -- Public
11 Service Commission of South Carolina
12 Accountability Report Fiscal Year 2010-2011"?

13 A: Yes, it is.

14 Q: Have you seen this document before?

15 A: Yes, I have.

16 Q: And would you typically review Public Service
17 Commission reports like this document?

18 A: Yes, I do.

19 Q: As part of your ordinary business
20 responsibilities?

21 A: Yes.

22 Q: And why would you review a document like this?

23 A: Well, the Public Service Commission regulates
24 Duke Energy and they decide whether the
25 infrastructure that I manage is being managed

1 the most efficient way and whether capital
2 investments that we need to make in the system
3 are prudent and, therefore, would be reflected
4 in our fixed portion of our rates that we
5 charge customers.

6 Q: I'd ask you to -- direct your attention to page
7 one of the report. It's a section entitled
8 "Executive Summary"?

9 A: Yes.

10 Q: Can you please read the first paragraph under
11 part one beginning with "Mission and Values"?

12 A: Yeah. "Mission and Values: The Public Service
13 Commission of South Carolina regulates the
14 rates and services of investor-owned public
15 utility in the State of South Carolina and
16 establishes just and reasonable standards for
17 their rates and services."

18 Q: Is this report's characterization of Duke's
19 business as one of providing services
20 consistent with your understanding of Duke's
21 business?

22 A: Yes, very much so.

23 MR. TRESH: Your Honor, I'd like to move this Public
24 Service Commission report into the record as
25 Petitioner's Exhibit Thirty-six.

1 MR. GREEN: No objection.

2 THE COURT: Okay. It's admitted.

3 MR. TRESH: Thank you, Your Honor.

4 (Petitioner's Exhibit Number Thirty-six was admitted
5 into evidence.)

6 Q: Mr. Jamil, I've just placed another fairly
7 lengthy document in front of you. It begins
8 with a cover letter followed by certificate of
9 service and then a docket number with respect
10 to the Public Service Commission. Have you
11 seen this document before?

12 A: Yes, I have.

13 Q: And can you describe what it is?

14 A: It is one of the many orders that we get from
15 the Public Service Commission of South Carolina
16 relative to our rates and our service.

17 Q: And what's the date on the cover letter that
18 accompanies this document?

19 A: The date is October 25th, 1991.

20 Q: Okay. And is this the type of document that
21 you would expect to maintain in the regular
22 course of your business?

23 A: Oh, yes.

24 Q: And you're familiar with it why?

25 A: Well, this sets the rates that we charge our

1 customers, so it's a very important document

2 for us.

3 Q: And could you -- if I could direct your
4 attention to page ten?

5 A: (Witness complies.) Okay.

6 Q: And it's entitled "Evidence and Conclusions For
7 Finding of Fact Number Five"?

8 A: Yes.

9 Q: If I could direct your --

10 MR. GREEN: Your Honor, I object to the introduction
11 and discussion of this. This is a proposed
12 order. There's no signature on it. It was not
13 issued by the Public Service Commission. I
14 object to it.

15 THE COURT: Well, he hadn't offered it yet. He was
16 mainly identifying it at this point. But you
17 want to address it now or ...

18 MR. TRESH: I'd like to have Mr. Jamil further
19 identify the document, if that's okay.

20 THE COURT: He can identify it but he can't go into
21 any aspect of the contents until we address the
22 objection.

23 MR. TRESH: Okay.

24 Q: Mr. Jamil, is this the type of document that --
25 is this Public Service order a document that

1 you would keep in your ordinary business
2 records?

3 A: Yes.

4 Q: And are you familiar with these types of Public
5 Service Commission orders, including this
6 order?

7 A: Yes.

8 Q: And does this document reflect your
9 understanding of the order that the Public
10 Service Commission issued in October 25th,
11 1991?

12 A: Yes.

13 Q: And it's kept in your ordinary course -- it's
14 kept as an ordinary business record by Duke
15 Energy?

16 A: Yes.

17 MR. TRESH: Your Honor, I think this constitutes a
18 business record exception. It constitutes a
19 business record and, as such, should be
20 admitted. Mr. Jamil has personal knowledge of
21 the document and has read it. It's kept in
22 Duke ordinary -- Duke Energy's ordinary course
23 and reflects his understanding of what the PSC
24 ordered.

25 MR. GREEN: It may be what he reflects his

1 understanding, but it is not on what the PSC
2 ordered because the best evidence of what the
3 PSC ordered would be a signed order issued by
4 the PSC.

5 As it is, its probative value is outweighed
6 because it's not the order they issued.

7 Proposed orders are changed and altered all the
8 time; the Court's well aware of that. PSC may
9 change them, too. They may not. I don't know.
10 But this is not the best evidence of what it
11 is.

12 MR. TRESH: Your Honor, this document is stamped as
13 received by the Public Service Commission as --
14 from Duke Power. It was, indeed, received from
15 the Duke's -- from Duke Power. To the extent
16 that this order was changed and Counsel would
17 like to submit any sort of evidence that this
18 order is proposed and has since been revoked or
19 this order is proposed and has since been
20 changed, he's free to do so.

21 THE COURT: I don't think that's their duty, so I
22 sustain the objection.

23 MR. GREEN: Thank you, Your Honor.

24 MR. TRESH: Your Honor, rather than offering this
25 document as evidence of what the PSC did, this

1 document was sent by Duke Energy to the Public
2 Service Commission, it was sent in 1991, and
3 we'd like to present it for the proposition of
4 it showed what Duke Energy's view of its
5 services provided to the PSC was at that time.

6 THE COURT: That would be relevant if the state of
7 mind of Duke Energy was at issue in this case.
8 And the issue in this case is the application
9 of the law. And I don't think the state of
10 mind of the corporation is at issue. If you
11 want to explain that.

12 MR. TRESH: Yeah. How Duke Energy has described
13 itself regularly to its chief regulator in the
14 State of South Carolina would seem to be
15 relevant to the issue of whether Duke Energy
16 provides a service or provides tangible
17 personal property.

18 MR. GREEN: Your Honor, that document is being
19 submitted because it was submitted to the PSC.
20 They are trying to weight that evidence because
21 it was filed with the PSC. Then it needs to be
22 the PSC order issued in that rate case.
23 We've got plenty of evidence talking about how
24 Duke views themselves. That document is being
25 submitted for a different reason, not the

1 reason -- different reason, which is it was
2 filed with the PSC.

3 The order is the best evidence of what the PSC
4 viewed and what was going on in the case. Its
5 probative value, if any, which I don't concede
6 there is because what they thought they were
7 and what they called themselves on returns and
8 stuff doesn't necessarily make them that.

9 That document is going to the PSC issue and
10 that's why its probative value -- there's no --
11 it's not helpful here and the best evidence
12 would be under Rule 1000 or so, whatever that
13 is -- would be --

14 THE COURT: Six?

15 MR. GREEN: -- the original signed return.

16 MR. TRESH: With all due respect to Mr. Green,
17 again, we're not making the argument at this
18 point that this document is probative of what
19 the PSC said or did. This document reflects
20 how Duke Energy represented itself to its chief
21 regulator, the PSC.
22 Whether or not the PSC submitted a subsequent
23 order or viewed it in a different way, Your
24 Honor sustained that objection. This is
25 probative of how Duke Energy represented itself

1 to its chief regulator, which is probative of
2 the issue of service or tangible personal
3 property.

4 THE COURT: I could let it in solely on the issue of
5 how Duke Energy represented itself and nothing
6 more.

7 MR. TRESH: (Nods head affirmatively.)

8 THE COURT: What is your objection about that?

9 MR. GREEN: I continue the objection because, again,
10 it is very -- they are trying to weight this by
11 the fact they submitted it to the PSC.

12 THE COURT: But the bottom line is it's admitted
13 only for Duke Energy's -- how did I phrase that
14 a while ago?

15 MR. MAYBANK: Limited.

16 MR. GREEN: How they represented themselves?

17 THE COURT: I know it's limited. How they
18 represented themselves. It doesn't matter to
19 whom. And I recognize that you say that the
20 fact it's going to the PSC it carries greater
21 weight. But that's only if I introduce it for
22 the value of being a PSC order. If I'm only
23 doing it -- it doesn't matter -- it doesn't
24 carry any additional weight who they represent
25 it to.

1 MR. GREEN: On those grounds, I'm fine with that.

2 THE COURT: All right. It's admitted only on that
3 limited purpose.

4 MR. TRESH: Understood, Your Honor. Thank you.

5 (Petitioner's Exhibit Number Thirty-seven was
6 admitted into evidence.)

7 Q: Mr. Jamil, if I could turn your attention to
8 page ten of the order. Again, the section
9 entitled "Evidence And Conclusions For Finding
10 Of Fact Number Five"?

11 A: Yes.

12 Q: Can you read the second paragraph?

13 A: Okay. The paragraph that starts with "Duke"?

14 Q: Yes, please.

15 A: Okay. "Duke provides retail service in two
16 states, as well as wholesale service to certain
17 municipalities and electric membership
18 cooperatives. Therefore, it is necessary to
19 allocate the cost of service among
20 jurisdictions and among customer classes within
21 each jurisdiction."

22 Q: Mr. Jamil, have you -- have you testified
23 before the South Carolina Public Service
24 Commission before?

25 A: Yes.

1 Q: And are you familiar with how the South
2 Carolina Public Service Commission -- putting
3 aside this document, are you familiar with how
4 the South Carolina Public Service Commission
5 sets Duke's rates and regulated Duke during the
6 course of your career?

7 A: Yes.

8 Q: And, to your knowledge, has Duke Energy always
9 represented itself to the South Carolina Public
10 Service Commission as in the business of
11 providing electric service?

12 A: Yes.

13 Q: And, to your knowledge, has the South Carolina
14 Public Service Commission ever done anything or
15 issued an order that would conflict with Duke
16 Energy's representation of its provision of a
17 service?

18 A: No.

19 Q: Thank you. I've just placed a document in
20 front of you. It's entitled "Before the Public
21 Service Commission of South Carolina, Direct
22 Testimony of Dhiaa Jamil for Duke Energy
23 Carolinas, LLC."

24 A: Yes.

25 Q: Is that correct?

1 A: Yep.

2 Q: And have you seen this document before?

3 A: Yes.

4 Q: And can you describe what this document is?

5 A: This document is a filing. This portion of the
6 filing to the Public Service Commission of
7 South Carolina relates to generation assets,
8 how have we ran them, the capital additions
9 that we've made to them that are necessary, in
10 conjunction with rate case hearings.

11 Q: Okay. And this is your testimony?

12 A: Yes, this is my direct testimony.

13 Q: Okay. And is this testimony, this record of
14 your testimony, is this something that Duke
15 would maintain in its ordinary course of
16 business?

17 A: Yes.

18 Q: And Duke, in fact, did maintain this in its
19 ordinary course of business?

20 A: Yes.

21 MR. TRESH: Your Honor, we'd like to move that
22 Mr. Jamil's testimony be entered as Exhibit
23 Thirty-eight.

24 MR. GREEN: Your Honor, I object, hearsay. It's an
25 out-of-court statement going to the truth of

1 the matter asserted.

2 MR. TRESH: Mr. Jamil gave the direct testimony,
3 Your Honor. He is here to testify to what that
4 statement was and this document is reflective
5 of the statement that he made. This wasn't
6 made by a third party or -- or anybody else.
7 It's his direct testimony.

8 MR. GREEN: Hearsay, Your Honor, I believe is a
9 statement other than one made by the declarant
10 while testifying at trial. That was other than
11 while he was testifying at trial.

12 MR. TRESH: Your Honor, the South Carolina Code
13 1-23-330(1), "...when a hearing will be
14 expedited and the interests of the parties will
15 not be prejudiced substantially, any part of
16 the evidence may be received as additional in
17 written form," as an exception to hearsay rule.
18 I think that's particularly relevant when
19 Mr. Jamil is here in person to testify as to
20 what his testimony was.

21 THE COURT: Well, but the issue here is whether
22 they're prejudiced by its submission. I don't
23 think that rule's applicable. I've got myself
24 in the wrong section again.
25 There used to be a case, Crawford, State v.

1 Crawford, a long time ago that said if the
2 declarant was available for cross-examination,
3 the out-of-court statement of that declarant
4 could still be admitted into evidence. But I
5 thought it was -- are you from South Carolina?

6 MS. TODOROVA: No, but I've researched it.

7 THE COURT: What did she say?

8 MS. TODOROVA: I've researched it.

9 THE COURT: Oh. Was it Crawford?

10 MS. TODOROVA: I don't have the case name, but ...

11 THE COURT: Oh, well. But the -- now you've got me
12 off track. If the declarant was available for
13 cross-examination, the hearsay evidence could
14 still come into evidence. And I think the
15 Court recently adopted that thought process in
16 another case.

17 MR. GREEN: Your Honor, the notes to Rule 801
18 says --

19 THE COURT: Let me get to Rule 801. I don't know if
20 I'm going to have the notes.

21 MR. TRESH: Your Honor, as you're pulling up 801, I
22 would further note that this document was
23 provided to Counsel as part of -- in terms of
24 the prejudicial aspect, Counsel's been aware of
25 this document for sometime.

1 MR. GREEN: We reserved all objections, Your Honor,
2 other than authenticity.

3 THE COURT: Well, I figured that was coming. Okay.

4 MR. GREEN: If you look under the notes to 801, I
5 think it's in subsection (d)(1). It'd be the
6 third paragraph -- fourth paragraph under the
7 notes. "Subsection (d)(1) changes the law in
8 South Carolina. Previously, where the
9 declarant testified at trial" --

10 THE COURT: It is State v. Caldwell.

11 MR. GREEN: I think that's right.

12 THE COURT: Yeah.

13 MR. GREEN: "Previously, where the declarant
14 testified at trial and was subject to
15 cross-examination, the general rules of prior
16 statements by the declarant/witness were
17 admissible regardless of hearsay nature." In
18 other words, there was a change in the law when
19 this rule was adopted.

20 THE COURT: Any response?

21 MR. TRESH: Your Honor, the response would be that
22 even if this document were not admissible, it
23 would be an objection to the hearsay rule on
24 the grounds that it's not prejudicial.
25 Mr. Green certainly has the opportunity to

1 cross-examine Mr. Jamil and his --

2 THE COURT: I'm not familiar with the exception to
3 the hearsay rule that it's not prejudicial.
4 The hearsay rules exist because of the nature
5 of the prejudicial aspect of hearsay testimony
6 and that was developed in common law.

7 MR. TRESH: Under South Carolina statutes under
8 1-23-330(1) --

9 THE COURT: Oh, I understand.

10 MR. TRESH: -- concerning the admissibility of
11 evidence --

12 THE COURT: Yeah.

13 MR. TRESH: -- the prejudicial nature of the
14 testimony is -- can be considered by the Court.

15 THE COURT: And I'm considering it.

16 MR. TRESH: Yes, Your Honor.

17 THE COURT: So do you want to explain it any more to
18 me what your position on the -- on whether this
19 evidence should come in or not?

20 MR. TRESH: The evidence should --

21 THE COURT: I tell you what I'm going to do. I'm
22 going to let it come in. I want to do this as
23 a -- I guess I'm having a brain ... a proof
24 of ...

25 MR. TRESH: Offer of proof?

1 MR. GREEN: Proffer?

2 THE COURT: Offer of proof, yeah. And I'm going to
3 rule on it later because there's one case I
4 want to find first. I want to make sure,
5 because I'm familiar with State v. Caldwell.
6 I'm familiar with the rule change and I thought
7 the court later came back and adopted the
8 concept of State v. Caldwell. And I just want
9 to make sure I'm not wrong on that. But if I
10 don't find that case, I'm going to sustain your
11 objection.

12 MR. GREEN: Thank you.

13 MR. TRESH: Your Honor, before we make an offer of
14 proof on the document itself, a few questions
15 to Mr. Jamil in advance of the offer of proof.

16 THE COURT: Okay.

17 Q: Mr. Jamil, you've testified a moment ago that
18 you do and have for -- that you have provided
19 testimony to the South Carolina Public Service
20 Commission; is that correct?

21 A: Yes.

22 Q: And you've provided testimony on a number of
23 occasions?

24 A: Yes.

25 Q: And in the testimony that you've provided to

1 the Public Service Commission, how have you
2 described Duke's business?

3 A: As an energy service provider.

4 Q: Energy service provider. And have you
5 described that to the Public Service Commission
6 during your testimony under oath as an energy
7 service provider? Is that Duke's primary
8 business? Is that the manner in which you've
9 described it?

10 A: Yes, our primary business.

11 MR. TRESH: Okay. With respect to the offer of
12 proof, Your Honor, referring to the document
13 now.

14 (Petitioner's Exhibit Number Thirty-eight was
15 introduced as an offer of proof.)

16 Q: Mr. Jamil, if I could turn your attention to
17 page 26 of the document.

18 A: (Witness complies.)

19 THE COURT: When you finish the offer of proof, let
20 me know so I'll know I've moved off of that
21 phase.

22 MR. TRESH: Yes, Your Honor.

23 A: Yes, I'm there.

24 Q: Okay. There's a question that's entitled
25 "Please summarize your conclusions about Duke

1 Energy Carolinas' generation operations,
2 investment and cost management." You answered
3 the question. Can you take a moment to read
4 your answer?

5 A: Sure. The answer is, "In summary, Duke Energy
6 Carolinas continues to safely operate its
7 generation assets in a manner that
8 appropriately balances affordability,
9 reliability, and environmental stewardship.
10 Since 1991, we have invested approximately \$6
11 billion in our generation fleet for addition
12 and capital improvements necessary to safely
13 provide reliable electric service to our
14 customers in full compliance with NRC and
15 environmental requirements. Our operational
16 track record demonstrates that we have been
17 successful in the balance we have struck and
18 continue to strike on these key attributes."

19 Q: Thank you. And does that answer that you gave
20 in this testimony in 1991, would you say that
21 that would reflect your testimony in any of the
22 years at issue in this case regarding Duke
23 Energy's primary business?

24 A: Yes.

25 MR. TRESH: Okay. Your Honor, that concludes our

1 offer of proof --

2 THE COURT: All right.

3 MR. TRESH: -- offered to that document.

4 Q: Mr. Jamil, a few more questions. We were
5 talking a little bit earlier about storage of
6 electrical charges. Does the electric service
7 or the electromagnetic field that Duke provides
8 have any physical form to it?

9 A: No.

10 Q: And can the electric field or electromagnetic
11 field be seen in any way?

12 A: No.

13 Q: What would you say or how would you respond to
14 the -- to the comment that when I see lightning
15 in the air, I'm seeing electricity; is that
16 accurate?

17 A: No.

18 Q: Why not?

19 A: Well, what you're seeing, once again, is the
20 impact of intense electromagnetic energy, the
21 impact of that on the median that is preventing
22 it from connecting the circuit, basically.
23 So, putting it in simpler terms, what you're
24 seeing is the breakdown of the air molecules.
25 When they are faced with an intense

1 electromagnetic field, basically, those
2 molecules, air molecules, burn and you're
3 seeing the burning of the air molecules as --
4 as lightning. It's nothing more than that.

5 Now, again, there is an electromagnetic field
6 right now in this room and you're not seeing
7 it.

8 Q: And --

9 THE COURT: All right. Are you through?

10 MR. TRESH: Just two more questions, Your Honor.

11 THE COURT: Going back to the ruling now. I found a
12 case that I was talking about and now I see why
13 I wasn't quite clear. It's an Advance Sheet
14 for 2012, Advance Sheet 23. I don't have the
15 case name itself.

16 It was dealing with an expert opinion on facts
17 not in evidence and I'll read it real quickly.
18 It's interesting that the Court of Appeals put
19 two "however's" in one sentence. Makes me feel
20 better about my writing.

21 It says, "Here, McHenry was allowed to rely on
22 hearsay in his report when giving his expert
23 opinion. However, the admission of the report
24 simply because McHenry used it in forming his
25 expert opinion was in error. The report

1 contained many instances of hearsay, including
2 numerous statements by Scully."

3 And here's the kicker: "However, the admission
4 in evidence of inadmissible hearsay affords no
5 basis for reversal where the out-of-court
6 declarant later testifies at trial and is made
7 available for cross-examination."

8 Now, the problem with that case is, they don't
9 say it's properly admitted. They just say it
10 doesn't afford a basis for reversal.

11 So, any response from -- and I'll let you go
12 first -- well, you're the one that objected.

13 Any response to that?

14 MR. GREEN: Based on what Your Honor read and my
15 understanding of it, part of that sounds like
16 an application of the expert rule regarding
17 hearsay.

18 THE COURT: It was expert.

19 MR. GREEN: Whereas here we're just talking about
20 straight up 801. And the rule clearly says
21 this is hearsay; it's not admissible.

22 MR. TRESH: Your Honor --

23 MR. GREEN: And so just because you get down the
24 road and it may not be reversible error on
25 appeal doesn't mean it was the right decision

1 to introduce it in the first place.

2 THE COURT: I know.

3 MR. GREEN: And the right -- the right basis for
4 introducing it or not introducing it is the
5 rule.

6 MR. TRESH: Your Honor, I think what you just
7 read -- and I've been familiar with it --
8 reflects the proper policy --

9 THE COURT: I'm the most familiar with it,
10 apparently.

11 MR. GREEN: You are, Your Honor.

12 MR. TRESH: Yes, you are, Your Honor. But I do
13 believe it reflects sound policy in that the
14 purpose of excluding evidence under the hearsay
15 rule is because out-of-court statements made by
16 a declarant are -- the opposing party would not
17 have a chance to depose or contest the veracity
18 of those statements.

19 Here we have a declarant that's in present
20 person and able to be cross-examined.

21 THE COURT: I'm going to still cogitate upon this
22 because I recognize the import of this. I
23 recognize the purpose when the court originally
24 did State v. Caldwell. But I also recognize
25 the rules and the notes, so ...

1 MR. GREEN: And may I add this, Your Honor. This is
2 direct pre-filed testimony, which is -- Your
3 Honor is familiar with pretrial -- filed
4 testimony, I think, that's drafted by Duke.
5 It's filed by Duke. There's no
6 cross-examination in here. It's essentially
7 moving additional testimony into evidence other
8 than what he's saying here by just saying,
9 "Yes, I said that." I object to that.

10 MR. TRESH: He's here to be cross-examined and
11 Mr. Green certainly has that opportunity.

12 THE COURT: All right. Go ahead.

13 MR. TRESH: Thank you, Your Honor.

14 Q: Just a couple more questions, Mr. Jamil. A few
15 times during your testimony you've referred to
16 this electromagnetic field, the provision of
17 access to the field that Duke provides. Is
18 gravity a field?

19 A: Gravity is a -- is a force.

20 Q: It's a force. Is there something called a
21 gravitational field?

22 A: Yes.

23 Q: And is gravity a field in the same way that --
24 is a gravitational field similar or the same as
25 an electrical -- electromagnetic field?

1 A: Yes; in many ways it is.

2 MR. TRESH: Your Honor, no further questions.

3 MR. GREEN: Just a moment, Your Honor.

4 THE COURT: While he's -- can gravity be harnessed
5 as electricity can be harnessed or produced?

6 THE WITNESS: Well, so, Your Honor, if I take a book
7 that's sitting on the floor and I raise it to
8 a level and I move it off of the shelf, you
9 will see gravity in action.

10 THE COURT: I understand that, but I --

11 THE WITNESS: So -- so in a way you did enact the
12 force of gravity by some action that you took.

13 THE COURT: Well, can you increase gravity?

14 THE WITNESS: No.

15 THE COURT: Well, I guess in a centrifuge you use
16 gravity, but ...

17 THE WITNESS: Centrifuge is what you're thinking
18 about is harnessing the gravitational force to
19 perform work, yes.

20 THE COURT: Is electricity a matter that has
21 qualities?

22 THE WITNESS: Electricity is not a matter.

23 THE COURT: Okay.

24 THE WITNESS: It's an energy. So, I'm sorry, Your
25 Honor.

1 THE COURT: If it's not a matter, you don't have to
2 get to the second part of the question.

3 THE WITNESS: Yeah.

4 THE COURT: All right.

5 MR. JAMIL - CROSS-EXAMINATION BY MR. GREEN:

6 Q: Mr. Jamil, good afternoon.

7 A: Good afternoon.

8 THE COURT: Wait a second.

9 MR. GREEN: Bear with me a moment.

10 THE COURT: Mr. Green, you can proceed.

11 MR. GREEN: Thank you, Your Honor. Sorry, I'm just
12 trying to gather my thoughts; a slow process
13 for me.

14 THE COURT: That's a good idea to do.

15 Q: You've testified here today that the service
16 that Duke Energy provides -- and I may say
17 "Duke;" I may say "Duke Energy." I grew up in
18 the Upstate, so I'm familiar with Duke Energy.
19 You said Duke Energy provides access to the
20 electromagnetic field.

21 A: Yes.

22 Q: Is that correct?

23 A: That's correct.

24 Q: But what comes into my house through the meter.
25 is a current, isn't it?

1 A: (No response.)

2 Q: An electric current?

3 A: No, actually, when you say "current" --

4 "current" is one of several properties of the
5 electric -- electromagnetic field that we
6 provide. It's only one.

7 Q: It's only one?

8 A: Yeah. Voltage is another one, for example.

9 Q: Well, a meter measures current, doesn't it?

10 A: Yes, it does.

11 Q: An electric meter?

12 A: Yes, it does.

13 Q: And a meter -- electric meter measures voltage;
14 is that correct?

15 A: Well, no.

16 Q: Okay.

17 A: So a meter -- so let me back up and -- well,
18 maybe I should ask you to ask the question.

19 The answer is no, it doesn't measure voltage.

20 Q: It does not measure voltage?

21 A: No.

22 Q: It just measures current.

23 A: Yes.

24 Q: Nothing else?

25 A: Nothing else.

1 Q: Doesn't that meter measure kilowatts?

2 A: Yeah. So that meter -- actually, the work
3 that's being performed by the electromagnetic
4 field is, in fact, measured in watt. And watt
5 is nothing more than the product of voltage and
6 current, corrected to the right power factor.

7 Q: So the wattage is the power that I'm using,
8 correct?

9 A: Wattage is the power you're using, the
10 magnitude of the power. So since your house is
11 predominantly 120 volts, we measure the current
12 portion of the service, because the other one
13 is essentially constant.

14 Q: And if I flip on the light switch in my house,
15 I've completed a current, haven't I?

16 A: Yes, you have.

17 Q: And when I complete that current, my lightbulb
18 comes on.

19 A: Yes. You've completed a circuit, actually.

20 Q: Circuit, okay. But the current flows in to
21 create the circuit; is that correct?

22 A: That's right.

23 Q: And the current is flowing in through the meter
24 from the distribution and transmission system.

25 A: Yes.

1 Q: Is that correct?

2 A: Yes.

3 Q: And I think you've described a fairly elaborate
4 transmission and distribution system, if I've
5 heard your testimony correctly --

6 A: Yes.

7 Q: -- where there is a series of transformers,
8 some that step voltage up --

9 A: (Nods head affirmatively.)

10 Q: -- some that step down voltage; is that
11 correct?

12 A: That's correct.

13 Q: And between one of Duke Energy's generating
14 facilities and my home, there will be quite a
15 few transformers that step up and step down; is
16 that correct?

17 A: At least two, sometimes more.

18 Q: And I think you testified that the
19 electric -- and it's electric current on the
20 transmission lines; isn't that correct?

21 A: It's electromagnetic field. One of the
22 properties is current.

23 Q: Well, if --

24 A: So, in layman's terms, it's "current" but it's
25 "electromagnetic field."

1 Q: Okay. You're saying it's "electromagnetic
2 field;" a layman describes it as "current."

3 A: Yes..

4 Q: But there is, in fact, a current going down
5 that line, isn't there?

6 A: Yes, there is an electromagnetic field going
7 down that line..

8 Q: And isn't the electromagnetic field -- well,
9 there are two fields, aren't there, an electric
10 field and a magnetic field?

11 A: It's electromagnetic field. It's one field.

12 Q: There's not two fields?

13 A: Well, there is a magnetic field and there is an
14 electromagnetic field. Energy is transmitted
15 on the -- on our system, it's an
16 electromagnetic field.

17 Q: Okay. Well, let me ask you this. Then, if --
18 let me state it wrong -- if a charge is not
19 moving, there is an electric field; is that
20 correct?

21 A: There is a field. It's commonly sometimes
22 referred to as an "electric field," but it's a
23 charge.

24 Q: Okay. And then the electric --

25 A: And so it does not do work.

1 Q: It does not. And if electric charge is moving
2 in the form of a current, it creates a magnetic
3 field; isn't that correct?

4 A: It creates an electromagnetic field.

5 Q: Not just a magnetic field?

6 A: Not just a magnetic field.

7 Q: But the electromagnetic field results from the
8 moving current; is that correct?

9 A: Electromagnetic field is -- results -- ask the
10 question again.

11 Q: The electromagnetic field results from the
12 moving current; isn't that correct?

13 A: Well, not the moving current. It creates
14 oscillation of the electrons.

15 Q: Okay. And it creates oscillation of electrons.

16 A: Yes.

17 Q: And then an electromagnetic field results.

18 A: Yeah, that's right.

19 Q: Okay. But the current moves first, correct?

20 A: Well, it's --

21 THE COURT: If I could be clear, there is not the
22 existence of an electromagnetic field if there
23 is not current?

24 THE WITNESS: That is very correct and that is,
25 electromagnetic field, we -- we have defined it

1 with certain properties. One of those
2 properties is current; the other property is
3 voltage.

4 THE COURT: I get it.

5 THE WITNESS: So, commonly, people say "current,"
6 but it is only one component of the
7 electromagnetic field that we provide access
8 to.

9 Q: Okay. Now, in your --

10 (Noise interruption.)

11 THE COURT: All right. Here is my ruling. I let
12 Mr. Maybank get away with it the first time.
13 Normally I go with it on the first one. But
14 everybody check your phones because the next
15 time it rings it belongs to the Court and you
16 can get it back at a purchase price of which
17 the Court gets to name the purchase price.

18 (Noise interruption.)

19 UNIDENTIFIED SPEAKER: It's a laptop, Your Honor.

20 It's a new one and it's driving me crazy.

21 THE COURT: Oh, I want that to apply to a laptop.

22 Yeah, let me expand my ruling. The Court may
23 keep the laptop.

24 MR. GREEN: I've never had music play while I was
25 cross-examining a witness, so that is a first

1 for me.

2 THE COURT: You've never done that good of a job.

3 MR. GREEN: This is the first time you've heard me,
4 though, Your Honor.

5 Q: Your Exhibit Thirty-four, Mr. Jamil, if you
6 could refer to that.

7 A: (Witness complies.) I'm there.

8 Q: It doesn't refer to electromagnetic power, does
9 it?

10 A: Exhibit Thirty-four is my bio.

11 Q: Yes, and it doesn't refer to electromagnetic,
12 does it.

13 A: I don't believe it does.

14 Q: It also doesn't refer to services, does it?

15 A: I'd have to read the whole thing with the
16 intent of looking for the word "service," so I
17 have not done that.

18 Q: Well, at the bottom it says "Duke Energy" --
19 and, correct me if I read this wrong of the
20 last paragraph -- "Duke Energy, the largest
21 electric power company in the United States,
22 supplies and delivers electricity to
23 approximately seven million customers in the
24 Southeast and Midwest."

25 A: That's correct.

1 Q: "Supplies and delivers electricity," that
2 sounds like supplying and delivering a product.

3 A: I don't view it that way.

4 Q: Okay. And -- but it doesn't say the largest
5 electromagnetic power company in the world
6 supplies and delivers electromagnetic field,
7 does it?

8 A: No, the electric piece implies that.

9 Q: Okay. All right. So -- anyway, so electric
10 current is on the line and that is generated at
11 one of Duke Energy's several generation
12 facilities.

13 A: Yes.

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

16 A: Yes, we do.

17 Q: Now, let me ask you about a couple of those.
18 You have two nuclear plants in South Carolina;
19 is that correct?

20 A: Yes, we do.

21 Q: One at Catawba.

22 A: Two units at Catawba.

23 Q: And when I say one, I don't mean units. I'm
24 just saying a location.

25 A: Yes.

1 Q: And then there's a location at Oconee.

2 A: Yes.

3 Q: Is that correct?

4 A: That's correct.

5 Q: And then you have four fossil generation plants
6 in South Carolina.

7 A: Yes.

8 Q: And these plants -- you have some hydroelectric
9 generation plants, too.

10 A: Yes, we do.

11 Q: Is that correct?

12 A: Yes.

13 Q: You have three of those in South Carolina.

14 A: I believe that's right.

15 Q: All right. And those generation plants I've
16 just described, some are nuclear, some are
17 water, some are fossil generation plants, I
18 believe is the term you used; is that correct?

19 A: Yeah, and some combustion turbine.

20 Q: And some combustion. And those operate on
21 generally the same process; is that correct?

22 A: Combustion turbine is a different process than
23 the steam cycle.

24 Q: Okay. But the combustion process and the steam
25 cycle, they both turn a turbine?

1 A: Combustion does not have a turbine, so --

2 Q: Okay. But it turns the generator.

3 A: It turns the generator.

4 Q: Okay. And is the generator -- so all of these

5 share a generator in common; is that correct?

6 A: Yes.

7 Q: And the generator turns by -- it's the -- I

8 assume it's a fairly large machine; is that

9 correct?

10 A: Oh, yes.

11 Q: A mechanical device?

12 A: Yes.

13 Q: And then it creates a varying magnetic field?

14 A: Yes, it does.

15 Q: And then that generates the electricity?

16 A: That -- yes, that generates --

17 Q: And then that is -- I'll say "uploaded" --

18 that's probably not the term you used -- that

19 is uploaded to the transmission system.

20 A: It's connected to the transmission --

21 Q: Connected to the transmission system, that's

22 correct.

23 Now, I think you testified that the electricity

24 coming from the generator, so that you don't

25 lose significant portions of it between the

1 generation plant and my home, is you go through
2 the series of step ups and step downs that we
3 talked about; is that correct?

4 A: That is correct.

5 Q: And you can -- do you make reports to the
6 Public Service Commission about line loss
7 issues? And that is called "line loss," isn't
8 it, the loss of electricity during transmission
9 and distribution?

10 A: Yes.

11 Q: Do you make reports on the expected line loss?

12 A: I personally do not.

13 Q: Do you know if that's done?

14 A: I would be speculating.

15 Q: Well, you said you were familiar with the PSC
16 filing process.

17 A: Oh, yes, very familiar with that.

18 Q: So you would have an informed speculation.

19 A: I really don't know.

20 Q: Okay. All right. And -- but now the amount of
21 energy that's going to be lost through this
22 line loss process, that can be calculated,
23 correct?

24 A: Yes, it can be calculated.

25 Q: Mathematically?

1 A: It can be calculated mathematically.

2 Q: Okay. And all electric utilities have to
3 accommodate that issue; is that correct?

4 A: Everybody has to deal with that.

5 Q: Now, I think you said the current moving
6 involves electrons oscillating; is that
7 correct?

8 A: Electromagnetic energy moves through
9 oscillation of -- that's one method. There are
10 many other methods.

11 Q: Okay. But we were talking about -- you were
12 talking about oscillating electrons.

13 A: Yes.

14 Q: Is that correct? Electrons have mass, don't
15 they?

16 A: Yeah, electron has mass.

17 Q: And the speed or -- I would say "speed."

18 The -- you measure moving current -- you can
19 measure moving current, can't you?

20 A: You can measure current, so I don't understand
21 the concept of "moving current."

22 Q: Well -- and that's fair enough. The movement
23 of electric current is measured in amperes,
24 correct?

25 A: Yes.

1 Q: And the term "amperes" measures the amount of
2 electrons passing a single point in a second;
3 is that correct?

4 A: No, an "ampere" is actually the intensity of
5 the electromagnetic field.

6 Q: Well, an "ampere," isn't it the charge
7 pertaining to one electron?

8 A: No.

9 Q: Explain to me where I'm wrong, then.

10 A: I don't know where you're going with it.

11 Q: Well, I'm asking you -- you're telling me -- to
12 me, amperes measures the movement of electric
13 current.

14 MR. TRESH: Your Honor, objection.

15 THE WITNESS: No.

16 MR. TRESH: Is Mr. Green testifying or is Mr. Jamil?

17 THE WITNESS: I -- I --

18 THE COURT: Well, I can stop both. He's reasking --
19 he's asking the question again, but he asked a
20 question of him.

21 It's your duty to answer the questions that are
22 asked of you. So let's just start that
23 process.

24 THE WITNESS: Okay.

25 MR. GREEN: Okay. Let me try again.

1 THE COURT: If you don't understand a question --

2 THE WITNESS: Yeah, I don't understand the question.

3 MR. GREEN: And let me --

4 Q: The electric current -- a charge is moving as
5 part of electric current; isn't that correct?

6 A: No.

7 Q: Why is that not correct?

8 A: Electromagnetic field is imposed on the
9 electron and causes it to oscillate. That is
10 the way to transmit -- an efficient manner of
11 transmitting electromagnetic energy to another
12 location. Another way could be lightning, just
13 like we spoke about. There are other ways to
14 do -- to do that. This is one way of doing
15 that.

16 Q: This is one way.

17 A: So you propagate -- you propagate the
18 electromagnetic field through the oscillation
19 of electrons. So I think what you're confusing
20 is current with electromagnetic -- there is no
21 current moving.

22 Q: There is no current moving in your
23 transmission.

24 A: I'm not delivering current to you. I'm not
25 sending an electron from my plant to you.

1 Q: That's not what I --

2 A: The electron's already there.

3 Q: That's not what I asked you.

4 A: Okay. So ampere is one component of the
5 electromagnetic energy.

6 Q: Well, "ampere" is a measurement of the strength
7 of current, is it not?

8 A: Yes.

9 Q: And it's measured by the amount of electrons
10 passing a single point in a second, isn't it?

11 A: No. It's the intensity of the electromagnetic
12 field.

13 Q: So it's not the intensity of the current.

14 A: It is the intensity of the current, the same
15 thing.

16 Q: Okay. So it is the intensity of the current.

17 A: Yes.

18 Q: Okay. And it's measured in coulombs, isn't it?

19 A: No.

20 Q: I may have mispronounced it, too. Don't --

21 A: "Coulomb" is the measure of the charge. It is
22 another property -- unit property of the
23 charge.

24 Q: All right. It's a measurement of the charge.

25 A: Yes.

1 Q: And electric current moves a charge, I think we
2 said, right?

3 A: Oscillates the charge.

4 Q: Okay. And --

5 THE COURT: You said oscillates?

6 THE WITNESS: Oscillates.

7 THE COURT: In one form of -- but it can be other
8 forms where it doesn't.

9 THE WITNESS: Yeah, that's right.. There are other
10 forms that do -- to do this. It doesn't have
11 to be by oscillating an electron.

12 THE COURT: Is the only way that Duke Energy
13 accomplishes this goal by oscillation?

14 THE WITNESS: Yes.

15 Q: Let's go back -- let's go back. I think you've
16 defined this several times as electromagnetic
17 energy, correct? Or electromagnetic field; is
18 that correct?

19 A: I did not understand the question.

20 Q: I apologize. I think you've defined this
21 several times as you provide access to the
22 electromagnetic field.

23 A: Yes.

24 Q: Is that correct? You've also defined it as
25 electromagnetic energy; is that correct?

1 A: Yes.

2 Q: And so you defined what I use to power the
3 lightbulb in my house as electromagnetic
4 energy; is that correct?

5 A: That is the impact of the electromagnetic
6 energy on that device.

7 Q: Okay. And that's what I use to power that
8 device.

9 A: Yeah.

10 Q: Now, the electromagnetic energy that you're
11 defining, that's different than kinetic energy?

12 A: Yes.

13 Q: And it's different than mechanical energy; is
14 that correct?

15 A: Yes.

16 Q: Kinetic energy won't power my lightbulb, will
17 it?

18 A: Not in pure form, it does not.

19 Q: And the same with mechanical energy, that would
20 not in its pure form --

21 A: That would not --

22 Q: -- power my --

23 A: No.

24 Q: -- lightbulb. Now, you will -- you -- you and
25 I did a deposition together; is that correct?

1 Do you recall that?

2 A: Yeah, we did.

3 Q: I took a deposition from you earlier this year;
4 is that correct?

5 A: Yes, I do remember.

6 Q: Do recall making a statement in that deposition
7 that you can touch electricity?

8 A: I don't recall.

9 Q: Okay. Would it help to see the deposition to
10 refresh your recollection?

11 A: If you say it is, then --

12 MR. GREEN: May I approach, Your Honor?

13 THE COURT: You may.

14 Q: There at the bottom.

15 A: (Reading.)

16 Q: It is on page 39.

17 MR. GREEN: Y'all have it?

18 A: The question says, "Am I touching electricity?"
19 Is that the question?

20 Q: Yes.

21 A: And the answer I gave was, "Absolutely not."

22 Q: Okay. Well -- and then what did you say
23 after -- right after that?

24 A: I said -- it reads as, "You're -- well, you're
25 touching electricity, yes, but you cannot feel

1 electricity."

2 Q: Okay. So at that time you did say you could
3 touch electricity; isn't that correct?

4 A: Yes, I did.

5 Q: Okay. Thank you. Now, I think we -- I'm
6 bouncing around. I'll try to walk you back to
7 where I am now. I think we talked a little bit
8 about the power in my house being measured
9 in -- excuse me, watts or kilowatts; is that
10 correct?

11 A: Yeah, watt hours is what we talked about.

12 Q: Watt hours.

13 A: Yeah.

14 Q: But now a lightbulb uses a different level of
15 electricity than my air conditioner; is that
16 correct?

17 A: Yes, and it's all watts.

18 Q: I mean, if I -- so, for instance, if I operate
19 a lightbulb for an hour, that uses
20 electricity -- less electricity than running my
21 air conditioner for one hour.

22 A: That's right.

23 Q: Now, I think you talked about the lightning and
24 you said that is not seeing electricity. And
25 if there is a downed power line and there is an

1 arc from that power line, power line is
2 severed, that -- your testimony is that is not
3 seeing electricity; is that correct?

4 A: No.

5 Q: But that is the path that the electricity
6 follows.

7 A: Yes.

8 Q: Okay. And I think you focused a little bit in
9 your testimony today on the conversion process
10 that goes on in your generation facilities; is
11 that correct?

12 A: Yep.

13 Q: And what you're after in that conversion
14 process is mechanical energy to create electric
15 energy; is that correct?

16 A: Not necessarily. You know, on -- not
17 necessarily.

18 Q: Okay. But you are -- you are after electric
19 energy, correct?

20 A: Yes, we're in the business of providing
21 electric energy service.

22 Q: And I think we said mechanical energy by itself
23 won't operate a lightbulb; is that correct?

24 A: That's correct.

25 Q: Now, a lot of your generation facilities use a

1 turbine; is that correct?

2 A: (Nods head affirmatively.)

3 Q: Not all of them.

4 A: Many of them do.

5 Q: Many of them.

6 A: Yeah.

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

10 A: Not significantly.

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

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

17 Q: Used technology --

18 A: Yeah.

19 Q: -- and things like that?

20 A: Different material --

21 Q: Is that correct?

22 A: Yeah.

23 Q: But the basic process is the same.

24 A: Basic process is the same.

25 Q: And I think you said that it had been

1 determined that was the most efficient method
2 of delivering electric energy to customers; is
3 that correct?

4 A: I'm sorry, I must have misunderstood. Are you
5 speaking about the generation or the --

6 Q: Well, now I'm onto the generation, transmission
7 and distribution system.

8 A: Yeah, that's the most efficient method.

9 Q: Okay. Now, Duke Energy can't produce unlimited
10 electricity, can it?

11 A: Can you repeat it? I'm sorry.

12 Q: I'm sorry, I think I was turning away from you.
13 I apologize. Duke Energy can't produce
14 unlimited electric energy, can it?

15 A: No.

16 Q: It's limited by the capacity of the generators
17 it has; is that correct?

18 A: That's right.

19 Q: Now, when Duke Energy constructs transmission
20 lines, you have many miles of transmission
21 lines; is that correct?

22 A: That is correct.

23 Q: And they carry very high voltages; is that
24 right?

25 A: Yes.

1 Q: And these high voltages create the
2 electromagnetic field; is that correct?

3 A: No.

4 Q: Well, let me withdraw that question. You have
5 an electromagnetic field accompanying these
6 transmission lines; is that correct?

7 A: Yes.

8 Q: And there is electromagnetic -- is there
9 electromagnetic radiation associated with this?

10 A: Sure, yes.

11 Q: And are your transmission lines -- do you do
12 anything with how the transmission lines are
13 strung to offset the electromagnetic radiation?

14 A: I don't understand the question.

15 Q: Well, do you -- do you --

16 MR. GREEN: Can I turn on this device, the drawing
17 part?

18 THE COURT: Yeah.

19 (Off the Record)

20 Q: Excuse me, Mr. Jamil. I apologize for the
21 delay. Transmission lines have more than one
22 circuit running on the transmission tower; is
23 that correct?

24 A: That's right.

25 Q: Sometimes two; is that correct?

1 A: That's right.

2 Q: Sometimes three?

3 A: I'm familiar with two.

4 Q: Okay. You often run two. And are these -- the

5 circuit will run so that, for instance, on the

6 tower, part of it's on one side and part of

7 it's on the other; is that right?

8 A: That's right. Uh-huh (affirmatively responds).

9 Q: And then if you have two, you may run them like

10 that (drawing); is that correct?

11 MR. TRESH: Your Honor, if I may, I don't think we

12 can -- or at least I can't see it.

13 MR. GREEN: Oh, I apologize.

14 MR. TRESH: Thank you.

15 MR. GREEN: I'm not doing that on purpose.

16 Q: Then you would run them like that (drawing).

17 A: That could potentially be -- well, that's not

18 necessarily the way it would need to be done.

19 Q: Okay. And you do them other ways?

20 A: Yeah, they could be done other ways.

21 Q: And, for instance, do you sometimes -- so like

22 this would be "A" and this would be "A" and

23 this would be "B" and this would be "B"

24 (drawing); is that correct?

25 A: No. I am -- I'm not sure that it is done that

1 way.

2 Q: All right. Fair enough. I withdraw that line.

3 Now, I think you've mentioned in your direct
4 testimony these solar panels; is that correct?

5 A: That is correct.

6 Q: And, in fact, Duke Energy has a solar
7 generation plant outside of Charlotte; is that
8 correct?

9 A: That -- yeah, solar site outside of Charlotte.

10 Q: And -- but that was created about 2002, wasn't
11 it, or later?

12 A: Later.

13 Q: Okay. And you talked a little bit about the
14 flat fee for the lighting; is that right?

15 A: Yes.

16 THE COURT: Mr. Green?

17 MR. GREEN: Yes, sir.

18 THE COURT: We're going to have to take a short
19 break.

20 MR. GREEN: Okay.

21 THE COURT: I have ran out of ink.

22 MR. GREEN: We can give you a pen but happy to take
23 a break, Your Honor.

24 THE COURT: Thank you very much. I tell you what,
25 let's just take a five-minute break for

1 everybody.

2 MR. GREEN: Okay.

3 (Off the Record from 3:05 to 3:16 p.m.)

4 THE COURT: All right. You're still under oath.

5 THE WITNESS: Yes.

6 MR. GREEN: Thank you, Your Honor. I think we were
7 talking about the ...

8 THE COURT: Solar panels.

9 Q: Solar panels. And I think, then, we were on --
10 I was going to head to the flat fee for
11 lighting. Do you recall your testimony about
12 it?

13 A: Yes.

14 Q: And you said that -- you testified that that
15 was a -- you provided that -- you made that
16 available for a flat fee.

17 A: Yes.

18 Q: Does that generate a significant amount of Duke
19 Energy's revenues?

20 A: It generates some revenue. I wouldn't be able
21 to tell you whether it's significant or not.

22 Q: Do you -- one of the lights they were talking
23 about, I think, is the -- I believe it was
24 described as an outdoor light, that's dusk to
25 dawn lighting --

1 A: Yes.

2 Q: -- with photocell control; is that correct?

3 A: That --

4 Q: And I'm referring to Exhibit Thirty-three.

5 A: Yes.

6 Q: I apologize. And depending on the hours, Duke
7 Energy would have an idea of how much that
8 light will consume, correct?

9 A: Not entirely correct, because we really can't
10 control some environmental conditions that will
11 play a significant factor in this.

12 For example, this morning, I am sure that
13 light, wherever it's used, ran at least one
14 hour or maybe more longer than on a sunny. I
15 don't know how it was in Columbia, but in
16 Charlotte it was very cloudy and that plays
17 into -- there's a significant amount of
18 variability in the amount of time that a light
19 like that would operate.

20 Q: Of course, average weather conditions can be
21 estimated, can't they?

22 A: I don't think so.

23 Q: You don't think so?

24 A: No.

25 Q: You can't make an estimate of the average

1 weather conditions?

2 A: We will make an estimate, but more so than not
3 we'd be wrong.

4 Q: And so -- but you will -- you'll make an
5 estimate and consider that as part of the
6 pricing for the outdoor lighting?

7 A: Yes. You would make an assumption about what's
8 reasonable and there's variables in that.

9 Q: And I think you testified -- I think I did ask
10 you this before. You testified that some --
11 you're familiar with the PSC in South Carolina
12 and North Carolina.

13 A: Yes.

14 Q: Does the PSC worry about Duke Energy losing
15 revenues?

16 A: Yes, they would.

17 Q: Now, I want to go a little bit back. I'm not
18 sure I understood your testimony. I think you
19 told me that as part of the electric bill
20 there's a facilities charge; is that right?

21 A: Well, it's a capacity charge.

22 Q: Capacity charge?

23 A: Yes.

24 Q: And that's a flat fee?

25 A: Yes.

1 Q: And then there is -- you testified there was a
2 fuel charge?

3 A: It's -- we call it the "energy charge," which
4 is the fuel charge, basically.

5 Q: Isn't it called a "fuel charge" by the PSC?

6 A: Yes, there's fuel hearings.

7 Q: Are those the two components of my bill?

8 A: Yes.

9 Q: And the energy charge varies by the amount of
10 power that I use?

11 A: Yes.

12 Q: And the capacity charge, that's a fairly
13 minimal rate, isn't it?

14 A: No.

15 Q: What is the capacity charge?

16 A: It depends on your usage.

17 Q: Okay. A residential.

18 A: Yeah, it's -- it's -- a significant portion of
19 your bill is the capacity charge.

20 Q: And when you say "significant," what do you
21 mean?

22 A: Well, it depends on if you don't use
23 electricity, it's a hundred percent of your
24 bill.

25 Q: Okay. So it's significant. Is it -- I mean,

1 Mr. Tresh -- I don't think you ever testified.

2 Mr. Tresh mentioned a hundred dollars. Is it
3 that high?

4 MR. TRESH: Objection, Your Honor. I did not
5 testify the capacity charge was a hundred
6 dollars.

7 MR. GREEN: I recall Mr. Tresh -- the record
8 reflects what it reflects. I recall him
9 mentioning a hundred dollars.

10 MR. TRESH: Your Honor, I used an example of an
11 electric bill of a hundred dollars. I didn't
12 say --

13 MR. GREEN: Okay. And maybe I misunderstood. If I
14 did, I apologize.

15 Q: But I recall a fee of a hundred dollars. Is
16 the facilities charge -- is the capacity charge
17 that high?

18 A: No, it would be less than that.

19 Q: Would it be less than 50 dollars?

20 A: It depends -- again, it depends on the customer
21 class. It depends on the portion of the --
22 your bill that is energy portion. There are
23 variables to -- I can't tell you what
24 percentage it is and I can't tell you the
25 amount of it because it varies from class to

1 class.

2 Q: Okay.

3 A: But it is -- suffice it to say, it's a
4 significant portion of your bill.

5 Q: Well, I want to explore that with you just a
6 little bit.

7 A: Yeah.

8 Q: Let's just talk about a residence, since that's
9 what most of us probably are familiar with.

10 You do not know what the capacity charge is for
11 a residence for a month?

12 A: I don't have that information.

13 MR. TRESH: Your Honor, he's asked -- Mr. Green has
14 asked the same question three times.

15 THE COURT: I didn't hear the answer, so ...

16 MR. TRESH: He said he doesn't know, Your Honor.

17 THE COURT: I overrule your objection.

18 Q: Could you repeat your answer?

19 A: I don't know.

20 Q: You don't know? Thank you. So you don't know
21 if it's over 50, under 50? You don't know.

22 A: The only thing I can tell you about it is, it
23 represents all the assets that we built, all
24 the iron on the ground, all the equipment, and
25 it is a significant portion of what we do.

1 The core business is to provide electricity
2 through installation of an infrastructure.

3 That charge represents that massive
4 infrastructure.

5 Q: But the amount of it you don't know, you
6 testified to.

7 A: No, that's really not my area.

8 Q: I think you testified that you sometimes
9 purchase electricity from other utilities; is
10 that correct?

11 A: Yes.

12 Q: How is that electricity measured?

13 A: It is -- well, it depends. The most common
14 way, of course, is megawatts.

15 Q: Okay. And that is -- represents megawatts of
16 electric power that is transferred from another
17 utility to you.

18 A: Yes.

19 Q: And then you transfer that to your customers.

20 A: Yes.

21 Q: Okay. And you've testified that Duke Energy
22 provides a service; is that correct?

23 A: Yes.

24 Q: Do you think it's common to transfer a service
25 in terms of megawatts? Let me strike that. Do

1 you think it's common to transfer a service?

2 A: I'm not familiar with other services. I am
3 really familiar with my service.

4 Q: Okay.

5 A: And my service it's very common.

6 MR. GREEN: Bear with me a moment, please, Your
7 Honor. Beg the Court's indulgence. Sorry,
8 Your Honor, I have a lot of different paper I'm
9 trying to juggle.

10 Q: Now, "electricity," Mr. Jamil, is not really a
11 scientific term, is it?

12 A: It's not the precise term, but it is a
13 scientific term.

14 Q: Did your college physics textbooks talk about
15 electricity?

16 A: Absolutely.

17 Q: Not just electric energy?

18 A: All of the -- all of the above terms were used.

19 Q: Do college physics textbooks talk about
20 electromagnetic energy?

21 A: Yes.

22 Q: Your college classes -- strike that. Strike
23 that.

24 MR. GREEN: Bear with me one moment, Your Honor.

25 I think that's all I have of this witness, Your

1 Honor.

2 Thank you, Mr. Jamil.

3 THE COURT: Redirect?

4 MR. TRESH: Yes, Your Honor. Thank you.

5 MR. JAMIL - REDIRECT EXAMINATION BY MR. TRESH:

6 Q: Mr. Jamil, Mr. Green started in his

7 cross-examination, he was talking about

8 electricity when he was a Duke Power customer

9 in the Upstate. I think I was a SCANA customer

10 when I was in law school here in South

11 Carolina.

12 What happens if SCANA or Duke or any electric

13 service provider gave me current but no

14 voltage, could you provide electric service?

15 Is that possible?

16 A: No.

17 Q: What if I got voltage but no current?

18 A: No, that's not possible.

19 Q: Could Duke Energy provide me -- or SCANA, as

20 the case may be -- could you provide electric

21 service if you got rid of your distribution

22 system?

23 A: No.

24 Q: Could you provide electric service if you got

25 rid of your transmission system?

1 A: No.

2 Q: Could you provide electric service if you got
3 rid of your generation assets?

4 A: Yes.

5 Q: Would Duke Energy get any receipts? Would it
6 receive any money at all if it had its
7 distribution and transmission assets and bought
8 power from somewhere else and sold me electric
9 services, would it still -- could it still earn
10 the same amount of receipts, money?

11 A: Maybe not the same amount, but could certainly
12 make a decent revenue since there are several
13 companies that way --

14 Q: Would it --

15 A: -- utility companies.

16 Q: I'm sorry.

17 A: There are several utility companies that have
18 exactly the model you just described.

19 Q: So there's several electric utilities that have
20 transmission and distribution, they buy their
21 power elsewhere, don't generate a thing and
22 they're -- are those companies still considered
23 to be primarily in the business of providing
24 electric service?

25 A: Yes.

1 Q: And Duke Energy is, in your view, primarily in
2 the business of providing electric service; is
3 that correct?

4 A: Yes.

5 Q: Mr. Green asked you some questions around how
6 you calculate things. I think he said amperes
7 and kilowatts per hour. Can you calculate
8 electricity, I think he might have said. Can
9 you measure or calculate sunlight, the amount
10 of sunlight?

11 A: You can measure and calculate the -- some
12 properties of sunlight.

13 Q: In much the same way that you can measure --

14 A: Same as you do with electromagnetic, you can
15 measure some properties of electromagnetic
16 field or energy.

17 Q: Can you measure or calculate the wind?

18 A: You can measure or calculate some properties of
19 wind.

20 Q: Okay. And would you think of wind or sunlight
21 as tangible personal property?

22 A: No.

23 Q: Mr. Green also mentioned "line loss." Can you
24 explain to the Court what "line loss" is?

25 A: Sure. As you impose electromagnetic field on

1 a wire and the electrons, that are already on
2 the wire, they oscillate. When they oscillate,
3 they collide with atoms and that friction
4 generates heat, just regular heat, and that
5 heat is energy.

6 And given that energy cannot be created, cannot
7 be destroyed, it's just redistributed. We've
8 just redistributed some of the electromagnetic
9 energy that we harnessed from another form of
10 energy into -- portions of it went into heat.
11 So we've lost it for the useful use of
12 customers.

13 Q: So the term "line loss" in a way, "loss" is
14 sort of a misnomer. Do you lose anything?

15 A: You never lose anything. The amount of energy
16 is constant.

17 Q: It's just the amount of usable energy that you
18 can deliver to your customer that decreases
19 because some of it evaporates into heat; is
20 that correct?

21 A: That's right. And it exists in our universe.
22 It just converts into a different form.

23 Q: So it's -- you're not creating energy; is that
24 correct?

25 A: No, no one creates energy.

1 Q: You don't lose any energy in the term "line
2 loss."

3 A: You do not lose energy.

4 Q: Mr. Green mentioned something about electrons.

5 Does Duke Energy make electrons?

6 A: No.

7 Q: Does Duke Energy sell electrons?

8 A: No.

9 Q: I'd like to turn to your attention to your
10 deposition, specifically page 39, line 20 --
11 beginning at line 23 of the question Mr. Green
12 asked around, "Am I touching electricity?" I
13 believe you said -- your answer was,
14 "Absolutely not. You're -- well, you're
15 touching electricity, yes, but you cannot feel
16 electricity." Was that your testimony?

17 A: It was my testimony.

18 Q: Can you further go on to page 40 and can you
19 read beginning with line two? Do you have a
20 copy of that?

21 A: I don't have a copy of it.

22 Q: Oh, I'm sorry. Can you, again, reading from
23 line two through line 16, please?

24 A: Okay. So continuing: "How can I touch
25 electricity but not feel it?" "A good

1 example" -- the answer is: "A good example of
2 that would be, have you ever seen a bird
3 standing on a power line?" "Yes."

4 "So that bird is touching the wire where the
5 electric field is taking place, its property;
6 yet, the bird is not feeling anything. In
7 fact, if you suspend yourself or, you know, if
8 I suspend myself from that same wire, I'd be
9 holding onto the wire where electricity is
10 flowing in the form of electric field, but I
11 would not be feeling anything. So electricity,
12 you cannot see it and you cannot feel it."

13 Q: Okay. Thank you. And so let me ask the
14 question again. Can you touch electricity?

15 A: No.

16 Q: Spent a little bit of time talking about solar
17 energy. Can you operate a lightbulb with
18 sunlight?

19 A: No.

20 Q: Can you operate a lightbulb with solar energy?

21 A: Yes.

22 Q: Taking a step back. How can you
23 describe -- we've talked a lot about the
24 properties of electricity and how it's
25 transmitted. How -- in your words, how have

1 you represented -- how does Duke earn its
2 money? What does it do?

3 A: We provide access to an electric field. Maybe
4 saying even more basic, we convert one form of
5 energy into electromagnetic energy and we
6 provide access to customers to it.

7 Q: And that's what Duke gets paid to do. That's
8 its primary business; is that correct?

9 A: That is our primary business.

10 Q: And it gets paid to provide access -- to
11 provide this electric service; is that correct?

12 A: Yes, that is correct.

13 MR. GREEN: Objection, leading.

14 Q: What does Duke Energy get paid to do?

15 A: We get paid to provide access to our customers
16 to that electric field.

17 Q: Mr. Green asked a question about the electric
18 business in the twenties, I believe. If I go
19 back to the 1920's, could you have purchased
20 electricity for resale? Were there resellers,
21 folks that just generated electric power and
22 sold it to others, to your knowledge?

23 A: I am not knowledgeable -- in the 1920's you're
24 talking about?

25 Q: Yeah.

1 A: I can't answer that.

2 Q: Okay. In the 1920's was there nuclear power?

3 A: No.

4 Q: Was there solar power?

5 A: No.

6 Q: Did South Carolina Public Service Commission
7 regulate utilities at that time, do you know?

8 A: I don't know. I would imagine it did.

9 Q: Was there competition, to your knowledge, among
10 electric service providers?

11 A: No.

12 Q: Okay. And was there any obligation to provide
13 service to all paying customers, to your
14 knowledge?

15 A: If there was a service commission, then the
16 answer to that is "yes."

17 MR. TRESH: Okay. No further questions, Your Honor.

18 THE COURT: Re-cross on new matters.

19 MR. GREEN: No re-cross, Your Honor. Thank you.

20 THE COURT: All right. Where my notes can be clear,
21 then, you said "line loss" is the conversion of
22 electricity into heat?

23 THE WITNESS: Yes, sir.

24 THE COURT: Is that right? Okay. Let me make sure.

25 Mechanical energy is used to create

1 electricity?

2 THE WITNESS: Could you repeat that, if you don't
3 mind, Your Honor?

4 THE COURT: I mean, I know --

5 THE WITNESS: Mechanical energy?

6 THE COURT: You testifying -- you were testifying
7 about means of producing electricity.

8 THE WITNESS: Yes.

9 THE COURT: And one was mechanical energy is used to
10 create electricity?

11 THE WITNESS: Yes. So a form of that would be --
12 hydroelectric is mechanical, movement of water.

13 THE COURT: Well, the nuclear facilities would
14 use ...

15 THE WITNESS: Well, so the distinction I would make
16 there is, nuclear energy is transformed into
17 heat first.

18 THE COURT: Is that -- and that's steam?

19 THE WITNESS: And that heat produces steam --

20 THE COURT: And that --

21 THE WITNESS: -- that creates mechanical energy --

22 THE COURT: Okay.

23 THE WITNESS: -- in the turbine.

24 THE COURT: And that would be the same with the
25 fossil plants, too?

1 THE WITNESS: Yes.

2 THE COURT: Okay. You said that there are various
3 properties of electromagnetic field that comes
4 in the house. One of the properties is current
5 and the other is voltage?

6 THE WITNESS: Yes.

7 THE COURT: All right.

8 THE WITNESS: Now, there are many other properties.

9 THE COURT: Oh, more than that?

10 THE WITNESS: Yes.

11 THE COURT: Okay.

12 THE WITNESS: There are many other properties, but
13 the useful ones to allow us to identify the
14 intensity of that field is voltage and current.
15 There are other things like power factor.

16 THE COURT: Well, I'll just change my notes to "the
17 useful properties are current and voltage."

18 THE WITNESS: Yeah. The others are useful, but
19 these are the most useful for your use, so --

20 THE COURT: Ah! Okay. Now the "most" useful
21 properties.

22 THE WITNESS: Yes.

23 THE COURT: All right. That's the follow-up
24 questions. Any questions on what I have asked?

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

1 MR. GREEN: No, sir, Your Honor.

2 THE COURT: You may step down.

3 (Witness excused.)

4 THE COURT: 3:30.

5 MR. GREEN: And Mr. Tresh and I just discussed and I
6 think we will -- it would be a good time to
7 call Mr. Joe Southard, so I will call him to
8 the stand.

9 THE COURT: Okay. While we're waiting, can you give
10 us your name?

11 THE WITNESS: My name is Joseph Pemberton Southard.

12 THE COURT: Spell that last --

13 THE WITNESS: S-O-U-T-H-A-R-D.

14 JOSEPH SOUTHARD, having been duly sworn, testifies
15 and examines as follows:

16 MR. SOUTHARD - DIRECT EXAMINATION BY MR. GREEN:

17 Q: What are you presently doing, Mr. Southard?

18 A: I am retired from the Department of Revenue.

19 Q: Is that all you're doing right now?

20 A: I am reactivating my private pilot licence here
21 at Owens Field.

22 Q: You're getting ready to solo?

23 A: Yes.

24 Q: You're not nervous about that?

25 A: No. I've done it before.

1 Q: Would you rather --

2 A: Just that I haven't done it in about 40 years,
3 so ...

4 Q: Would you rather solo or testify?

5 A: I'd rather solo, personally.

6 Q: How many years did you work for the Department
7 of Revenue, Mr. Southard?

8 A: Twenty-five.

9 Q: And what position did you hold -- what year did
10 you start with the Department, excuse me?

11 A: 19 -- July of 1986, I think.

12 Q: What position did you hold with the Department
13 during your time?

14 A: I was a foreign corporate sales tax auditor and
15 a foreign corporate income tax auditor.

16 Q: And did you ever conduct audits of electric
17 utilities as part of your employment?

18 A: Yes.

19 Q: And were you ever involved in a corporate
20 income tax or examination -- auditor
21 examination of Duke Energy involving the years
22 1994 to 2001?

23 A: Yes.

24 Q: And what role did you play in that examination?

25 A: I was -- I assisted the main auditor.

1 Q: Okay. And who was the main auditor?

2 A: Randy Wilson.

3 Q: And did you ever do audits of Duke -- did you
4 ever do any other audits for other years for
5 electric utilities, without going into
6 particulars?

7 A: Yes.

8 Q: Did you understand the Department to have a
9 position regarding the treatment of electric
10 utilities for apportionment purposes?

11 A: Yes.

12 Q: What did you understand that position to be?

13 A: They were to be treated as manufacturers of
14 electricity and, as such, they were required to
15 file the three-factor formula, which then
16 changed to the four-factor formula or
17 double-weighted sales.

18 Q: How did you become aware of the Department --
19 how were you made aware of the Department's
20 position?

21 A: Through OJT, reading manuals on how to do an
22 electric utility.

23 Q: And what is "OJT"?

24 A: On-the-job training.

25 Q: And were you ever given any documents or

1 classes or anything of the like?

2 A: Yes.

3 Q: Okay. I'm going to show you --

4 MR. GREEN: Let me mark this, I apologize.

5 (Off the Record)

6 Q: I'm going to show you what's been marked as

7 Respondent's One. Do you recognize this

8 document?

9 A: Yes, I --

10 MS. TODOROVA: Excuse me, Your Honor. We object.

11 We believe that this is a hearsay.

12 MR. GREEN: It is just a manual going to the

13 Department's position. It's not going to the

14 truth of whether they should be treated that

15 way. It is just simply a reflection of the

16 Department's position, as part of the training

17 that he got, as part of a manual that was

18 provided to him by the Department of Revenue.

19 MS. TODOROVA: Your Honor, if I may.

20 MR. GREEN: It's not truth of the matter asserted.

21 MS. TODOROVA: It is for the truth of the matter,

22 Your Honor. You will hear testimony from

23 Mr. Green and Mr. Southard as to the contents

24 of the manuals, so it is an out-of-court

25 statement presented for the truth of the

1 matter. And it's a hearsay. It doesn't fall
2 under any exceptions.

3 THE COURT: Well, I can -- if your theory was
4 correct, that I'm going to hear testimony about
5 the content of the record, then "not offered
6 for the truth of the matter asserted" would
7 never be a theory in which somebody could
8 utilize because there would always be referring
9 to the document and, therefore, that would
10 subsume the rule, so --

11 MS. TODOROVA: But --

12 THE COURT: There must be some nuances there that --
13 of which I must rule upon.

14 MS. TODOROVA: Correct. I mean, this document, it's
15 not dated and it's not clear by whom it was
16 prepared. And Mr. Southard is going to testify
17 about this document, so we believe it's
18 hearsay.

19 MR. GREEN: He's going --

20 THE COURT: That would be whether it's authentic.

21 MR. GREEN: Correct, and we've waived objections to
22 authenticity.

23 MS. TODOROVA: Well --

24 MR. GREEN: But he can talk about he got it in the
25 context of his training and his employment and

1 that he received it from the Department. He
2 can make that testimony.

3 THE COURT: So what is this specifically offered
4 for?

5 MR. GREEN: To show --

6 THE COURT: If it's not offered for the truth of the
7 matter asserted, it must be offered for
8 something.

9 MR. GREEN: It is offered to show that the
10 Department had a policy. It's not to show the
11 accuracy of that policy. There's really no way
12 to show that policy. I mean, then no written
13 document could show the policy, then you could
14 never prove the Department policy.

15 MS. TODOROVA: Your Honor, this is exactly --

16 MR. GREEN: Let me --

17 MS. TODOROVA: Oh, I'm sorry. I didn't realize you
18 were not finished, Mr. Green.

19 MR. GREEN: It is just to show the Department's
20 policy was how treating electricity companies
21 for apportionment purposes. It's not to show
22 the accuracy of that thing. It's not to show
23 that it was correct under the statute; we
24 contend it was, but it doesn't show that. It
25 just shows the Department had a policy. If you

1 can't show a writing about the Department's
2 policy --

3 THE COURT: Oh, I thought he was saying something on
4 the other side. Okay.

5 MR. GREEN: I may have said that and it's not what I
6 meant. I'm just saying a writing is a way to
7 prove that there was the policy.

8 THE COURT: I understand.

9 MR. GREEN: It's not the accuracy of the policy or
10 the correctness.

11 THE COURT: I understand.

12 MR. GREEN: So that's how we submit it.

13 THE COURT: All right. For the existence of the
14 policy.

15 MR. GREEN: Existence of the policy.

16 THE COURT: Any response?

17 MS. TODOROVA: We still believe that it's hearsay.

18 I mean, it is offered for the fact that this is
19 the Department's policy. And I understand that
20 there's no other document that would indicate
21 the Department's policy; however, that is not
22 our concern.

23 THE COURT: Well --

24 MS. TODOROVA: The Department --

25 THE COURT: -- the problem with that is the

1 definition of "hearsay."

2 MS. TODOROVA: Uh-huh (affirmatively responds).

3 THE COURT: And so thinking through the definition
4 of "hearsay," which is offered for the truth of
5 the matter asserted --

6 MS. TODOROVA: Correct.

7 THE COURT: -- and they're saying it's not offered
8 for the truth of the matter asserted but the
9 existence of the policy, I overrule the
10 objection.

11 MR. GREEN: Thank you, Your Honor.

12 Q: I'm sorry, I may backtrack on you,
13 Mr. Southard, and I apologize.

14 A: That's okay.

15 Q: Do you recognize this document?

16 A: Yes.

17 Q: And what is this document?

18 A: It's an Income Tax Division Foreign Corporate
19 Training Manual.

20 Q: And do you recall the appearance of that
21 document?

22 A: The one I saw when I was there was red in
23 color.

24 Q: And would this look like the document that you
25 saw originally?

1 A: Yes.

2 Q: And have you seen this document before?

3 A: Yes.

4 Q: And is the copy that you have that's introduced
5 as an exhibit, is that exactly the same as this
6 provision here?

7 A: Yes.

8 MR. GREEN: Thank you, Your Honor. I move the
9 introduction of Respondent's One into evidence.

10 THE COURT: You maintain your objection, I assume?

11 MS. TODOROVA: Yes, please.

12 THE COURT: Then it's admitted it over that
13 objection.

14 MR. GREEN: Thank you, Your Honor.

15 (Respondent's Exhibit Number One was admitted into
16 evidence.)

17 Q: In what context did you become aware of
18 Respondent's One?

19 A: (No response.)

20 Q: In what context did you become aware of that
21 document? How did you become aware of that
22 document?

23 A: When I became a foreign corporate income tax
24 auditor and in my initial training for this
25 type of entity --

1 Q: Okay.

2 A: -- business.

3 Q: I'm sorry.

4 A: In this type of business entity, electrical.

5 Q: Okay. Were you aware of this document before
6 this present litigation that we're here for
7 today?

8 A: Yes.

9 Q: And did you refer to that document during your
10 employment?

11 A: Yes.

12 Q: Let me refer you to page 37 of that document.

13 A: Okay.

14 Q: And do you see where it says "power company"?

15 A: Yes.

16 Q: And would you read that, please?

17 A: "Power company: A power company is considered
18 to be a manufacturer and must use the
19 three-factor formula."

20 Q: To your knowledge, is that how the Department
21 treated power companies for apportionment
22 purposes?

23 A: Yes.

24 Q: Are you aware of any challenges to that
25 Department position, other than that posed by

1 Duke Energy?

2 A: No.

3 MR. GREEN: Thank you, Your Honor. I have no
4 further questions.

5 THE COURT: Any questions?

6 MR. SOUTHARD - CROSS-EXAMINATION BY MR. TRESH:

7 Q: Good afternoon, Mr. Southard.

8 A: Good afternoon.

9 Q: How are you?

10 A: I'm wonderful.

11 Q: I have a couple of questions for you.

12 A: All right.

13 Q: When you were at the Department, did you have
14 any supervisory responsibilities?

15 A: No.

16 Q: And who did you report to while you were at the
17 Department?

18 A: Do you want the name of the individual or ...

19 Q: The title of the person you reported to.

20 A: Foreign -- foreign sales tax supervisor and
21 foreign income tax supervisor.

22 Q: Did you receive any --

23 A: Corporate income tax.

24 Q: Corporate income tax supervisor. And did you
25 receive any training while you were at the

1 Department? You mentioned you were there for
2 how long, I'm sorry?

3 A: Twenty-five years.

4 Q: Twenty-five years. What type of training did
5 you receive?

6 A: I received training in sales tax and I received
7 training in corporate income tax and I received
8 training in property taxes.

9 Q: What type of training? What form did that
10 training take?

11 A: Going out with an auditor, reading the law as
12 applicable to what I was doing, whether it
13 would be foreign income tax or foreign sales
14 tax or property tax.

15 Q: Anything else?

16 A: And reading manuals that were provided and
17 reading the law that was applicable for each
18 case.

19 Q: Sure. And after you read the law and you read
20 the manuals, part of your job was to make
21 determinations on whether taxpayers were
22 following the law --

23 A: Yes.

24 Q: -- as part of your audits? So -- and you made
25 those determinations in the regular course of

1 your business?

2 A: Well, we were auditing the return.

3 Q: You were auditing the return. So you would
4 make determinations as to the validity of the
5 return?

6 A: Yes.

7 Q: And you made those determinations as part of
8 your regular responsibilities as an auditor.

9 A: Yes.

10 Q: Is that correct?

11 A: Yeah.

12 Q: And as an audit supervisor, correct?

13 A: I was not an audit supervisor.

14 Q: Just an auditor.

15 A: Just an auditor.

16 Q: Okay. Got it. Did you ever receive any
17 training on any kind of industry specialization
18 or, you know, specialized industry training?

19 A: I didn't get specialized industry training.
20 There were -- like in this particular -- you'd
21 talked a little bit about the different
22 entities, types of entities: power companies,
23 service companies.

24 Q: Who talked a little bit about power companies
25 and service companies?

1 A: Well, this particular -- this manual.

2 Q: Okay. So the manual talked a little bit about
3 service companies and power companies?

4 A: Yeah, you had to make a determination of
5 whether they sold tangible personal property or
6 not.

7 Q: Okay.

8 A: And that would determine the apportionment
9 method.

10 Q: So to determine the apportionment method, you
11 had to make a determination as to whether they,
12 the taxpayer, sold tangible personal property
13 or not.

14 A: Right.

15 Q: Okay. And -- okay, and so that was the test.
16 Did you ever receive any specialized training
17 in the nature or character of electricity?

18 A: No.

19 Q: Okay. Was the audit method that you used
20 different depending upon the industry the
21 taxpayer was in when you audited?

22 A: The audit -- I don't quite understand your
23 question. The audit method?

24 Q: Yeah, so -- so you said that you had to make
25 determinations. One of the ways that you

1 determined as to whether how somebody would
2 file, whether they were selling tangible
3 personal property or something else, right,
4 that would dictate an apportionment method?
5 And so my question is: Did you ever receive
6 any -- did your review of what audit method
7 they used, did that vary by the type of
8 taxpayer? In other words, how could you
9 determine what the taxpayer should do?

10 A: We would look at the taxpayer, find out what
11 business he was involved in, and then from that
12 make a determination that he was either filing
13 the correct apportionment method or the
14 incorrect apportionment method and then we
15 would make adjustments.

16 Q: Got you. You were asked to come and testify
17 regarding the Department's policy relative to
18 the treatment of electric utilities for income
19 tax purposes; is that correct?

20 A: Yes.

21 Q: Who sets -- who sets the Department of
22 Revenue's policies regarding corporate income
23 taxes and how to apportion revenue for South
24 Carolina?

25 A: Legislature.

1 Q: Do they set the policy?

2 A: Well, the powers that be way above me would set
3 the policy.

4 Q: Who would that be?

5 A: The director, the -- probably the managers.

6 Q: And how would they set that policy?

7 A: I guess they would interpret what the
8 Legislature passed and what the law says.

9 Q: Uh-huh (affirmatively responds). And did you
10 do that as part of auditing taxpayers, as well?

11 A: Well, I didn't write it down, if that's what
12 you're saying. You have to -- you have to look
13 at what the law says and if you don't quite
14 understand it, then you would ask your
15 supervisor, "What does this mean? What does
16 that mean?"

17 Q: I guess the question I asked in -- earlier in
18 your testimony you said that you reviewed the
19 law and you reviewed --

20 A: Uh-huh (affirmatively responds).

21 Q: -- a manual and then you made determinations in
22 terms of looking at the returns whether
23 adjustments were warranted. Then I asked with
24 respect to Department policy who set Department
25 policy and you said, well, no, the Department

1 folks above you. I think you said --

2 A: Right.

3 Q: -- the director and others would set the
4 Department policy.

5 A: I --

6 Q: Did you make the policy or did --

7 A: I don't get in to make the policy.

8 Q: Okay.

9 A: I was an auditor.

10 Q: So you would make a determination.

11 A: That would be people that would be above me
12 that'd make policy.

13 Q: So you would make a determination based upon --

14 A: I would make a determination based on the
15 policy.

16 Q: Okay. How did you become aware of the
17 Department's policies, generally? How did that
18 get communicated to auditors like yourself?

19 A: Written -- written documentation, verbally;
20 mostly written.

21 Q: And what forms would that --

22 A: I mean --

23 Q: What forms would that writing take in addition
24 to this manual? Is this manual the only --

25 A: Manuals.

1 Q: What else?

2 A: The law.

3 Q: No, I didn't ask about the law. I asked, the
4 Department director sets policy.

5 A: Uh-huh (affirmatively responds).

6 Q: And you said -- I asked how you were made aware
7 of those policies and you said in writing. Is
8 there any other writing that would reflect --
9 typically reflect the Department's policies?
10 Would there be emails? Would there be letters?
11 Would there be memos?

12 A: Oh, yeah, emails, letters, those types of
13 things.

14 Q: And, to your knowledge --

15 A: Sessions. Sessions that we would have when the
16 law would change that we would have. They
17 would go over the law changes.

18 Q: Who would go over the law changes?

19 A: People at the Department of Revenue. I can't
20 tell you who, specifically.

21 Q: Would this be a meeting? Is it a --

22 A: Yeah, it would be a meeting. They'd pass out
23 pamphlets. And you would be only concerned
24 with your area of expertise.

25 Q: Okay. And so -- so we would have meetings and

1 then we would have memos or emails or bunch of
2 writings that would -- and that was the way we
3 communicated or the Department communicated the
4 policy down to the auditors who were
5 responsible for auditing the returns; is that
6 correct?

7 A: Right.

8 Q: Okay. And in the context of electric
9 utilities, you said you've audited a couple.
10 Are you aware of any meetings that took place
11 around how electric utilities should be treated
12 for South Carolina income tax purposes?

13 A: No.

14 Q: Are you aware of any emails --

15 A: Well ...

16 Q: -- that were transmitted regarding how
17 utilities --

18 A: No.

19 Q: -- should be taxed?

20 A: No.

21 Q: Any internal memorandum?

22 A: Other than this manual.

23 Q: Other than the manual. Any internal
24 memorandum?

25 A: No.

1 Q: Anything at all other than that manual?

2 A: Other than my training from experienced
3 auditors.

4 Q: Your training from experienced auditors, let's
5 talk about that. What type of training was
6 that?

7 A: That was on-the-job training.

8 Q: On-the-job training. And did one of those
9 experienced auditors tell you that electric
10 power companies sold tangible personal
11 property?

12 A: Yes.

13 Q: Who was that?

14 A: Randy Wilson.

15 Q: Okay. You mentioned that the Department's
16 policies are sometimes in writing and you
17 referenced this revenue -- the manual you have
18 in front of you.

19 A: (Nods head affirmatively.)

20 Q: Are those manuals made public at all? Are they
21 communicated to anybody?

22 A: I don't know the answer to that.

23 Q: Okay. Are you aware of any instance -- in the
24 course of your audit of electric utilities, did
25 you ever provide that manual to an electric

1 utility that you audited?

2 A: No, it wasn't necessary.

3 Q: Why is that?

4 A: Never asked for it.

5 Q: Okay. Did you ever otherwise communicate in
6 writing to any electric utility that you
7 audited what the Department's policies
8 regarding electricity were?

9 A: No.

10 Q: Did the Department ever communicate that, not
11 just to the public, but to an electric utility,
12 their policy on how electric utilities should
13 be taxed?

14 A: I can't answer that. I assume that they did.

15 Q: Oh, okay. Does the Department issue
16 regulations on how taxpayers ought to be taxed
17 or ought to file their returns for corporate
18 income tax purposes?

19 A: Yes.

20 Q: They do so, typically? Is that something they
21 oftentimes do?

22 A: They issue a lot of regulations each year.

23 Q: Did they ever issue a regulation with respect
24 to how electric utilities are taxed?

25 A: I -- I don't know. If they did, I can't

1 remember it.

2 Q: A moment ago you told me that you were assigned
3 to audit, not just one electric utility, but
4 you audited a number of electric utilities.
5 You said your training was on-the-job training
6 with a review of the law and written
7 pronouncements by the Department of Revenue.

8 A: Uh-huh (affirmatively responds).

9 Q: Are you aware of any regulation that the
10 Department issued on this point? I mean,
11 surely you would have read it if it would have
12 been issued.

13 A: Other than this, no.

14 Q: Is that manual a regulation?

15 A: No.

16 Q: Okay. So you're not aware of any regulation
17 the Department issued regarding utilities,
18 despite the fact that they issue multiple
19 regulations every year.

20 A: No.

21 Q: Okay. Does the Department regularly issue
22 other policy documents, like Revenue Rulings or
23 Private Letter Rulings?

24 A: Yes.

25 Q: The Department -- are you aware of any policy

1 document that the Department of Revenue issued
2 with respect to the treatment of electric
3 utilities for income tax purposes?

4 A: No, not off the top of my head.

5 Q: Not of the top of your head. Would you have --

6 A: There may be but I couldn't tell you what it
7 was.

8 Q: Would you have had -- would it would be --
9 would it be in the normal course or scope of
10 your duties before auditing a taxpayer in a
11 certain industry to look into not just the
12 revenue manual but whether or not there have
13 been rulings or other pronouncements from the
14 Department of Revenue with respect to how that
15 taxpayer should be taxed?

16 A: Yes.

17 Q: Okay. And so that would have been part of your
18 duties. But you're unaware of any ruling or
19 policy or any information of any type --

20 A: No.

21 Q: -- that the Department would have issued other
22 than that manual?

23 A: No.

24 Q: And to the best of your manual -- best of your
25 knowledge, that manual's never been provided to

1 any of the electric utilities?

2 A: Not that I'm aware of.

3 Q: Okay. Department of Revenue has a taxpayer
4 education group; is that correct?

5 A: Yes.

6 Q: And does that education group put on seminars
7 for taxpayers?

8 A: I think they do.

9 Q: Are you aware of any seminar that the
10 Department of Revenue ever communicated this
11 policy on how it taxed --

12 A: No.

13 Q: -- electric utilities?

14 A: No.

15 Q: Okay. And the DOR frequently places materials,
16 informational bulletins to taxpayers on their
17 website. Are you aware of anything on the
18 website when you were employed as an auditor
19 that would have communicated to the taxpayers
20 what the Department's policy was with respect
21 to the taxation of utilities?

22 A: Run that by me ...

23 Q: Are you aware -- the Department --

24 A: I know they published policies on their
25 website, but there's a lot of policies they've

1 published. And they probably -- I really -- I
2 can't answer it directly. They probably do,
3 but I can't say for sure.

4 Q: When you were an auditor, if the Department of
5 Revenue had published a policy on how a type of
6 client -- a type of company that you were
7 auditing ought to be taxed, when you were an
8 auditor would you have made yourself familiar
9 with that policy --

10 A: Yes.

11 Q: -- published by the website? And so in the
12 course of auditing not just one utility, but
13 more than one utility, did you ever become
14 aware of any policy that --

15 A: No.

16 Q: -- the Department published on the website?

17 A: No.

18 Q: Okay. You testified a moment ago that electric
19 utilities like Duke Energy, power -- I think
20 you said "power producers."

21 A: (Nods head affirmatively.)

22 Q: Electric power producers were in the business
23 of -- were to be taxed as manufacturers. I
24 think that's what you testified, is that
25 right --

1 A: Correct.

2 Q: -- as using the three-factor formula?

3 A: Correct.

4 Q: Okay. And do you know why? Why that -- why
5 the Department made that policy in this manual?

6 A: I can speculate why, but

7 Q: Sure.

8 A: If that's what you want me to do.

9 Q: Yes, please.

10 A: Because they are considered a manufacturer of
11 electricity and, as such, a manufacturer is
12 required to file -- and when I initially
13 started with the Department of Revenue -- as a
14 three-factor entity.

15 Q: You said a moment ago that the reason why Duke
16 Energy was taxed as a -- under the three-factor
17 formula was because it sold tangible personal
18 property. Is it that because they sold
19 tangible personal property or because there
20 were a manufacturer?

21 A: Well, as a manufacturer that sold tangible
22 personal property.

23 Q: Okay. And how is that determination made? So
24 let's say for a moment that I have a taxpayer
25 that's in two businesses. How would I

1 determine -- if I had this side electric
2 utilities -- if I had a taxpayer that made
3 chairs and provided accounting services, how
4 would you determine what method that taxpayer
5 ought to file their income tax returns under?

6 A: I'd have to look at his revenue source, revenue
7 stream, to see where the majority of his
8 revenue came from.

9 Q: Okay. And so the test would be based upon
10 where the majority of the revenue was?

11 A: In that case, yes.

12 Q: Okay. And if Duke Energy, the majority of
13 their revenue -- if I told you that the sale --
14 that electricity, the sale of electric service
15 was indeed a service, and the majority of
16 revenue that Duke Energy received was from the
17 sale of that electric service, would you
18 conclude that they should file using the gross
19 receipts method?

20 MR. GREEN: Objection. He's asking a hypothetical
21 question. This witness is not an expert.

22 MR. TRESH: The witness is -- was an auditor for 20
23 years and has said that he is -- he was
24 responsible for the audits of --

25 THE COURT: Well, if you want to have him qualified

1 as an expert, that would be a different story.

2 MR. TRESH: I'm just asking based on his experience
3 how he would treat a taxpayer in multiple
4 businesses.

5 THE COURT: Well, you can ask him that.

6 MR. GREEN: But he --

7 THE WITNESS: But I answered --

8 MR. GREEN: He loaded the question with
9 hypotheticals --

10 THE COURT: I understand.

11 MR. GREEN: -- and I objected.

12 MR. TRESH: I'll move on. Strike the question, Your
13 Honor.

14 Q: Mr. Southard, you -- a moment ago you asked --
15 you were speaking about revenue. You said
16 that, you know, in my -- in the example you, in
17 your experience, would determine where the
18 revenue came from; is that correct?

19 A: Correct.

20 Q: Okay. How would you find revenue?

21 A: Income stream from the sale of the product.

22 Q: Or the service?

23 A: Or the service.

24 Q: Okay. I'm going to talk for a moment about the
25 corporate training manual in front of you. Did

1 you use that manual on a regular basis?

2 A: Not on a regular basis, depending on your
3 definition of "regular." I read it, but once
4 you -- once you become acclimated as an
5 auditor, you have a good understanding of the
6 law. In fact, you even took the law with you
7 so you could remember specific things. But I
8 wouldn't take this with me on an audit.

9 Q: Why did you conclude, then, that Duke Energy
10 was in the business of selling tangible
11 personal property if you didn't have the manual
12 with you? Is the manual the sole basis for
13 your conclusion?

14 A: My understanding when I became a corporate --
15 foreign corporate income tax auditor that power
16 companies were considered to be manufacturers
17 of electricity and, as such, they should file
18 the three-factor formula. That was my
19 training. I wasn't in any position to say
20 otherwise.

21 Q: You testified a moment ago that you made
22 independent judgments. You would review the
23 law and then you would make a judgment about a
24 taxpayer's return.

25 A: Right..

1 Q: Why did you --

2 A: I would make a determination of what their
3 business was. You have to make -- you have to
4 look at what their business is. What are they
5 involved with? Are they selling tangible
6 personal property? Then they would file the
7 three-factor and now the four-factor
8 double-weighted sales formula.

9 Q: Read back the testimony. I think earlier you
10 testified that you made determinations of the
11 law, not just what the business the taxpayer
12 was in. Did you not say that?

13 A: I don't remember what I said exactly.

14 Q: Can we read that back? You said four minutes
15 ago that you --

16 A: I try to make --

17 Q: -- make determinations of the law. Is that --

18 A: Well --

19 Q: Is that correct or not correct?

20 A: I guess if I -- okay.

21 Q: Did you make -- well, let me ask it again. Did
22 you make determinations -- did you make an
23 independent evaluation of the law as part of
24 your responsibilities as an auditor?

25 A: Yes.

1 Q: And did you make an independent evaluation of
2 the law as part of your responsibilities in the
3 audit of Duke Energy's amended returns, their
4 refund claims?

5 A: Yes.

6 Q: And so what was the basis in your -- what did
7 you base in the law or what portions of law did
8 you base your opinion on that Duke Energy was
9 in the business of selling tangible personal
10 property?

11 A: They're a manufacturer of electricity.

12 Q: Does it say --

13 A: The State has always looked at the utilities as
14 manufacturers, those that manufacturer
15 electricity as manufacturers --

16 Q: Does it --

17 A: -- and, as such, you file three-factor or
18 four-factor double-weighted sales formula. Or
19 now I think it's gross receipts. I think this
20 year or last year it changed.

21 Q: Does it say that in the law anywhere?

22 A: Does it say what in the law?

23 Q: That electric -- that power producers are
24 sellers of tangible personal property?

25 A: Not specifically, I don't think it does.

1 Q: Does the law imply that?

2 A: Yes.

3 Q: Which section?

4 A: Under the -- the three-factor formula,

5 manufacturer. They're considered a

6 manufacturer.

7 Q: Okay. So that was your determination. So you

8 read the section of the law -- let's look --

9 let's take a look at that for a second.

10 A: Well, I ...

11 MR. TRESH: Give me one moment, Your Honor.

12 I'm going to hand him a copy of 12-6-2250.

13 MR. GREEN: That's fine. My objection would be, I

14 don't know if this was the version in effect

15 during the years in question.

16 MR. TRESH: I'm handing him --

17 MR. GREEN: That's the only question that I have.

18 MR. TRESH: I'm handing him a version of 12-6-2250.

19 MR. GREEN: It was amended several times after '95.

20 2006, 2007. I don't remember the particular

21 language changes that occurred after that and

22 so ...

23 MR. TRESH: The first section of the -- I'm fairly

24 certain, Your Honor, it was materially the same

25 in terms of the first section of 12-6-2250(A).

1 THE COURT: You can ask him about it. You're not
2 offering it into evidence, are you?

3 MR. TRESH: No, I'm not.

4 Q: Mr. Southard, I'd like you to take a look at
5 12-6-2250(A). As Mr. Green pointed out, this
6 is the 2011 version, but my recollection is
7 it's substantially the same as the one in
8 effect during the time periods at issue. Do
9 you recall this statute?

10 A: Yes.

11 Q: Is this the statute that you decided that Duke
12 Energy was a seller of tangible personal
13 property under?

14 A: When you say "I" determined it, through my
15 training is -- and they were always considered
16 a manufacturer of electricity. So, obviously,
17 I would -- if they filed a three-factor, that
18 would be the correct method.

19 Q: You said a moment ago that you made an
20 independent determination of the law.

21 A: Yes.

22 Q: You said --

23 A: When I was auditing other taxpayers.

24 Q: And you said --

25 A: I did a whole bunch of taxpayers. I just

1 didn't do electric utilities.

2 Q: In the context of Duke Energy, I believe you
3 said that you made an independent determination
4 of the law, correct?

5 A: Yes.

6 Q: And I asked you whether the law stated that
7 Duke Energy sold -- that electric power
8 producers sold tangible personal property and
9 you said the law implied it.

10 A: (Nods head affirmatively.)

11 Q: And so then I asked you if this is the section
12 of the law that implied it and I believe you
13 said "yes."

14 A: Yes.

15 Q: Can you point out which section of the law
16 implies that a power producer is a seller of
17 tangible personal property, which part of that?

18 A: "A."

19 Q: And you agree this is the section that you
20 believe implies that?

21 A: "Taxpayer whose principal business -- whose
22 principal business in this state is
23 manufacturing or a form of collecting, buying,
24 assembling or processing goods and materials
25 within this state" -- you want me to read the

1 whole thing?

2 Q: Well, is there a particular piece that you
3 think was relevant to the determination of what
4 a power producer is -- their primary business
5 was?

6 A: "Manufacturing, selling, distributing, dealing
7 in tangible personal property within this
8 state."

9 Q: Would you agree that Duke Energy's primary
10 business was the sale of electric service?

11 A: No.

12 Q: What would it be -- what would be your
13 characterization of their primary business?

14 A: They are a manufacturer of electricity.
15 Distribution is simply an aspect of it.

16 Q: Distribution is an aspect of it.

17 A: Aspect.

18 Q: Aspect of it, okay. So if Duke Energy created
19 electricity and didn't do anything with that
20 electricity, if we eliminated the transmission
21 and distribution functions, could it earn any
22 money?

23 A: No.

24 Q: Okay. Mr. Southard, I'd like to point your
25 attention to page 23 of the revenue manual.

1 A: Twenty-three, okie-dokie.

2 Q: All right. If you turn to the bottom of page
3 23 and if you could read the sentence beginning
4 "This part of the manual..."?

5 A: "This part of the -- this part of the manual
6 addresses itself to the two additional
7 apportionment formulas provided for by law for
8 computing the taxable income or ordinary
9 corporations dealing in some manner in tangible
10 personal property and those corporations whose
11 principal business in this state is
12 dealing"

13 Q: And can you go on to the next page and read
14 the --

15 A: "...dealing in intangible property or
16 services."

17 Q: Would you agree that it was the Department's
18 long-standing policy that if a business was
19 primarily engaged in the provision -- in
20 selling services --

21 A: Uh-huh (affirmatively responds).

22 Q: -- that they should file using the single gross
23 receipts tax method during the period at issue?

24 A: Correct.

25 Q: Okay. And if their primary business was the

1 provision or the sale of tangible personal
2 property, they would file using the
3 three-factor method?

4 A: Correct.

5 Q: And that was the Department's long-standing
6 policy.

7 A: Yes.

8 Q: And so under the Department's long-standing
9 policy, it would be necessary to interpret
10 exactly what the taxpayer was selling, right?

11 A: Correct.

12 Q: Okay. Do you recall what the policy would have
13 been for telecommunications providers,
14 Mr. Southard?

15 A: Policy for tele -- they were selling a service.

16 Q: Okay. And was there any -- ever any regulation
17 or do you know why the Department created that
18 policy? Why the Department determined that
19 telecommunication providers were selling a
20 service?

21 A: Telephone was considered a service.

22 Q: Okay. So telephone is considered a service;
23 electricity was considered tangible personal
24 property.

25 A: They're providing the ways and means of

1 communication.

2 Q: Okay. Ways and means of communication, okay.

3 In terms of the Department's long-standing
4 policy that we just talked about, primary
5 business, how would you test for primary
6 business? What was the Department's
7 long-standing policy in terms of how it would
8 test for primary business?

9 A: How it would test for primary?

10 Q: Would you use receipts, profits, costs?

11 A: Oh, receipts.

12 Q: You'd use receipts?

13 A: (Nods head affirmatively.)

14 Q: Did you ever use profit?

15 A: No.

16 Q: Okay. It was always based on receipts?

17 A: Always based on receipts.

18 Q: Okay. I'm going to give you a copy of what's
19 been entered as Exhibit Number Twenty-nine.

20 This is the Final Agency Determination issued
21 by the Department.

22 A: Okay.

23 Q: I'm going to direct your attention to page
24 three.

25 A: Page three, okay.

1 Q: And I'm going to ask you to read the last
2 sentence on that page, begins "thus"?

3 A: Oh, okay, way down here. "Thus, while the
4 taxpayer is correct that it provides a service,
5 its service is statutorily defined as tangible
6 personal property."

7 Q: So if -- if the taxpayer was correct, that it
8 provides a service, and you testified that
9 anybody that provides a service -- whose
10 primary business is providing a service would
11 apportion its income using the single-factor
12 method --

13 A: Uh-huh (affirmatively responds).

14 Q: -- why was Duke Energy denied a refund claim?

15 A: Why were they denied a refund claim?

16 Q: Why were they denied a refund? In other words,
17 if they were correct, as this document issued
18 by the Department says, that they provide a
19 service --

20 A: Uh-huh (affirmatively responds).

21 Q: -- and you testified that any -- it's the
22 Department's long-standing policy that any
23 taxpayer whose business is more than 50 percent
24 from -- revenue from providing a service, why
25 was Duke Energy, in your view, required to file

1 using a three-factor formula?

2 A: Well, I mean, if that's -- the State looks at
3 electric utilities as manufacturers of
4 electricity and, as such, they file the
5 three-factor or four-factor formula.

6 Q: Now, you testified --

7 A: They claim that they should be treated as a
8 service provider, which would require the gross
9 receipts formula.

10 Q: Mr. Southard, a moment ago you said that the
11 Department had a long-standing policy that if
12 you sold a service and your business was more
13 than 50 percent selling services, you would be
14 required to file using the single-factor
15 method.

16 A: But --

17 Q: This document issued by the Department says
18 that Duke Energy is correct that it sells a
19 service. Why would it not be required, then,
20 to file using the single-factor formula? Why
21 would it be different than all other taxpayers?

22 MR. GREEN: Your Honor, I object. He needs to ask
23 one question and it needs not to be a compound
24 question. I object on that basis.

25 MR. TRESH: I'll withdraw and restate, Your Honor.

1 Q: Why would Duke Energy -- if Duke Energy
2 provides a service, why would Duke Energy be
3 required to file using three-factor?

4 A: Because they are a -- they are a manufacturer
5 of electricity.

6 Q: Is it true that you testified a moment ago that
7 if you -- if your business was more than -- if
8 you earned your revenue from providing services
9 more than 50 percent based on revenue, that the
10 Department's long-standing policy would require
11 you to file using single-factor?

12 A: Correct. That's ...

13 Q: So what is the -- why is the -- why is whether
14 Duke is or is not a manufacturer irrelevant?
15 You said the Department's long-standing policy
16 was.

17 A: Yes, that's -- that's been the Department's and
18 the State's long-standing policy, that electric
19 utilities are treated as manufacturers of
20 electricity. That's their main business,
21 primary business, and if that's their primary
22 business, then it should be filing the
23 three-factor or four-factor formula in this
24 time period.

25 Q: So in all the taxpayers you've audited,

1 corporate income taxes --

2 A: Yes.

3 Q: -- I believe you testified that if they sold
4 services, they were single-factor, if they sold
5 tangible personal property, they were
6 three-factor; is that correct?

7 A: Well, if the majority of the revenue came from
8 the selling -- for instance, a movie theater,
9 they sell -- what do they sell? They sell
10 tickets.

11 Q: Uh-huh (affirmatively responds).

12 A: But they also sell popcorn, peanuts, candy,
13 drinks --

14 Q: Sure.

15 A: -- hot dogs, whatever.

16 Q: Yeah.

17 A: So if I was going to audit the movie company,
18 I'd look at the revenue, where the majority of
19 the revenue came from. And if it was tangible
20 personal property, then it would be -- you
21 would have to file under the three-factor
22 formula. If it was from tickets, you would
23 have to file for the gross receipts --

24 Q: So --

25 A: -- because you're providing a service.

1 Q: Earlier there was testimony that during this
2 time period Duke sold appliances. If you
3 looked at their revenue, Duke Energy's revenue,
4 and it turns out that more than half of it was
5 from selling appliances, you would say they
6 were a seller of tangible personal property and
7 should file three-factor, correct?

8 A: Yes.

9 Q: If all other taxpayers -- and you would
10 agree -- or would you agree that Duke Energy's
11 primary business is the sale of electricity?

12 A: Yes.

13 Q: Okay. Why -- what is special -- if the
14 Department acknowledges here that the taxpayer
15 provides a service, that's what this says, why
16 was a power producer special in that all other
17 taxpayers who earned the majority of their
18 revenue from providing a service were taxed on
19 a single-factor formula and power producers
20 were three-factor?

21 A: I'm trying to formulate how I'm going to
22 answer.

23 Q: Absolutely.

24 A: I mean --

25 Q: Please take your time.

1 A: Again, I reiterate that the State of South
2 Carolina considered manufacturers of --
3 utilities that manufactured electricity or
4 created electricity were manufacturers and, as
5 such, they were to file under the three-factor
6 formula.

7 Q: You testified a moment ago that you would agree
8 that Duke Energy's primary business was the
9 sale of electricity, right? That's what I
10 believe you said a second ago.

11 A: Yes.

12 Q: Okay. If Duke Energy were a
13 manufacturer -- well, you've testified that
14 Duke Energy -- strike that. You testified that
15 Duke Energy -- the reason why you've made your
16 conclusion is Duke Energy is a manufacturer.
17 But you've also said that their primary
18 business was the sale of electricity.
19 If the Department believes that electricity is
20 the sale of a service, which is what this
21 document says, right? It says, "Thus, while
22 the taxpayer is correct that it provides a
23 service..."

24 MR. GREEN: Objection, Your Honor, asked and
25 answered.

1 MR. TRESH: Withdrawn.

2 THE COURT: Mr. Tresh, if it's helpful at all, I
3 recognize the determination is important, but
4 ultimately this is a de novo hearing. This
5 Court will make the determination.

6 MR. TRESH: Yes, Your Honor. If I could just take
7 just one second. I don't believe we have any
8 other questions.

9 Just a few more questions, Your Honor.

10 Q: So your testimony here today is the only
11 document that you're aware of that states that
12 electric utilities should file as manufacturers
13 is this training manual; is that correct?

14 A: Power companies. It says "power companies."

15 Q: Power producers, thank you. Let's turn to the
16 training manual for a second.

17 A: Okay.

18 Q: If you can turn to page 24. I'm sorry, excuse
19 me, page 38.

20 A: Thirty-eight, okay. All right.

21 Q: I believe this section -- you can take a look
22 at it -- it describes the Department's policy
23 for license taxes with respect to what sales of
24 electricity are, service or intangible; is that
25 correct?

1 A: Yes. I haven't read it in a long time, so ...

2 Q: Okay. Take your time.

3 A: What section are you concerned with?

4 Q: In the section on "license taxes."

5 A: (Perusing.)

6 Q: Let me ask a different question. Do you recall
7 how the Department treated electric power
8 producers for license tax purposes?

9 A: Yes.

10 Q: And did the Department take the view that they
11 were selling a service or tangible personal
12 property?

13 A: They were selling tangible personal property.

14 Q: That was view the Department took for license
15 taxes?

16 A: For the electricity.

17 Q: Can I ask you to take a look at the manual,
18 page 38, entitled "gross receipts"?

19 A: Uh-huh (affirmatively responds).

20 Q: Can you read paragraph two entitled "gross
21 receipts," first sentence?

22 A: You want me to read it -- okay. "As used in
23 Section 12-19-110 shall include all receipts
24 derived from services from regulated businesses
25 within this State. Only the receipts from

1 activities that originate and terminate within
2 the State are to be included in the taxable
3 base, unless the interstate journey can be
4 interrupted. This would be true in the case of
5 power companies generating power outside the
6 state and transmitting the power through a
7 substation, decreasing the voltage. Income
8 from intangibles used in the conduct of the
9 business within this state shall be included in
10 gross receipts. Net gains on the sale of
11 property shall be included if business assets
12 are sold."

13 Q: And Section 12-19-110 is used in this document
14 and refers to what tax?

15 A: (No response.)

16 Q: Let's go back to page 37, maybe that would
17 refresh --

18 A: I don't recall 12-19-110 to see exactly what it
19 says. I can't remember.

20 Q: No, if you turn the page back -- turn to page
21 37, the language immediately preceding what you
22 just read.

23 A: Uh-huh (affirmatively responds).

24 Q: Section (D)(1).

25 A: Oh, here we go.

1 Q: What does it refer to?

2 A: Section (D)(1), Property: "License fee on
3 utilities and electric cooperatives are imposed
4 in lieu of the fee imposed by Section
5 12-19-70."

6 Q: So would you agree that in section two of this
7 same subsection, when it's referring to gross
8 receipts --

9 A: Yeah.

10 Q: -- it's referring to the license fee?

11 A: Probably. Yes.

12 Q: Probably or is that correct?

13 A: Yes.

14 Q: It is correct?

15 A: 12-19 -- yeah.

16 Q: And so in the "gross receipts" section, what
17 you just read -- I think you just read that
18 12-19-110 shall include all receipts derived
19 from services; is that correct?

20 A: Yes, that's what it says.

21 Q: A moment ago you said that the State of South
22 Carolina for the license fee purposes treats
23 power producers as sellers of tangible personal
24 property. Why the inconsistency between this
25 manual and your testimony?

1 A: I don't see any inconsistency.

2 Q: Uh-huh (affirmatively responds). Does the
3 manual say that --

4 A: The manual says what it says. I didn't write
5 the manual.

6 Q: So the manual says that Duke Energy -- that
7 license fees -- that it treats license fees as
8 fees from -- excuse me, revenue from public
9 utility service companies as services; is that
10 what this says?

11 A: (No response.)

12 Q: What's the reference to "services"?

13 A: Well, probably talking about the income,
14 receipts. They're talking about receipts
15 from -- from the service of providing
16 manufacturing and distributing to the customer
17 electricity.

18 Q: "Receipts" refers to income?

19 A: Right. Receipts is the income.

20 Q: Okay. And so it would be your view that Duke
21 Energy earned -- or that power producers, as
22 used in the subsection, earned their income
23 from services and their primary business was
24 selling tangible personal property? I don't
25 understand the consistency.

1 A: Well, the State treats power companies as
2 manufacturers of electricity and, as such, the
3 receipts from that activity is -- in the tax
4 return should be filed as the three-factor
5 formula.

6 Q: Why does the manual refer to the receipts in
7 the context of power companies here as receipts
8 from services?

9 A: I can't answer that. I don't know why. I
10 didn't write it.

11 Q: Fair enough. So in the course of your audits,
12 electric utilities, you reviewed this manual,
13 correct?

14 A: Initially in my training, but I didn't -- every
15 time I went on an audit, I didn't look at this
16 manual, no.

17 Q: And -- but you testified earlier that you
18 relied on this manual when you --

19 A: Well, I --

20 Q: -- when you said that Duke Energy was a
21 provider of tangible personal property.

22 A: As a -- as a -- as a new auditor in a new area
23 of tax, I have to rely on something --

24 Q: Uh-huh (affirmatively responds).

25 A: -- initially. And so I would read this, become

1 familiar with it, and read the law and any
2 regulations or revenue -- anything that would
3 apply to the taxpayer or that specific type of
4 business, try to become familiar.

5 Q: Try to become familiar with anything that --

6 A: Anything that would -- that was available.

7 Q: And so one section of the manual says that Duke
8 Energy -- that power producers sell services
9 and another section of the manual says that
10 they should file three-factor. How did you
11 resolve that inconsistency? Or did you not
12 read this?

13 A: Well, I've read it, but that's the way the
14 State of South Carolina has treated people
15 involved in the manufacturer of electricity.
16 I have no reason to say that -- to say
17 otherwise. They're treated as manufacturers
18 and, as such, they file the three-factor
19 formula, period.

20 MR. TRESH: No further questions, Your Honor.

21 MR. GREEN: Just a brief question, Your Honor.

22 MR. SOUTHARD - REDIRECT EXAMINATION BY MR. GREEN:

23 Q: The exhibit that's in front of you,
24 Respondent's One, Mr. Southard.

25 A: Yes.

1 Q: On page 34, could you look there with me,
2 please?

3 A: Thirty-four, okay.

4 Q: And what does item "C" on page 34 say?

5 A: "Apportionment of Public Service Corporation."

6 Q: Okay. And then could you turn with me to page
7 37?

8 A: Thirty-seven, yes.

9 Q: And what does item "D" there say?

10 A: "Telegraph Company."

11 Q: I'm sorry.

12 A: I'm sorry.

13 Q: The big capital letter --

14 A: Big "D."

15 Q: -- there.

16 A: "Public Service Corporations License Fee."

17 Q: That says "license fee;" is that correct?

18 A: Yes.

19 MR. GREEN: I have no further questions, Your Honor.

20 MR. TRESH: Quick re-cross, Your Honor.

21 THE COURT: On new matter?

22 MR. TRESH: I'm sorry?

23 THE COURT: Re-cross I'll allow on new matter.

24 MR. TRESH: New matter related to what Mr. Green --

25 THE COURT: Yeah, I was wondering how that was new.

1 Go ahead.

2 MR. SOUTHARD - RECROSS-EXAMINATION BY MR. TRESH:

3 Q: In the section entitled "Public Service
4 Corporations License Fee," section 2 "gross
5 receipts."

6 A: Section two.

7 Q: You were just looking at.

8 A: Two, okay, there. On page 38?

9 Q: Yeah, the section -- we were talking about
10 services before and how that section used
11 "services." Can you read the -- one,
12 two -- third sentence?

13 A: Starting with "only"?

14 Q: Starting with "This would be true..."

15 A: "This... "

16 Q: Page 38.

17 A: Thirty-eight -- wait a minute.

18 Q: Section two entitled "gross receipts."

19 A: Okay. Okay. Here we go. "This would be true
20 in the case of power companies generating power
21 outside the State and transmitting the power
22 through a substation decreasing the voltage."

23 Q: And so "This would be true in the case of power
24 companies....," meaning that they were treated
25 as providing --

1 MR. GREEN: Your Honor, I object. This goes beyond
2 the scope of my redirect.

3 MR. TRESH: His redirect was implied to say that
4 somehow this section didn't apply to power
5 companies and I think it's relevant that it
6 does.

7 THE COURT: What is --

8 MR. GREEN: My redirect --

9 THE COURT: The redirect was pretty straight
10 forward. It was this, this and this. I mean,
11 I don't know the implications thereof, but you
12 could argue that at a subsequent time.
13 What were you going to say?

14 MR. GREEN: No, I'm sorry, I just -- I was just
15 making the objection.

16 MR. TRESH: If I could ask one further question,
17 Your Honor?

18 THE COURT: Okay.

19 Q: In your view, did this section -- when I say
20 "this section," I mean (D), "Public Service
21 Corporations License Fee," apply to power
22 companies?

23 A: Yes.

24 MR. TRESH: No further questions, Your Honor.

25 THE COURT: All right. You may step down.

1 (Witness excused.)

2 MR. TRESH: Your Honor, a couple of procedural
3 issues quickly.

4 THE COURT: All right.

5 MR. TRESH: I believe we have ...

6 THE COURT: A lot of documents.

7 MR. TRESH: Yes, sir.

8 MS. TODOROVA: This is the document that was missing
9 pages.

10 THE COURT: Oh, okay.

11 MR. TRESH: Exhibit Twenty-six.

12 MS. TODOROVA: Can we just relabel it or do you want
13 me to bring it to you?

14 THE COURT: Remark it.

15 MS. TODOROVA: Remark it, sorry.

16 (Off the Record)

17 MR. TRESH: Your Honor, I have here -- if I may
18 approach -- with respect to Professor Pomp and
19 the preservation of our objection, I have the
20 original interrogatories responses that were
21 served on Mr. Green reflecting what Mr. Pomp
22 would testify on.

23 THE COURT: Okay.

24 MR. TRESH: I'd like to enter that into evidence.

25 THE COURT: That's an offer of proof?

1 MR. TRESH: Yes, Your Honor.

2 MR. GREEN: As an offer of proof, yes.

3 THE COURT: So that will be marked as ...

4 MR. TRESH: What number are we at?

5 THE COURT REPORTER: I guess it'd be Fifty.

6 THE COURT: Fifty, offer of proof.

7 Y'all need to hold on one moment.

8 (Off the Record)

9 (Petitioner's Exhibit Number Fifty was introduced as
10 an offer of proof.)

11 MR. TRESH: Your Honor, may have I sidebar with
12 Counsel for a moment.

13 THE COURT: Yeah.
14 (Sidebar off the record between counsel.)

15 MR. TRESH: Your Honor, may we approach?

16 THE COURT: Yeah.
17 (Sidebar off the record with the Court.)

18 THE COURT: All right. With that said, that being
19 that which was not upon the record, this
20 hearing is adjourned for today and return
21 tomorrow at 9:30.

22 (The proceedings adjourned at 4:39 p.m., Wednesday,
23 September 5, 2012, and reconvened at 9:48 a.m.,
24 Thursday, September 6, 2012, as follows:)

25 THE COURT: All right. Proceed.

1 MR. TRESH: Good morning, Your Honor. Duke would
2 like to call Dr. John Papapolymerou, who we
3 will affectionately call Dr. Papa --

4 THE COURT: All right.

5 MR. TRESH: -- if it's okay with the Court to the
6 stand.

7 THE COURT: Doesn't bother me.

8 MR. TRESH: Doctor, I did butcher that, again, a
9 common problem.

10 IOANNIS PAPAPOLYMEROU, Ph.D., having been duly sworn,
11 testifies and examines as follows:

12 DR. PAPAPOLYMEROU - DIRECT EXAMINATION BY MR. TRESH:

13 Q: Professor, good morning.

14 A: Good morning.

15 Q: Can you please state and spell your full name
16 for the record?

17 A: Yes. It's Ioannis -- that's I-O-A-N-N-I-S --
18 Papapolymerou, P-A-P-A-P-O-L-Y-M-E-R-O-U.

19 THE COURT: Can you spell it one more time so we
20 make sure we get it up here?

21 THE WITNESS: Okay. The first name is Ioannis,
22 I-O-A-N-N-I-S. Last name is Papapolymerou,
23 P-A-P-A-P-O-L-Y-M-E-R-O-U.

24 THE COURT: Thank you.

25 Q: Professor, can you please tell the Court your

1 current occupation?

2 A: Yes. I am currently a professor at the School
3 of Electrical and Computer Engineering at the
4 Georgia Institute of Technology.

5 Q: And I'd like to show you what's been
6 marked -- I'm going to show you a document.
7 Professor, do you recognize this document?

8 A: Yes.

9 Q: And can you please tell the Court what this
10 document is?

11 A: This is a short version of my bio from the
12 Georgia Tech website.

13 Q: Okay. And if you can take a look at it. Is
14 that accurate?

15 A: It has a selected number of my publications.
16 I have since then had more peer-reviewed papers
17 published. I have also received an award from
18 the Antennas and Propagation Society of IEEE.
19 It's called the Wheeler Applications Award
20 given for the best general paper in the area of
21 technology for antennas. I have also been
22 named recently the editor in chief for the --
23 one of the journals, the Microwave and Wireless
24 Components Letters.

25 Q: And can you please describe for the Court your

1 education and background?

2 A: Yes. I received a diploma in electrical
3 engineering from the National Technical
4 University of Athens in Greece. The diploma is
5 a five-year program following the German model.
6 It's equivalent to a U.S. Bachelor of science
7 in electrical engineering. Then I received a
8 Master's degree in electrical engineering from
9 the University of Michigan in Ann Arbor and
10 then a Ph.D. degree in electrical engineering
11 from the University of Michigan.

12 Q: Thank you. And you mentioned a moment ago that
13 you're a full professor at Georgia Tech's
14 School of Electrical and Computer Engineering.
15 Are you also the associate director of Georgia
16 Electric Design Center of Electromagnetics and
17 Electric Design and Applications?

18 A: Yes.

19 Q: Okay. How long have you been in your current
20 position at Georgia Tech?

21 A: I have been a Professor since the summer of
22 2009 and I have been teaching and doing
23 research at Georgia Tech since 2001.

24 Q: Okay. Can you please describe any prior
25 employment that you had prior to Georgia Tech?

1 A: Yes. Prior to Georgia Tech, while being a
2 graduate student at the University of Michigan,
3 I was employed as a graduate research assistant
4 until '99. Then I accepted a faculty position
5 at the University of Arizona in Tucson. I was
6 there for about two and a half years and then
7 I moved to Atlanta.

8 Q: And as a visiting professor, were you a
9 visiting professor of electrical and computer
10 engineering?

11 A: Yes. I have spent two summers in France at the
12 University of Limours as a visiting professor.

13 Q: Are you a fellow of any institutes?

14 A: Yes. I'm a fellow of the Institute of
15 Electrical and Electronics Engineers, which is
16 the worldwide professional organization for
17 electrical and electronics engineers.

18 Q: And is it quite common for electrical engineers
19 to be fellows of the IEEE?

20 A: No, it is not. It is highly selective. You
21 have to demonstrate several achievements
22 throughout your career. And, typically, every
23 year it's about .1, .2 percent of the members,
24 the voting members, that can be elevated to the
25 fellow level.

1 Q: Okay. And in your current position at Georgia
2 Tech, are you called upon to assist the United
3 States government and other organizations in
4 matters of electrical engineering?

5 A: Yes.

6 Q: Can you tell us which organizations?

7 A: Well, we have done research work in the area of
8 electrical engineering for the Department of
9 Defense where we applied electricity for, you
10 know, various needs of the Army, the Navy, the
11 Air Force. We have also done research for
12 NASA, the National Aeronautics and Space
13 Administration, and also research for the
14 National Science Foundation.

15 Q: Thank you.

16 MR. TRESH: Your Honor, I'd like to move Professor's
17 CV into evidence as Exhibit Forty-three.

18 MR. GREEN: No objection.

19 THE COURT: It's admitted.

20 (Petitioner's Exhibit Number Forty-three was admitted
21 into evidence.)

22 MR. TRESH: Your Honor, I'd like to also move to
23 qualify Dr. Papa as an expert in the nature and
24 character of electricity and how it's provided.

25 MR. GREEN: I have no objection.

1 THE COURT: So qualified.

2 MR. TRESH: Thank you, Your Honor.

3 Q: Okay. Dr. Papa, the document I've just handed
4 you, do you recognize it?

5 A: Yes.

6 Q: Can you please describe this document for the
7 Court?

8 A: It's a report I prepared to describe some of
9 the fundamentals of electricity and also
10 describe how utility companies such as Duke
11 provide this service.

12 Q: Okay. And were you asked to render an opinion
13 in this matter regarding the nature of
14 electricity?

15 A: Yes.

16 Q: And what is your opinion? What is
17 "electricity"?

18 A: "Electricity" is a force that exists in nature.
19 We know for a fact that we have four major
20 forces in nature. The first one is the atomic
21 force that exists inside the atom and it's the
22 strongest force from all of them.
23 The second one is the electromagnetic force,
24 which basically governs the interaction between
25 atoms or molecules and it's less strong than

1 the atomic.

2 The third one is the weak interaction, which
3 is, I guess, less strong than the previous two,
4 and that happens between some specific
5 radioactive particles. And the fourth is the
6 gravitational force, which happens between two
7 bodies, two masses.

8 Q: And does this report accurately reflect the
9 opinion you just gave?

10 A: Yes.

11 MR. TRESH: Your Honor, I'd like to move the
12 doctor's report into evidence and have it
13 marked as Exhibit -- it is marked as Exhibit
14 Forty-five.

15 MR. GREEN: Objection, Your Honor, hearsay.

16 THE COURT: The expert report is hearsay?

17 MR. GREEN: Yes, out-of-court statement going to the
18 truth of the matter asserted. He can testify
19 about it, but the report itself is hearsay.

20 MR. TRESH: Your Honor, the doctor has rendered an
21 expert opinion in this matter. He's
22 produced --

23 THE COURT: I think -- do y'all have any case law on
24 it? I think Mr. Green's correct on that. Do
25 you have a legal position on that?

1 MR. TRESH: We do, Your Honor. Hundley versus Rite
2 Aid of South Carolina, 529 S.E.2d 45: "An
3 expert witness may state an opinion based upon
4 facts not within his firsthand knowledge, but
5 that evidence is admissible -- but it's
6 admissible solely as the basis to show an
7 expert's opinion."

8 In other words, the report of the expert in his
9 opinion, written or otherwise, are admissible
10 to show what his expert opinion is, even though
11 it may be an out-of-court statement.

12 THE COURT: Say that --

13 MR. TRESH: State -- it's Hundley versus Rite Aid of
14 South Carolina, 529 S.E.2d --

15 THE COURT: Do you have it? Can you hand it to me?

16 MR. TRESH: Oh, I don't have a case. I apologize,
17 Your Honor.

18 MR. GREEN: I don't have that case in front of me,
19 Your Honor, but that sounds like that's talking
20 about whether an expert can rely on hearsay
21 evidence --

22 THE COURT: Yeah.

23 MR. GREEN: -- which he can.

24 THE COURT: Which he can, I know that.

25 MR. GREEN: But he is not a vehicle to introduce

1 hearsay evidence, including his own report.

2 THE COURT: Well, that's the case I'm thinking about
3 is where they recently addressed the issue of
4 he relied -- or the expert relied on the
5 out-of-court information to reach the decision.
6 But the Court said recently that even though he
7 can render the decision, that that which he
8 relied on doesn't automatically come into
9 evidence.

10 Now, in cross-examination the cross-examiner
11 has the option to bring that into evidence, but
12 I don't think that you have that option.

13 MR. TRESH: Similar to the Caldwell case we
14 discussed yesterday, Your Honor, the witness
15 has made this out-of-court statement. He is
16 available for cross-examination.

17 THE COURT: Oh, that one's weaker. Good shot,
18 though.

19 MR. TRESH: Okay.

20 THE COURT: I like the way lawyers can cut -- think
21 on their feet, but at this point in time, I'm
22 not -- I want to research that just to make
23 sure.

24 MR. TRESH: Okay.

25 THE COURT: And I can always let it in later.

1 MR. TRESH: We're happy to -- thank you, Your Honor.

2 Your Honor, may we ask the Court to turn on the
3 monitor so that we can use the --

4 THE COURT: You can ask us and we will do it.

5 MR. TRESH: Thank you, Your Honor.

6 THE COURT: Which one, the computer or the ELMO?

7 MS. TODOROVA: The computer.

8 THE COURT: And, Doctor, you can also draw on that
9 screen, if need be.

10 THE WITNESS: Yes, I can see it. Thank you.

11 MR. TRESH: He's saying you can -- if we need to
12 draw anything, he's saying you have the ability
13 to have you ...

14 THE WITNESS: Okay.

15 Q: Okay. Dr. Papa, I'd like to start with a
16 couple of -- get a couple of definitions out of
17 the way. We heard a lot of testimony yesterday
18 regarding what is "electricity" and what is
19 "energy."

20 In your expert opinion, can you tell us, again,
21 is electricity tangible in any way under your
22 definition or under the laws of physics?

23 A: No.

24 Q: Electricity is not tangible?

25 A: That is correct.

1 Q: Is electricity property?

2 A: No.

3 Q: Okay. What is an "electromagnetic field"?

4 A: An "electromagnetic field" is an influence and
5 what that means is that it's a force field. So
6 if you bring inside an electromagnetic field a
7 charge, the field will apply a force to the
8 charge.

9 The easiest way to understand this is by making
10 an analogy with the gravitational field. So
11 right now we're all here and we are under the
12 influence of the gravitational field that is
13 produced by the Earth. And we all know that if
14 we pick up something and let it go, it's going
15 to fall on the ground.

16 Q: Okay. And is an electromagnetic field the same
17 as electricity?

18 A: Yes.

19 Q: Okay. We heard yesterday a little bit about
20 charges. Is a charge electricity?

21 A: The charge is a physical property of matter and
22 it's what creates the electromagnetic field.

23 Q: But a charge itself is not electricity or is
24 it?

25 A: It's the source of electricity.

1 Q: It's the source of electricity, okay. And what
2 is an "electron"?

3 A: An "electron" is the most fundamental carrier
4 of charge that exists in nature.

5 Q: And what is "energy"?

6 A: "Energy" is the ability that a system has to do
7 work.

8 Q: Okay. I'd like to direct your attention to the
9 expert report that you prepared. Will you
10 please turn to page eight?

11 A: Sure. Yes.

12 Q: Will you please read your conclusion for the
13 Court?

14 A: "Based on the previous analysis, it is my
15 opinion that what Duke Energy provides is a
16 service, and that the electrical energy it
17 sells is not something that one can possess or
18 does not have physical dimensions. Example, a
19 table, a chair, a book, a car. The service
20 that Duke Energy provides is to transform
21 existing energy from one form to the other and
22 to transmit and distribute that energy in a
23 safe and efficient manner to its customers."

24 Q: Dr. Papa, is that still -- does that statement
25 reflect your conclusion regarding what Duke

1 Energy provides?

2 A: Yes.

3 Q: Dr. Papa, in forming your opinion regarding
4 what is electricity and what Duke Energy
5 provides, how did you form your opinion? What
6 did you base your opinion on?

7 A: The opinion is based on the fundamental laws of
8 physics that govern the electromagnetic force,
9 what we call in everyday life "electricity,"
10 and these laws have been experimentally
11 verified by several scientists over the last
12 150 years and, as we see, it has completely
13 changed, you know, our world.

14 Q: From a physics perspective would it be at all
15 correct to say that electricity is tangible
16 property in any way?

17 A: No.

18 Q: Okay. Is that -- would that violate any
19 fundamental rule of physics?

20 A: Yes. So in the laws of physics, we have
21 objects, we have energy and fields, and
22 electricity is an electromagnetic field, so it
23 is an influence; it is not an object.

24 Q: Is there any difference -- when you say it's
25 not an object. Is there any difference between

1 electricity and energy and an electromagnetic
2 field, those three things?

3 A: Well, the electromagnetic field has -- carries
4 energy. So what it does, it's another form of
5 energy, in some sense.

6 Q: Okay. And you said -- is electricity an
7 object?

8 A: No.

9 Q: Is electricity a material?

10 A: No.

11 Q: Why not?

12 A: It is not. It does not consist of matter. It
13 is a field. It's a force field. And force
14 fields are not matter.

15 Q: Can you explain to the Court a little bit
16 around -- about what a "field" is? You've said
17 now electricity, electric energy are force
18 fields or fields in nature. What is a "field"?
19 Can you explain a little bit about that to the
20 Court?

21 A: A "field," as I said before, is an influence.
22 So the easiest way to understand it, as I said
23 before, is to look into the gravitational
24 field.

25 So right now there's a gravitational field in

1 this room. And the way we -- we understand, we
2 feel the effect of this field is by basically
3 a force that the field applies on an object.
4 So in this case, for example, if I lift this
5 cup up, we all know it's going to go down.
6 Similarly, the electromagnetic field does the
7 same thing. However, the source of the
8 electromagnetic field is charge, so it's not
9 matter, and there are differences. For
10 example, the electromagnetic force can be both
11 attractive and repulsive, whereas the
12 gravitational force is only attractive.

13 Q: Gravitational force, gravitational field, can
14 you harness gravity?

15 A: You can -- you can harness gravity.

16 Q: Can you measure gravity?

17 A: You can measure the strength of the
18 gravitational field.

19 Q: And can you also measure the strength of the
20 electromagnetic field when I transmit
21 electricity?

22 A: Yes.

23 Q: And I can harness electrical energy.

24 A: Yes.

25 Q: Is electric energy made up of electrons or

1 electronically charged particles?

2 A: What happens is that the -- again, the -- any
3 charge, either static or moving, creates an
4 electromagnetic field. A static charge
5 creates --

6 THE COURT: What did you say? The energy charge? I
7 didn't hear you.

8 THE WITNESS: No, the charge.

9 THE COURT: Okay.

10 THE WITNESS: Yeah. So the charge is the source of
11 an electromagnetic field. If the charge is not
12 moving, it creates an electric -- stationary --
13 what we call a "stationary electric field." If
14 the charge is moving, it creates both an
15 electric, as well as a magnetic field.

16 And, again, all of these have been
17 experimentally verified. I do give a brief
18 overview of the history in my report.

19 THE COURT: Wait a second. You said the charge is
20 not moving; explain that. The charge does not
21 create movement. What is that?

22 THE WITNESS: The charge -- if I have a stationary
23 charge -- so let's say somehow magically I can
24 hold a charge --

25 THE COURT: Yeah.

1 THE WITNESS: -- okay, that creates a field, an
2 influence.

3 THE COURT: An influence.

4 THE WITNESS: Right. And if I --

5 THE COURT: And if it's moving, what --

6 THE WITNESS: If it is moving, it creates an
7 electric field, as it was before, but it also
8 creates a magnetic field.

9 THE COURT: Okay.

10 THE WITNESS: So, typically, these two fields go
11 together. That's why we call it
12 "electromagnetic field."

13 A very common analogy we do -- we use in our
14 classrooms is like two people dancing together
15 like a tango dance and, you know, basically
16 interacting and passing energy from one person
17 to the other one.

18 Q: When a -- when a --

19 THE COURT: Be careful about that.

20 MR. TRESH: I won't touch that.

21 THE COURT: Contempt is energy, too.

22 Q: When -- putting aside our dancing graduate
23 students, when we -- when an electric utility
24 like Duke provides electricity, can you explain
25 the scientific properties that you were just

1 speaking of, the physical properties? Can you
2 explain how that works practically when a
3 company like Duke is providing the electric
4 service? So, you know, I turn on my lights at
5 home. I pay a monthly bill. How does that
6 work from an electric service provider like
7 Duke?

8 A: So -- okay. So what -- in order for us to do
9 work, we need energy. So what, you know, we
10 tried over the years to be able (sic) is to
11 deliver energy in a very convenient, practical
12 and cost effective way.
13 So what basically happens is that at some point
14 an electric -- electromagnetic field is
15 created, all right, and that field gets
16 propagated through a transmission line and what
17 you really have is access to a force.
18 So a force can move objects, okay. In this
19 case it would be the electrons that exist in a
20 metal. And then we can take advantage of the
21 work that those electrons can do for us. So,
22 in reality, it's an energy transformation.

23 Q: Okay. Energy transformation. So I'm going to
24 talk to you about other energy transformations.
25 So if I have a telecommunications company, for

1 example, let's say a wire line
2 telecommunications company, AT&T or the old
3 BellSouth, does that company also use wires to
4 transmit its service? How does that work?

5 A: Yes, it works in exactly the same way. So I
6 have an energy source on one end that transmits
7 the energy via the wires and on the other end,
8 your load -- in this case would be the
9 telephone -- receives that energy and does
10 something with it.

11 THE COURT REPORTER: It does what?

12 THE WITNESS: And does work, does something --

13 THE COURT REPORTER: Does something.

14 THE WITNESS: -- with that energy.

15 Q: So in the -- so you said -- so the cell phone
16 company -- oh, excuse me, the wire line
17 telecommunications provider is creating an
18 electric charge and using energy to do work
19 and, in this case, to provide -- to allow me to
20 talk to my brother in New York, for example?

21 A: Correct.

22 Q: Okay. And what about a cell phone provider,
23 how does that work? So there are no wires,
24 but -- how does that work in comparison? Is it
25 similar, the same?

1 A: It is very similar. The process, of course, of
2 transforming -- of propagating the energy is a
3 little bit different.

4 But what happens is that you have electric
5 power at the base station and that power, via
6 several devices and especially antenna, becomes
7 electromagnetic wave; that wave propagates in
8 free space. Our cell phone receives that wave
9 and then basically receives a signal that
10 contains information, such as the voice or
11 data, and that's how we receive it.

12 Q: So a cell phone propagates energy; is that
13 correct?

14 A: A cell phone uses electric energy and produces
15 electromagnetic waves.

16 Q: Produces electromagnetic waves.

17 A: Uh-huh (affirmatively responds).

18 Q: And a landline telecommunications provider
19 propagates ...

20 A: Also electromagnetic waves.

21 Q: Propagates electromagnetic waves. And an
22 electric service provider propagates
23 electromagnetic waves.

24 A: Yes.

25 Q: All three -- well, the first two are the same,

1 using the wires, and cell phone is similar; is
2 that --

3 A: Right. So the fundamentals are the same. Of
4 course, what is different, as we know, is the
5 characteristics of the signal; for example, the
6 frequency, the strength, but that -- you know,
7 we do that because for the specific purpose
8 we're wanting to serve.

9 Q: So in all three examples, electric service,
10 telephone service, wireless telephone service,
11 I'm propagating a signal, an electromagnetic
12 wave, and the difference in the wave is the
13 signal? Can you explain that a little bit?

14 A: No, the difference are the characteristics of
15 the wave. For example, the waves have a
16 frequency, how many cycles per second. The
17 electricity we use on the grid is 60 hertz,
18 which stands for 60 cycles per second. For
19 cell phones, we use frequencies of around one
20 gigahertz; that's one billion cycles per
21 second. And telephone we use either, again, DC
22 or very low frequencies for the signal.

23 Q: So it's just -- excuse me, it's just the
24 frequency of the signal that --

25 A: The frequency and, of course, the strength.

1 Q: Okay. The frequency and the strength. But
2 still an electromagnetic wave in all three
3 services.

4 A: Correct.

5 Q: Okay. And with regard to -- with regard to
6 landline telecommunication service providers,
7 do their customers receive anything tangible?

8 A: No.

9 Q: And in cell phone providers, do their customers
10 receive anything tangible?

11 A: No.

12 Q: And in electric service providers, do their
13 customers receive anything tangible?

14 A: No.

15 Q: Dr. Papa, does electricity or the
16 electromagnetic field, does it have any
17 discernible physical form, like a desk, a book
18 or a chair?

19 A: No.

20 Q: And does electricity have any shape?

21 A: No.

22 Q: Electricity -- does electricity have any
23 length?

24 A: No.

25 Q: Does it have any thickness?

1 A: No.

2 Q: Does it have any breadth?

3 A: No.

4 Q: Can electricity be seen?

5 A: No.

6 Q: When I see a lightning strike in the air, a lot
7 of people would say, "Well, I'm seeing
8 electricity;" is that not accurate?

9 A: No. What you are seeing is the effect of a
10 very high electric field. So what typically
11 happens is that the electric field is very,
12 very, very strong that it basically breaks up
13 the molecules of the air particles. When that
14 happens, a lot of effects happen. Basically,
15 light is created. You also have audio waves.
16 And we know that if lightning strikes close it
17 can actually break a window. And also you have
18 heat generated.

19 Q: And so what you're seeing is the effects of the
20 electric current in the air as opposed to
21 seeing electricity; is that correct?

22 A: You see the effects of a very strong electric
23 field on matter. And in this case, matter are
24 the air particles that are in the air.

25 Q: And would the principals be the same, when I

1 say -- you just testified that you can't see
2 electricity, that it doesn't have shape,
3 length, thickness, breadth. Would these be the
4 same for telecommunications --

5 A: Yes.

6 Q: -- service providers?

7 A: Yes.

8 Q: Would it be the same for television broadcast
9 companies?

10 A: Yes.

11 Q: Can you explain that a little bit? Is that the
12 same principle?

13 A: So we have the same principle. For example, we
14 use the radios that we have in our cars. So
15 somewhere we have a radio station that
16 basically transmits electromagnetic waves via
17 an antenna and in our car, we have another
18 antenna that receives the electromagnetic wave.
19 And, basically, then, through the electronic
20 circuits in the radio crosses that signal
21 for -- you know, for us to hear music or, you
22 know, whatever other purpose.

23 Q: Similar process as providing an electric
24 service?

25 A: It's similar.

1 Q: Can electricity be touched?

2 A: No.

3 Q: Certainly I can stick my finger in a socket and
4 get hurt, get a charge.

5 A: Correct. So, again, very common misconception.

6 What happens is that the strong electric field
7 interacts with matters, in this case your
8 finger, you know, your body, and our bodies
9 have charges and, of course, the electric field
10 applies a force on the charges in our bodies
11 and that's how we feel the effect of the field.

12 Q: And the idea that I can't see or touch
13 electricity, are these rules that -- your
14 testimony, are these fundamental laws of
15 physics that have been in place for sometime?

16 A: Yes.

17 Q: How long?

18 A: Well, since, you know, the beginning of the
19 universe. Of course, it takes us a long time
20 to understand what happens, but that's a
21 different story.

22 Q: And among -- and among -- and would you say
23 these laws are -- this point commonly
24 understood?

25 A: Not only understood but they have been

1 experimentally verified, so the laws are strong
2 and accurate.

3 Q: Never been -- in recent times, in the last 50
4 years, in the last 100 years, never really been
5 debated seriously by anybody?

6 A: No.

7 Q: When you say you couldn't touch electricity but
8 you can feel the effects of electricity, are
9 feeling the effects of electricity similar to
10 feeling the effects of sunlight? Are there any
11 differences?

12 A: Well, there are differences, some differences.
13 The -- typically the -- in sunlight we -- what
14 we feel is heat. So sunlight can basically
15 provide heat. The electricity provides a force
16 and part of that energy, basically, that is
17 provided could become heat, but the force can
18 also move things. So there are some
19 differences.

20 Q: But can I see sunlight?

21 A: You can see sunlight.

22 Q: Like I can see lightning?

23 A: Different. The lightning, the result of the
24 breakdown of the material is that, you know,
25 light is produced.

1 Q: Okay. You mentioned earlier in your testimony
2 that gravitational -- that a gravitational
3 field can be harnessed. Can you explain that
4 a little bit?

5 A: Sure. So in all of these fields, one way
6 we -- one concept we typically use is the
7 potential energy.

8 So if I, for example, pick up this cup and move
9 it up here, it has potential energy. What does
10 that mean? It can do work. When does it do
11 work? If I let it go and it falls down. Okay?

12 A typical example is in hydropower stations
13 where they use the energy of falling water.

14 You know, if, for some reason, they want to
15 increase the energy at some point that the
16 generator is producing, they can move up water
17 at a higher level and then basically use that
18 energy as the water falls to increase, you
19 know, the energy of the generator.

20 Another example is what we use in space travel.
21 So when we launch, for example, a satellite
22 into Mars or other planets, we use the force of
23 the gravitational fields of those planets to
24 guide, you know, our satellite, our spacecraft
25 to the desired location.

1 Q: You mentioned earlier that electricity is not
2 tangible and it's not property. Can you
3 measure electricity?

4 A: You can measure the -- for example, the
5 strength of the electric field. So, yes, you
6 can measure it.

7 Q: Are there other intangibles that you can
8 measure, other fields or other tangibles --

9 A: Yes.

10 Q: -- in the universe?

11 A: So you can -- we can measure a force. We can
12 measure time. We can measure the speed of a
13 car. That's what happens in freeways, right,
14 when the police measure via radar the speed of
15 our car.

16 Q: So if an electric utility like Duke -- we heard
17 testimony -- measures their electric service in
18 kilowatt hours, a cell phone provider might
19 measure their service in minutes of use, time,
20 for example?

21 A: Yes, you can measure time. You can also
22 measure energy.

23 Q: Can I measure wind?

24 A: You can measure the speed of wind, yes.

25 Q: Can I measure light?

1 A: You can measure light.

2 Q: In your view, is measuring something, the
3 ability to measure something instructive at all
4 into determining whether something is tangible
5 or property?

6 A: No. The example I brought before is time. So
7 I can measure time, but, you know, time is not
8 an object. I can measure the force. The force
9 is not an object. I can measure speed of an
10 object, but speed itself is not an object.

11 Q: Does the power company, electric service
12 provider like Duke Energy, do they make or
13 create electricity?

14 A: No. What happens is that they transform energy
15 from one form to another and in this case it
16 would be electromagnetic field energy.

17 Q: Okay. Can I store electric service?

18 A: What one can do is that you store electric
19 charge, which is the source of the electric
20 field.

21 Q: Could store the source of an electric charge.
22 Can you explain that a little bit further?

23 A: Yes. So we know and have proven experimentally
24 that charges are the sources of the electric
25 and magnetic fields. Now, what we can do is,

1 basically, via chemical reactions, we can
2 create charges via specific chemical reactions
3 and we can store them; most common device used
4 is the battery.

5 Q: Is it common that fields and other intangibles
6 have properties associated with them?

7 A: It is common, yes.

8 Q: In the context of gravitational field, what are
9 some of those properties?

10 A: It's the strength of the field, the direction
11 of the field.

12 Q: Is that similar, the same, for an
13 electromagnetic field?

14 A: Yes, the strength of the field, the direction,
15 also, and then the time variation of the field,
16 because as I said before, in most applications
17 we -- the sources move over time, so that has
18 to do with the frequency of the field, which
19 translates into frequency of the signal.

20 Q: Does the electric -- switching gears for a
21 moment. Does the electric energy that Duke
22 provides -- you mentioned that they don't
23 create the energy; is that right?

24 A: That is correct.

25 Q: Okay. And can energy be created or destroyed?

1 A: No. So one of the fundamental laws of physics,
2 probably the most important one, is that one
3 cannot create or destroy energy.

4 MR. TRESH: Okay. One moment, Your Honor.

5 No further questions, Your Honor.

6 THE COURT: Oh, while I'm at it, I'll go ahead and
7 rule on the -- specifically on Petitioner's
8 Exhibit Forty-five.

9 I'm relying on Jones versus Doe, 372 S.C. 53,
10 and then the more recent case of -- let me back
11 up -- Allegro, A-L-L-E-G-R-O, Inc., v. Scully.
12 It was decided July 11, 2012. That case almost
13 directly addressed this particular subject and
14 ruled that it was -- that the document was not
15 admissible. All right?

16 MR. TRESH: Thank you, Your Honor.

17 MR. GREEN: Thank you, Your Honor.

18 DR. PAPAPOLYMEROU - CROSS-EXAMINATION BY MR. GREEN:

19 Q: Good morning, Doctor.

20 A: Good morning.

21 Q: Nice to see you again.

22 A: Same here.

23 Q: Your testimony here today is based on abstract
24 concept, isn't it?

25 A: Yeah. It's based on the laws of physics.

1 Q: But the answer to my question is "yes"?

2 A: I'm answering that it's based on the laws of
3 physics.

4 Q: The answer to my question is "no," then?

5 A: (No response.)

6 Q: Let me ask the question again. I'm not -- I'm
7 just trying to get an answer to my question.
8 Your testimony here today is based on something
9 abstract, isn't it -- abstract concept, isn't
10 it?

11 A: My testimony is based on the laws of physics
12 that I've learned as an engineer and I practice
13 and I teach. I'm not sure I understand how
14 you -- you know, how you define "abstract."

15 Q: Well, didn't you previously testify that energy
16 is the ability to do something, something very
17 abstract?

18 A: It's the ability to do work.

19 Q: But you testified it was something very
20 abstract, didn't you?

21 A: I believe I testified that it's the ability to
22 do work.

23 Q: All right. Let's look at what you testified.
24 You previously gave a deposition in this case,
25 did you not?

1 A: Yes.

2 Q: And I have just handed you a copy of your
3 deposition. I would draw your attention to
4 page 52 of that deposition, lines seven and
5 eight. Are you with me?

6 A: Yeah.

7 Q: And does it say, "You have energy, which is the
8 ability to do something, something very
9 abstract"?

10 A: Yes.

11 Q: So that was your testimony, then.

12 A: That is correct, yeah.

13 Q: And I think you've described electricity as a
14 "phenomenon;" is that correct?

15 A: Yes. I have described it as a force field.

16 Q: Yes. But the answer -- my question is, I think
17 you've described electricity as more of a
18 "phenomena;" is that correct?

19 A: Yes.

20 Q: Okay. And I think you've testified that
21 "Electromagnetic energy can propagate in the
22 form of waves even in a vacuum; actually, this
23 is how we know that other galaxies or star
24 systems exist in outer space."

25 A: Yes.

1 Q: Is that correct?

2 A: Yes.

3 Q: I think you testified that you can pick up
4 waves seen and unseen; is that correct?

5 A: Yes.

6 Q: Now, I think Exhibit Forty-three has a lot of
7 your publications here, a lot dealing with
8 microwaves and the like; is that correct?

9 A: Yes.

10 Q: And you deal a lot with cell phone technology;
11 is that correct?

12 A: To a good extent, yes.

13 Q: And you deal with radar technology for the
14 Department of Defense; isn't that correct?

15 A: Yes.

16 Q: And you provide expert testimony or expert
17 assistance -- let me recharacterize that -- you
18 provided expert assistance in a case involving
19 cell phone technology; isn't that correct?

20 A: Uh-huh (affirmatively responds). Yes.

21 Q: And you have advised Motorola on circuit
22 designs for telecommunications products; isn't
23 that correct?

24 A: Yes.

25 Q: And that was cell phones with Motorola?

1 A: Circuits -- circuits that are used in wireless
2 communication systems.

3 Q: And the cell phones that you're talking about,
4 doesn't that really involve radio technology?

5 A: It involves electromagnetic waves.

6 Q: But isn't a cell phone transmission really a
7 radio transmission?

8 A: You can call it a radio transmission, but
9 fundamentally it's an electromagnetic wave.

10 Q: Okay. But -- so the answer to my question is,
11 yes, it is a radio transmission?

12 A: Yes.

13 Q: And radar -- radar technology, that involves
14 radio -- I mean, excuse me, radar, that
15 involves radio technology; isn't that correct?

16 A: It involves launching electromagnetic waves and
17 then, you know, reading the return from those
18 waves.

19 Q: Okay. What is "radar" short for?

20 A: Radio detection and ranging.

21 Q: Thank you. Now, what we're talking about here
22 today, I think you've testified, is
23 transforming energy, right?

24 A: Correct.

25 Q: And you agree, I think, that kinetic energy,

1 that's a form of energy, correct?

2 A: Yes.

3 Q: That won't power my kid's stereo, will it?

4 A: No.

5 Q: Mechanical energy won't power my kid's stereo.

6 A: No.

7 Q: Electricity or electric energy will power my
8 kid's stereo.

9 A: Correct.

10 Q: And that electricity has a charge, correct?

11 A: The -- the electromagnetic field that exists on
12 the lines, that basically will apply a force on
13 the electrons that are inside the conductors of
14 the various circuits, and that is then
15 providing the work to listen to the music that
16 your kids listen to, for example.

17 Q: There's an electric charge as part of that
18 process; isn't that correct?

19 A: The charges are inside the conductors.

20 Q: Okay. But there is an electric charge,
21 correct?

22 A: Correct. Yes.

23 Q: I think you testified earlier that charge is a
24 physical property of matter; isn't that
25 correct?

1 A: Yes.

2 Q: Now, kinetic energy doesn't have any type of
3 charge or electric current with it, correct?

4 A: Correct.

5 Q: Nor does mechanical energy.

6 A: Correct.

7 Q: But your testimony is that's just energy.

8 A: Correct.

9 Q: Your testimony is it's not a substantially
10 different use of energy from electric -- from
11 mechanical energy to electric energy.

12 A: Energy is energy.

13 Q: Okay. Now, you would agree that Duke Energy
14 generates electricity with its generators,
15 correct?

16 A: It generates energy in the form of an
17 electromagnetic field. So common parlance we
18 call it "electric energy."

19 Q: Now, electric --

20 MR. GREEN: Bear with me just one moment.

21 Q: An electric current is a flow of charges,
22 right?

23 A: Yes.

24 Q: And that's measured in amperes?

25 A: Correct.

1 Q: Electrons have mass, correct?

2 A: Correct.

3 Q: And I think you said cell phone technology, the
4 frequencies are different between cell phone
5 transmissions and electric transmissions; isn't
6 that correct?

7 A: Correct.

8 Q: Cell phone has a much higher frequency.

9 A: That's right.

10 Q: Electricity is about 60 hertz.

11 A: Correct.

12 Q: And then I think you said telephone company and
13 cell phone companies use electricity to
14 transmit communications; is that correct?

15 A: Yes.

16 Q: The cell phone uses a battery, correct, to
17 generate the -- to transmit the communications;
18 isn't that correct?

19 A: Yes. The cell phone that we have, the users
20 have, use a battery.

21 Q: Okay. And the telephone company use
22 electricity; is that correct?

23 A: That's correct.

24 Q: Telephone companies, to your knowledge, don't
25 typically generate their own electricity, do

1 they?

2 A: They may get it from the power grid. In the
3 old days, they would use batteries. For
4 example, in the 1800's when telegraphy, you
5 know, which was the predecessor to telephony,
6 they would use batteries to power, you know,
7 their transmission lines.

8 Q: You testified you can't touch electricity.

9 A: Correct.

10 Q: Is that right?

11 A: Yes.

12 Q: If I stick my finger in a socket, I'm not
13 touching electricity.

14 A: You're not.

15 Q: I feel the force of the electricity if I
16 complete the circuit.

17 A: You feel the force of the electric field. In
18 a lot of cases, you know, if the field is
19 extremely strong, you know, you don't even have
20 to touch the metal, for example, that
21 propagates the energy.

22 Q: So I can touch -- I can't touch electricity,
23 but it can touch me; is that your testimony?

24 A: No. The testimony is that the human body can
25 feel the effects of the electric field. The

1 reason for that is that the electric field
2 interacts with matter. As we all know, our
3 bodies consist of matter, so that's what
4 happens.

5 Q: And I think you testified that I can't move
6 electricity; is that correct?

7 A: Correct.

8 Q: But the current moves, doesn't it?

9 A: The charges move.

10 Q: Okay. You testified electric current --

11 THE COURT: You said the charges?

12 THE WITNESS: The charges move, yes.

13 Q: And you testified that electric current is a
14 flow of charged particles; is that correct?

15 A: Yes.

16 Q: And as part of that process, there are
17 electrons that are oscillating; is that
18 correct?

19 A: If you use an alternating current, yes.

20 Q: And that results in the charge.

21 A: No. As I explained before, and I want to make
22 it very clear, what we do is that we basically
23 propagate the energy. And the fact that we
24 have the charges in motion, in the case of our
25 wire, are electrons, we make them move in a

1 certain direction. In that way, they can do
2 the work and give us the energy to use to power
3 our devices.

4 Q: Now, electricity can be measured, correct?

5 A: Correct.

6 Q: And I think you testified that the scientific
7 principles really haven't changed in the
8 last -- certainly in the last hundred years; is
9 that correct?

10 A: Yes.

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

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

20 MR. GREEN: Bear with me one moment, please, Your
21 Honor.

22 Your Honor, I don't have any more questions for
23 this witness, excuse me.

24 Thank you, Doctor.

25 MR. TRESH: Brief redirect, Your Honor.

1 DR. PAPAPOLYMEROU - REDIRECT EXAMINATION BY MR.

2 TRESH:

3 Q: Professor Papa, what -- can you tell the Court,
4 what does Duke Energy -- a company like Duke
5 Energy, what do they provide to their
6 customers?

7 A: Energy.

8 Q: Mr. Greene asked a couple of moments ago, he
9 was saying can you touch electricity and I
10 believe you testified that you can't touch
11 electricity but you could feel the effects; is
12 that correct?

13 A: Yes.

14 Q: And can you feel -- can you -- can the human
15 body -- can you feel the effects of sunlight?

16 A: Yes.

17 Q: How do you feel the effects of sunlight?

18 A: Well, if we stand out in the sun, you know, the
19 sun will warm up your body.

20 Q: Is it heat?

21 A: It's heat, yes.

22 Q: Okay. The same way I can feel the effects of
23 a gravitational field; is that similar?

24 A: It's similar.

25 Q: Can I feel -- can a human body feel wind?

1 A: Yes.

2 Q: Okay. Does Duke Energy make electrons?

3 A: No.

4 Q: What do they do with electrons, if anything?

5 A: The electrons are used to basically propagate
6 the energy from the generator all way to the
7 load. And through various processes, you know,
8 you -- you want to do that in a very efficient
9 way.

10 So, for example, you increase the voltage, have
11 a high voltage transmission line and then you
12 decrease it at the location of the load. But
13 they do not provide electrons.

14 Q: And in a telecommunications signal -- and I'm
15 not concerned about the battery that's in my
16 handset, but when you have a radio tower or
17 wireless telecommunications and it's
18 transmitting a signal to my handset, is there
19 electrons or how -- how is that working, again?
20 The signal.

21 A: Right. It's an electromagnetic wave that
22 propagates in free space and even in vacuums.

23 Q: And a telecommunications landline provider, not
24 the telephone that I have in my hand and not
25 the base station, but what's transmitting over

1 the wire, what is that?

2 A: That is energy.

3 Q: Thank you. You mentioned a moment ago,

4 Mr. Green asked you about whether the process

5 of electricity has remained in place the same

6 for a hundred years. I believe you said

7 "fundamentally the same." I'd like to -- I'd

8 like to drill into that a little bit. A

9 hundred years ago, did they have nuclear power?

10 A: No.

11 Q: Fifty years ago? When did nuclear power come

12 into existence?

13 A: Well, it's historical. It's the Manhattan

14 Project; that was World War II. And after

15 that, you know, in the -- sometime in the

16 '50's, early '60's -- I don't remember

17 exactly -- that they started making it into a

18 commercial -- for commercial purposes.

19 Q: And the processes -- the fundamental physics

20 behind nuclear power, they haven't changed.

21 It's just our understanding of it and our

22 ability to use it.

23 A: Correct. So the -- as I said before, the

24 universe is the universe and, you know, how we

25 understand that, you know, basically evolves

1 over time.

2 Q: But your understanding of Duke Energy today,
3 that provides nuclear power, hydropower, solar
4 panel -- power, those are forms of -- or part
5 of the electric service process; is that
6 correct?

7 A: That is correct.

8 Q: And those wouldn't have existed a long time
9 ago.

10 A: No.

11 Q: And a company like Duke Power -- we heard
12 testimony earlier -- would you agree with the
13 statement that a company like Duke Power, it
14 wouldn't have to generate any of its own
15 electricity, it could buy it on the open
16 market?

17 A: That's true.

18 Q: And so it could have just -- it could just
19 provide the exact same electric service that it
20 provides today, even if it didn't generate any
21 electric service at all.

22 A: That's true.

23 Q: And that wouldn't have been the case a hundred
24 years ago, correct?

25 A: Correct.

1 MR. TRESH: No further questions, Your Honor.

2 MR. GREEN: Short redirect -- re-cross, Your Honor.

3 DR. PAPAPOLYMEROU - RE-CROSS-EXAMINATION BY MR. GREEN:

4 Q: Mr. Tresh asked you about nuclear power; is
5 that right?

6 A: Yes.

7 Q: Now, the electric energy that comes down the
8 line to my house, that's not nuclear energy, is
9 it?

10 A: No, it's electrical energy.

11 Q: And electrical energy that was generated
12 through the use of nuclear power; is that
13 correct?

14 A: It -- no, it was generated by using nuclear
15 fuel.

16 Q: Nuclear fuel.

17 A: Using nuclear material.

18 Q: And nuclear fuel is an input that runs the
19 generator, essentially, correct?

20 A: In very, very layman's terms. We have to be
21 careful here. So what you use that -- you
22 create a nuclear reaction and that's how you
23 extract the energy. And, typically, when you
24 do that, you boil water, you make it into
25 steam, and the steam moves the turbine.

1 Q: And so you're generating steam. That's no
2 different, though -- you're still generating
3 steam even if you use a fossil fuel?

4 A: Correct.

5 Q: Or coal?

6 A: That's correct.

7 THE COURT: Coal is not a fossil fuel?

8 MR. GREEN: I guess coal is a fossil fuel. I guess
9 I'm being redundant.

10 THE COURT: The dinosaurs would feel that way.

11 MR. GREEN: Thank you. Yes, sir.

12 Q: And those are all part of the inputs that start
13 the generation process, isn't that correct,
14 coal, fuel, gas, nuclear fuel?

15 A: You use it to generate energy, but then you
16 transform into electrical energy.

17 Q: Okay. And nuclear energy uses uranium; is that
18 correct?

19 A: Correct.

20 Q: And uranium is -- under your definition, is it
21 a good or material? Is it tangible?

22 A: It's an object, yeah. It's matter.

23 Q: Okay.

24 MR. TRESH: Your Honor, objection. Mr. Green has
25 gone way beyond any kind of redirect that I

1 started down. He started --

2 MR. GREEN: He started talking about nuclear power,

3 Your Honor, so --

4 MR. TRESH: We did not talk about how -- what

5 uranium was or anything like that, Your Honor.

6 MR. GREEN: Nuclear power, it depends on uranium.

7 THE COURT: You're on re-cross.

8 MR. GREEN: I'm raising issues involved in what he

9 raised on redirect.

10 THE COURT: What are you responding -- what issue

11 did he --

12 MR. GREEN: He talked about nuclear power as being a

13 difference -- or whatever it was. He made a

14 point about nuclear power that wasn't available

15 a hundred years ago is available now. Well, I

16 asked him about -- I am probing into the nature

17 of that nuclear power in the context of the

18 transmission -- generation, transmission and

19 distribution system.

20 THE COURT: And your objection is?

21 MR. TRESH: My objection, Your Honor -- my question

22 was limited to whether nuclear power existed a

23 hundred years ago or not and the answer was

24 "no."

25 THE COURT: Well

1 MR. GREEN: Your Honor, I think I'm entitled to
2 explore the nature of that impact of nuclear
3 power.

4 THE COURT: You did open up the issues -- I mean, by
5 saying that, whether or not it existed, you
6 open up the issue of -- to explore its benefits
7 or -- I can't find the word I want to use --
8 aspects in energy. So I'm going to let him go
9 into it.

10 MR. TRESH: Okay. Thank you, Your Honor.

11 THE COURT: At least right now.

12 MR. GREEN: I apologize, Your Honor. I lost my
13 train of thought.

14 Q: I think we said that uranium was -- it's
15 matter. It's tangible under your definition.

16 A: That's correct.

17 Q: Same as the coal?

18 A: That's correct.

19 Q: Same as whatever fossil fuel it might be.

20 MR. TRESH: Your Honor, if I may. I did not ask any
21 questions on coal or fossil fuels. That is not
22 the scope of --

23 THE COURT: I'll sustain that.

24 MR. GREEN: Okay. Withdrawn.

25 No further questions. Thank you.

1 MR. TRESH: No further questions, Your Honor.

2 THE COURT: All right. Where I can understand, you
3 testified -- I'm phrasing a little different,
4 but the egis of electricity is the charge?

5 THE WITNESS: I'm sorry, I couldn't hear. The ...

6 THE COURT: The -- well, the -- I said, "The egis of
7 electricity is the charge?" Electricity is
8 derived from the charge?

9 THE WITNESS: The source --

10 THE COURT: Source.

11 THE WITNESS: -- of electricity, or an electric
12 field, to be accurate, is a charge.

13 THE COURT: Is a charge. So Duke Energy generates
14 the charge first which creates the electrical
15 field?

16 THE WITNESS: No, they do not generate the charge.

17 THE COURT: Where does the charge come from, then?

18 THE WITNESS: The charge exists in the metals.

19 THE COURT: In the what?

20 THE WITNESS: In the metal in the wires.

21 THE COURT: Okay.

22 THE WITNESS: So what -- what fundamentally happens
23 through the generator is that it separates the
24 positive from the negative charges and that can
25 give you a very strong electric field. And if

1 you bring a third charge now in that field,
2 it's going to -- a force will be applied to the
3 charge.

4 THE COURT: A charge can be stored, correct?

5 THE WITNESS: That's correct.

6 THE COURT: If Duke Energy didn't through their
7 generators create something that created the
8 charge, then how would you have the electrical
9 field?

10 THE WITNESS: Through the force. Through the force.
11 The electric field applies a force to the
12 electrons in the conductors and that field
13 propagates and you get it at the other end and
14 you hook it up to a device that takes advantage
15 of that force. So, in essence, what --

16 THE COURT: The generators generate force? I mean,
17 what ...

18 THE WITNESS: Yes, a force field, exactly.

19 THE COURT: They generate the force field. By what
20 means?

21 THE WITNESS: It is called electromagnetic induction.
22 So when you have a moving metal inside a
23 magnetic field, or the opposite, you have a
24 metal inside a time varying magnetic field,
25 the -- a force gets applied in the electrons

1 inside the metal and you can basically separate
2 the negative from the positive. And that
3 basically is how we create an electric field,
4 between the positive and the negative.

5 THE COURT: If charge is the source of electricity,
6 then how does it enter into all that?

7 THE WITNESS: Well, you manipulate the charges;
8 that's what you do, Your Honor. So ...

9 THE COURT: So Duke Energy manipulates the
10 charges --

11 THE WITNESS: Correct.

12 THE COURT: -- to create the electric field.

13 THE WITNESS: That's correct.

14 THE COURT: All right. And that charge is moved via
15 whatever transmission means that they have
16 available, wires --

17 THE WITNESS: Right. So the --

18 THE COURT: -- to the ultimate source.

19 THE WITNESS: Correct.

20 THE COURT: All right. Now, you said that you can
21 feel electricity because we are matter. And I
22 gather that the principle by which you can feel
23 electricity is because it is therefore because
24 we are matter. If we weren't matter, we
25 couldn't feel electricity, correct?

1 THE WITNESS: That's correct.

2 THE COURT: If that's the theory, then we could
3 equally not feel a pinprick if we were not
4 matter, correct?

5 THE WITNESS: (No response.)

6 THE COURT: I mean, we feel a pin pricking our skin
7 because we are matter, do we not? I'm just
8 trying to understand if there is a distinction
9 there that I'm missing or ...

10 THE WITNESS: Yes, you can feel it, but the pin is
11 an object. So you have an object touching your
12 body. The field is not an object. It exerts
13 a force on your body.

14 THE COURT: Well, that being the case, then what --
15 if it's only because we're matter, it's
16 not -- it would seem to me that the distinction
17 is not that we are matter but that we possess
18 electrons.

19 THE WITNESS: That is true, too. But the electric
20 field can interact also -- it does interact
21 with, for example, insulators; materials that
22 don't have any free electrons.

23 THE COURT: It does interact with those?

24 THE WITNESS: Yes.

25 THE COURT: Okay. Follow up on what I have asked?

1 MR. TRESH: Thank you, Your Honor.

2 THE COURT: If you wish.

3 MR. TRESH: I do and I think it's relevant.

4 DR. PAPAPOLYMEROU - FURTHER REDIRECT EXAMINATION BY

5 MR. TRESH:

6 Q: So, in the pin example, you can certainly feel
7 a pin or a pen hit your finger, matter. Can
8 you -- again, on the sunlight, can you feel the
9 sunlight because we're matter, for example? In
10 other words, if we didn't have matter, we
11 couldn't -- you know, our bodies wouldn't heat
12 in the sunlight, right?

13 A: Correct.

14 Q: And in the context of what Duke Energy sells to
15 its customers -- and I think this is
16 critical -- how would -- when Duke Energy's
17 customers -- I'm at home, I plug in my
18 television set, what's -- what's happening in
19 that television set? Are there -- are there
20 excited electrons that are in that television
21 set and that field is exciting those electrons?
22 Is that what's happened?

23 A: When you connect it to the plug, yes.

24 Q: When I connect it to the plug. So it's not
25 Duke Energy sending electrons down the wire.

1 It's there's electrons in my television set or
2 my battery or my cell phone, whatever the case
3 may be, and that's what's being excited by the
4 field, right?

5 A: That's correct.

6 Q: And the difficulty regarding all of this, at
7 least to me as a nonengineer, has always been
8 this field is abstract, as you said to
9 Mr. Green in the beginning, right?

10 A: It is abstract, yes.

11 Q: So the idea and concept of electricity, which
12 is what people have had a hard time with, is it
13 has no form, it has no shape, it has no
14 existence, correct?

15 A: It has no form, correct, yes.

16 Q: No form, no shape?

17 A: Shape, right. Correct.

18 Q: And so what I'm getting in my house is just
19 this field. I can't see it; I can't touch
20 it...

21 MR. TRESH: And that's makes it so difficult, Your
22 Honor.

23 Q: Is that accurate?

24 A: Yes.

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

1 THE COURT: Re-cross?

2 MR. GREEN: None from me, Your Honor. Thanks.

3 THE COURT: You may step down.

4 THE WITNESS: Thank you.

5 THE COURT: Wait a second.

6 You may step down.

7 (Witness excused.)

8 THE COURT: Do we need to take a break or ...

9 MR. GREEN: It's up to y'all. Are y'all resting?

10 MR. TRESH: We're fine. We're ready to go if you
11 are.

12 MR. GREEN: Well, I mean, are you resting your case?

13 MR. TRESH: Oh. Yes, Your Honor, we have no further
14 witnesses. We rest.

15 THE COURT: I guess you were operating under one
16 definition of "resting" and --

17 MR. TRESH: That is correct, Your Honor. I was
18 asking if he thought I was taking a break, yes.

19 THE COURT: You were a body at rest.

20 All right. He has legally rested.

21 MR. GREEN: Yes, he has legally rested. Your Honor,
22 we would move for under Rule 41(b) for an
23 involuntary nonsuit. We contend that based on
24 the record thus far that Duke Energy has failed
25 to meet its burden of proof and the judgment --

1 the Department is entitled to judgment as a
2 matter of law for the reasons you've heard here
3 today, as well as for the reasons stated in our
4 pretrial brief.

5 THE COURT: All right. That's denied.

6 MR. GREEN: Thank you. It might be appropriate to
7 take a five or ten-minute break, if that'd be
8 all right with the Court.

9 THE COURT: That's fine with me.

10 (Off the Record from 10:59 to 11:14 a.m.)

11 THE COURT: Proceed away.

12 MR. GREEN: First, Your Honor, I'd like to go ahead
13 and move into the record the articles of --
14 corporate charters that we've already
15 stipulated to as part of -- I just wanted to go
16 ahead and move those in as Exhibits Two, Three
17 and Four.

18 THE COURT: You started with "articles," but it's
19 the corporate charter?

20 MR. GREEN: It's the corporate charter. Articles of
21 incorporation, articles of -- but it's the
22 corporate charter.

23 THE COURT: All right.

24 MR. TRESH: No objection.

25 MR. GREEN: Thank you.

1 THE COURT: They're admitted. They've been marked
2 as?

3 MR. GREEN: Respondent's Two, Three and Four.

4 THE COURT: Okay.

5 MR. GREEN: Thank you.

6 (Respondent's Exhibit Numbers Two, Three and Four
7 were admitted into evidence.)

8 MR. GREEN: And now I would call Glenn Robinson to
9 the stand.

10 GLENN ROBINSON, P.E., having been duly sworn,
11 testifies and examines as follows:

12 MR. ROBINSON - DIRECT EXAMINATION BY MR. GREEN:

13 Q: Mr. Robinson, please state your name for the
14 record.

15 A: I'm Glenn Robinson.

16 Q: And what is your current employment and
17 position?

18 A: I am an electrical engineer. I work for
19 Engineering, Design & Testing as a consultant.

20 Q: Are you a registered professional engineer?

21 A: Yes, I am.

22 Q: What states are you registered in?

23 A: Georgia, South Carolina, North Carolina, Ohio,
24 Indiana and Washington.

25 Q: Thank you. Now, tell me a little bit about

1 ED&T. What type of work do you do at ED&T?

2 A: Engineering, Design & Testing primarily
3 performs services for the insurance industry.
4 They investigate claims and the purpose of this
5 investigation generally is to determine the
6 facts of -- or circumstances of loss so that
7 the insurance adjusters can determine whether
8 the loss is covered by the policy language. We
9 also do work in the scope of damage, cost of
10 reconstruction, and we occasionally do work
11 directly work for attorneys.

12 Q: Okay. And as part of your work for ED&T, do
13 you evaluate plant-wide electrical systems?

14 A: I have.

15 Q: Do you evaluate damage and repairs, needed
16 repairs to electrical systems and equipment?

17 A: I have.

18 Q: And do you -- are you involved in
19 troubleshooting and analyzing failures of
20 electric and control networks?

21 A: Yes.

22 Q: How long have you worked with ED&T?

23 A: Thirteen years now.

24 Q: And prior to that, did you used to work for a
25 company called FiberMark?

1 A: Yes.

2 Q: And what projects were you involved in at
3 FiberMark regarding, of course, the electrical
4 issues?

5 A: FiberMark is a small custom paper manufacturer
6 in New Jersey. They have two mills near the
7 Delaware River, about a mile and a half apart.
8 I was -- my job title was electrical and power
9 superintendent. In regard to that, I was
10 responsible for operations of two water wheel
11 generators and a steam turbo generator and I
12 also ran a crew of six electricians, two at one
13 mill and four at another, doing maintenance
14 work, primarily. I did occasionally get into
15 system design and construction where we were
16 adding capabilities to the mills.

17 Q: And prior to that, did you work for a company
18 called Getchell Gold, Inc.?

19 A: Yes, I did.

20 Q: And what electrical projects were involved in
21 for Getchell Gold?

22 A: I was a project engineer and I was involved in
23 a wide variety of projects. The largest
24 electrical project I was involved with was the
25 addition of a feeder to a new underground mine,

1 which involved working with the electric
2 utility to provide a new substation to step
3 down transmission voltage to an intermediate
4 voltage and the construction of the lines and
5 controls to bring the power to the mouth of the
6 line (sic).

7 Q: Okay. And did you work for Pitt County
8 Hospital in North Carolina as an electrical
9 engineer for a while?

10 A: I did, briefly.

11 Q: And did you work for Weyerhaeuser Company --

12 A: Yes.

13 Q: -- as a electrical engineer?

14 A: I worked -- I did.

15 Q: And just very briefly, what were your
16 responsibilities for Weyerhaeuser?

17 A: At Weyerhaeuser I had two sequential jobs. The
18 first one, I was a research and development
19 project manager responsible for implementing a
20 computer-based control system for cross-cutting
21 tree length stems into saw logs and plywood
22 blocks with the objective of placing the cut
23 points to maximize the economic return to the
24 mill.

25 At the -- I stayed with that project long

1 enough through the first commercial
2 implementation, Wright City, Oklahoma, and then
3 because the next stage was just replication at
4 other mills, I chose to move to a different
5 line of endeavor and I became the engineering
6 manager for a new technology sawmill project in
7 North Carolina.

8 I worked with the design and construction
9 outfit in Atlanta for a couple of years during
10 that phase of the job and then I stayed on as
11 plant engineer after that phase of the job.

12 Q: Okay. And for a period of years, you were
13 employed with the Oregon Graduate Institute; is
14 that correct?

15 A: That's correct.

16 Q: Prior to that you were employed with the
17 University of Washington?

18 A: Yes, I was the staff electrical engineer. My
19 first assignment was in development of control
20 systems for torpedoes. This was a Navy
21 contract lab.

22 Q: Okay.

23 A: And then after about five years at that -- six
24 years, possibly -- at that, I went for two
25 years to the high energy physics lab where I

1 managed their instrument development and their
2 experimental workforce. And then I put in two
3 years, also, at the computer center, where I
4 worked on developing campus data network.

5 Q: And prior to that, did you work for a while for
6 the Boeing Company?

7 A: Yes, I did.

8 Q: And what did you do for the Boeing Company
9 group?

10 A: I was involved in the wiring for the Minuteman
11 II missile.

12 Q: And what is your educational background?

13 A: Excuse me.

14 Q: Do you need some water?

15 A: I have a Bachelor of Science in electrical
16 engineering from the University of Washington
17 and a Master of Science in electrical
18 engineering from the same institution.

19 MR. GREEN: Your Honor, I would tender Mr. Robinson
20 as an expert in the areas of principles of
21 manufacturing electricity, its scientific and
22 technical intricacies and industry standards.

23 MR. TRESH: Your Honor, we would object to
24 Mr. Robinson serving as an expert in this
25 regard and I'd ask the Court for permission to

1 examine Mr. Robinson's credentials further?

2 THE COURT: Proceed.

3 VOIR DIRE EXAMINATION BY MR. TRESH:

4 Q: Good morning, Mr. Robinson. How are you?

5 A: Good morning. I'm nearly perfect.

6 Q: Nearly perfect. Excellent. Mr. Robinson, for

7 the past 13 years, August '99 to the present,

8 approximately 13 years, you've been an

9 insurance investigator for Engineering, Design

10 & Testing corporation?

11 A: No.

12 Q: Tell me what your responsibilities are at

13 Insurance (sic) Design & Testing corporation.

14 A: My responsibilities at Engineering, Design &

15 Testing was as an engineer in charge for

16 engineering investigations into cases of loss.

17 I was involved in cases where somebody

18 perceived that there was an electrical aspect

19 or I was brought in as a second engineer if the

20 initial investigation developed the need for

21 that expertise.

22 Q: So what would be an example of an electrical

23 issue? A hospital gets -- somebody gets

24 electrocuted in a hospital, would that be an

25 example?

1 A: I have -- I worked on a variety of types of
2 losses. Some involved personal injury. Many
3 of them were fires, defects in control systems.
4 I had a couple of cases involving substations
5 and large transformer failures. I think that
6 pretty well covers it.

7 Q: Has any -- in the last 13 years, how many cases
8 have you worked on investigating insurance
9 claims regarding manufacturing electricity?

10 A: I have not handled any claims in regard to
11 commerce. My role is strictly engineering.

12 Q: That was not my question I asked. How many
13 cases have you been involved in involving the
14 manufacturing of electricity?

15 A: I would say a handful of generator files.

16 Q: Handful of cases in 13 years?

17 A: Yes.

18 Q: And how many cases have you been involved in
19 involving scientific intricacies -- the
20 scientific intricacies of electricity?

21 A: That ...

22 Q: These are your counsel's words, not mine.

23 A: I understand. One can't really control what a
24 lawyer will say.

25 Q: Absolutely true. Except the Judge.

1 THE COURT: No, I can't.

2 A: We --

3 THE COURT: I can only react to it.

4 MR. TRESH: And I will feel the effects of that.

5 A: We base our investigations on the scientific
6 method and to the -- to that degree, all of the
7 work that I have done, which were primarily
8 electrical in nature, involved the application
9 of scientific principles and my engineering
10 training to the resolution of the matter.

11 Q: But only a handful of those cases involved
12 manufacturing electricity?

13 A: That's correct.

14 Q: And how many cases -- are you an expert in
15 industry standards regarding electricity?

16 A: I am a near expert in the National Electric
17 Code, which has to do with the application of
18 electricity. I am somewhat familiar with the
19 National Electrical Safety Code, which is what
20 the transmission and distribution industry goes
21 by. I am familiar with the transmission and
22 distribution technology. And to the extent
23 needed, if a specific code or standard is --
24 needs to be consulted to resolve an issue, then
25 I go to that code or standard to resolve it.

1 Q: So you are an expert in electric industry
2 standards or are you not?

3 A: I have a working familiarity with the National
4 Electrical Safety Code, which is what the
5 electrical industry -- transmission industry
6 uses in its transmission system.

7 Q: A working familiarity. And are you an expert
8 in manufacturing industry standards?

9 A: I'm an expert in manufacturing by virtue of my
10 experience in manufacturing.

11 Q: For the past 13 years, you said you were --
12 worked on insurance claims.

13 A: Yes.

14 Q: What expertise in manufacturing do you have as
15 part of insurance claims?

16 A: From the period of 1980 -- excuse me, 1979
17 through 1999, I worked in manufacturing.

18 Q: But in the last 13 years you have not; is that
19 correct?

20 A: That's correct.

21 Q: Would an electrician be familiar with
22 electrical safety codes/standards?

23 A: Yes.

24 Q: Would that make an electrician an expert in the
25 scientific and technical intricacies of

1 electricity?

2 A: No, that's a different question.

3 Q: That was just the question I asked.

4 A: Yep.

5 Q: Okay. Do you consider yourself an expert in
6 the National Electric Code?

7 A: Yes, I would say so.

8 Q: Do you recall during your deposition when I
9 asked you whether you're an expert in any
10 electrical industry standards, your response
11 was, "I came close to being an expert in the
12 National Electrical Code"?

13 A: Yes.

14 Q: So which is it, do you come close or are you an
15 expert?

16 A: Being an "expert" is a relative term. My
17 client employed me as an expert; I'm an expert.

18 Q: You mentioned you worked at a paper mill in New
19 Jersey --

20 A: Yes.

21 Q: -- about 14, 15 years ago?

22 A: I guess that's right. Time flies.

23 Q: Okay. And at that paper mill, what were your
24 responsibilities?

25 A: I was responsible for improvement projects, for

1 supervising maintenance electricians and
2 supervising the operation of a turbo generator
3 and two water wheel generators.

4 Q: And in the past 13 years, in your role -- in
5 your current position, did many of your claims
6 involve physical damage to equipment?

7 A: Yes.

8 Q: Did they involve damage to equipment as a
9 result of equipment malfunction?

10 A: Yes.

11 Q: Fires?

12 A: Yes.

13 Q: Machines that broke down?

14 A: Yes.

15 Q: And yet only a handful of those involved
16 electricity?

17 A: No.

18 Q: What did a handful involve?

19 A: You asked me a question about generation of
20 electricity and I answered that question.

21 Q: Uh-huh (affirmatively responds).

22 A: But virtually all of my jobs involved some
23 aspect of electricity.

24 Q: Since 1990, your capacity as being employed by
25 Engineering, Design & Testing, have you done

1 any actual engineering work?

2 A: It was all engineering work.

3 Q: I'd like to read your deposition. When I asked

4 you that question, line 17 of your deposition,

5 "Okay, since 1999 in your capacity as being

6 employed by Engineering, Design & Testing

7 corporation, have you done any actual

8 engineering work?" Answer: "Only incidental

9 to investigations. I do calculations,

10 sometimes prepare sketches and drawings." Is

11 that not correct?

12 A: I said that.

13 Q: So you don't always do engineering work. It's

14 only incidental to your --

15 A: I'd like to explain that.

16 MR. TRESH: Now, Your Honor, Mr. Robinson in 13

17 years has only done incidental engineering work

18 as he just testified to --

19 THE COURT: Well, one, he just asked to explain that

20 but, number two, do you -- are you through with

21 your voir dire?

22 MR. TRESH: I am, Your Honor.

23 THE COURT: Well, that's --

24 MR. TRESH: Fair enough.

25 MR. GREEN: Thank you, Your Honor.

1 THE COURT: Then I'll hear your argument.

2 MR. GREEN: Thank you, Your Honor.

3 VOIR DIRE EXAMINATION BY MR. GREEN:

4 Q: Mr. Robinson, are you a registered professional
5 engineer?

6 A: Yes, I am.

7 Q: You have an undergraduate in electrical
8 engineering.

9 A: Yes, I have.

10 Q: Do you have a Master's degree in electrical
11 engineering?

12 A: Yes, I have.

13 Q: Do you do electrical engineering for employers
14 in your employment history?

15 A: Yes, I did.

16 Q: Are you involved in the installation of
17 electrical systems?

18 A: Yes.

19 Q: Are you involved in the installation of
20 electrical substations?

21 A: Yes.

22 Q: Were you involved in the installation of
23 electric lines?

24 A: Yes.

25 Q: Were you involved in a manufacturing process

1 involving electricity?

2 A: Yes.

3 Q: Did you -- how long -- when did you -- did you
4 first start work in 1963?

5 A: Yes.

6 Q: For the Boeing Company?

7 A: Yes.

8 Q: And then did you start -- and then you've
9 proceeded there through your present job, the
10 Engineering, Design & Testing; is that correct?

11 A: Yes.

12 Q: So you have how many years of employment
13 history?

14 A: Forty-nine.

15 Q: And what has been your profession for those 49
16 years?

17 A: Electrical engineer.

18 Q: And did you serve as an electrical engineer for
19 the Boeing Company?

20 A: Yes.

21 Q: And what, again, was your employment for the
22 Boeing Company?

23 A: I was working on wiring for the Minuteman II
24 missile.

25 MR. GREEN: That's all I have, Your Honor.

1 MR. TRESH: Your Honor, for the past 13 years, if I
2 can focus on what Mr. Robinson has been doing
3 for over a decade, he hasn't done engineering
4 work other than sketches and drawings.
5 Mr. Robinson has never been involved in the
6 generation of electricity. The fact that he
7 worked for plants that used electricity --
8 virtually every business uses electricity.
9 The fact that Mr. Robinson hasn't worked as an
10 engineer in the last 13 years -- his primary
11 responsibilities involve investigating
12 insurance claims and that in only a handful of
13 those claims in a 13-year period have involved
14 electricity? Or it seems -- I find it hard to
15 believe that he is an expert in the intricacies
16 of manufacturing of electricity and in the
17 principles and industry standards regarding
18 manufacturing electricity. There's nothing in
19 the past 13 years in his background that
20 suggests he's been involved in any of that.

21 MR. GREEN: Your Honor, his record -- his employment
22 history, 49 years, establishes that he's got
23 the knowledge, training, his educational
24 background, his work experience, both current
25 and past. All that Mr. Tresh has gone into,

1 frankly, at most goes to weight and
2 credibility; doesn't go to admissibility.
3 Everything that you've heard here today, Your
4 Honor, shows that he's an expert qualified to
5 testify regarding electrical engineering issues
6 that we've tendered him for.

7 THE COURT: What, again, are you seeking him to be
8 qualified as?

9 MR. GREEN: I think he was identified to be
10 qualified as -- witness as the principles of
11 manufacturing electricity, its --

12 THE COURT: Whoa, whoa, you're going too fast.

13 MR. GREEN: I'm sorry.

14 THE COURT: Slow down. Principles ...

15 MR. GREEN: Principles of manufacturing electricity,
16 its scientific and technical intricacies and
17 industry standards.

18 THE COURT: All right. On the first part,
19 principles, I can qualify him on. The industry
20 standards? I don't understand. There's lots
21 of industry standards. So is there something
22 more specific there? Because he's talked about
23 certain industry standards by which he has a,
24 quote, "working familiarity with," end quote.

25 MR. GREEN: Yes.

1 THE COURT: I mean -- and "working familiarity" can
2 reach to the level of being an expert under
3 the -- under Rule 703.

4 MR. GREEN: It's 703, yes, Your Honor.

5 MR. TRESH: If it was frequent, Your Honor. His
6 working familiarity --

7 THE COURT: But -- frequent, yes. I don't want to
8 cut you off. When you say "frequent," it
9 doesn't -- the rules don't say it has to be
10 recently frequent. It's, you know, skill,
11 training, experience, education or knowledge.
12 You know, those are the -- that's the list. I
13 don't know if I did it exactly in order, but
14 that's the list.

15 MR. TRESH: But in the past 13 years -- I understand
16 that, Your Honor. So not only frequently, but
17 in his current role. In the past 13 years,
18 we've only got a handful of instances where he
19 was involved in matters concerning electricity.
20 And he's never been involved in a position
21 where he's recently -- where -- in the past 13
22 years where he's responsible for manufacturing
23 electricity.
24 If I went -- you know, if I got my JD and then
25 went off and consulted on an area outside of

1 the law having nothing to do with my law
2 degree, that wouldn't make me an expert in the
3 law in any way. If I was a certified public
4 accountant and worked in a grocery store for 13
5 years, that wouldn't make me an expert in tax
6 accounting.

7 THE COURT: Well, I think he did testify about
8 expertise or experience in generating or
9 manufacturing electricity.

10 MR. GREEN: Generating, manufacturing issues.

11 THE COURT: I think he used the word
12 "manufacturing."

13 MR. TRESH: In the past 13 years --

14 THE COURT: Well, in the past 13, okay, I follow
15 you.

16 MR. TRESH: I mean, recent -- in recent history. I
17 mean, if -- again, if I was licensed as a
18 certified public accountant and changed careers
19 and spent 13 years doing something else and
20 somebody called me into testify into court, I
21 doubt that I would be qualified as an expert as
22 a CPA having not done it for 13 years.

23 MR. GREEN: Your Honor, I --

24 THE COURT: Well, I think I may agree with you on
25 that because the tax law has changed

1 significantly. But our earlier professor
2 explained to us how the principles of
3 electricity have not changed significantly as
4 of recent.

5 MR. TRESH: Well, I think his testimony was on the
6 intricacies, the technical intricacies, which I
7 do believe have changed.

8 THE COURT: Look, I'm okay with the first -- the
9 first part. The second was one was the
10 industry -- then it was the intricacies of the
11 standards. Now, that is where I'm asking
12 questions.

13 MR. GREEN: Well, it was principles of manufacturing
14 of electricity, its scientific and technical
15 intricacies and industry standards.

16 THE COURT: Okay. Well, the "and industry
17 standards" is the one I'm having trouble with,
18 because I want to know what standards we're
19 talking about.
20 Then when you say "intricacies of scientific
21 principles," I think for purposes of this case
22 I can qualify him for -- do you know that
23 quote?

24 MR. TRESH: "Scientific and technical intricacies"?

25 THE COURT: I don't see the need to do all that,

1 but ...

2 MR. GREEN: If I understand, you're qualifying
3 principles of manufacturing electricity, its
4 scientific and technical intricacies, period.

5 THE COURT: I don't see the need to do the
6 "scientific." If I can get to the science, I
7 don't need to get to the technical intricacies.

8 MR. GREEN: That's fine. Okay.

9 THE COURT: I don't know what means. I don't know
10 what it means to qualify somebody like that,
11 unless there was something in the case that
12 made it more -- if there was a -- something in
13 this case that there was -- that phrase was of
14 specific significance and I don't see that.

15 MR. GREEN: Yes. Frankly, what I really -- I'm just
16 tendering him on the principles, the science --

17 THE COURT: Okay.

18 MR. GREEN: -- the technical industries (sic) and
19 industry standards. That's fine.

20 THE COURT: All right.

21 MR. TRESH: Your Honor, on the principles of
22 manufacturing electricity, I don't believe that
23 Mr. Robinson has ever worked or had experience
24 in manufacturing electricity.

25 THE COURT: Well, according to you, that doesn't

1 happen, so ...

2 MR. TRESH: That is true.

3 THE COURT: That would be a little difficult to have
4 an experience in that which does not occur. So
5 I get the -- I get the gist of what he's
6 testifying to from his perspective. So I'm
7 going to qualify him as I said earlier.

8 MR. GREEN: Thank you, Your Honor.

9 MR. TRESH: Thank you, Your Honor.

10 MR. ROBINSON - DIRECT EXAMINATION (Continued) BY

11 MR. GREEN:

12 Q: Mr. Robinson, let's start out with: What is
13 "electricity"? Is "electricity" a scientific
14 term?

15 A: It is not really useful as a scientific term.
16 It is commonly understood to be the field of
17 endeavor having to do with electric charges.
18 We heard earlier about the four fundamental
19 forces of which one is electromagnetic. We
20 heard about electromagnetic fields. And then
21 we have as a subset of that the phenomena
22 associated with electrical charge. So that,
23 for example, propagation of radio waves would
24 not be included in the field of electricity as
25 commonly understood. But phenomena --

1 MR. TRESH: Your Honor --

2 THE WITNESS: Excuse me, I'm not done speaking.

3 THE COURT: You don't get to rule.

4 You have an objection?

5 MR. TRESH: I do, Your Honor. If Mr. Robinson is
6 testifying as an expert, is he an expert in the
7 common understanding or the common meaning of
8 any of these words? If he's testifying from a
9 scientific perspective as to what "electricity"
10 is from a scientific perspective or in his
11 technical expertise, I believe that's what Your
12 Honor allowed. To testify what a common
13 understanding of terms are, I don't believe
14 Mr. Robinson is an expert in that area at all.

15 MR. GREEN: He can testify what the common
16 understanding is and relate that back to the
17 scientific understanding he's about to go into.

18 THE COURT: Common understanding within his field of
19 expertise, that's what I'm limiting your
20 testimony to.

21 THE WITNESS: Yes, Your Honor. Okay.

22 Q: Okay. So let me rephrase the question. In
23 your field, when the term "electricity" is
24 used, what does it encompass?

25 A: It encompasses phenomena associated with the

1 use of the electric charge that's associated
2 with electrons and protons.

3 Q: What is "electric current"?

4 A: It's the motion of electric charge.

5 Q: What is "electric energy"?

6 A: "Electrical energy" is the form of energy that
7 can be transmitted by means of electrical
8 charges moving on a conductor.

9 Q: What are -- what are the components of electric
10 power -- of electric current?

11 A: Well, electric current is merely the motion of
12 a specified number of electrons past a given
13 point in one second.

14 Q: Okay. And what is "electric power"?

15 A: "Electric power" -- first of all, any kind of
16 power is the ability to apply a force.
17 "Electric power" means the ability to apply a
18 force at a given location. "Electric energy"
19 is the amount of power delivered in one second.
20 The -- or any other specified unit of time.

21 Q: And I think you said "current" was the movement
22 of electric charge; is that correct?

23 A: Yes.

24 Q: How is the movement of current measured?

25 A: (No response.)

1 Q: Or, excuse me, how is current measured?

2 A: Current is measured in amperes.

3 Q: And what is the formula for amperes, generally
4 speaking?

5 A: Well, ampere is -- one ampere is one coulomb
6 per second. A coulomb is six times ten to the
7 18th electrons.

8 Q: And is it the charge associated with those
9 electrons?

10 A: The charge associated with those electrons,
11 yes.

12 Q: And electric current consists of moving
13 electrons; is that correct?

14 A: Yes.

15 Q: What is "voltage"?

16 A: "Voltage" is potential energy per unit charge,
17 but it -- in practical terms, it represents the
18 electrical force available between two
19 specified points, usually two conductors.

20 Q: Do electrons have mass?

21 A: Yes.

22 Q: Can you measure electricity?

23 A: Yes, we -- we measure electrical energy. We
24 measure electrical current. We measure
25 electrical potential, which is voltage. We

1 measure frequency. We measure many aspects of
2 electricity.

3 Q: Okay. And the electric utility doesn't just
4 give away power, does it?

5 A: No.

6 Q: Does it charge for electric power?

7 A: Yes, it does.

8 Q: How does the electric utility measure electric
9 power that -- say a manufacturing company?

10 A: They actually measure energy. They -- in terms
11 of their generating capacity, it's stated in
12 megawatts. In terms of the delivery to a
13 customer, it's so many kilowatt hours in a
14 billing interval.

15 Q: Okay. And the meter on a residential house,
16 let's just say, for example, what does that
17 meter measure?

18 A: It is a kilowatt hour meter.

19 Q: And does it measure current and voltage?

20 A: Yes, it does. Power is current times voltage.
21 The meter totalizes the amount of current and
22 voltage -- actually, it -- the mechanism of the
23 meter multiplies the two and the product is
24 totalized over a period of time so that the --
25 the amounts consumed in any small interval are

1 added together and the total is available to be
2 read at the end of the month.

3 Q: When someone turns on a light in their house,
4 is that a load, an electric load?

5 A: That's -- we -- we use that term, yes.

6 Q: And is that load completing a circuit?

7 A: Yes, it is. It does.

8 Q: And what happens when the circuit is completed?

9 A: When the circuit is completed, there is a
10 complete path for electrons that pass through
11 the load to return to the source.

12 Q: And does a current flow as part of that?

13 A: Yes.

14 Q: And when I -- if I stick my finger in a socket,
15 electric socket, do I complete a current -- a
16 circuit?

17 A: If you're standing on a conductive surface, you
18 may well complete a circuit.

19 Q: And what happens if I complete a circuit?

20 A: Then electricity will flow through your body.

21 Q: Do you consider that touching electricity?

22 A: I do. One has to determine what you mean by
23 the word "touch." My understanding of the word
24 "touch" is that it's something that I can sense
25 through my skin. It's also --

1 THE WITNESS: Excuse me.

2 MR. TRESH: May I object, Your Honor?

3 THE COURT: Yes.

4 MR. TRESH: Your Honor, I believe that you qualified

5 Mr. Robinson as an expert in the manufacturing

6 of electricity and I think you said not into

7 the scientific and technical intricacies and

8 industry standards. Whether or not

9 Mr. Robinson's opinion is one can touch

10 electricity, I think that would go to the

11 science behind electricity and not to its

12 manufacture.

13 MR. GREEN: I thought you said the science was okay,

14 the technical intricacies and industry

15 standards.

16 THE COURT: I said science was okay.

17 MR. TRESH: Okay. Thank you, Your Honor. Objection

18 withdrawn.

19 Q: I'm sorry, I don't even recall the question,

20 Mr. Robinson.

21 A: It was about touch.

22 Q: About touch, yes. Thank you.

23 A: Can you touch electricity? Maybe that was not

24 the question.

25 THE WITNESS: Could we have it read back?

1 MR. GREEN: Is it possible to read that back?

2 THE COURT: I think the question -- I can make it

3 easier. Although she can read it back. You

4 were talking about feeling it or passing

5 through the body and then whether you can feel

6 it and then you went into touch.

7 If you want it read back --

8 MR. GREEN: Could she read it back, I guess, the

9 question and the beginning of his answer?

10 Thank you, Your Honor.

11 (The requested question and answer were read back by

12 the court reporter.)

13 MR. GREEN: Thank you.

14 A: One aspect of the word "touch" has to do with

15 proximity between two bodies. So, for example,

16 as we heard earlier, you can experience a force

17 without actually touching something. If you

18 grab -- for example, a gravitational field,

19 okay, but you can also apply a force by

20 touching something.

21 The -- when one says, "Are you touching

22 something?" What I am referring to is that I

23 can actually experience pressure through my

24 skin.

25 And, remember, all these sensations are

1 conducted by our nerves. So that if you
2 complete an electrical circuit, the electricity
3 flowing through your body can be sensed as
4 variations in muscle tension through the
5 nervous system.

6 So, yes, I am comfortable saying that if a
7 current flows through my body, I am touching
8 electricity.

9 Q: And when a current flows through your body, do
10 you feel electricity?

11 A: Absolutely. If it's strong.

12 Q: Is it your opinion that electricity has
13 physical characteristics?

14 A: Yes.

15 Q: Is it material? Is it a material? Excuse me.

16 A: Is electricity a material? No, it is not a
17 material. It is --

18 Q: I'm sorry, I didn't mean to interrupt you.

19 A: It is material in the sense that it's tangible.

20 Q: So you believe electricity is tangible?

21 A: Yes.

22 Q: Can it be touched? I think we've said that.
23 Strike that. Can you taste it?

24 A: Yes, you can -- there's a kids' science fair
25 demonstration where you can generate -- you can

1 create a battery using dissimilar metals and
2 orange juice. You can put it in your mouth.
3 You can taste the bitter and -- excuse me, the
4 word escapes me. But it activates a couple of
5 different kinds of taste buds.

6 Q: Now, let's go back a little bit to how we were
7 talking about the meter and the measurement of
8 current; is that right? We were talking about
9 that earlier?

10 A: Yes.

11 Q: Meter measures current and voltage; is that
12 correct?

13 A: Yes, that's --

14 Q: Electric. What's a "kilowatt"?

15 A: A thousand watts. It's a measure of power.

16 Q: What is a "kilowatt hour"?

17 A: It is the amount of energy transferred at that
18 power level in one hour.

19 Q: If I use a light bulb for an hour, do I consume
20 a kilowatt?

21 A: No. The standard hundred watt bulb takes
22 approximately -- it's rated at 100 watts, so
23 that would be a hundred watt hours or a tenth
24 of a kilowatt hour.

25 Q: Okay. And if I turn on my air conditioner for

1 an hour have I used a kilowatt?

2 A: Approximately.

3 Q: Is every kilowatt of electricity the same?

4 A: Yes.

5 Q: In your opinion they're fungible?

6 A: Yes.

7 Q: Now, do electric utilities charge by the amount
8 of power, the electric power used?

9 A: By the amount of electric energy used, yes.

10 Q: If electricity was sold at a flat rate -- well,
11 strike that. Is it your opinion that electric
12 utilities are engaged in manufacturing?

13 A: Yes.

14 Q: It is your opinion they're engaged in
15 manufacturing of electricity?

16 A: The precise quantity manufactured is electrical
17 energy, which is one aspect of electricity.

18 Q: Now, and I think you testified that the
19 electric utility charges by the quantity of
20 power consumed; is that correct?

21 A: Quantity of energy consumed.

22 Q: Quantity of electric energy consumed. If an
23 electric utility sold electricity at a flat
24 rate, all you can consume, would that change
25 your opinion about whether an electric utility

1 is a manufacturer?

2 A: No.

3 Q: And could you explain your answer?

4 A: There's really a couple of different aspects to
5 the determination of whether a -- excuse me.

6 There's a couple of different aspects to the
7 energy business. One is the generation of
8 energy and the other is the transmission,
9 distribution and sale of energy.

10 So that if a -- if a person -- a company
11 decided to ignore economics and give away its
12 product, which is essentially what would happen
13 if you just charged a flat rate per month
14 regardless of energy consumption, you still
15 have to manufacture the electricity, the
16 energy. So -- or in this context, I would use
17 "generation" and "manufacture" as synonymous.

18 Q: The electric -- the electricity that goes from
19 the generator to the transmission lines to the
20 distribution lines into my home, is that
21 electricity readily available?

22 A: In general, yes. All you have to do is call up
23 the electric company and ask them to connect
24 you up.

25 Q: But is it -- what does -- what does the

1 electric utility do to generate that
2 electricity?

3 A: Oh. They have to construct a generation plant,
4 okay, which consists of the fuel management, a
5 conversion system to -- usually a boiler to
6 convert the fuel energy to steam energy, a
7 turbine to convert the steam energy to
8 rotational mechanical energy, an electrical
9 generator to convert the mechanical energy to
10 electrical energy, and then that is connected
11 to the transmission and distribution network to
12 be made available to customers. Did I answer
13 your question?

14 Q: Yes. And ...

15 MR. GREEN: Bear with me one moment.

16 Q: In the process that you've described, what role
17 does the transmission and distribution system
18 play in the delivery of electricity?

19 MR. TRESH: Objection, Your Honor. Mr. Robinson,
20 even as a -- being qualified as an expert in
21 manufacturing of electricity and the scientific
22 and technical intricacies of electricity,
23 Mr. Robinson is not an expert in the
24 transmission or distribution of electricity or
25 the provision of it to customers.

1 THE COURT: Well, he hasn't testified, at least that
2 I remember, to any specifics of the
3 transmission and distribution.

4 MR. GREEN: He has not testified yet, but I'm going
5 to go into it. Frankly, I think his testimony
6 will be that's part of the manufacturing
7 process to manufacture electricity.

8 THE COURT: Well, then at this point in time, if you
9 could first lay the groundwork for his
10 expertise in this area and then I'll determine
11 if he's qualified to continue down the path --

12 MR. GREEN: Okay.

13 THE COURT: -- at which time you could object, if
14 you wish.

15 MR. GREEN: That's fine. Okay.

16 Q: Mr. Robinson, what -- you have -- what
17 experience do you have in the transmission and
18 distribution of electricity?

19 A: In the context of industry, in-plant
20 distribution, and interfacing with the electric
21 utility. I mentioned the job I did in Nevada
22 where we had to construct a -- cooperating with
23 the local utility a step-down substation to
24 convert from 115 kilovolts to 13.8 kilovolts
25 and --

1 Q: And --

2 A: -- to install a line from that location to our
3 mine entry.

4 Q: And that was involved, I think you testified,
5 in installing a substation?

6 A: Yes. Also, when we designed the sawmill in
7 North Carolina, we had a in-plant distribution
8 system. In that case, we received power at
9 13.8 kilovolts and routed it to a number of
10 point-of-use substations serving individual
11 buildings.

12 Q: And is it your understanding that substations
13 are part of the transmission and distribution
14 system?

15 A: Yes.

16 Q: And what purpose do they serve?

17 A: They serve a number of purposes. One of them
18 is adjusting the voltage levels to be
19 appropriate to the -- to the location. Another
20 is to provide circuit protection and another is
21 to split power into local service transmission
22 lines.

23 Q: And the -- let's go back to the substation that
24 you installed at Getchell Gold?

25 A: Yes.

1 Q: What was the voltage that substation is
2 designed to process?

3 A: It took in 115 kilovolts from the utility and
4 put out 13.8 kilovolts to the mine.

5 Q: Okay. Would that be called "step down"?

6 A: Step down, yes. We also had in-plant
7 distribution at the mine, unit substations at
8 various buildings.

9 Q: And what about the -- and obviously there is
10 interaction in the -- I think you've testified
11 the substation is part of the transmission and
12 distribution system. What other experience
13 might you have with transmission and
14 distribution systems?

15 A: In conjunction with a couple of large losses,
16 one in Colombia, South America, one in San
17 Juan, Puerto Rico, I had to get the fault
18 information from the utilities and analyze that
19 in conjunction with determining what happened.

20 Q: Okay. And what about -- did you previously do
21 some electric work for a sawmill?

22 A: Yes, I mentioned that.

23 Q: And would you just go back into that very
24 briefly?

25 A: It was a new construction sawmill. Part of the

1 job was the in-plant distribution system. Part
2 of the job was process control.

3 Q: And at the paper mill, were you in charge of
4 the electric generation and distribution
5 process?

6 A: Yes. We had a -- a feeder line between the two
7 mills a mile and a half long. The power to the
8 Hughesville Mill came from the Warren Glen
9 Mill, which was our tie-in point to the
10 electric utility.

11 We had a rather large steam boiler whose
12 primary purpose was to provide heat to the
13 paper making process. But we ran a three
14 megawatt turbo generator off of that to provide
15 electricity to the plant and we also had two
16 water wheel generators. We did not sell
17 electricity because of the -- the State of New
18 Jersey law at the time.

19 Q: But you were involved in the transmission and
20 distribution of electricity between those two
21 mills?

22 A: Generation, transmission and distribution, yes.

23 MR. GREEN: Your Honor, I would submit that
24 qualifies him as an expert in this matter. Any
25 challenge would go to the weight, not the

1 admissibility.

2 MR. TRESH: Your Honor, what I just heard was over
3 20 years ago he cooperated with a utility
4 setting up some sort of -- setting up some sort
5 of electric system for a mine. That was
6 Getchell Mines company.

7 THE COURT: Step down.

8 MR. TRESH: Step down. Thirty years ago he worked
9 at a sawmill and he was in charge of process
10 control, perhaps involving electric utility.
11 And he worked as -- and his experience with two
12 losses as an -- I think he said "a couple" --
13 but two losses as an insurance adjuster where
14 the fault involved information he took from a
15 utility. That's in a career that spans
16 40-something, 50-something years.
17 I apologize if I'm overstating how long you've
18 been active.
19 That does not make him an expert in the
20 transmission -- utility transmission and
21 distribution systems. He's never worked for a
22 utility. He's never been involved in running
23 a transmission and distribution system. He's
24 worked with it in a very limited process that
25 goes back decades, Your Honor. He just hasn't

1 done this in years and years and years.
2 And even if the process is substantially the
3 same, the number of times he's even been
4 involved in this process is limited. Four,
5 five, six process -- six times over 30 years?
6 I just don't see how that qualifies him as an
7 expert.

8 MR. GREEN: He's an electrical engineer. He has a
9 Bachelor's in Science. He's worked at -- with
10 electrical engineering issues for almost 50
11 years. He is involved in setting up generation
12 distribution system for one of his employers.
13 While he didn't work directly for a public
14 utility, Dr. Papa did not either, so that just
15 goes to weight. It goes to the credibility
16 that you as the Finder of Fact might assign to
17 him. It does not go to the admissibility of
18 his testimony. He has a sufficient basis for
19 that.

20 THE COURT: Are you going to be asking him about
21 distribution and transmission from a public
22 utilities standpoint or just generating from
23 the scientific principles of transmission and
24 distribution?

25 MR. GREEN: I'm only asking him his opinion as to

1 whether that is a component of the
2 manufacturing process, the generation and
3 distribution, if that involves the process of
4 the manufacturing of electricity.

5 MR. TRESH: In the context of the public utility, he
6 has no experience.

7 THE COURT: I recognize that. I also heard the
8 components of your expert's qualifications
9 today.

10 I'm going to -- I'm going to let him go into
11 what I just asked and that is the scientific
12 aspects of the transmission and distribution of
13 electricity.

14 I don't know if he can get -- you know, again,
15 I go back to the case law, and Mr. Green keeps
16 referring to it, about the qualifications in
17 South Carolina courts do keep reemphasizing
18 that over and over: It goes to the weight.

19 MR. GREEN: Yes, Your Honor.

20 THE COURT: So a lot of times --

21 MR. GREEN: It goes to the weight as long it's not
22 something that was acquired just for the
23 purpose of litigation. He's been doing this
24 for years.

25 THE COURT: Yeah, I recognize that. Although it

1 does have to meet -- it's got to meet the
2 threshold --

3 MR. GREEN: Absolutely.

4 THE COURT: -- of education, experience, skill,
5 knowledge or training. And there has been none
6 in the public utility arena.

7 MR. GREEN: There has been none in the public
8 utility. But, again, their expert has none in
9 the public utility arena and I didn't object to
10 their expert. And --

11 THE COURT: Well, I've seen it happen before where
12 if one person doesn't object and the other
13 objects ...

14 MR. GREEN: Oh, okay. Understood. Understood.
15 But, you know, he's got -- he's got skill,
16 training, knowledge and expertise. He can
17 testify about the principles of electricity and
18 how it works in that context.

19 THE COURT: All right. Well --

20 MR. GREEN: You know, if it goes further, I mean,
21 you obviously can revisit the issue if I go too
22 far.

23 THE COURT: Okay. Mr. Tresh?

24 MR. TRESH: Your Honor, Dr. Papa is -- works with
25 electricity on a daily basis, not only for

1 universities but for the United States
2 government.

3 THE COURT: Yeah.

4 MR. TRESH: In contrast, with all due respect to
5 Mr. Robinson -- I'm sure he's very good at what
6 he does -- but for the past 13 years ...

7 THE COURT: I recognize that, but we're talking
8 about weight.

9 MR. GREEN: We're talking about weight. And he
10 worked for the Boeing Company years ago.

11 THE COURT: Yeah.

12 MR. GREEN: So ...

13 THE COURT: Okay. I'm going to let him go in as I
14 said. He starts entering the public utility
15 area, I may revisit that.

16 MR. TRESH: Thank you, Your Honor.

17 MR. GREEN: Thank you.

18 Q: Let's step back just a minute, Mr. Robinson.

19 So electricity is generated at a generator.

20 A: I'm sorry, say again please?

21 Q: Electricity is generated at a generator?

22 A: Yes.

23 Q: Does it then go through a transmission and
24 distribution system before it reaches my house?

25 A: Yes, it does.

1 Q: Are there step-down transformers as part of
2 that system?

3 A: Yes.

4 Q: Are there step-up transformers as part of that
5 system?

6 A: At the -- at the generating plant, yes, there's
7 a generator -- step-up transformer for each
8 generator.

9 MR. TRESH: I believe we're talking about the public
10 utility context, Your Honor. Mr. Green said
11 his house.

12 MR. GREEN: I'm talking generally about the
13 transmission.

14 THE COURT: Yeah, I think -- from what I've heard,
15 he can testify to that because he said he's
16 worked in that area --

17 MR. GREEN: He was --

18 THE COURT: -- where it came from a public utility.
19 So I'll let him proceed on that answer.

20 MR. GREEN: All right. Thank you, Your Honor.

21 Q: Are those step-up and step-down transformers
22 necessary to deliver electricity to my house?

23 A: In principle, no. They are done for reasons of
24 efficiency.

25 Q: For whose efficiency?

1 A: The power company. Excuse me, the energy
2 utility.

3 Q: Now, is it your understanding that electricity
4 is generated based on the same principles in
5 play as a hundred years ago?

6 A: Yes. When I worked for the paper company, one
7 of the water wheel generators had a name plate
8 dated 1923 and it is pretty similar to
9 generators of that sort that are available
10 today.

11 Q: Okay. And what about the scientific principles
12 behind the generation of electricity?

13 A: Those were worked out, as was said earlier, in
14 the last 150 years. There's a lot of
15 fundamental work done between the American
16 Revolution and the Civil War, a lot of device
17 development done between the Civil War and
18 World War I, and the separation of generation
19 from use into generating entities and using
20 entities started about 1881.

21 MR. GREEN: Bear with me just a moment, please, Your
22 Honor.

23 I have no further questions at this time, Your
24 Honor.

25 Q: And --

1 MR. GREEN: Well, one more question. Columbo, I
2 apologize.

3 Q: And, again, it's your opinion that the
4 generation, transmission and distribution of
5 electricity constitutes manufacturing?

6 A: Yes.

7 MR. GREEN: Thank you. No further questions.

8 THE COURT: Go ahead. I'm trying to decide whether
9 to take a break for lunch.

10 MR. TRESH: Would it make sense, Your Honor?

11 THE COURT: How long are you going to be?

12 MR. TRESH: I think it could be a little bit, 20, 30
13 minutes at least.

14 (Off the Record)

15 THE COURT: We're going to take a break for lunch!

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

17 MR. GREEN: I rested with this witness.

18 THE COURT: Yeah, that's right.

19 You're still under oath.

20 THE WITNESS: Yes.

21 THE COURT: And you're up.

22 MR. TRESH: Thank you, Your Honor.

23 MR. ROBINSON - CROSS-EXAMINATION BY MR. TRESH:

24 Q: Good afternoon, Mr. Robinson. How are you?

25 A: Still nearly perfect.

1 Q: Excellent. Mr. Robinson, you had indicated
2 earlier in your testimony that you were an
3 expert in the principles of manufacturing
4 electricity and its scientific and technical
5 intricacies. Can you tell me what those
6 scientific and technical intricacies -- which
7 of those are relevant to the matter at hand?

8 A: I wish that the attorney had used the words
9 "principles" instead of "intricacies."
10 However, what is relevant to the matter at hand
11 is Ampere's law, Faraday's law and Ohm's law.

12 Q: Okay. Anything else?

13 A: That will do.

14 Q: Okay. Well, that will do or are there others?

15 A: I'm sorry?

16 Q: Is it that those will do or are there others,
17 I'm sorry?

18 A: Well, I don't know where you're going with
19 that. There's -- I have experience in most
20 branches of electrical engineering and so the
21 questions you're going to ask, I just have to
22 fall back on my experience.

23 Q: I'm not questioning your qualifications at this
24 point.

25 A: Okay.

1 Q: I was asking you what principles do you believe
2 are relevant to the matter at hand.

3 A: Okay.

4 Q: You said Faraday's law. What else did you say?

5 A: Ampere's law and Ohm's law.

6 Q: Any others?

7 A: These are representative of the approaches used
8 in implementing electrical and electromagnetic
9 systems. I acknowledge the -- talking science
10 now?

11 Q: I just asked what principles are involved here.
12 You said Faraday's law --

13 A: Okay.

14 Q: -- Ohm's law.

15 A: There's -- all right. To dive into it, then,
16 we're talking about the principles that lay
17 behind electrical generation and conduction and
18 transmission lines and consumption at the
19 users' premises.

20 Q: Okay. And you testified earlier that your
21 expertise is based upon your experience in
22 those areas; is that correct?

23 A: Yes.

24 Q: Okay. And in forming your opinion, what
25 sources did you rely upon?

1 A: Primarily on my experience, however, I did
2 consult college textbooks and I consulted
3 dictionaries.

4 Q: College textbooks. Which college textbooks?

5 A: Sears and Zemansky is a very good one. It's a
6 college physics text.

7 Q: Did you consult that prior to rendering your
8 opinion in your deposition?

9 A: It's been on my desk forever. I can't answer
10 the question when -- when's the last time I
11 looked at it.

12 Q: Did you look at it prior to your deposition?
13 Not the last time you look at it, prior --

14 A: I don't -- I don't know the answer to that
15 question.

16 Q: Okay.

17 A: Well, all right, did I look at it prior to the
18 deposition? Yes, because it's been on my desk
19 forever.

20 Q: Did you prepare for your deposition by
21 reviewing that text?

22 A: I don't think so.

23 Q: Thank you. Did you rely on any other sources?
24 College textbooks, your experience, what else?

25 A: I think I mentioned dictionaries.

1 Q: Dictionaries. Did you rely on something called
2 a "Wiktionary"?

3 A: I did not rely on it. I used it and I used
4 Merriam-Webster, as well. I'm relying
5 primarily on Merriam-Webster.

6 (Off the Record)

7 Q: In your deposition, do you recall saying -- I
8 asked you a question, "In forming your opinion
9 regarding issues in this case, you testified
10 that you're an expert in these subjects, did
11 you rely on Internet sites such a Wikipedia?"
12 Answer: "Among others, yes."

13 A: That's still true.

14 Q: I think a moment ago you said you did not rely
15 on Wikipedia.

16 A: (No response.)

17 Q: Here's your deposition, sir. If I can direct
18 your attention your to page 26, line nine.

19 A: I can -- I can remember the language. I relied
20 on Wikipedia among others, yes.

21 Q: Okay. So that's different than what you
22 originally testified to a moment ago.

23 A: Yes.

24 Q: Okay. Do you remember looking at something
25 called "Wiktionary Verb Produce"?

1 A: I know that's in my file notes.

2 Q: So did you review it in order to form an
3 opinion in this case?

4 A: Yes, I did.

5 Q: Okay. And in forming your notes for this case,
6 did you cut and paste a section of Wikipedia
7 Verb Produce into your notes that you submitted
8 as part of this case?

9 A: Yes.

10 Q: And why is "Wikipedia Verb Produce" relevant to
11 the matter at hand? Why is Wikipedia relevant?

12 A: I was using Internet resources to consult on
13 language, because the questions involved
14 questions of what is a -- what is
15 "manufactured", what is "tangible property,"
16 and so I consulted dictionaries to determine
17 the meanings of the words and the meanings of
18 the related words. "Produce" was not one that
19 I initially searched for but it came up in
20 context of other words.

21 Q: So you testified earlier that you're an expert
22 in manufacturing. You had to look up what the
23 word "manufacture" meant for purposes of
24 rendering an expert opinion in this case?

25 A: I prefer to be as informed and precise as I can

1 and so, yes, I did look up the meanings of the
2 words "manufacture" and several other terms,
3 "produce".

4 Q: Are you aware that Wiktionary and Wikipedia,
5 that those -- do you consider those
6 authoritative sources?

7 A: Semi. You have to read them with an informed
8 mind and skeptical mind.

9 Q: Okay. And would you -- do you believe that
10 it's the regular practice of a professional
11 engineer such as yourself to look up sources
12 like Wikipedia to inform you about engineering
13 definitions and engineering aspects?

14 A: If I went -- if I wanted an engineering
15 definition, I probably wouldn't go to
16 Wikipedia. I would probably go to my college
17 textbooks.

18 Q: Then why would you go to Wikipedia? If you
19 would not go for engineering resources, why
20 would you go for it for manufacturing
21 resources? Is Wikipedia more authoritative
22 with respect to manufacturing?

23 MR. GREEN: Objection, compound question.

24 Q: Is Wikipedia --

25 MR. TRESH: I'll rephrase.

1 THE COURT: Yeah.

2 Q: Is Wikipedia more authoritative for
3 manufacturing than it is for engineering?

4 A: In the following sense: Part of the question
5 posed to me was, "What is the meaning of
6 'manufacturing'?" And it's a linguistic
7 question, really. It is not a matter of
8 engineering. It's a matter of language and
9 it's also -- I understand it's a legal term.

10 Q: Did you render an opinion as a matter of
11 linguistics in this case?

12 A: Had to.

13 MR. TRESH: Your Honor, if Mr. Robinson's expert
14 opinion is based upon linguistics, I would
15 submit he's not an expert in linguistics, if
16 that's what his opinion is based upon, and I'd
17 ask the Court to give that due weight.

18 MR. GREEN: Your Honor...

19 THE COURT: Well, that's not an objection, so --

20 MR. GREEN: Okay.

21 THE COURT: He said "give due weight," so ...

22 MR. GREEN: Thank you, Your Honor.

23 MR. TRESH: Okay.

24 THE COURT: That is a preliminary closing argument,
25 I guess.

1 Q: Did you review anything else as part of forming
2 your opinion in this case, Mr. Robinson?

3 A: I cannot remember everything that I referred
4 to. You have a copy of my file notes and
5 anything in the file notes I referred to.

6 Q: Do you recall looking at a submission by Duke
7 Energy to the Regulatory Commission, South
8 Carolina Regulatory Commission in 1991 as part
9 of your report?

10 A: I reviewed that, yes.

11 Q: Okay. Is this the copy of the report that you
12 reviewed?

13 A: (Perusing.) I guess it's part of it. What I
14 reviewed was about a four-inch thick binder.

15 Q: Okay. So that's part of what you reviewed; is
16 that correct?

17 A: Appears to be, yes.

18 Q: Okay. And do you have any other expert
19 knowledge of Duke's business other than what's
20 in that report? Have you ever -- to avoid a
21 compound question -- have you ever reviewed a
22 Duke Energy plant? Have you ever done a plant
23 tour for Duke Energy?

24 A: I've been on Duke Energy premises for purposes
25 of investigation.

1 Q: Let's talk about that a little bit. You were
2 investigating Duke Energy?

3 A: I was investigating a claim submitted by Duke.

4 Q: Were you representing Duke Energy or the
5 claimant?

6 A: Duke Energy was the claimant.

7 Q: And was it your role -- so you represented the
8 insurance company in that claim.

9 A: Yes.

10 Q: Is that correct? You did? So you were
11 representing the insurance company. Duke
12 Energy had gone ahead and made an insurance
13 claim.

14 A: That's correct.

15 Q: And so in that sense your task was to go ahead
16 and determine the validity of Duke Energy's
17 claim; is that correct?

18 A: That's correct.

19 Q: Okay. And so in that sense you -- so your
20 experience with Duke Energy is you were on
21 site, to go ahead and figure out whether you
22 should deny or accept their insurance claim; is
23 that correct?

24 A: Well, I don't deny or accept. I only -- I only
25 present the -- my opinion as to what took place.

1 and the insurance adjuster -- and I'm not an
2 adjuster. The insurance adjuster makes the
3 determination based on facts that I can present
4 to him.

5 Q: Okay. So that was the only time you were at
6 Duke Energy's facilities; is that correct?

7 A: I'm trying to think if there are other times or
8 places. Relative to Duke Energy, I think
9 that's correct.

10 Q: Okay. You didn't conduct any sort of
11 independent analysis where you went out and
12 visited a Duke Energy plant or went and looked
13 at a substation or looked at their facilities
14 as part of your expert report in this matter?

15 A: I was at their plant site, which was relevant.
16 It's their generating plant on -- northwest of
17 Charlotte.

18 Q: For purposes of the insurance claim?

19 A: Yes.

20 Q: Okay. And when was that?

21 A: Probably six years ago.

22 Q: Okay. And then you reviewed this report in a
23 binder that was four-inches thick. You
24 reviewed this document that was in front of
25 you, correct?

1 A: Yes.

2 Q: There's a part of the document that's labeled
3 with a green tab. Can you open up to the green
4 tab?

5 A: Sure.

6 Q: Can you read the description of Duke Energy's
7 business on line ten, please?

8 A: Yes. It says, "Duke provides retail service in
9 two states, as well as wholesale service to
10 certain municipalities and electric membership
11 cooperatives."

12 Q: Thank you. Now, you testified earlier to
13 Mr. Green that in your view that Duke Energy
14 provided tangible personal property; is that
15 correct?

16 A: Yes.

17 Q: And so did you just discount Duke's filing to
18 the Public Service Commission? How did you
19 reconcile the PSC filing with your view? Was
20 it Wikipedia or --

21 A: I -- I considered that Duke's statement to the
22 PSC was in common parlance and did not address
23 the issues of what is "service" versus
24 "manufacturing."

25 Q: So you believe that Duke's statement was common

1 parlance?

2 A: Yes.

3 Q: But you testified earlier that --

4 linguistically speaking, that it was common
5 that Duke Energy provided electricity and
6 electricity was tangible; is that correct?

7 A: That's all true.

8 Q: So it's common parlance that Duke Energy
9 provides a service and it's a common
10 parlance -- and would you agree that Duke
11 Energy provides electricity?

12 A: Provides electrical energy, which is in this
13 case, I think, synonymous with electricity.

14 Q: Duke Energy provides electric energy and,
15 common parlance, Duke Energy provides a
16 service, okay. You said earlier that Duke
17 Energy -- or that electricity, electric energy,
18 is not a material; is that correct?

19 A: It is not correct. I'm sorry, is that correct?
20 Electric energy is not a material.

21 Q: Okay. Thank you. Would you agree that
22 electric energy is the ability to provide a
23 force?

24 A: It's the ability to do work.

25 Q: Okay. Does Duke Energy sell electrons?

1 A: No, it does not. It uses electrons, but the
2 customer returns every electron to Duke.

3 Q: Does Duke Energy sell electrons?

4 A: No. I answered that.

5 Q: Okay. Thank you. I didn't ask about
6 whether -- what they returned or how they
7 returned it. Okay.

8 MR. GREEN: I object, Your Honor. The witness can
9 explain his question.

10 THE COURT: Well, I think he answered "no" and then
11 explained it while ago, but now -- so I don't
12 think we'll accomplish anything at this point
13 in time other than to please just listen to his
14 answer.

15 MR. TRESH: Yes, Your Honor.

16 Q: You mentioned earlier you can measure
17 electricity; is that correct?

18 A: Yes.

19 Q: Can you measure wind speed?

20 A: Yes.

21 Q: Can you measure sunlight?

22 A: Yes.

23 Q: Can you measure cell phone minutes of time?

24 A: Yes.

25 Q: Is sunlight tangible?

1 A: Yes. It excites the nerves in your skin.

2 Q: So you would say -- and is sunlight tangible
3 property?

4 A: Only if you have the right to block my access
5 to sunlight.

6 Q: So your view would be that sunlight is tangible
7 personal property in the same vein that
8 electricity is tangible personal property,
9 linguistically speaking?

10 MR. GREEN: I object to that question, Your Honor.

11 That calls -- "tangible personal property" is
12 a legal conclusion. The testimony has been
13 about whether it's tangible to this point.

14 MR. TRESH: I believe he testified that it was
15 tangible personal property and I'm trying to
16 understand the basis for his conclusion given
17 that he's also testifying that sunlight is
18 tangible personal property.

19 MR. GREEN: I object to that line of questioning.

20 THE COURT: He testified it was tangible personal
21 property because you asked him.

22 MR. TRESH: No, no, no, when Mr. Green was --

23 THE COURT: Okay.

24 MR. TRESH: -- asking him questions.

25 MR. GREEN: I think -- I thought we just talked

1 about it was tangible. Now, I don't
2 specifically recall that he didn't say that,
3 but I -- the questions we went into was whether
4 it was tangible.

5 THE COURT: I'll have to go -- my memory is, is it
6 was "tangible," because I've noted the personal
7 property aspects of the definition and I've
8 been trying to pay attention to that. So I
9 think it's been "tangible."

10 MR. GREEN: No. And, in fact, I think in my notes I
11 have, "Is electricity tangible?" I stayed away
12 from the "personal property."

13 MR. TRESH: I'll stay away from the personal
14 property for the time being, Your Honor, with
15 this witness, Your Honor.

16 THE COURT: All right.

17 Q: Okay. So sunlight is tangible.

18 A: Yes.

19 Q: Is that correct? Is wind tangible?

20 A: Yes.

21 Q: Is wind tangible in the same way that
22 electricity is tangible, in your view?

23 A: Not identically. "Tangible" is anything that
24 you can sense. You can sense wind in several
25 ways. You can sense electricity in several

1 ways. They're not the same ways.

2 Q: Okay. Would you -- if it's anything you can
3 sense, can you sense gravity?

4 A: Actually, no. All I can sense is the pull
5 of -- excuse me, the pressure on my feet.

6 Q: The effect of gravity; is that correct?

7 A: Yes.

8 Q: Would you agree with the statement -- so
9 gravity is a gravitational field; is that
10 correct?

11 A: There is gravitational field produced by
12 masses, yes.

13 Q: And I believe you testified that electricity,
14 electric energy, involves an electromagnetic
15 field; is that correct?

16 A: I parsed that one apart. "Electricity" is a
17 subset of electromagnetic phenomena.

18 Q: So "electricity" is a subset -- does it involve
19 an -- does electricity involve an
20 electromagnetic field?

21 A: Not necessarily.

22 Q: Can you give me an example of electricity that
23 does not involve an electromagnetic field?

24 A: Stationary charges produce an electric field
25 but not a magnetic field.

1 Q: Stationary electric. What's an example of a
2 stationary charge?

3 A: If I run a generator and do not connect a load
4 to it, I have stationary -- let me use a
5 different example and I'll tell you why later.
6 Let me run a DC generator and connect wires to
7 it, do not connect a load. The charges on the
8 wires are stationary. You can measure the
9 voltage, which is the electric field, but no
10 matter what instrumentation you apply, you
11 cannot detect a magnetic field.

12 Q: And is Duke Energy, when it provides
13 electricity, does it provide -- the electricity
14 it provides involve an electromagnetic field?

15 A: It does.

16 Q: Thank you.

17 A: Explanation. It is a result and not a cause of
18 their activities to deliver electrical energy
19 to their customers.

20 Q: And so Duke Energy provides an electromagnetic
21 field that's part of electricity. And you
22 testified a moment ago that one can feel the
23 effects of gravity; is that correct?

24 A: It is. You misstated what I said.

25 Q: Oh? Please correct me.

1 A: Electricity is part of electromagnetic
2 phenomena, okay, but there are -- but
3 electromagnetic phenomena are not part of
4 electricity, except in an incidental way.

5 Q: So when Duke provides electric service to their
6 customers, they're not providing an
7 electromagnetic field; is that your testimony?

8 A: That is my testimony.

9 Q: Okay. Let's talk about -- a little bit about
10 parallels between electricity and
11 telecommunications. When you transmit and I
12 make a cell phone call --

13 A: Yes.

14 Q: -- and there's a signal that goes from a cell
15 tower somewhere to my telephone, what is that
16 signal?

17 A: It is radio waves which you would describe as
18 electromagnetic waves.

19 Q: Electromagnetic waves.

20 A: Uh-huh (affirmatively responds).

21 Electromagnetic waves are not electricity.

22 Q: What's the difference in the electromagnetic
23 wave that a cellular provider uses to make its
24 phone call uses to complete a cell phone and
25 the electricity that Duke provides?

1 A: The electromagnetic waves are propagating in
2 free space. They're not guided. Anyone can
3 pick them up. You cannot exclude access to
4 them.

5 Q: Uh-huh (affirmatively responds).

6 A: That was the reason for the Radio Communication
7 Act of 1917, which -- in which we decided we
8 would not license receivers of any sort of
9 radio wave.

10 Q: So the difference is in that -- in how the
11 electromagnetic waves function. You can block
12 them in terms of how they're sent and received;
13 is that your testimony?

14 A: The difference -- the difference between
15 electromagnetic radiation --

16 Q: Uh-huh (affirmatively responds)..

17 A: -- and conducted current has to do with, first
18 of all, the purpose of electromagnetic
19 radiation is to convey information. The
20 purpose of conducted electricity is to provide
21 energy. Now, you do transfer energy, minuscule
22 amounts, from the cell transmitter to the cell
23 receiver.

24 Q: Uh-huh (affirmatively responds)..

25 A: But the value is in the information and not in

1 the energy.

2 Q: Okay. And that's not -- I didn't ask you about
3 the purpose, although we'll get there in a
4 minute.

5 A: All right.

6 Q: In terms of, they both use electromagnetic
7 waves. Now, I didn't ask about the strength of
8 them. I didn't ask about the purpose of them.
9 They both use electromagnetic waves; is that
10 correct? I think that's what you --

11 A: No. Actually, no.

12 Q: Okay. Well, tell me -- tell me where I'm
13 wrong.

14 A: Because electromagnetic waves, the term implies
15 electromagnetic propagation; that is, it is not
16 guided propagation. It is radiated energy in
17 free space. Like sunlight.

18 Q: So they're radiated energy in a cell phone.
19 Sunlight is radiated energy. Duke is guided
20 energy; is that what you're saying?

21 A: That's correct.

22 Q: Okay. But they all involve electric energy; is
23 that correct?

24 A: Actually, the electromagnetic radiation -- I'm
25 sorry, would you repeat the question, please?

1 Q: Cellular telephone service and the transmission
2 of electricity both involve the transmission of
3 energy; is that correct?

4 A: That's correct.

5 Q: Okay.

6 THE COURT: While ago your question was electricity,
7 I think.

8 MR. TRESH: Energy and I said -- yes, energy, yep.

9 Q: And they both involve the transfer --
10 transmission of electricity; is that correct?

11 A: No.

12 Q: Okay.

13 A: Electromagnetic waves in a free space do not
14 involve the motion of charge. They -- and
15 then, hence, do not involve electricity.

16 Q: Now, would you say -- what about a landline
17 telecommunications provider? They transmit a
18 signal over the landline, do they not?

19 A: Yes. That is -- electricity is involved in
20 landline communication.

21 Q: Okay. So they're transmitting electricity.
22 Are they transmitting it using an
23 electromagnetic wave?

24 A: No, they're using conduction, just like every
25 other electrical circuit.

1 Q: Like every other electrical circuit, including
2 those used by Duke Energy.

3 A: Yes.

4 Q: Okay. Similar process, would you agree?

5 A: What is similar to what?

6 Q: That the transmission of an electric signal
7 over a telephone line is similar to the
8 transmission of an electrical signal over a
9 line used by Duke Energy.

10 A: Well, a very weak similarity but, yes, in
11 principle. In principle they are both
12 conduction of current on copper conductors.

13 Q: So, in principle, both conduction of current on
14 copper conductors. Now, would you say that
15 telecommunications service, landline, is that a
16 service or is that, in your view, a provision
17 of tangible personal property?

18 A: In my view, that is a service. It is -- the
19 product delivered is intelligence and not
20 energy.

21 Q: So what is delivered is being -- is the same.
22 It's the same -- you testified a moment ago
23 that it's the same process, right? We're
24 transmitting an electrical -- we're
25 transmitting an electrical energy over a copper

1 wire. Is Duke providing anything else other
2 than that electrical energy?

3 A: The means have similarities, which I have
4 already agreed to, okay. The product, what's
5 for sale, is not the same.

6 Q: Is Duke providing anything other than electric
7 energy to its customers?

8 A: In the main, no.

9 Q: If Duke isn't providing anything other than
10 electric energy to its customers, what product
11 is it providing?

12 A: Electrical energy.

13 Q: And is -- when you -- when I have -- when I
14 make a telephone call, what is -- what is it
15 that I'm receiving from the telephone company?
16 What is it that's flowing across those lines?

17 A: The communication from whoever's on the other
18 end, the intelligence in the signal. The --
19 the electrons just, as in Duke Energy's case,
20 are a means -- electrons are not energy. I
21 agree with what's been said on that. They are
22 a means of transferring energy. In the -- in
23 the case of Duke Energy, the means transports
24 energy and no communication. In the case of
25 the phone company, the means transports

1 communication and negligible amounts of energy.

2 Q: So when the phone company would -- transmits
3 negligible amounts of energy and communication,
4 Duke Energy just submits -- just transmits
5 communication.

6 A: No.

7 Q: Oh, excuse me. Duke Energy just transmits
8 energy; is that correct?

9 A: Yes.

10 Q: Okay. And if the phone company is sending a
11 signal that is energy, as you said, and your
12 view is that energy is tangible property, why
13 isn't the cell phone company providing tangible
14 personal -- tangible property?

15 MR. GREEN: Objection. It's just tangible, Your
16 Honor.

17 MR. TRESH: Tangible, excuse me. I'll withdraw.

18 A: All right. Now, let's go back. First of all,
19 we're talking landline and not cell phones,
20 okay?

21 Q: Yes, sir.

22 A: All right. Because the tangible entity
23 transferred, the minuscule amounts of energy
24 needed to activate a telephone receiver, is
25 waste energy. It is not the product. It is a

1 waste by-product.

2 Q: Waste by-product, okay. And is the difference
3 between the amount of energy, is that a
4 function of power and voltage?

5 A: Yes.

6 Q: Okay. So the difference between the low level
7 of energy in the telecommunications signal and
8 the high level of energy in an electric energy
9 provider like Duke is the voltage and the level
10 of power, correct?

11 A: Among many other things, yes.

12 Q: Okay. You mentioned earlier that you can touch
13 electricity; is that correct?

14 A: Yes.

15 Q: Okay. And did you testify that the reason why
16 that was your view was that because you could
17 feel the effect of electricity?

18 A: I didn't say that.

19 Q: What did you say?

20 A: I said that the electricity passing through the
21 body excites the nervous system and so,
22 therefore, we can sense electricity and,
23 therefore, it's tangible.

24 Q: In the same way that one can sense sunlight?

25 A: In a similar sense, yes. You don't have to be

1 connected to a circuit to experience sunlight.

2 Q: Does sunlight -- when I feel the sunlight on my
3 skin, does it excite the nerves in my body?

4 A: Yes, it does.

5 Q: Okay. And does it excite those the nerves in
6 the same way that it would when I feel
7 electricity?

8 A: Only if you're talking about flash burns. If
9 you're talking about electricity passing
10 through the body --

11 Q: Uh-huh (affirmatively responds)..

12 A: -- you can experience electricity without
13 injury.

14 Q: Can I experience sunlight without injury?

15 A: Yes, you can.

16 Q: Okay.

17 A: But the point is, you don't have to be part of
18 a circuit to collect sunlight. You get what
19 falls on your skin. Whereas in terms of
20 electricity, to experience electricity
21 internally, you need to be part of a circuit.

22 Q: Does it excite the nerves in the same way? I
23 didn't ask whether it had to be part of a
24 circuit. When I feel -- when my nerves feel
25 the sunlight on my skin or I touch electricity,

1 are the nerves excited in the same way?

2 A: No.

3 Q: No? What's the difference in the way nerves
4 are excited?

5 A: First of all, different receptors are involved.
6 Secondly, the passage of electricity through
7 your nerves disrupts the internal
8 communication, so you lose control -- with
9 enough current you lose control of your
10 muscles.

11 Q: Uh-huh (affirmatively responds).

12 A: This does not happen in sunlight.

13 Q: But you would still agree that both sunlight
14 and electricity are tangible, correct?

15 A: Yes.

16 Q: Can electric energy be created or destroyed?

17 A: Electric energy cannot be created or destroyed.
18 It has to be the result of a conversion
19 process.

20 Q: Electric energy has to be the result of a
21 conversion process. There's no electric energy
22 without a conversion process? You said it has
23 to be.

24 A: Yeah, and I'm just checking for exceptions.

25 Yes, electric energy is the result of

1 transformation of energy from some other form.

2 Q: How does the telecommunications provider that
3 transmits energy, where does its electrical
4 energy come from? What conversion process does
5 it envision?

6 A: Ultimately, from Duke's power pile, coal pile.

7 Q: So the electric -- so the telecommunications
8 company just uses electrical energy that it
9 receives from a company like Duke Energy; is
10 that correct?

11 A: That's correct.

12 Q: Okay. It doesn't broadcast its own signal?

13 A: That's a different question.

14 Q: Does it broadcast its own electrical energy
15 signal?

16 A: Does it broadcast its electrical signal -- or,
17 excuse me, its electromagnetic energy? Yes, it
18 does.

19 Q: Do you know the difference between an object
20 and a field?

21 A: A "field" is a mental construct which states
22 that a body is experiencing a force without
23 being in contact with another body.

24 Q: It's a mental construct. Fields don't exist as
25 one of the laws of physics?

1 A: All of our laws of physics are mental
2 constructs. They're very useful. You can do
3 engineering with them. You can make product.
4 But they're still mental constructs.

5 Q: So what is the difference between an object and
6 a field?

7 A: Difference between an object and a field is
8 that with an object -- excuse me, a field can
9 exert a force on an object. An object -- and
10 by the way, as far as I know, fields have no
11 mass. Objects have mass.

12 Q: Objects have mass; fields have no mass, okay.

13 A: Close enough.

14 Q: Any other differences?

15 A: That's good enough for now.

16 Q: Does electric energy have mass?

17 A: Actually, no.

18 Q: So, in that regard, it's more like a field than
19 an object.

20 A: No. Electric energy is the product of current
21 and voltage. A field is a -- let's go back.

22 Would you restate the question, please?

23 Q: You testified that an object has mass.

24 A: Uh-huh (affirmatively responds).

25 Q: That one of the differences between a field and

1 an object is an object has mass and a field
2 doesn't.

3 A: That's correct.

4 Q: And then you said that an electric field,
5 electric energy -- excuse me, electric energy
6 does not have mass.

7 A: That's correct. That does not make it a field.

8 Q: I did not say that.

9 A: Okay. I just wanted to explain.

10 Q: And my question was, is that one of the
11 similarities -- or, excuse me, one of the
12 differences between an object and a field, mass
13 versus no mass?

14 A: That's one of the principal differences.

15 Q: Okay.

16 A: The other principal difference, now that we've
17 talked about it, is that to exert a force on a
18 secondary object, two objects have to be
19 touching one another; whereas a field can exert
20 a force without a -- what you might call
21 "touch."

22 Q: Okay. Does the propagation of electricity in
23 transmission lines, is that analyzed in terms
24 of the propagation of electromagnetic waves?

25 A: Not by most people in the power industry, nor

1 by most electrical engineers because it is
2 normally dealt with in terms of Ampere's law,
3 Faraday's law and Ohm's law.

4 Q: Can I direct your attention to page 49 of your
5 transcript?

6 A: (Witness complies.)

7 Q: Line 22, please.

8 A: Yes.

9 Q: If I can actually -- starting with line 20, can
10 you read the question?

11 A: "So when they transmit electricity, they're not
12 transmitting any electromagnetic energy?"

13 Q: And your answer?

14 A: Answer: "The propagation of electricity in the
15 transmission lines can be analyzed in terms of
16 the propagation of electromagnetic waves."

17 Q: And I think the question I just asked was, can
18 the propagation of electricity be analyzed --
19 in the transmission lines be analyzed in terms
20 of propagation of electric --

21 A: If -- if that was the wording of your question,
22 then that's identical to what's in my testimony
23 and I agree with that.

24 Q: Okay. Thank you. And is Faraday's law
25 inconsistent with what you testified to?

1 A: No, it is just -- electromagnetic wave theory
2 is normally applied to objects -- excuse me, to
3 systems where the wavelength is similar to the
4 size of the object.

5 Q: Uh-huh (affirmatively responds).

6 A: So, for example, your favorite cell phone
7 example, the size of my antenna is related to
8 the wavelength of the radio wave at that
9 frequency.

10 A power frequency, 60 hertz, the wavelength is
11 3,000 miles long. So very little that we deal
12 with is 3,000 miles long, that we deal with as
13 systems. Once in a while, yes, you do. But
14 for routine business, you're talking about
15 components and systems whose dimensions are
16 much less than the wavelength of the power
17 frequency. And so using electromagnetic
18 analysis is not productive. It is too hard,
19 too complicated.

20 Q: Can I ask you to turn to page 69 of your
21 deposition, please?

22 A: (Witness complies.) Sixty-nine.

23 Q: Actually, strike that. Is the reason that you
24 believe that Duke Energy provides something
25 tangible is because you can measure it?

1 A: That's one of the reasons, yes.

2 Q: You can measure cell phone minutes, right?

3 A: And I can measure cell phone minutes, that's
4 correct.

5 Q: Okay. In your deposition, do you recall when
6 we last spoke, you had made a distinction
7 between electric energy sold for a flat fee
8 versus that sold on a per kilowatt hour basis?

9 A: I remember that.

10 Q: Do you recall saying that if electric energy
11 were sold for a flat fee it would be the
12 provision of a service?

13 A: Yes, I recall saying that. And to --

14 Q: Is there any --

15 A: And I'd like to add to -- that that is intended
16 as a reductio ad absurdum.

17 Q: Okay. Did you not mean that when you said
18 that? Was that testimony incorrect?

19 A: It is not incorrect. It is merely that the
20 world doesn't operate that way.

21 Q: When you say the world doesn't operate that
22 way, what do you mean?

23 A: I mean, people don't give away electrical
24 energy.

25 Q: I didn't say -- that's not the question. I

1 said if it was provided on a flat-fee basis.

2 A: If it were provided on a flat-fee basis, you
3 could consider it a service.

4 Q: Thank you. And I believe you weren't here, but
5 we heard testimony earlier that Duke Energy
6 provides electric service on a flat-fee basis.
7 Do you have any reason to believe that
8 electricity provided on a flat-fee basis, other
9 than the way it's billed, is any different than
10 the electricity or electric energy provided on
11 a per kilowatt hour basis? Scientifically, are
12 they the same?

13 A: Oh, yes, all kilowatt hours are the same.

14 MR. TRESH: One moment, Your Honor.

15 Just a few more questions.

16 Q: I'm going to hand you a copy of the -- a few
17 documents.

18 A: Yes.

19 MR. TRESH: I've handed him the North American
20 Industry Classification System documents.

21 MR. GREEN: Oh, okay.

22 Q: Are you familiar with the North American
23 Industry Classification System?

24 A: Yes.

25 Q: And what, in your view, is the purpose or what

1 is the North American Industry Classification
2 System?

3 A: I believe it comes out of the Census Bureau.

4 In fact, I see that at the bottom here it does.

5 Q: What's --

6 A: And so the Census Bureau collects information
7 to characterize America's economy and
8 infrastructure, in addition to its primary
9 mission, which is to enumerate voters.

10 Q: And do you agree that -- if you look at the
11 first document entitled "Sector 22 Utilities"
12 and "Section 221 Utilities," those two pages,
13 would you agree that they describe electric
14 utilities like Duke Energy?

15 A: Yes.

16 Q: And if I could ask you to take a look at the
17 stapled document that's labeled at the top
18 right "one of 22." I believe that's -- begins
19 with NAICS code -- NAICS Code 31,
20 Manufacturing. Would you believe that -- would
21 you agree that these NAICS's codes that
22 constitute the next 22 pages describe
23 "manufacturers"?

24 A: (Perusing.) Yes.

25 Q: Mr. Robinson, are you familiar with the

1 National Electric Safety Code?

2 A: I have used it in the past, yes.

3 Q: Are you an expert in that area?

4 A: Not really, no.

5 Q: Are you very familiar with it?

6 A: I have a working knowledge of it.

7 MR. GREEN: I object to this. He made a big deal

8 about standards not being appropriate for his

9 expertise and now he's going to ask him about

10 a standard.

11 THE COURT: It is an interesting approach.

12 MR. TRESH: I'm just curious in his experience -- he

13 knows a lot about manufacturers -- whether

14 under this code or standard -- whether there's

15 any standard that would say what a

16 "manufacturer" is.

17 MR. GREEN: I'm curious about a lot of things, but I

18 don't get to ask about them if I've moved to

19 get them out of --

20 THE COURT: I was about to ask him if his curiosity

21 is probative.

22 MR. TRESH: Probative as to what a "manufacturer"

23 is, Your Honor.

24 THE COURT: Well, then proceed at your own risk.

25 MR. TRESH: Thank you, Your Honor.

1 Q: Does the National Electric Safety Code anywhere
2 talk about electricity?

3 A: It ...

4 MR. GREEN: I'm sorry --

5 A: It has primarily to do with the installation
6 and maintenance of transmission and
7 distribution lines. I am -- I would be much
8 surprised if somewhere in there it did not
9 mention "electricity."

10 MR. GREEN: Before we go any further down this road,
11 have you provided a copy of the document?

12 MR. TRESH: I asked him are you familiar with them.

13 MR. GREEN: You're just asking?

14 MR. TRESH: Yeah.

15 THE COURT: Well, if you're asking from a document,
16 he has the right to review the document.

17 MR. TRESH: I'm not asking from a document, Your
18 Honor.

19 THE COURT: Okay.

20 MR. TRESH: And at this point, I would say I have no
21 further questions, Your Honor.

22 THE COURT: Okay. Mr. Tresh, you did do one thing I
23 thought was really interesting.

24 MR. TRESH: What's that, Your Honor?

25 THE COURT: You asked a compound question and then

1 you killed the first part of the compound
2 question and finished with asking only the
3 latter part of the compound question.

4 MR. TRESH: I did my best, Your Honor.

5 MR. GREEN: All right. Just a few questions on
6 redirect, Your Honor.

7 MR. ROBINSON - REDIRECT EXAMINATION BY MR. GREEN:

8 Q: Mr. Robinson, Mr. Tresh asked you about your
9 statement about electricity being sold as a
10 flat fee. Do you recall that?

11 A: I recall that.

12 Q: And I think the question was -- and I'll refer
13 you to pages 72 and 73 in your deposition, of
14 which I think is where those come from. And I
15 think the question was -- read with me starting
16 on line 23, page 72 -- "Okay. So in your
17 view" --

18 A: Hold on, please.

19 Q: Sure. Let me know when you get there.

20 MR. TRESH: Line 22?

21 MR. GREEN: Line 23 on page 72.

22 A: Seventy-two. Line what?

23 Q: Twenty-three.

24 A: Thank you.

25 Q: And I think it starts there: "Is this correct?"

1 Okay. So in your view, electricity,
2 electricity that Duke sells, electric energy
3 that Duke sells, it would change from a
4 material to a service if Duke went ahead and
5 sold it on a single charge, you know, 40
6 percent -- \$40 dollars per month for all the
7 electricity?" And your answer -- is that
8 correct?

9 A: That's what it says, yes.

10 Q: And then your answer beginning on line four of
11 73 was: "All you can eat"?

12 A: Yes.

13 Q: And then on line five the question was:
14 "That's a service?" And then on line six the
15 question is: "All you can eat. For example --
16 a good example -- well, strike that." Were you
17 discussing quantity in that context?

18 A: Yes.

19 Q: And, in fact, let me refer you back to page 72.

20 A: (Witness complies.)

21 Q: Line 12. Was your answer, "But if you're
22 paying by quantity of goods transferred, then
23 it is manufacturing"?

24 A: Yes.

25 Q: And what were you trying -- point were you

1 trying to make with respect to quantity?

2 A: Really a couple of points. One is, when you're
3 transferring a commodity, you can't maintain a
4 business without billing on the basis of
5 quantity. If you do a flat fee, you're going
6 to go out of business.

7 Second point, however, is that if the unlimited
8 demand is -- if you try to meet the unlimited
9 demand, you run out of generation facilities.
10 And so you have to go through a capital cost
11 upgrade to try to meet this unlimited demand,
12 which is impossible.

13 Q: Thank you, Mr. Robinson. Let me refer -- I
14 think you were handed a document, a cover
15 letter, 1991 that was part --

16 A: Yes.

17 Q: -- of your file?

18 A: Yes.

19 Q: Would you refer to page, I guess, six of that
20 document? At the bottom it has 00006538?

21 A: Yes.

22 Q: And do you see on there number 14 near the
23 bottom of that page?

24 A: Yes, I do.

25 Q: And is it talking about depreciation and

1 decommissioning expenses?

2 A: Fourteen is depreciation and 15 is
3 decommissioning.

4 Q: Okay. And under 14, does it have the word
5 "production"?

6 A: Yes.

7 Q: And does an electric company produce
8 electricity?

9 A: Yes.

10 Q: There's been some discussion about your opinion
11 in this case. What is your definition of
12 "manufacturing" that you have used?

13 A: I prefer Merriam-Webster. One of their -- one
14 of their definitions, which covers the ground
15 based on my experience is, is that it's a
16 productive activity involving the use of
17 machinery and division of labor.

18 Q: And it is your opinion that an electric company
19 like Duke Energy falls within that definition?

20 A: Yes.

21 MR. GREEN: I have no further questions, Your Honor.

22 Thank you.

23 MR. TRESH: Short redirect, Your Honor.

24 THE COURT: You said short?

25 MR. TRESH: Yes, Your Honor. Short redirect.

1 Re-cross, I'm sorry.

2 THE COURT: Yeah, that's what I was ...

3 MR. TRESH: I apologize.

4 MR. ROBINSON - RE-CROSS-EXAMINATION BY MR. TRESH:

5 Q: You mentioned earlier that if Duke provided
6 electric service on a flat-fee basis that that
7 would be the provision of a service, correct?

8 A: Yes.

9 Q: Okay. And you said that's not possible because
10 if people provided items on a flat-fee basis,
11 they'd go out of business; is that correct?

12 A: I said that.

13 Q: Do you have any experience with respect to
14 working in an electric utility that provided
15 electricity on a flat-fee basis?

16 A: I know that all electric utilities provide a
17 minority of their product on a flat-fee basis,
18 but the majority is charged for.

19 Q: But the product, in your view, the electric
20 service doesn't change, right?

21 A: The product is a commodity. Every kilowatt
22 hour is the same.

23 Q: Okay. And with regard to manufacturing, you
24 said you looked at --

25 (Cell phone interruption.)

1 Q: -- Wikipedia and other dictionary sources.

2 A: Uh-huh (affirmatively responds).

3 Q: Why do you think the North American Industry
4 Classification System has separate industry
5 codes for manufacturers versus utilities?

6 A: Utilities --

7 MR. GREEN: I object. I didn't go into that in
8 redirect, Your Honor.

9 MR. TRESH: He's an expert in manufacturing and he's
10 stating why his -- why he formed that basis,
11 why he formed his expert opinion. He should be
12 able to justify why --

13 THE COURT: Well, the question isn't what he's up to
14 justifying. The question is, did he go into
15 that matter on re-cross as a new matter and
16 that's the standard I have said.

17 MR. TRESH: Uh-huh (affirmatively responds).

18 THE COURT: If it was a new matter opened up
19 in -- and I said "cross," I meant -- you
20 started with your redirect; now I'm doing his
21 as re-cross.

22 In his redirect, did he open up a new matter
23 that you can go into?

24 MR. TRESH: Your Honor --

25 THE COURT: That's the --

1 MR. TRESH: He opened up manufacturing, Your Honor.

2 MR. GREEN: Your Honor, he talked about the
3 standards in his cross and I didn't bring them
4 up.

5 THE COURT: And I don't think he opened up anything
6 new. He addressed that which you had opened.
7 So if you want to refresh my memory, I'll look
8 for it.

9 MR. TRESH: What he opened up was manufacturing,
10 Your Honor. He opened up what --

11 THE COURT: He asked him to define "manufacturing."

12 MR. TRESH: Right. And I'm offering a different
13 definition and asking him why this definition
14 is different than the definition that he --

15 THE COURT: If that's the path, I'll overrule your
16 objection.

17 MR. TRESH: Thank you, Your Honor.

18 Q: So why is this definition different? Why is
19 the North American Industry Classification
20 System definition different than the one that
21 you think ought to be used?

22 A: Because utilities occupy a special place in our
23 economy.

24 Q: So utilities are not manufacturers.

25 A: I didn't say that.

1 Q: Well, are they --

2 A: They may -- they may well be manufacturers.

3 You can categorize any way you like for

4 whatever purposes you have. These happen to be

5 manufacturers classed as utilities, fine.

6 Q: The classification "manufacturers," how many
7 pages is it in the North American Industry --

8 A: Many, many, many, many pages.

9 Q: And yet they didn't choose to classify
10 utilities as manufacturers; is that correct?

11 A: Because it did not serve their purposes.

12 MR. TRESH: No further questions, Your Honor.

13 MR. GREEN: Nothing from me, Your Honor.

14 THE COURT: You may step down, sir.

15 (Witness excused.)

16 MR. GREEN: Thank you, Your Honor. The State rests.

17 We have no further witnesses.

18 One moment. Let me make sure I've gotten
19 everything.

20 Yes, the State rests.

21 MR. TRESH: Your Honor, we'd like to call a rebuttal
22 witness.

23 THE COURT: All right.

24 MR. TRESH: I'd like to call Dr. Papa back to the
25 stand, please.

1 THE COURT: If we could take a break?

2 MR. TRESH: Yes, Your Honor.

3 THE COURT: All right.

4 (Off the Record from 2:29 to 2:47 p.m.)

5 THE COURT: All right.

6 MR. TRESH: Dr. Papa?

7 THE COURT: You're still under oath, Doctor.

8 THE WITNESS: Okay.

9 IOANNIS PAPAPOLYMEROU, Ph.D., having been previously
10 sworn, testifies and examines as follows:

11 DR. PAPAPOLYMEROU - DIRECT EXAMINATION BY MR. TRESH:

12 Q: Dr. Papa, just a few questions. You heard
13 Mr. Robinson's testimony just a few moment ago?

14 A: Yes.

15 Q: And did you hear Mr. Robinson testify that the
16 provision of electrical energy by a company
17 like Duke Energy is not the provision of
18 electro -- of an electromagnetic field?

19 A: Yes.

20 Q: Do you agree with that testimony?

21 A: No.

22 Q: Can you tell us why?

23 A: I do not agree because what -- as I explained
24 in my testimony, what we are getting is a field
25 force. And what we have in nature are

1 electromagnetic fields.

2 There was a little bit of talk about, you know,

3 the voltage and the current and, you know,

4 current is an effect of the field. The field

5 applies a force to charges, for example.

6 Voltage is a way for us to help us analyze a

7 little of the electrical and electronic devices

8 much faster than, you know, when dealing with

9 a field. But what exists is a field, either

10 electrical or magnetic.

11 Q: And what exists in terms of -- and what Duke --

12 and what does Duke provide? Not just what

13 exists. What does Duke provide to its

14 customer?

15 A: It provides access to an electromagnetic field.

16 Q: So in that regard you would disagree with what

17 Mr. Robinson said earlier?

18 A: Yes.

19 Q: Okay. Are there other areas -- are there other

20 things that Mr. Robinson testified to that you

21 would disagree with?

22 A: (No response.)

23 Q: So, for example, would you agree that you can

24 touch electricity?

25 A: No, I do not agree. As I explained earlier in

1 my testimony, what we feel, what our body
2 feels, are the effects of the field.

3 THE COURT: I don't know if that's reply testimony,
4 but ...

5 MR. GREEN: Yes.

6 MR. TRESH: Okay.

7 THE COURT: I don't quite know what that "yes"
8 meant, either, but ...

9 MR. GREEN: Sorry. I was reading and I'm listening
10 and I'm not very -- my wife will tell you I'm
11 not very good at multitasking. Yes, I don't.
12 think that's reply testimony, Your Honor. I
13 think that is ...

14 Q: I believe that Mr. Robinson testified that
15 electricity is not a field; is that correct?"

16 A: No.

17 Q: Can you tell us why?

18 A: Because electricity is a force and a field
19 basically applies a force, in this case, to
20 other charged particles, so it is a field.

21 Q: I believe that Mr. Robinson said that Duke
22 Energy produces electric energy. Is that true?

23 A: No. What happens is that a company like Duke
24 Energy converts one form of energy to another.
25 So, in this case, the original form of energy,

1 for example, kinetic, as we said, gets
2 transformed into electromagnetic energy.

3 Q: I believe that Mr. Robinson testified that the
4 electromagnetic field or that the electric
5 energy associated with cell phone transmissions
6 is different than that associated with electric
7 energy that Duke provides. Can you tell us
8 what -- do you agree with that statement?

9 MR. GREEN: Your Honor, I object to this -- the
10 formulation of these questions. He is
11 characterizing how Mr. Robinson testified and
12 then he is getting the witness to answer his
13 characterization of that testimony. It's not
14 the witness's understanding of it. It's a
15 repackaging of the testimony.

16 THE COURT: It's called "pitting the witness" rule
17 in South Carolina. You're not allowed to pit
18 one witness against another.

19 Q: Dr. --

20 MR. TRESH: I'll withdraw that question, Your Honor.

21 THE COURT: That's a good idea.

22 MR. TRESH: Thank you, Your Honor.

23 Q: Dr. Papa, do you believe that you can touch
24 electricity?

25 A: No.

1 Q: Do you believe you can taste electricity?

2 A: No.

3 Q: Do you believe electricity has mass?

4 A: No.

5 Q: Do you believe that the provision of electric
6 energy by Duke is the provision of an electric
7 service?

8 A: Yes.

9 MR. TRESH: No further questions, Your Honor.

10 THE COURT: Mr. Green?

11 MR. GREEN: Just hopefully very briefly, Your Honor.

12 Thank you.

13 DR. PAPAPOLYMEROU - CROSS-EXAMINATION BY MR. GREEN:

14 Q: You testified -- the electromagnetic field that
15 you were discussing, you testified that that is
16 caused by the flow of current; is that correct?

17 A: I testified that the electric field is caused
18 by a static charge, by any charge actually, and
19 the magnetic field is caused by a moving charge
20 or at times varying electric field.

21 Q: And so that field results from the moving
22 charge; is that correct?

23 A: The magnetic field results from a moving
24 charge.

25 Q: Now, as part of your file in this case, didn't

1 you reference a Wikipedia article?

2 MR. TRESH: Your Honor, objection. We didn't call
3 Dr. Papa on rebuttal for anything involving
4 Wikipedia.

5 MR. GREEN: No, but they did call him as a rebuttal
6 witness and they did raise that issue in
7 cross-examination of my witness.

8 MR. TRESH: But we didn't raise that issue in our
9 rebuttal testimony.

10 THE COURT: That's interesting. I don't know if
11 I've ever researched that. Is rebuttal
12 testimony -- there's a rule in South Carolina,
13 different than the federal rule, is there's
14 wide latitude on cross-examination in South
15 Carolina. But then you're in rebuttal. And I
16 don't know if there's a case out there that
17 sets forth whether or not there's wide latitude
18 on cross-examination in rebuttal.

19 MR. TRESH: It's true with wide latitude, Your
20 Honor, but typically I would -- I believe it's
21 limited to the matters raised.

22 THE COURT: That's the difference. In South
23 Carolina it's not in the case in chief. I'm
24 going to let him go into it, but ...

25 Q: As part of your file, did you reference a

1 Wikipedia article regarding electricity?

2 A: If I remember correctly, yes.

3 Q: And did you say that that Wikipedia article was
4 extremely close to the statements that you made
5 in your report?

6 A: I believe so, yeah.

7 MR. GREEN: Thank you. I have no further questions,
8 Your Honor.

9 MR. TRESH: One question, Your Honor?

10 THE COURT: Okay.

11 DR. PAPAPOLYMEROU - REDIRECT EXAMINATION BY MR.

12 TRESH:

13 Q: Dr. Papa, in forming your expert opinion in
14 this matter, did you rely on Wikipedia?

15 A: No.

16 MR. TRESH: Thank you.

17 MR. GREEN: Nothing.

18 THE COURT: All right. You may step down.

19 (Witness excused.)

20 MR. TRESH: Your Honor, we have no further
21 witnesses.

22 THE COURT: All right.

23 MR. GREEN: None from the Department, Your Honor.

24 THE COURT: Okay. Are we going to have closing
25 arguments today or are we going to put them in

1 our proposed orders -- how do y'all want to do
2 it -- or both?

3 MR. TRESH: Your Honor, I'd propose, if it please
4 the Court, to do a short closing argument and
5 submit a post trial brief, if that would be
6 acceptable to the Court.

7 THE COURT: I normally do proposed orders --

8 MR. TRESH: Proposed orders, okay.

9 THE COURT: -- of which my normal rule is 30 days
10 from today's date or 30 days from the date that
11 the transcript -- if someone requests a
12 transcript, 30 days from the date the
13 transcript is made available to you.

14 MR. GREEN: I think we'll both want the transcript.

15 MR. TRESH: I think that's right. Yes, Your Honor.

16 MR. GREEN: I would propose no closing arguments,
17 but --

18 THE COURT: Well, he --

19 MR. GREEN: -- he asked, so ...

20 THE COURT: Then you just get to decide -- you want
21 to make one, too? You've got the option of
22 going first, last or both. If you do both, you
23 have to open in full.

24 MR. TRESH: Both, Your Honor.

25 THE COURT: All right.

1 CLOSING ARGUMENT BY MR. TRESH:

2 MR. TRESH: Your Honor, a few points, all of which I

3 assume will be addressed in our order. But

4 what we've heard over the past two days is --

5 we've heard a couple of things. We've heard

6 testimony that the Department of Revenue had a

7 long-standing policy in place whereby it

8 assessed single-factor versus multi-factor

9 formula with regard to a corporation's primary

10 business.

11 The test for that primary business is based

12 upon what 50 percent or greater of its receipts

13 were from. Receipts or profit, I think was the

14 actual testimony we heard.

15 Now, we heard testimony from Duke Energy that

16 without question, greater than 50 percent of

17 its receipts and profit were received from the

18 sale of electric services. That testimony's

19 not been controverted in any way.

20 Now, we also heard testimony from the

21 Department of Revenue in the Final Agency

22 Determination that they categorized Duke's

23 provision of electric service as just at that,

24 a service. Mr. Southard testified that that

25 was what was in the FAD; the Department had,

1 indeed, characterized it that way.

2 Now, when asked about what appeared to be an
3 inconsistency in the Department's revenue
4 manual, Mr. Southard couldn't explain the
5 difference between the characterization in the
6 revenue manual -- not just the FAD but in the
7 revenue manual -- with electric service as just
8 that, a service, versus the statement that
9 power producers should file using a
10 three-factor formula.

11 So what are we left with? We're left with
12 testimony by the Department of Revenue that
13 Duke Energy provides a service. Testimony from
14 all of Duke's witnesses that the sale of
15 electric energy is a service and that that is
16 greater than 50 percent of the business that
17 they're in. And if that's the case and under
18 the Department's long-standing --

19 THE COURT: You said 50 percent. I don't remember
20 any testimony about the amount of gross
21 receipts.

22 MR. TRESH: Mr. Monroe testified that more than
23 50 percent of its -- of Duke Energy's receipts
24 came from the provision of electric service.

25 THE COURT: He did?

1 MR. TRESH: Yes, sir. Yes, Your Honor.

2 THE COURT: From the provision of electrical
3 services. He didn't give any specificity in
4 that regard, though, did he? From whether it
5 came from the generation plants or -- you're
6 just saying generally it flows in from the
7 provision of the service at the site.

8 MR. TRESH: He didn't break down -- and, indeed,
9 there was no breakdown of the revenue.

10 THE COURT: The only breakdown was the -- what was
11 that phrase called, the "capacity charge? That
12 wasn't really broke down. It was just that it
13 is a charge.

14 MR. TRESH: Yes. Yes, Your Honor. Mr. Jamil
15 testified -- Dhiaa Jamil testified that what
16 Duke charged customers, too, that their primary
17 business was, indeed, the provision of electric
18 service, more than 50 percent, and he discussed
19 that there were different components of that
20 bill.
21 He discussed that in arriving at the monthly
22 charge, the hundred dollars in my example
23 yesterday, that one might pay a month for
24 electric service, that that charge was made up
25 of a few different components --

1 THE COURT: Yeah, okay.

2 MR. TRESH: -- some of which were related to
3 generation, some of which were related to
4 other.

5 Now, if Duke's primary business is, indeed, the
6 provision of a service -- we've got this
7 long-standing agency policy. So what is --
8 what is Duke in the business of?

9 Well, we've heard testimony from Duke's
10 executive vice president in charge of nuclear
11 operations, who serves on nuclear generation
12 facility boards across the county, advises
13 other utilities on how to run their generation
14 operations, and has been in the business for 24
15 or 25 years or so, that without question what
16 Duke provides is an electric service.

17 We then heard testimony from an esteemed
18 professor from the Georgia Institute of
19 Technology, who advises the United States
20 government, who advises NASA and who is a full
21 professor at Georgia Tech and has been involved
22 in studying electricity for 20-some-odd years,
23 that without question electric -- the provision
24 of electricity is a service and electricity
25 itself is an electromagnetic field.

1 And so what are we left with? We're left with
2 testimony from one Department witness, who has
3 some level of experience involving electricity
4 and, in his view, electricity is tangible in
5 the same way that wind and sun are tangible, as
6 well.

7 I think for the purposes of South Carolina law,
8 it would be a stretch to say that the provision
9 of sunlight or the provision of wind are
10 tangible in any respect. Nonetheless -- and
11 certainly not tangible personal property.

12 THE COURT: Well, the second part was -- tangible
13 personal property is difficult.

14 MR. TRESH: Very, Your Honor. And so we have no
15 testimony, then, from the Department as to
16 whether Duke provides tangible personal
17 property. We have two highly credible
18 witnesses who gave, both from a scientific
19 perspective and from a business perspective,
20 that Duke provides a service.

21 The Department argues that, well, wait a
22 minute, Duke's a manufacturer and that the
23 section -- the apportionment provisions of
24 South Carolina law should be read that
25 "manufacturer" -- one can be a "manufacturer"

1 and still be a service provider.

2 We've heard no testimony on how that can
3 happen. It's, quite frankly, very hard to
4 conceive that someone could manufacture a
5 service.

6 But the better read of that statute is that one
7 must manufacture or process a good or material.

8 And we heard testimony from Mr. Jamil and
9 Dr. Papa that electricity was not tangible.

10 How could it be a good or material? Even the
11 Department's witness, Mr. Robinson, testified
12 that electricity wasn't a material.

13 And so because of that, because that -- what
14 Duke's primary business is, is the provision of
15 an electric service, Duke Energy is required to
16 use the single-factor apportionment formula.

17 THE COURT: All right.

18 MR. GREEN: Your Honor, just very briefly.

19 CLOSING ARGUMENT BY MR. GREEN:

20 MR. GREEN: What you've heard testimony, in the
21 Department's view, is that there is a process
22 in producing electricity that involves
23 generation, it involves transmission, it
24 involves distribution, and all that is one
25 system that processes and reprocesses the

1 electricity until it is delivered to the
2 customer.

3 You've heard that from, frankly, both sides of
4 witnesses. There's a lot of descriptions of
5 it. Duke references a lot of stuff they have
6 calling it a "service," other times they've
7 called it the production of -- "generation of
8 electricity," which is what they do.

9 Really the question is whether -- one of the
10 questions I think is whether Duke Energy has
11 met its burden to establish that the Department
12 unreasonably viewed electricity as
13 manufacturing under that statute.

14 We submit that the better reading of that
15 statute is not manufacturing, a form of
16 processing. It is manufacturing "or" any form
17 of processing.

18 The statute is in the disjunctive. The
19 legislative history supports that
20 interpretation, quite frankly.

21 THE COURT: The legislative history?

22 MR. GREEN: The history that that statute, how it
23 originally read "manufacturing" and then later
24 on the clause "or any form of manufacturing" --
25 excuse me, "processing goods and materials" --

1 and we referenced that in our pretrial brief,
2 Your Honor -- that supports that manufacturing
3 stands alone by itself.

4 So we submit that they have not proven that the
5 Department's view of that was unreasonable and
6 they certainly -- and they have not met their
7 burden to prove that it was not manufacturing
8 based on the whole system of processing.

9 The system for delivering electricity, it
10 really is processed, it is just -- it is
11 stepped up and it is stepped down until it
12 finally reaches the meter at a customer's home
13 or business at which point in time, then it is
14 delivered in a form they can use. Not before.
15 Not at any time. And that is -- it is
16 essentially a big assembly line, a big conveyor
17 belt that takes the product to the customer.
18 For that reason, Your Honor, we submit they
19 have not met their burden of proof and the
20 Department is entitled to judgment on this
21 issue.

22 REPLY BY MR. TRESH:

23 MR. TRESH: Couple of quick points, Your Honor.

24 Mr. Green's interpretation of the statute as
25 being disjunctive omits the word "primary" at

1 the beginning of the statute..

2 THE COURT: You mean "principal."

3 MR. TRESH: Or "principal," excuse me, Your Honor.

4 THE COURT: Well, there's no "or." It's

5 "principal."

6 MR. TRESH: It is "principal". It is "principal."

7 And so one can only -- if one's principal
8 business is manufacturing or processing goods
9 or materials, that implies there's only one
10 business. And the uncontroverted testimony
11 we've heard is that Duke's primary business is
12 dealing in services.

13 Now, in terms of how that's been interpreted,
14 for years, going back at least 20 years,
15 probably more, we have guidance from the
16 Department of Revenue and case law that says
17 that the single-factor method is used for those
18 dealing in services, and the three-factor or
19 four-factor method is used for those dealing in
20 tangible personal property.

21 THE COURT: The four-factor method's not at issue
22 here, is it?

23 MR. TRESH: Not in these years, Your Honor.

24 THE COURT: Okay.

25 MR. TRESH: You're right, not in these years.

1 So the three-factor method versus the
2 single-factor is reserved for those dealing in
3 tangible personal property.

4 And with regard to the four-factor method, it
5 is -- the whole idea of dealing in tangible
6 personal property has, indeed, been continued.
7 That same test has been continued to the
8 current time.

9 THE COURT: Wonderful.

10 MR. TRESH: That test has always been dealing in
11 tangible personal property and Duke Energy
12 doesn't do it. And for that reason, Your
13 Honor, we request that the Court find in favor
14 of Duke.

15 THE COURT: Okay.

16 MR. TRESH: Your Honor, one last matter. We did not
17 earlier move the 10-K's into the record,
18 although they were stipulated to. We've
19 consulted with Mr. Green. I don't believe he
20 has any objection.

21 MR. GREEN: No objection.

22 MR. TRESH: I'd like to move them into the record.

23 THE COURT: They're admitted.

24 MR. TRESH: Thank you, Your Honor.

25 MR. GREEN: Are they labeled?

1 MS. TODOROVA: Yes. I relabeled --

2 MR. GREEN: Okay. That's fine.

3 THE COURT: Well, I don't really care if they're
4 labeled. I'd like to know if they're marked.

5 MS. TODOROVA: They're marked.

6 THE COURT: All right. They're marked as what?
7 I've admitted them.

8 THE COURT REPORTER: Forty-nine-B-1 through
9 Forty-nine-B-24.

10 (Petitioner's Exhibit Numbers Forty-nine-B-1 through
11 Forty-nine-B-24 were admitted into evidence.)

12 THE COURT: All right. This hearing is adjourned.
13 (There hearing concluded at 3:08 p.m.)

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT DIVISION
Docket No. 10-ALJ-17-0270-CC

Duke Energy Corporation,

Petitioner,

v.

South Carolina Department of
Revenue,

Respondent.

(COPY)

MOTIONS HEARING

Tuesday, June 26, 2012
9:56 a.m. - 2:22 p.m.

The hearing before the Honorable Ralph King Anderson, III, was taken at the Edgar A. Brown Building, 1205 Pendleton Street, Suite 224, Columbia, South Carolina, on the 26th day of June, 2012 before Cassandra E. Vance, Court Reporter and Notary Public in and for the State of South Carolina.

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INDEX**PAGE****MOTION FOR SUMMARY JUDGMENT****ARGUMENT BY:**

MR. GREEN	4
MR. MAYBANK	54
MR. TRESH	97
MR. FRIEDMAN	110

REPLY ARGUMENT BY:

MR. GREEN	140
MR. TRESH	149
MR. MAYBANK	152
MR. TRESH (Continued)	153
MR. FRIEDMAN	155

MOTION TO FILE AMICUS CURIAE**ARGUMENT BY:**

MR. MAYBANK	158

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MOTION TO COMPEL

ARGUMENT BY:

MR. GREEN	162
MR. TRESH	166

REPLY ARGUMENT BY:

MR. GREEN	170

MOTION TO STRIKE

ARGUMENT BY:

MR. TRESH	177
MR. GREEN	179

Certificate	187

EXHIBITS

(There were no exhibits marked during the hearing.)

STIPULATIONS

It is stipulated and agreed that this hearing is being taken pursuant to the rules of the Administrative Law Judge Division and the South Carolina Rules of Civil Procedure.

1 **THE COURT:** All right. This is a case in matter of
2 Duke Energy Corporation, Petitioner, versus
3 South Carolina Department of Revenue,
4 Respondent. It's Docket Number
5 10-ALJ-17-0270-CC.

6 This is a Summary Judgment Motions Hearing and,
7 apparently, you may want to add other things,
8 but I'll address that first, so -- let's see.
9 Department of Revenue made the initial request,
10 so ...

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

12 **THE COURT:** You're going to start the party?

13 **MR. GREEN:** Be happy to, Your Honor. Thank you.

14 (Off the Record)

15 **MR. GREEN:** May I approach, Your Honor?

16 **THE COURT:** Yes, sir.

17 **MR. GREEN:** This is what we're handing out to the
18 other parties. It's what you'll see on the
19 screen. Does everybody have a copy?

20 **ARGUMENT BY MR. GREEN:**

21 Good morning, Your Honor. May it please the
22 Court. Are you ready for me to proceed, Your
23 Honor?

24 **THE COURT:** Go ahead.

25 **MR. GREEN:** Good morning. May it please the Court.

1 My name is Tracey Green. With me is John
2 Roberts, operating the computer here. We are
3 with the law firm Willoughby & Hoefer, as well
4 is with me is Harry Hancock and a gutting of
5 the Department of Revenue. We all collectively
6 represent the Department of Revenue in this
7 matter. We are here today on the Department's
8 Motion for Summary Judgment.

9 The Department -- and let me say at the outset,
10 Your Honor, there are three issues here today
11 that we're going to ask the Court to consider,
12 which is what we filed our motions about. My
13 presentation on these is lengthier than I would
14 like and most of that time is spent with the
15 refund claims.

16 THE COURT: That probably means it's longer than I
17 would like.

18 MR. GREEN: Yes, sir.

19 THE COURT: I can almost guarantee that it's longer.

20 MR. GREEN: I can almost guarantee that, as well,
21 Your Honor. You know, I'll try to get through
22 it as quickly as I can.

23 THE COURT: That's fine.

24 MR. GREEN: But, first, the refund claim argument
25 takes a little bit longer than the last two.

1 THE COURT: Well, I read it, so I recognize it's
2 not --

3 MR. GREEN: Okay. So I apologize in advance.

4 THE COURT: Go ahead and apologize in advance,
5 because I'm going to make it longer because I'm
6 going to probably ask you questions.

7 MR. GREEN: Yes, sir, Your Honor, that will be fine.
8 And I'll jump around with you as best I can.
9 The Department contends that it's entitled to
10 Summary Judgment for three reasons: The Duke
11 Energy's pre-1994 refund claims are untimely;
12 that Duke Energy is a manufacturer for purposes
13 of the apportionment statutes; and that a
14 taxpayer's return of principal from short-term
15 securities transactions is not -- should not be
16 included in its apportionment formula.
17 Now, just a little bit of background, Your
18 Honor. In 2002, Duke Energy resolved some
19 ongoing issues with the Department. These
20 involved sales taxes, license fees and income
21 taxes. The income tax issue mainly pertained
22 to the sale, I think, in the late seventies or
23 early eighties involved with Catawba facility
24 in Cherokee County. The sales tax issue, none
25 of which is before you today, pertained to tax

1 years 1991 through 2001.

2 As part of that resolution, Duke Energy got a
3 refund of 9.4 million on income taxes. They
4 paid 3.6 million on license fees; 2.9 on sales
5 taxes. Those were offset against the income
6 tax refund and Duke received a check for a
7 little over \$3 million.

8 There was some dispute over interest
9 calculation, which, again, is not before you,
10 and that was resolved through an order of this
11 Court in the early 2000's, I think.

12 Thereafter, Duke filed some rounds of amended
13 returns for the year '78 to 2001. In the first
14 round, they just sought some additional tax
15 credits. In the second round, which I believe
16 were filed on December 30th or so of 2002, Duke
17 changed its method of apportionment and
18 calculation of its apportionment formula, the
19 last two issues that are here before you today.
20 Later on in 2007, I think, they filed some more
21 amended returns related to the years '86 to '98
22 pertaining to some federal audit issues, which
23 really aren't, I think, before you today.

24 The Department denied Duke Energy's refund
25 claims in whole. Duke is looking for \$126

1 million plus interest, roughly. I think they
2 have had some issue with the calculation. I
3 think that is taken from their Exhibits A and
4 F, though. Giving the amounts we're talking
5 about any difference I don't think is material,
6 Your Honor.

7 **THE COURT:** I like that they have some issue with
8 the calculation; y'all don't.

9 **MR. GREEN:** Well, they have some issue with the
10 calculation. I was referring to the absolute
11 amount, not whether they're entitled to it or
12 not, Your Honor.

13 The requested refund for the closed periods at
14 issue, '93 and earlier, is about 63 million;
15 '94 and later is about 63 million. The refund
16 attributable to the manufacturing issue is 35
17 million for all years. The apportionment
18 formula issue, the principal return is about 36
19 million for all years, almost 37, and about
20 22 million for '93 and before.

21 Okay. What I want to talk about first, Your
22 Honor, is the refund issue. And I want to go
23 into some general principals about that before
24 I get into sort of breaking down the refund
25 statutes.

1 Now, the Department's authority to grant
2 refunds is controlled by statute and no
3 employee or agent of the Department has the
4 authority to exceed a statute. They've got to
5 comply with it. If the statute says one thing,
6 the employee believes it says something else,
7 that's not binding. The Department has to do
8 what the statute says.

9 The refund of taxes is a matter of legislative
10 grace. That's been decided in numerous cases
11 by the Supreme Court and by this court; *Asmer*
12 *v. Livingston* is an often cited example.

13 Refunds claims must comply strictly with the
14 authorizing statute. And example of that is
15 *Guarantee Bank & Trust*, but there are other
16 decisions holding the same.

17 Department employees can't waiver or alter the
18 statutory time frames. *TNS Mills* case, which
19 I'll refer to several times during this, a
20 Department employee -- actually, a whole
21 division of the Department allowed taxpayers to
22 file retroactive claims for property tax
23 exemption, to do so late. The Supreme Court
24 held that this was impermissible. It affirmed
25 the decision of the Commission rejecting what

1 that employee had allowed to happen. The
2 Supreme Court said it was contrary to the
3 statutory framework and language, so they
4 denied the taxpayer any benefit from what the
5 employee had allowed them to do.

6 This Court has reached that same conclusion in
7 one of the many *Anonymous Taxpayer* decisions --

8 **THE COURT:** Well, let me cut -- or save y'all both
9 some time. Both of y'all have a tendency to
10 cite the decisions of this Court in your
11 arguments.

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

13 **THE COURT:** The decisions of this Court are not
14 binding. The decisions that I have made in
15 this court are not binding upon me. I've
16 issued decisions in the past and, especially
17 with pro se litigants when they come back and
18 had good lawyers on both sides arguing and
19 reversed my decision.

20 I can save you the time of addressing that
21 which this Court's done. Let's stick with
22 courts that may have either precedential value
23 or more persuasive value.

24 **MR. GREEN:** Yes, sir, Your Honor. I'll move on from
25 those, then.

1 I will cite briefly expired refund periods are
2 forever closed. I do have a Yamshak decision
3 up there, but I'll cite the South Carolina
4 National Bank decision, which held that when it
5 was interpreting the newly adopted 12-54-80 in
6 this case regarding assessment period. The
7 Court held that the adoption of a new statute
8 establishing a longer period of time for
9 assessment didn't go back retroactively. So
10 that had expired.

11 The Department is not subject to estoppel.
12 Three decisions I've cited for that are in the
13 brief, as well: *Texaco, Inc.*, *Heyward v. South*
14 *Carolina Tax Commission*, and, again, the *TNS*
15 *Mills* case.

16 In *Texaco* --

17 **THE COURT:** When you say they're not subject to
18 estoppel, they're not subject to estoppel
19 regarding the extension of a time to file for
20 refund, I assume is what you're arguing,
21 because state agencies can be subject to
22 estoppel under certain circumstances, correct?

23 **MR. GREEN:** I think state agencies can be subject to
24 estoppel if they act within the scope of their
25 authority. Our whole argument here, Your

1 Honor, is that they -- the forms that are
2 issued -- which I will get to as part of my
3 argument -- could not have extended the refund
4 period --

5 THE COURT: Okay.

6 MR. GREEN: -- because there was no authority to do
7 so.

8 THE COURT: I want to be clear we're on the same --

9 MR. GREEN: Yes, sir. Yes, sir. Yes.

10 Heyward v. Commission -- and I'll point out in
11 Texaco that the Department employee had said
12 that -- they told him to use a specific
13 accounting method. The Court said the
14 Department was not estopped from assessing
15 additional taxes.

16 Heyward, taxpayer said that the Department had
17 acquiesced and approved the election of
18 installment method; again, that was contrary to
19 statute. The Court did not permit that to
20 happen.

21 TNS Mills, the Department had issued a
22 memorandum saying that you could -- a recently
23 enacted statute gave the Department authority
24 to accept exemption applications any time. The
25 Court rejected that again, held estoppel did

1 not apply.

2 So I argue that there's no equitable
3 estoppel --

4 **THE COURT:** So does *TNS Mills* -- I was following
5 that. That's the only example where it was --
6 it was in written format, correct?

7 **MR. GREEN:** No, sir, I believe *Texaco* involved a
8 letter to the taxpayer saying, "You must use
9 this accounting method -- method of
10 accounting." But --

11 **THE COURT:** Okay. So both of them were situations
12 in which the Department set forth in writing a
13 particular method and the Department -- then
14 the Courts held you could not -- even though
15 that was set forth in writing, it was
16 nonbinding.

17 **MR. GREEN:** That is correct, Your Honor.

18 **THE COURT:** All right.

19 **MR. GREEN:** No equitable estoppel or equitable
20 tolling, Your Honor. I'll move on from those
21 since they are ALJ decisions, but I would say
22 they're based upon that.
23 Problems with equitable tolling, I won't cite
24 to that decision. I'll just make the argument
25 they create stale claims. They work havoc with

1 the State's settled financial situation. They
2 create budget problems.

3 An example of that was a *TNS Mills* case where
4 the retroactive property tax exemptions would
5 cause counties budgetary problems, because say
6 in year one they budgeted based on the property
7 tax amounts that had been filed. If it could
8 be retroactively changed in year five, their
9 whole budget projections are messed up. So
10 budgetary issues are something to be considered
11 in determining the equitable estoppel and
12 equitable tolling issues, Your Honor.

13 Court of Appeals agrees, I think, with that.
14 It has rejected taxpayer's argument that
15 statute of limitations should be tolled based
16 on a letter requesting a refund, because
17 nothing prevented the taxpayers from learning
18 of the right statutes.

19 U.S. Supreme Court has held in *Brockamp*, which
20 is tax law not normally characterized by
21 case-specific exceptions, and so Congress -- or
22 the Legislature in our context -- would likely
23 have decided just whether and when they wanted
24 to expand the limitations period.

25 And I think that holding, while that is a

1 Supreme Court holding under Federal tax law, I
2 think that analysis is consistent with the
3 Supreme Court decisions from this State that
4 we've cited in our brief, Your Honor.

5 The Department has consistently applied that
6 rule, which in, for instance, Revenue Procedure
7 95-5, "Although the statute of limitations is
8 arbitrary and can cause hardships, its
9 application is designed to be neutral." And I
10 think the Department has consistently applied a
11 statute of limitations on refund claims
12 consistent with the Supreme Court precedence.

13 So, Your Honor, to summarize all that, we would
14 argue that the refund of taxes is a matter of
15 legislative grace, expired refund periods are
16 closed, and the Department is not subject to
17 estoppel or equitable tolling for acts by its
18 agents inconsistent with the statute or taken
19 outside of the statutory authority. Now, based
20 on that, we would argue that pre-1994 claims
21 are untimely. We've got two refund frameworks
22 here at issue, I think, Your Honor: what I
23 call '95 to present or the "modern era" and
24 then the pre-'95 era. In the modern era, the
25 Department may extend the time to file a refund

1 claim. It may grant a refund claim.
2 12-60-40 enacted in nineteen-ninety -- I had
3 four on there, but I think that's five --
4 permits the Department to extend applicable tax
5 periods. 12-60-470 permits taxpayers to file
6 written refund claims within the time period
7 specified in Section 12-54-85.
8 12-54-85 was enacted in '95, as part of the
9 Revenue Procedures Act, superseded Section
10 12-54-80 and the three-year -- essentially the
11 federal three year from the time the return is
12 filed or two years from the date of payment,
13 whichever is later.
14 The Department set forth parameters of these
15 claims in Revenue Procedure 95-5; in that,
16 based on the statutes I just mentioned, the
17 Department ruled that an extension of time for
18 assessment extends the time to file a refund
19 claim and all periods open on the effective
20 date of the Revenue Procedures Act, which I
21 think was in August of '95, could be extended
22 further.
23 So a little bit less restrictive provisions
24 than before and there is a provision that open
25 refund periods may be extended by the

1 Department.

2 This leads to the issues: What periods were
3 open when 12-60-40 was enacted and were those
4 periods timely extended by Duke Energy?

5 In the pre-'95 era, the refund statutes' much
6 restrictive and limited. 12-47-440 applied to
7 the tax periods 1990 to 1994. Sections
8 12-47-210 and 220 applied to the period '78 to
9 '89. 1990 to '94 is 12-47-440, three years
10 from the date the payment was originally due,
11 without regard to extensions.

12 The Department had originally taken the
13 position that that statute applied to all
14 taxes. The Supreme Court in both Bass
15 decisions -- I think I'm citing the second one
16 here -- said that's not the case. This Court
17 has previously stated that the exclusive remedy
18 for testing income tax assessments is 12-47-210
19 and 220.

20 Noteworthy in that case is that the Court noted
21 that the Department had advised taxpayers that
22 they had a three-year refund limitation period
23 in which they could file their claim. The
24 Court said, "We regret that, but it doesn't
25 help the taxpayer."

1 Now, what ultimately happened with this is the
2 Legislature amended in 47-440 in 1994 to apply
3 to 1990 years and later. So they made -- the
4 Legislature went in and made a change to deal
5 with that. I cite to a decision of this Court,
6 not for precedent but just recognizing the
7 change in the statute.

8 So from 1990 to 1994, refund claims were timely
9 filed within three years from the date payment
10 was due, without reference to extensions. Duke
11 Energy always filed on a calendar year and so
12 their payment would have been due on March 15th
13 of the next year.

14 Based on that --

15 THE COURT: Their payment? The refund --

16 MR. GREEN: Their refund claim would have been -- in
17 other words, they had -- and this chart, I
18 think, helps illustrate it. Their original --

19 THE COURT: That's the same chart that's in your --

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

21 THE COURT: Okay.

22 MR. GREEN: And so it would have just been -- that
23 sets forth the time.

24 Based on this chart, Your Honor, we would
25 contend that 1990 and 1991, the extensions

1 were -- could not -- these years couldn't be
2 extended because those periods closed before
3 the Revenue Procedures Act became effective in
4 late '95. '92 and '93, potentially could have
5 been extended, but they were -- they closed
6 before a form was executed in '96 and '97. And
7 we've gotten these dates set forth --

8 **THE COURT:** What form?

9 **MR. GREEN:** The Form FS-43 that is at issue in this
10 case. And, again, I apologize, I'll get to
11 that shortly.

12 '94, the Department concedes, based on Revenue
13 Procedure 95-5, that appears timely because
14 that period would have closed March 15th of
15 '98. And I think the waiver form was signed in
16 December of '97, if I remember right.

17 **THE COURT:** All right. So where I can be clear on
18 this case, so 1994 on the extensions were
19 timely.

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

21 **THE COURT:** For purposes of this Summary Judgment
22 hearing, we're dealing with '93 on back. If I
23 grant Summary Judgment regarding '93 back,
24 we've got the other issues of whether or not
25 they're a manufacturer and we got the -- I

1 think it's a three-part test.

2 MR. GREEN: Yes.

3 THE COURT: And then we've got the other factors --

4 MR. GREEN: Yes.

5 THE COURT: -- or the third issue. What would be
6 left to determine in the case-in-chief?

7 MR. GREEN: If, for instance, you were to grant the
8 Department's Motion for Summary Judgment on all
9 three issues, there would be nothing left.

10 THE COURT: Okay. That was --

11 MR. GREEN: I think there is an issue preserved
12 dealing with Crescent Resources; that's not
13 before the Court right now and that's a
14 separate issue. We have to go back and work
15 that out, but --

16 THE COURT: And the determination regarding
17 manufacturing --

18 MR. GREEN: Yes.

19 THE COURT: -- would also resolve this particular
20 issue, would it not? I'm asking.

21 MR. GREEN: I'm sorry, which issue, Your Honor?

22 THE COURT: The issue of timeliness. I'm asking.
23 If I determine that Duke Energy was a
24 manufacturer --

25 MR. GREEN: Yes.

1 think we would still have to have a hearing on
2 whether the distortive effect of including the
3 short -- the principal from the short-term
4 transactions --

5 THE COURT: Okay.

6 MR. GREEN: -- in the denominator, I think that
7 would be a factual hearing.

8 THE COURT: All right. Well, I got you off track,
9 but I kind of wanted to know where we were
10 going on all this.

11 MR. GREEN: That's all right, Your Honor. Please
12 interrupt me any time you need to ask
13 questions.

14 Okay. So '94 was a timely --

15 THE COURT: Can I define "need" broadly, then?

16 MR. GREEN: Pardon me?

17 THE COURT: Can I define "need" broadly, because I
18 may want to interrupt you and you may not feel
19 that that's --

20 MR. GREEN: Yes, Your Honor. It's not my
21 definition; it would be yours, yes, sir.

22 THE COURT: Good. I get to make the ruling.

23 MR. GREEN: So to summarize, we would say '94 was
24 timely extended and '93 through '90 were not
25 timely extended, Your Honor.

1 For the years '78-'89, Sections 12-47-210 and
2 220: Exclusive remedy for obtaining income tax
3 refund prior to 1990. I think with the Bass
4 decision, as well as *Perpetual Building & Loan*
5 go to that issue. I think *Perpetual* is cited
6 in Bass.

7 There was a limited refund window. The
8 taxpayer was required to expressly pay taxes
9 under protest and then institute an action in
10 circuit court within 30 days after payment.
11 Failure to pay under protest was fatal to the
12 claim.

13 Under these statutes, Your Honor, we submit the
14 pre-1990 claims are untimely. Nothing paid
15 under protest, no actions filed in circuit
16 court, refund claims filed here. So we submit
17 that all those claims prior to 1990 are
18 untimely under 210 and 220.

19 And we would say that '78 through '82 have some
20 additional process. They were first added to
21 Form FS-43 in May 30, 1996, well after the
22 original periods expired. Those periods could
23 have been opened only by virtue of an IRS
24 report under 12-54-80 or -85 and we submit that
25 IRS wouldn't have examined the apportionment

1 issue, either of the apportionment issues,
2 really, that are at issue here. And so that
3 would not assist them in opening those years
4 for the refund claims that they've filed.
5 Now, taxpayer's whole argument comes down to
6 Form FS-43, keeping the '78 to '93 years open.
7 And that form doesn't do what they say it does
8 or if it's not authorized to do what they say
9 it does, their claims are untimely.
10 There were 21 Forms FS-43 executed beginning in
11 about 1988.
12 Go to the next slide.
13 Form FS-43 shows its limited purpose: Consent
14 to extend the time to assess tax. Then it
15 says, "This agreement extends the time for
16 mailing notice of assessment or refund of the
17 above tax" -- which is cited in the
18 fill-in-the-blank part --- "pursuant to
19 provisions of Section 12-54-80."
20 So it says, "This agreement extends the time
21 for mailing the notice of assessment or
22 refund" -- which is really a Department
23 action -- "pursuant to the provisions of
24 Section 12-54-80." So that form references its
25 authority, 12-54-80, and at the top it says,

1 "Consent to extend the time to assess tax,"
2 again, a Department action.

3 So Form FS-43's authority was Section 12-54-80.
4 For all years prior to '95 and sometimes
5 thereafter, Form FS-43 referenced 12-54-80.
6 12-54-80 was entitled "Time within which amount
7 of tax due must be determined and assessed,"
8 and imposed a 36-month limitation on the
9 Department determining and assessing taxes.

10 12-54-80 was adopted in '85. Here is the first
11 version, I think, and it just imposes a
12 36-month limitation and then says, "If, before
13 the time expires for mailing a notice of
14 assessment, the taxpayer has consented in
15 writing to the mailing of notice after that
16 time, then you can mail it at a later date
17 during the period set forth and the consent --
18 the written consent."

19 Statute was amended a little bit later. You'll
20 see the second sentence of the first paragraph
21 was added to deal with IRS issues and gave
22 180-day extension after that.

23 **THE COURT:** That has nothing to do with this case.

24 **MR. GREEN:** Has nothing to do with this case, at
25 least not primarily..

1 So, again, there was no general authority for
2 refund claim extension prior to 1995, which was
3 enacted as part of the Revenue Procedures Act.

4 So 12-54-80 doesn't contain any references to
5 refund authorization.

6 There was no general authority to extend the
7 time period for refund claims. And so if
8 12-54-80 was the source of authority, it
9 doesn't reference refund claims, then there has
10 to be some other refund remedy if the taxpayers
11 are to prevail.

12 Section 12-54-30 permitted a refund of amounts
13 discovered by the Department on examination of
14 a return or otherwise. It applied even if a
15 claim for refund hadn't been filed. And
16 previous to that, there were some statutes,
17 12-7-2240 and 2210, that roughly dealt with
18 these same issues.

19 But 12 -- the remedy in 12-54-30 and those
20 predecessor statutes was pretty limited. There
21 was a three-year statute. The taxpayers could
22 request a conference, but there was no right to
23 judicial review. And the statute didn't give
24 greater rights than were available under the
25 refund statutes.

1 And the Commission recognized this in 88 --
2 Commission Decision 88-162. There was a refund
3 claim that didn't meet the requirements of
4 12-47-440. The taxpayer argued that they could
5 still review it under 12-54-30 because they
6 filed their request during the audit period set
7 forth in 12-54-80.

8 **THE COURT:** Hold on a second.

9 **MR. GREEN:** The Commission concluded -- I'm sorry,
10 Your Honor?

11 **THE COURT:** So that Commission Decision is -- when
12 you said it didn't meet the requirements of
13 12-47-440 --

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

15 **THE COURT:** -- that's interpreting what the previous
16 statute you referenced?

17 **MR. GREEN:** That is interpreting whether 12-54 ...

18 **THE COURT:** 30.

19 **MR. GREEN:** Excuse me, yes, 12-54-30 would permit
20 the Commission to grant review and issue a
21 refund during a time period after. In other
22 words, I think what happened was, there was
23 a -- you had the three-year window that would
24 have been under 12-47-440, but the taxpayer
25 filed a return on an extension. So the

1 three-year period from the date they actually
2 filed in which the Department could assess
3 taxes would run later than the 12-47-440
4 period. It would extend a little bit longer.

5 **THE COURT:** Would 12-47-440 been an applicable
6 statute in this case or are you just presenting
7 this as a global treatment of 12-54-30?

8 **MR. GREEN:** I'm sorry, and I'm misquoting, it's
9 12-7-2240. 12-7-2240 was a predecessor to
10 12-54-30.

11 **THE COURT:** Okay.

12 **MR. GREEN:** Excuse me, 12-54-85. I apologize. I'm
13 making this more confusing than it is, I
14 apologize. 12-54-80 was the successor enacted
15 in '85 to 12-7-2240. And they both gave the
16 Department, if they discovered a refund on
17 examination, some authority to issue a refund.

18 **THE COURT:** Okay. Well, I'm more interested in the
19 application of 12-54-30, so ...

20 **MR. GREEN:** And I apologize, Your Honor. I'm still
21 confusing this. 12-7-2240 and 12-54-30 are
22 similar statutes. They gave the Department the
23 authority to issue a refund in certain
24 situations.

25 **THE COURT:** There's where I'm trying to figure out.

1 MR. GREEN: Yes, sir, I apologize. I'm mixing 30
2 and 85 up and I apologize for that.

3 12-7-2240. 12-54-30 says on examination of
4 return or otherwise, the Commission may order
5 a refund or give a credit. It was a matter
6 committed to the Commission's discretion under
7 the precedence of the Supreme Court and it was
8 not reviewable by a Court. It was sort of an
9 administrative action.

10 What happened -- let me step back. I
11 apologize, but I think to be clear I need to do
12 that. When they -- the taxpayer's return would
13 have been due March 15th, '84, but they
14 extended it, so it wasn't ultimately paid until
15 September 14th, '84. They got a six-month
16 extension.

17 A refund came after the three-year period,
18 which would expire on March 15th, 1987, under
19 12-47-440, but it would have been within the
20 three-year period for assessment provided under
21 12-54-80, which is the statute, obviously,
22 referenced in the form.

23 THE COURT: Okay.

24 MR. GREEN: The Commission denied that refund claim
25 and said -- it quotes here, "The company argues

1 that because the Tax Commission could audit
2 through the period when the return was filed,
3 36 months after, the Commission has the
4 authority to refund through that same period."
5 And the Commission held concluding, no, that it
6 doesn't. It rejected that argument because it
7 said to do so would render the refund statutes
8 meaningless.

9 And we would -- we would submit, again, to go
10 back to the *TNS Mills* case, there's a similar
11 line of argument in there whereas to look at
12 the exempt -- the statute that was at issue
13 there that was argued would permit a
14 retroactive refund. The Court looked at the
15 statutes, read them together and concluded that
16 that would render the other property tax
17 statutes meaningless. And so it concluded
18 that, no, you can't file those retroactive
19 claims. That same type of analysis followed in
20 this Commission Decision.

21 And I think what this Commission Decision also
22 goes to, Your Honor, is that the Commission,
23 frankly, has -- did not authorize refunds
24 during the 12-54-80 36-month limitation period,
25 because they held in here that you can't do

1 that. That was the conclusion they reached in
2 this Commission Decision 88-162, which is
3 attached to our materials, I think, at Tab J,
4 5.

5 **THE COURT:** All right.

6 **MR. GREEN:** So, to summarize, Your Honor, Form FS-43
7 references 12-54-80. Section 12-54-80 does not
8 reference refunds. Based on that Commission
9 Decision, I'm not sure they were entitled to
10 any review under 12-54-30 or 12-7-2240. But if
11 they were, they've received the benefit of that
12 review and the Commission denied it.

13 The general refund extensions were not
14 available for '95 and so 12-54-30 and 12-54-80
15 and its predecessors and successors do not
16 assist Duke Energy's refund claims in this
17 case, Your Honor, is our position.

18 Now, I apologize, again. I confused all that
19 with the references to 30 and 80 and 85. I
20 hope I've cleared it up. Before I proceed to
21 the next issue, do you have any questions for
22 me on that?

23 **THE COURT:** The only question I have is, would you
24 rather us separate each one of those issues and
25 have argument from the Respondents now or do

1 you want to proceed and deal with it all at one
2 time?

3 **MR. GREEN:** I'm happy to proceed on. It may be
4 easier with the PowerPoints to just do it at
5 one time, but ...

6 **MR. TRESH:** Would it be helpful to Your Honor to
7 have it all grouped together? What would be
8 best, Your Honor?

9 **THE COURT:** I don't care. I'm just asking from your
10 perspectives.

11 **MR. GREEN:** Okay. We'll just proceed on. Thank
12 you. If I get into it and you change your
13 mind, let us know and we'll switch gears.

14 The next issue is generating electricity is
15 manufacturing.

16 12-6-2250, the pretty common three-factor
17 apportionment factor: property, payroll and
18 sales; applies to entities whose principal
19 business is manufacturing or any form of
20 collecting, buying, assembling, processing
21 goods.

22 Duke Energy originally when it filed its
23 returns for '78 to 2001 used the three-factor
24 formula. Duke Energy in its refund claims has
25 changed that. It says that generating,

1 producing electricity is not manufacturing. So
2 they've changed a method they've used for many
3 years.

4 The Department obviously denied the refund
5 claims and took the position that Duke Energy
6 is a manufacturer required to use the
7 three-factor formula.

8 Now, Duke Energy's corporate charter states in
9 one of its corporate purposes is manufacturing
10 electricity. This was a '77, I think, Restated
11 Charter, but that had been in their corporate
12 charter, I think, for many years.

13 If you look at the 1930, I think, Duke Power
14 decision and some of the factual recitations,
15 that same provision is quoted from a charter of
16 Duke Power: "To manufacture, generate, buy" --
17 blah, blah, blah -- "electric current for
18 light, heat and power."

19 Maybe more importantly --

20 **THE COURT:** When you say -- you cite that, is that
21 an exhibit or affidavit attached to your
22 Summary Judgment Motion?

23 **MR. GREEN:** It was attached to the Summary Judgment
24 Motion, yes. It was provided in the --

25 **THE COURT:** Okay.

1 MR. GREEN: -- discovery as well to them and so --
2 but it was attached to the motion, yes, sir,
3 Your Honor.

4 THE COURT: All right.

5 MR. GREEN: The Supreme Court says generating -- and
6 I think it was a certified copy, if I remember
7 right, I think.
8 The Supreme Court says generating electricity
9 is manufacturing. Columbia Railway and Gas
10 decision in 1926, predecessor of SCE&G,
11 question was the application of Manufacturer's
12 Tax Act.
13 The Court said the three exceptions present the
14 single question whether the plaintiff is
15 engaged in the business of manufacturing. And
16 the Court went on to hold, "We don't think
17 there's any doubt that the appellant is engaged
18 in the business of manufacturing gas and
19 electricity, and it is clearly within the
20 provisions of the Manufacturer's Tax Act."
21 So I want to point out, I submit that holding -
22 - it's not saying, well, they're just a
23 manufacturer for this purpose. They are
24 engaged in the business of manufacturing and,
25 therefore, they come within the Manufacturer's

1 Tax Act.

2 Now, the Manufacturer's Tax Act applied to
3 every person, firm or corporation engaged in
4 the business of manufacturing. So if you look
5 at the statute, highlighted terms there:

6 "Every person, firm or corporation engaged in
7 the business of manufacturing." And then (a)
8 talks about manufacturing.

9 The two statutes here at issue today are both
10 directed to manufacturing. At the top is the
11 Manufacturer's Tax Act, that every person is
12 engaged in the business of manufacturing --

13 **THE COURT:** Now, wait a second. The Manufacturer's
14 Tax Act dealt with -- when you say both are
15 directed toward manufacturing, the issue here
16 under 12-6-2250?

17 **MR. GREEN:** 22 -- yes.

18 **THE COURT:** I thought it was another one, too; maybe
19 90?

20 **MR. GREEN:** I think 2290 is the gross receipts
21 statute, if I remember right.

22 **THE COURT:** Oh, okay. Then we're to interpret 2250
23 as to whether or not it defines them as a
24 manufacturer, correct? I mean, it says
25 "manufacture" --

1 MR. GREEN: "A taxpayer whose principal business in
2 this State" --

3 THE COURT: "...is manufacturing."

4 MR. GREEN: Yes, sir, Your Honor.

5 THE COURT: All right. I see where you --

6 MR. GREEN: Yeah, so --

7 THE COURT: Because you said that there was two
8 parts to that in your argument. You said "or
9 processing goods."

10 MR. GREEN: There is another provision: "...or any
11 form of collecting, buying, assembly or
12 processing goods."

13 THE COURT: But that's not an issue.

14 MR. GREEN: We submit that's not an issue here.
15 It's a question of whether they're engaged in
16 the business of manufacturing.

17 THE COURT: All right. So in Columbia ...

18 MR. GREEN: Railway and Gas?

19 THE COURT: Railway and Gas, they determined that
20 they were engaged -- well, at least SCE&G, the
21 predecessor to them, was engaged in
22 manufacturing.

23 MR. GREEN: Yes, sir.

24 THE COURT: Is that determination by the court a
25 factual determination by the court or a legal

1 determination by the court?

2 **MR. GREEN:** I submit that based on that last part
3 it's both. The factual determination is that
4 it's engaged in the business of manufacturing
5 gas and electricity and then it's applying that
6 provision -- applying that finding to the
7 provisions of the Manufacturer's Tax Act, which
8 in this case apply to a manufacturer.

9 **THE COURT:** All right.

10 **MR. GREEN:** Or somebody engaged in the business of
11 manufacturing.

12 **THE COURT:** Well, let me follow that, then. So the
13 first aspect of it is both. Is the factual
14 determination by the court that a -- that
15 electricity is manufacturing, is that of
16 precedential value in the future?

17 In other words, I'm getting at -- I'm asking.
18 I recognize that when courts make
19 interpretations of the law, that that's
20 precedential value. I'm just -- and this is a
21 legitimate question. I don't have any answer.
22 Sometimes I set y'all up, but this one I don't
23 know.

24 Is a court's determination factually binding in
25 the future regarding other cases that come

1 before the court?

2 MR. GREEN: Well, I would submit that it is binding
3 here, Your Honor, in this case for a couple of
4 reasons. One --

5 THE COURT: And I will allow y'all to brief any of
6 these questions I ask, if you wish to do so
7 later.

8 MR. GREEN: Okay. Thank you, Your Honor. I think,
9 Your Honor, in this case it would be binding
10 because you've got a determination that a
11 company engaged in the business -- producing,
12 generating electricity, they are a
13 manufacturer. You've got a determination
14 dealing with manufacturing as applied in a tax
15 statute on virtually the same language that
16 we've got at issue here today.

17 THE COURT: Well, that would take it to the legal
18 aspects of it.

19 MR. GREEN: But I do think that -- yes, but I
20 do -- but I think -- if I understand the
21 question correctly, I think that is binding on
22 you because that was a determination that -- a
23 legal determination under statute, a tax
24 statute directed to manufacturing. It covers
25 companies like SCE&G, in that case, that

1 produces electricity.

2 THE COURT: Well, hence -- I mean, the question is
3 somewhat confusing because the issue is
4 somewhat confusing.

5 MR. GREEN: The issue is -- yes.

6 THE COURT: Because if you had the same exact
7 statute, I think this would all be clear.

8 MR. GREEN: Yes.

9 THE COURT: This activity is almost directly related
10 or similar to that which another act dealing
11 with the same language; that's why I'm trying
12 to parse this out.

13 MR. GREEN: Yes, sir, Your Honor. No, I think --
14 again, I think it is because I think they
15 reached the determination that generating
16 electricity is manufacturing and generating
17 electricity is roughly done the same way now
18 that it was done then. I mean, it's
19 technically more advanced, but the basic
20 process is the same. That's really a factual
21 determination not here. But --

22 THE COURT: Well, don't know if it matters, the
23 process is the same. It's whether the end
24 result of what is produced is the same, because
25 electricity being the transmission of

1 electrons, I assume that that hasn't changed a
2 whole lot.

3 **MR. GREEN:** I think that has not changed, Your
4 Honor.

5 Now, I would also submit as addition to the
6 binding nature, there's the 1930 Duke Power
7 decision where the Court -- again, different
8 statute, admittedly, but the Court relied on
9 the *Columbia Railway* decision, says that a
10 company engaged in generating electricity is a
11 manufacturer. For the purposes of the statute
12 imposing a tax, the place where it generates it
13 is a manufacturer.

14 So, I think you've got a couple things there.
15 You've got a finding that this taxpayer is
16 engaged in the business of manufacturing and
17 you've also got the application of the *Columbia*
18 *Railway* decision to another statute. So I
19 think that indicates that it has effect beyond
20 just the Manufacturer's Tax Act. And I think
21 it has effect here, Your Honor. And we submit
22 that's why Duke Energy is a manufacturer for
23 purposes of the apportionment statute.

24 In fact, they treat themselves as a
25 manufacturer on their recently filed returns,

1 and for that reason, we think the Department's
2 determination on this should be sustained.

3 Now, Duke references *Consolidated Hydro*, which
4 is a decision of this Court. I gather you do
5 not want me to spend any time on decisions of
6 this Court, so I'm going to move right along,
7 unless you'd like to hear my argument on that.

8 THE COURT: Lucky for you, unlucky for Duke on this
9 one.

10 MR. GREEN: I will move on, Your Honor.

11 THE COURT: Or you can argue the pertinent aspects
12 of what *Hydro* is based upon.

13 MR. GREEN: I will argue -- I will point out that
14 *Consolidated Hydro* dealt with a completely
15 different statute.

16 THE COURT: Okay.

17 MR. GREEN: And then I will move on to slide 79,
18 Agency Precedent.

19 Under property tax, the agency has applied
20 these decisions. If there's language going to
21 manufacturer or manufacturing, the Department
22 has applied those decisions. And, frankly,
23 they applied it to give taxpayers the benefit.
24 So, for instance, if there's a property tax
25 benefit, sales tax benefit or whatever directed

1 to a manufacturer, they give them the benefit
2 of that, as well. So it's been a -- it's been
3 a two-way street, frankly.

4 The Attorney General, which used to be the
5 legal advisor to the Commission, applied
6 Columbia Railway and Duke Power to include that
7 SCE&G was a manufacturer, again, based on the
8 cited decisions.

9 So I'd submit those go to agency precedent
10 regarding this and the consistent application
11 of that precedent, Your Honor.

12 If there are no questions on that issue, I'll
13 move on to the last one.

14 **THE COURT:** Is there -- under your view, is there
15 any factual input that could be made to clarify
16 whether or not producing electricity is
17 manufacturing or not or is that solely based on
18 statute?

19 **MR. GREEN:** I think it's solely based on statute and
20 the Columbia Railway and Duke Power decisions.
21 I don't -- I think based on those decisions,
22 this is not a novel issue for this Court that
23 would require any factual input to that issue.
24 I think the Supreme Court has already resolved
25 those issues for you.

1 THE COURT: All right. So to rephrase that question
2 to where I can be clear, there is no need for
3 a factual exploration of the issue because the
4 Supreme Court's resolved it or because that
5 would not be anything that would -- for which
6 a factual exploration of the issues would be
7 pertinent?

8 MR. GREEN: The Department submits it's not.

9 THE COURT: If the Supreme Court -- I'll make it
10 easier for you. If the Supreme Court had not
11 made a previous -- any determinations on this
12 issue, would that be an issue that this Court
13 needs to have a factual hearing to resolve?

14 MR. GREEN: I would submit that it would not be. I
15 would submit that to some extent, probably
16 Department precedent reasonably concluding that
17 a company generating electricity is
18 manufacturing.

19 Now, I guess my response gets a little circular
20 because some of that agency precedent is based
21 upon the Columbia Railway decision. But I
22 would submit --

23 THE COURT: I think there's no dispute about what is
24 indeed -- or what the end result of
25 manufacturing electricity or producing

1 electricity is, so ...

2 MR. GREEN: We would submit there's not --

3 THE COURT: (Inaudible.)

4 MR. GREEN: I'm sorry, I didn't mean to interrupt
5 you.

6 THE COURT: No, that's okay.

7 MR. GREEN: We would submit there's not. I know the
8 taxpayer will vehemently disagree with me on
9 this point. We would submit there's not, Your
10 Honor. We would submit that it is a matter
11 that, frankly, could be adjudicated by this
12 Court without any further factual exploration.

13 THE COURT: Okay. All right. Move on to the next
14 one.

15 MR. GREEN: All right. Last issue is the return of
16 principal issue. We've called it here the
17 "Proper Calculation of the Apportionment
18 Formulas."

19 Starting point, you've seen the decisions of
20 the Supreme Court. The Colonial Life case, I
21 think, was a big one. But taxpayer -- it's
22 12-6-2210 and that focused on whether --
23 focuses on ensuring that "the South Carolina
24 income tax is imposed upon a base which
25 reasonably represents proposition of the trade

1 or business carried on in this State."

2 Now, the statute, then, has two formulas that
3 go to that. The three-factor formula under
4 12-6-2250, which I've already referenced, and
5 then the gross receipts factor under 12-6-2290,
6 which is used by companies whose principal
7 business is not manufacturing; in other words,
8 not described in 12-6-2250.

9 The sales factor is just the proposition of
10 sales in this state to other states. Gross
11 receipts is the same; it's just a proportion of
12 gross receipts here to gross receipts
13 everywhere.

14 Now, issue in this case are I think what we
15 colloquial call "short-term investment
16 transactions." As I understood from discovery,
17 Duke Energy will -- obviously intakes cash.
18 They will have excess cash or excess working
19 capital that I think they determine, pursuant
20 to a fairly complicated formula, and then they
21 will use that money to invest in certain
22 short-term transactions.

23 These are typically municipal bonds, commercial
24 paper, and what I'll call "repos" or loan
25 repurchase agreements, whereas some Duke --

1 somebody has a security, they'll give Duke
2 Energy the security, Duke Energy gives them
3 some cash for a period of time. They then
4 repay the money plus a little bit extra and
5 they get a security back. It's not unlike a
6 title loan. And they just get their principal
7 back plus a little bit of interest for the
8 time.
9 There are -- these transactions have been done
10 for many years and they are not atypical by
11 companies. Transactions have little risk.
12 Testimony of their witness was that Duke never
13 suffered a loss on any of these transactions.
14 And I believe the testimony was that they were
15 typically outstanding for 30 days or less.
16 They're very short-term transactions.
17 They generate a minimal amount of gain or
18 interest relative to the principal invested and
19 the activities involved in these transactions
20 all occur outside South Carolina.
21 I believe the testimony was that they're
22 directed in North Carolina or set by the
23 corporate headquarters and then they're
24 typically placed in New York.
25 A review of -- this was one of the -- this is

1 just an example of a report that was provided
2 to us in discovery. This shows the type of
3 transactions that were done just during a
4 representative month. You can see "repo" up
5 there. You can see "commercial paper."
6 There's some municipal bonds and the like.
7 And then if you go to the next slide, you can
8 see that the principal involved in those
9 transactions is nine figures and approaches a
10 very high number, almost a billion dollars, but
11 with a return of just a few hundred thousand
12 dollars. So very big transactions
13 principal-wise, very small in the actual
14 increase in Duke Energy's working capital. And
15 so that's what's at issue in this case.
16 Now, what happened was, in their original
17 returns, I believe they included only the
18 interest -- that number on the right-hand side
19 there -- their net gain or interest from these
20 transactions in their sales factor. That was
21 consistent with the Department precedent I
22 believe going back to about '77, at least.
23 In 2000, Duke Energy starts filing its returns
24 and included not only the interest, but the
25 principal in these transactions.

1 Now, what happens with that is -- well, excuse
2 me, in 2002, then they changed -- they filed
3 their refund claim, changed their method of
4 apportionment to the gross receipts factor, and
5 added the return of principal all the way back
6 to 1978.

7 What happens to that is that you've got a much
8 higher denominator based on these principal --
9 the principal of these transactions being
10 included. But because they -- all the
11 transactions occur outside this State, you have
12 a much lower amount of income apportioned to
13 South Carolina, because the denominator is much
14 higher, but the numerator stays the same.

15 The Department denied that, said it was
16 directly contrary to their long-standing
17 policy. It would unreasonably represent the
18 amount of business Duke Energy does in South
19 Carolina and would lead to an absurd result,
20 one that could not possibly have been intended
21 by the Legislature.

22 This is based upon their long-standing policy,
23 which has been to interpret the allocation of
24 apportionment statute as excluding the return
25 of principal in transactions like this.

1 I-D-309 -- Commission Decision 88-11 and
2 I-D-309, sales of intangible property were
3 included only to the extent the sale results in
4 a gain. In other words, essentially in a
5 transaction like this is just, to the extent
6 the pool is increased, you add that, but you
7 don't add the principal coming back to you. It
8 concluded to do otherwise would distort the
9 sales factor.

10 And 88-11, the Department -- has been the
11 policy since '77 to include only the gain from
12 the sale of foreign exchange contracts. I
13 think that first one, I-D-309 referred to
14 intangibles. This one refers to foreign
15 exchange contracts.

16 There were some briefs in the 19 -- I think it
17 was the 1987 Duke Power case regarding license
18 tax and in those briefs, which are attached to
19 our Summary Judgment memoranda, there was some
20 argument about Duke took the position that this
21 would -- the Department's position in that case
22 would require including principal. The
23 Department said no, that's not the case; it
24 would not. And Duke Energy, in fact, argued
25 that that would be absurd to do so and the

1 Department agreed, said it wouldn't do that.
2 Now, courts in other jurisdictions -- and they
3 are, admittedly, not uniform on the subject.
4 The courts in other jurisdictions have agreed
5 with this policy. We cited four here. They're
6 in our brief. But all those courts say
7 including certain types of transactions, these
8 short-term investments transactions, is absurd
9 and does not fit within the statutory terms.
10 The *General Motors Corp.* decision there at the
11 bottom dealt with repo transaction, like I
12 mentioned earlier, and said those shouldn't be
13 included, as well, even though, as Duke Energy
14 points out in his brief, California did take a
15 little bit decision on the other short-term
16 transaction. But even California said repos
17 shouldn't be included.
18 We submit the Department's policy furthers the
19 purpose --

20 **THE COURT:** Did California do the *Microsoft* case?

21 **MR. GREEN:** Yes, sir, Your Honor.

22 **THE COURT:** So *General Motors*, they went one way and
23 *Microsoft* -- well, of course, *Microsoft* you
24 argued that that was based on --

25 **MR. GREEN:** No, we argued -- we argued that --

1 THE COURT: You argued that it was based on the fact
2 that they had made a concession.

3 MR. GREEN: Made a concession. Yeah, we think a lot
4 of that drove that. And General Motors and
5 Microsoft were issued the same day --

6 THE COURT: Okay.

7 MR. GREEN: -- which is kind of interesting.

8 Now, the Department's policy, we submit, is
9 entirely consistent with the -- how the Supreme
10 Court has interpreted these statutes, which is
11 provide for the reasonable basis rule that I
12 mentioned earlier. The Department policy
13 furthers Legislative intent.

14 THE COURT: You left out an important aspect of
15 Hertz. Hertz says that you should be -- it
16 says you should literally construe the -- what
17 is it -- should literally construe in favor of
18 inclusion of business which are formally as
19 appropriate.

20 MR. GREEN: Well, Hertz -- Hertz references that.
21 Hertz also -- I take that as a preference for
22 the three-factor formula. There seemed to be
23 a three -- a preference for applying that
24 formula. And the --

25 THE COURT: There's a preference for doing that

1 which is appropriate.

2 MR. GREEN: Which is doing that which is
3 appropriate.

4 And, again, that decision, *Colonial*, they all
5 focus not merely on just taking certain
6 language in a statute in isolation. It's that
7 reasonable -- a reasonable basis --

8 THE COURT: Yeah.

9 MR. GREEN: -- a base which reasonably represents
10 proportion of trade or business carried on
11 within this state." We submit that's pretty
12 critical language, as we pointed out in our
13 brief.

14 *Etiwan Fertilizer*, just says Commission
15 Decision, a policy which has been applied here
16 since '77, shouldn't be overturned without
17 cogent reasons. We submit that there are no
18 cogent reasons here, because this would lead to
19 an absurd result, which is what the Department
20 recognized in its policy going back to '77.

21 We submit that the policy -- excuse me, the
22 Department's position on this is it's entitled
23 to deference because the Department -- as
24 *Colonial Life* recognizes, the Department has
25 the power and duty to prescribe a method for

1 reasonably represents basis.

2 And Ryder Truck, the Court recognized it

3 wouldn't be justified in overturning a long,

4 continued application of the statute, which the

5 Legislature's given at least implied assent.

6 And there was some changes in '95 to the

7 allocation apportionment statute. They were

8 moved around. Moved from, I think, Chapter

9 Seven to Chapter Six. No changes were made

10 that would have addressed this issue in any

11 way.

12 So we submit the Department's policy in this

13 situation is entitled to deference, Your Honor,

14 because they are the agency in charge with

15 interpreting and applying those statutes.

16 We submit that Duke Energy's interpretation of

17 "gross receipts" is an erroneous one and not

18 compelling enough to overthrow the Department's

19 long-standing policy, which is based upon the

20 whole statute.

21 Effectively, Duke's position effectively

22 ignores the sales factor as a factor that

23 you're applying that you're trying to get that

24 represents a reasonable basis, not just words

25 taken out of isolation and not construed in

1 context.

2 So we -- what would happen, Your Honor, is if
3 principal -- if taxpayers can include principal
4 in transactions like those at issue, they could
5 easily increase their income from one state or
6 another by increasing the denominator from
7 another state; that would cause distortions in
8 income from year to year. We submit that's an
9 absurd result that really could not have been
10 contemplated by the Legislature.

11 And with that, Your Honor, if you don't have
12 any more questions, I will --

13 THE COURT: Not right now.

14 MR. GREEN: -- wrap it up. Thank you, Your Honor.

15 THE COURT: All right.

16 MR. MAYBANK: Thank you, Your Honor.

17 THE COURT: Mr. Maybank, I might forewarn you. I
18 might ask you more questions.

19 MR. MAYBANK: Okay. Fair enough. Fair enough.

20 We're going to load our PowerPoint while we
21 start and I can go ahead and get started while
22 we're doing that.

23 (Off the Record)

24 ARGUMENT BY MR. MAYBANK:

25 MR. MAYBANK: Your Honor, I know you've been one --

1 one of the original members of the
2 Administrative Law Court and I know you've seen
3 a lot, particularly since the *Shabaz* (phonetic)
4 case, but I'll dare say you haven't seen a case
5 where a governmental agency attempts to deny 12
6 of its own contracts in your time on the bench.
7 What we'd like to do is, we have split up our
8 argument, Your Honor. As you know, this case
9 arises out of Duke Energy's amended corporate
10 income tax returns, requested a refund of South
11 Carolina corporate income taxes for 1978
12 through '81.
13 On our original returns, we mistakenly
14 apportioned income to South Carolina based on
15 the manufacturer's three-factor formula. We
16 also -- or also erroneously failed to include
17 gross receipts, even though that's what the
18 statute required.
19 When we filed our amended returns, we corrected
20 the errors. We apportioned based on the
21 single-factor gross receipts formula and we
22 included gross receipts from -- total gross
23 receipts from the sales of securities and not
24 net gross receipts, as the statute required.
25 The Department denied Duke's refund claims and

1 we instituted with an action before the
2 Administrative Law Court. We've moved for
3 Summary Judgment on one issue, the issue of
4 whether gross receipts from the sale of
5 investment securities are included in the
6 apportionment formula. As I've indicated, the
7 statute so requires. And the Department has
8 moved for Summary Judgment on three issues.
9 First, the Department contends "gross
10 receipts," it means "net receipts." We'll call
11 that "gross receipts issue." Second of all,
12 that Duke was prohibited from filing refund
13 claims, even though the Department signed a
14 waiver form on anywhere between 12 and 21
15 times. Third, the Department claims Duke is a
16 manufacturer, despite the fact that what Duke
17 does in South Carolina is provide electrical
18 services. We'll refer to that as the
19 "manufacturing issue."
20 One area indicated -- where it's indicated --
21 Tracey indicated neither side moved for Summary
22 Judgment is on the issue of: If "gross" means
23 "gross," which we contend that it does, is that
24 net result distortive? And neither side moved
25 for Summary Judgment for that because that's

1 just an inherently factual type of issue.

2 As you know, the standard for summary judgment
3 in South Carolina is well-settled. Summary
4 judgment is a drastic remedy and it's
5 appropriate only when it's clear there's no
6 genuine issue of material fact. When a fact is
7 in dispute, the fact is resolved in favor of a
8 non-moving party for purposes of summary
9 judgment motion.

10 Summary judgment is not appropriate when
11 further inquiry of facts is desirable to
12 clarify the application of the law. And the
13 party seeking summary judgment bears a burden
14 of proving the absence of a genuine issue of
15 material fact.

16 Your Honor, we've split our arguments into
17 three parts. I'll address the waiver issue.
18 Jeff Friedman will address the gross receipts
19 issue. And Eric Tresh from Sutherland will
20 handle the issue of whether Duke is a service
21 provider. So if that's agreeable to Your
22 Honor, I will go into the waiver issue, then.

23 **THE COURT:** All right.

24 **MR. MAYBANK:** Your Honor, on the waiver issue,
25 it's -- we contend that the waiver issue is a

1 straightforward one. Before we get into the
2 waiver issue, the first question that's got to
3 be on your mind is: How on earth has this case
4 managed to drag on for such a long period of
5 time?

6 **THE COURT:** Hold on one moment.

7 **MR. MAYBANK:** And we --

8 **THE COURT:** Hold on one moment.

9 Okay. Go ahead.

10 **MR. MAYBANK:** Thank you.

11 The case started in 1978 or at least for the
12 tax year 1978. The tax year 1978 was the first
13 year that Duke Energy and the Department
14 executed waiver agreement on the Form FS-43.
15 Things then rocked along until 2002. The
16 Department executed -- we have about 12 waiver
17 agreements in our file. Tracy referenced 21 of
18 them a few minutes ago. And so the Department
19 kept extending the time line to file the
20 amended return, largely because -- well, for
21 several reasons.

22 First of all, the auditor had a series of
23 personal issues and was out some period of time
24 and because of his personal issues, he had
25 difficulty completing the waiver. Second of

1 all, Duke's obviously a huge corporation and
2 any audit of Duke, a corporation that size is
3 going to be lengthy. And then, third, Duke was
4 going through a number of federal changes as a
5 result of the construction of its nuclear power
6 plant and that produced federal adjustments.

7 In any event, on December 12, 2002, Duke filed
8 South Carolina amended tax returns for 1978
9 through 2001. The Department denied those
10 fairly quickly, just a month and a half later.
11 So on February the 12th of 2003, the Department
12 denied them.

13 We then timely protested it within 30 days of
14 the Department's denial and that was done March
15 13th, 2003. Shortly thereafter, just two
16 months later, the Department contacted Duke and
17 they came in and audited Duke Energy's 1978 to
18 2001 refund claims and factually made no
19 changes to the refund claims.

20 A solid -- a solid six years then commenced.

21 The case sat at the Department of Revenue. We
22 filed a protest. They denied the claim. We
23 filed a protest. They audited the file.

24 Finally, six years later, Duke Energy worked up
25 the nerve or the whatever to ask the

1 Department, "Look, we've been here a while. I
2 think we would ask that you admit or deny or
3 grant or deny the amended returns," and the
4 Department then issued a Department
5 Determination on February 4th, 2010.

6 **THE COURT:** Just curious. How long after the
7 Federal IRS involvement did Duke Energy work up
8 the nerve?

9 **MR. MAYBANK:** The RAR's would have been very early
10 in the process. I don't think it's in the
11 record as to exactly when that -- I don't
12 believe either side has submitted anything in
13 the record as to when that time period was.
14 But it would have been -- I know it's early in
15 the process. How early? That, I don't know.

16 **THE COURT:** All right.

17 **MR. MAYBANK:** So that's where we -- that's what's
18 got us into court here today. And what I'd
19 like to do is address the waiver issue.
20 The waiver issue is straightforward. Duke and
21 the Department issued a number of waivers
22 starting in '78 for the periods at issue.
23 These waivers or agreements are found on the
24 DOR Form FS-43, a form obviously drafted by the
25 Department, in many cases requested by the

1 Department for Duke Energy as a result of, as
2 I've mentioned, the personal issues suffered by
3 the auditor. These waivers kept the statute of
4 limitations open to allow either party to amend
5 its tax position and in 2002 did just that.

6 The Department now claims that the waivers kept
7 the statute of limitations open for the sole
8 purpose to give it more time to assess a tax
9 liability on Duke Energy.

10 That -- the Department's arguments fail for
11 four reasons. One, the Department had the
12 explicit authority to waive the statute of
13 limitations under the statute, explicit
14 statutory authority to waive the statute of
15 limitations. Even if the statute was silent,
16 the Department of Revenue contractually waived
17 it. And under any circumstances, the
18 Department should be equitably estopped from
19 asserting the statute of limitations or
20 equitably tolled.

21 Now, there is -- the Department had explicit --

22 **THE COURT:** Are you going to back up and tell me
23 each one of those?

24 **MR. MAYBANK:** Yeah, I am, Your Honor.

25 **THE COURT:** All right.

1 MR. MAYBANK: That will be the gist of my argument
2 now.

3 THE COURT: Okay.

4 MR. MAYBANK: Your Honor, the Department had
5 explicit statutory authority to issue the FS-43
6 agreements. And there's been some discussion,
7 maybe -- I'm not sure how explicit Tracey said,
8 but there's certainly been some intimation that
9 the forms were not authorized by the Department
10 or the Department didn't have the authority to
11 waive the statute of limitations.

12 THE COURT: Well, now, clearly they have the
13 authority to issue Form --

14 MR. MAYBANK: FS-43.

15 THE COURT: -- FS-43. The issue is whether in
16 issuing those forms, whether they have the
17 authority to waive -- and y'all call it -- both
18 of y'all and I know the courts do, too, so --
19 use the phrase "statute of limitations."

20 I can tell you, if you -- if "statute of
21 limitations" really is the operative phrase in
22 this area of the law, then our case law doesn't
23 make sense and a lot of other case law doesn't
24 make sense.

25 I think to make all this make sense -- and I

1 know there's a Kentucky case on it. I'll tell
2 you -- I'll give it to you if I pull it up --
3 this is more of a condition precedent in order
4 to seek that which you are seeking and therein
5 lies the limitation period.

6 MR. MAYBANK: Well --

7 THE COURT: And I'll get into that later on when we
8 have a discussion on that. But I'm not so
9 sure -- but when you say a "statute of
10 limitations," it doesn't reference the phrase
11 "statute of limitations." It references a time
12 period.

13 MR. MAYBANK: Correct.

14 THE COURT: So

15 MR. MAYBANK: And it's our contention that the
16 Department has explicit authority to extend
17 that time period. Whether you call it a
18 "statute of limitations" or whatever, they --

19 THE COURT: Well, where is that?

20 MR. MAYBANK: Under modern law, it's found in the
21 Revenue Procedures Act. The Department of
22 Revenue has given it in two places.

23 THE COURT: I understand modern law.

24 MR. MAYBANK: Right.

25 THE COURT: But I go back and look at the older law.

1 MR. MAYBANK: Right. And that's what I'll go --
2 that's what I will proceed immediately, Your
3 Honor, if that's agreeable to you.

4 THE COURT: Yeah.

5 MR. MAYBANK: All right. Under -- the Department
6 has always had the authority to extend the
7 statute of limitations under Section 12-54-80.
8 That gives the Department the explicit
9 authority to execute a waiver, to execute the
10 FS-43 agreement. And the Department's
11 attorneys misunderstand the nature of an
12 "assessment."
13 Now, what 12-54-80 states -- and I apologize,
14 I don't have a PowerPoint to put up -- well,
15 what it states is, if before the expiration of
16 the time prescribed in this section for the
17 mailing of a notice of any assessment, the
18 taxpayer has consented in writing to the
19 mailing of the notice after the time. The
20 notice of assessment may be mailed at any time
21 prior to expiration of the period agreed upon.
22 The party so agreed upon may be extended by
23 subsequent agreements in writing made before
24 the expiration of the period previously agreed
25 upon.

1 Well, that statute came in 1985, but there was
2 a predecessor statute. The operative word
3 there is "notice of assessment." Now, again,
4 this is not to be repetitive. What I'm reading
5 from is not a DOR policy document; it's a
6 statute.

7 It says, "If before the expiration of the
8 time -- before the expiration of the notice of
9 assessment, the taxpayer has consented in
10 writing to the mailing of the notice after the
11 time. Notice of assessment may be mailed at
12 any time prior to the expiration of the period
13 agreed upon."

14 Now, "notice of assessment" is a term of art.
15 The Department's job is not to maximize revenue
16 for the State of South Carolina. The
17 Department's job is to fairly and accurately
18 estimate what a taxpayer owes in taxes.

19 Many times when the DOR audits a taxpayer, it
20 doesn't produce a tax liability. In fact, it
21 produces a tax refund. And there's no
22 statistics kept, but the Department, in their
23 annual report, they pointed out that it's their
24 job to fairly and accurately estimate what a
25 taxpayer owes.

1 So when the DOR does an audit, if they
2 determine that a refund is due -- and as I've
3 indicated, many audits produce refunds. The
4 taxpayer has miscalculated either the law or
5 the facts to negatively hurt itself. So many
6 audits the DOR produces a refund.
7 If the taxpayer agrees with the amount of the
8 refund, the DOR comes in with a field agent's
9 report and says, "Gee, Burnie, we think you're
10 owed a thousand dollars." If I agree with
11 that, I say "fine," and they send me a check
12 and the file is closed and never hear -- the
13 Court never hears from us.
14 If they come in and say, "Gee, Burnie, we think
15 we're owed -- your -- we audited your
16 individual income tax" -- corporate income tax,
17 it doesn't matter what -- "we've audited your
18 corporate income tax and we think you're owed
19 a refund," that's obviously good news. And
20 they say, "We've calculated your refund to be
21 \$1200," and I say, "No, I calculated it and
22 it's \$2,000," then I protest it.
23 They then send a notice of assessment out that
24 says Burnie's owed -- under our calculations,
25 Burnie's owed \$1200. If I think I'm owed

1 \$2,000, I file a refund and under today's era,
2 that refund would come to the Court.

3 So a proposed assessment includes -- the
4 proposed assessments is DOR's calculation of
5 taxes. Many cases it's a tax liability. In
6 many cases it's a tax refund, but it's their
7 version.

8 If it's a refund and I like their numbers, I
9 take it; the file's closed. If it's a refund
10 and I think the refund is too low, I appeal the
11 proposed assessment to the Administrative Law
12 Court.

13 So, the -- simply put, 12-54-80 and its
14 predecessor statute explicitly allowed the
15 Department of Revenue to delay the issuance of
16 an assessment, which was the predecessor or the
17 predicate for filing a claim for refund.

18 And that's exactly what the Department of
19 Revenue did on some 12 to 21 times. And that's
20 a factual matter -- one of the factual matters
21 involved in this is exactly how many waivers
22 the Department executed.

23 But that explicit statutory authority is what
24 gave the Department the right to execute or
25 draft -- to promulgate, draft and sign the Form

1 FS-43 agreement. And that's why, an important
2 point, the FS-43 reads almost exactly the same
3 today as it did previously.

4 If you look at the pre-'95 language, the
5 language is virtually identical, except for the
6 reference to the code section.

7 And it's no amazing coincidence that it reads
8 almost identical. We've heard a lot of
9 testimony about the dramatic change in the law,
10 the Revenue Procedures Act, and the Revenue
11 Procedures Act was fairly dramatic. But it's
12 not coincidence that form looks exact --
13 virtually exactly the same today as it did pre-
14 '95, because under the Department of Revenue's
15 interpretation, or the people who signed our
16 waiver form, that particular little part of the
17 law never changed, because it was found in
18 12-54-80.

19 Now, if we go --

20 **THE COURT:** Mr. Maybank, where I can be clear,
21 you're talking about -- in dealing with the
22 phraseology "notice of assessment" under 54-80,
23 you're talking about the Department reviews the
24 case. They issue -- in issuing their
25 assessment, they either assess for taxes or

1 refund taxes.

2 MR. MAYBANK: Exactly.

3 THE COURT: All of that is actions that is by the
4 Department; whereas in this case, the
5 distinction is that Duke Energy has not gone
6 with their original filing, but they have
7 sought a new and distinct reason for a refund
8 that was not part of the original filing.

9 So wherein do you derive the authority out of
10 80, when it says the Department can issue a
11 notice of assessment, that the taxpayer has a
12 right to amend their filing to seek anything
13 that they wish to now claim is a new reason for
14 getting a refund?

15 MR. MAYBANK: Our position, Your Honor, is under
16 12-54-80, the statute of limitations never ran.
17 The Department had the contractual authority
18 to waive or toll, what have you, the statute of
19 limitations. They did so. And so for that
20 entire period of time, the statute of
21 limitations never commenced running.
22 We could have filed amended returns for
23 anything in the world we had wanted to, as
24 opposed to RAR adjustments, which were more
25 limited.

1 So our position can be stated simply, 12-54-80
2 gave the Department explicit power to waive the
3 statute of limitations, they exercised that
4 power on a form drafted by them, and in most
5 cases they exercise the power by asking us to
6 sign it.

7 Now, there's not a whole lot in the record as
8 to who requested it, but if you look on many of
9 the forms, the Department signed them first,
10 and there is testimony in the record of the
11 personal trials and tribulations that the
12 auditor was having.

13 So not only did they promulgate it and sign it,
14 they requested us to sign it. So in some
15 cases -- and there's -- I'm sure in some
16 years -- I don't have any doubt in some years
17 we requested it, but in other years it was done
18 for their convenience.

19 So our position is, the statute never started
20 running and we could have amended our returns
21 for anything in the world we had wanted to.

22 Now, if you say what is --

23 **THE COURT:** So when you say it's "explicit," you're
24 getting the explicit language out of the fact
25 that 54-80 sets forth that the notice of

1 assessment may be mailed at any time prior to
2 the expiration of the period agreed upon.

3 **MR. MAYBANK:** Correct. And as I've come to, that's
4 exactly the way the Department viewed it.

5 Under post '85 law -- and the only change done
6 in the Revenue Procedures Act was the
7 Department was then given the power to waive
8 all statutes of limitations or all limitations
9 periods.

10 The basic, same language of 12-54-80 is in the
11 code, but they were given another power in
12 which they could extend any deadline.

13 Now, I haven't counted up the number of
14 deadlines in Title 12, but I'm sure there are
15 hundreds of them. Tobacco tax returns. You
16 could imagine the number of liquor ABL issues.
17 So it gave them the explicit authority to waive
18 every other time limitation, in addition to
19 what was found in 12-54-80.

20 Now, if you say, "Gee, Burnie, where are you
21 coming up with all of that?" The form reads
22 exactly the same and the Department of Revenue
23 on a number of occasions has said, "This new
24 form waives the time for or extends the time
25 for filing refund claims."

1 So post '95, they say that form works. We say
2 it works for pre-'95 because they had explicit
3 statutory authority to do it. Now, it's not
4 just me. I'm not the only one that reads the
5 form like that.

6 **THE COURT:** Okay. When you say that the new forms
7 reads exactly the same, there is one little
8 difference, isn't there?

9 **MR. MAYBANK:** There's --

10 **THE COURT:** Like 54-80 versus 54-85(C).

11 **MR. MAYBANK:** Correct.

12 **THE COURT:** So don't. I need to look at 85(C) to see
13 what it authorizes in order to interpret what
14 the form authorizes?

15 **MR. MAYBANK:** Well, under the Revenue Procedures
16 Act, naturally, of course, the statutes -- the
17 statutes have changed; the statutory references
18 have changed. But, basically, what the Revenue
19 Procedures Act, the major significance of that
20 is, it allowed them to waive every other time
21 limitation and not just assessments.

22 **THE COURT:** Now, when you say "it" allowed, was that
23 85(C) allowed it or was it another provision?

24 **MR. MAYBANK:** It was another provision. In fact --

25 **THE COURT:** Is it referenced by 85(C)? Because I

1 don't --

2 MR. MAYBANK: I've actually got it here, Your Honor.

3 Let me real quickly ...

4 THE COURT: I don't think I have 85(C).

5 MR. MAYBANK: Well, I've got 470. I didn't bring my
6 darn code.

7 THE COURT: That's fine. I'll pull it up.

8 MR. MAYBANK: Okay..

9 THE COURT: Go ahead.

10 MR. MAYBANK: Now, it's not just me who reads the
11 forms in that regard. It's the Department of
12 Revenue, as well as Duke Energy.

13 THE COURT: Well, I assume Duke Energy reads it that
14 way.

15 MR. MAYBANK: Your Honor, I don't think anybody ever
16 thought about it. The form was so crystal
17 clear, nobody ever thought about it.

18 But in the record is an affidavit of Rickey
19 McCarver, retired with Duke Energy. To the
20 best of my knowledge, both the Department and
21 Duke understood that all waiver extended the
22 time of statute of limitations with respect to
23 both audits and refund claims.

24 THE COURT: Back up and say that again.

25 MR. MAYBANK: And by the way, Your Honor, it's not

1 in the record anywhere, but, you know, you've
2 never seen this case before. You've never seen
3 the Department claim its form doesn't say what
4 it says. And we've also put up the
5 affidavits -- we've given you affidavits from
6 Marvin Davant and Robby Anderson.

7 Marvin Davant, as his affidavit shows, he
8 worked for the Department for 30 years. He
9 retired as a head of the field service division
10 just, oh, probably eight years ago, and he came
11 back as an independent contractor for the
12 Department.

13 So he signed many of the Duke forms, but more
14 importantly, he was head of the field service
15 division. And in his affidavit, he said he
16 understood the Form FS-43 agreement to not only
17 extend the time to assess additional tax, but
18 also authorizes -- extended the time for the
19 taxpayer to file a claim for refund. And he
20 said both in his eyes, the Revenue Procedures
21 Act made no difference as far as the FS-43
22 agreement. It extended the time for a refund
23 before the RPA, exactly as it did after the
24 RPA.

25 We also got an affidavit from Robby Anderson.

1 Robby worked at the Department of Revenue from
2 1975 to 2008; again, some 30 years. He retired
3 as a number three official at the Department of
4 Revenue, what in most agencies would be called
5 the "deputy chief of staff" or in this case,
6 senior administrator. He was also head of the
7 field service division. He also signed some of
8 the Duke forms.

9 He basically said the same thing. The RPA made
10 no difference in terms of the Form FS-43. It
11 allowed pre-RPA exactly as the way it did post
12 RPA.

13 And I know I'm being repetitive, but the
14 Department policy document says the form works
15 post RPA. Marvin Davant and Robby Anderson
16 said it worked pre RPA for the simple reason
17 that that's the way the Department had
18 administrated it in thousands of -- there's
19 nothing in the record that shows the number of
20 waivers granted. But if you look at just the
21 number Duke's was granted to Duke, you've got
22 to assume there was probably thousands of those
23 waivers out there.

24 We asked the actual auditor, who testified for
25 the Department of Revenue did it work for a

1 refund and he basically says "yes." "If a
2 taxpayer were to seek a refund, would you have
3 told them they couldn't?" "No, I don't see why
4 I would."

5 And we asked Ron Urban, who was the chief legal
6 counsel, retired chief legal counsel. He also
7 testified on behalf of the Department and he
8 agreed that the form today works both ways.
9 Now, that's the argument in terms of the
10 explicit authority.

11 The second issue is, the Department has waived
12 the statute under either a standard contract
13 basis or a common law analysis. I argue
14 they've got explicit authority to do it. If
15 I'm wrong, at worse the statute is silent.
16 There is no statute that prohibited them from
17 doing it. They either had the explicit
18 authority or, if I'm wrong on that, the statute
19 is silent. So do they have the common law
20 right to -- or do they by contract waive the
21 statute of limitations?

22 Now, there are surprisingly a large number or
23 a fair number of cases on waiver of the statute
24 of limitations against the government. And the
25 most recent one, there's a 2004 case. There's

1 actual two cases against the Department of
2 Revenue, a Anonymous Taxpayer versus South
3 Carolina Department of Revenue 2008 case. The
4 Court -- which is a Court of Appeals case in
5 2008 -- just a blink of an eye in the tax
6 world -- the Court of Appeals said a party can
7 waive a statute of limitations defense, but the
8 waiver must be shown by words or conduct,
9 including an expressed agreement. So that
10 was --

11 THE COURT: Both of those cases are dealing with
12 where the person was authorized to do so,
13 correct?

14 MR. MAYBANK: Correct. Correct.

15 THE COURT: The problem I've got with your argument
16 now is you've said, okay, we were, A,
17 explicitly authorized to do it and, B, now
18 you're moving to a common law theory. But the
19 common law theory requires explicit
20 authorization to do so.

21 MR. MAYBANK: Correct.

22 THE COURT: So your argument falls off the cliff
23 because your argument needs to go back to "A"
24 again in order to win on "B."

25 MR. MAYBANK: Well, the -- there's no -- there's

1 about four or five cases involving waiver of
2 the statute of limitations against the
3 government and in no case has the court imposed
4 that requirement.

5 Now, obviously --

6 **THE COURT:** -- then has to be authorized?

7 **MR. MAYBANK:** Well, clearly, it'd have to be
8 authorized by a proper official. There's no
9 doubt about that.

10 **THE COURT:** Oh, so the authorization -- let me back
11 up. Then -- all right. Under your theory, if
12 Duke Energy consults someone who is part of the
13 cleaning crew at DOR --

14 **MR. MAYBANK:** Correct.

15 **THE COURT:** -- and they ask if they can have -- if
16 they can get a Form FS-53 (sic)...

17 **MR. MAYBANK:** And he says "sure."

18 **THE COURT:** Sure. Then that person doesn't have the
19 authority to do it, so you obviously would not
20 argue that.

21 **MR. MAYBANK:** Correct.

22 **THE COURT:** So -- and even if that person appeared
23 to have the authority --

24 **MR. MAYBANK:** Correct.

25 **THE COURT:** -- and even if that person says, "I do

1 have the authority to do it," Duke Energy
2 wouldn't rely upon that assertion of authority.

3 **MR. MAYBANK:** Correct.

4 **THE COURT:** So the -- when the authority -- when you
5 say the authority exists, there must be
6 something for which you base the authority
7 upon.

8 **MR. MAYBANK:** The two persons who signed it -- well,
9 first of all, the form was drafted by the
10 Department of Revenue. We didn't draft the
11 form. They --

12 **THE COURT:** Well, taking it back to my question,
13 then. If the cleaning crew drafted the form,
14 it wouldn't make any difference, because they
15 never had the authority.

16 **MR. MAYBANK:** Well, if the cleaning crew drafted the
17 form and the Department signed it for 30 years,
18 at some point maybe the cleaning crew had the
19 authority. But in our case, the clean -- it
20 wasn't the cleaning crew. It was a number
21 three official at the Department of Revenue.
22 It was the head of field services division.
23 Collectively they worked at the Department for
24 60 years. And Mr. Davant testified they were
25 using the form before he got there.

1 **THE COURT:** But there again, still, they must derive
2 their authority from where? That's what I'm
3 asking you.

4 **MR. MAYBANK:** In my --

5 **THE COURT:** Where do you get the authority for them
6 to exercise this?

7 **MR. MAYBANK:** Because of their high rankingness
8 (sic) within the Department of Revenue. One
9 was a number three official in the entire
10 Department of Revenue, Robby Anderson, and
11 number -- the second one was head of the field
12 services division. He was in charge of all the
13 auditors in the Department of Revenue.

14 **THE COURT:** Is there any case law out there that
15 sets forth that the ranking of an individual in
16 an agency therein reflects their authority to
17 do something other than the statutory authority
18 to do something?

19 **MR. MAYBANK:** Well, there's no case law that
20 discusses the ranking within an agency signing
21 a contract. There are several cases that talk
22 about the person who signed it or gave the
23 advice was not authorized to do so.

24 **THE COURT:** Okay.

25 **MR. MAYBANK:** They didn't just -- none of those

1 cases discuss -- well, in one case they said
2 the city -- the city claimed it didn't have
3 authority, but he really did, and the case was
4 so -- and I've got the citation for that. The
5 facts in the case were so abbreviated, you
6 really can't see what the swearing match was
7 about.

8 **THE COURT:** Okay.

9 **MR. MAYBANK:** But there's no doubt that the person
10 in the Department of Revenue signed that form
11 had to have the authority to do so. And we
12 contend that the number three official in the
13 Department of Revenue and the head of the
14 entire audit division had the authority to do
15 so.

16 **THE COURT:** By essence of their position.

17 **MR. MAYBANK:** By essence of their position; that's
18 correct, Your Honor.

19 And I know I'm using up my time, so I'm going
20 to pick up the pace a bit here.

21 **THE COURT:** You're not limited on time.

22 **MR. MAYBANK:** Okay. Thank you.

23 The -- real quickly through waiver. There are
24 a number of waivers of statute of limitations
25 defense against the government. In most cases

1 the party, the private litigant did not
2 prevail, but there are a number of those cases.
3 And in none of those cases was there any
4 doctrine that waiver doesn't run against the
5 government the way there is for estoppel
6 purposes.

7 So the five or six waiver cases we've cited,
8 three or four of them are against the
9 government and not a single case references
10 that there's some public policy against waiver
11 by the government of the statute of
12 limitations, the way admittedly there is for
13 estoppel.

14 So you don't see cases waiver doesn't run
15 against the government the way you see cases
16 that says estoppel doesn't run against the
17 government.

18 **THE COURT:** Well, when you say "waiver," are the
19 cases dealing with waiver of the statute of
20 limitations against the government based on a
21 cause of action or is it explicit statutory
22 time frame of which I call it "condition
23 precedence"? Do you --

24 **MR. MAYBANK:** No, that's --

25 **THE COURT:** If you don't know --

1 MR. MAYBANK: That's too fine a point for me. But,
2 I mean, one of them involved medical
3 malpractice.

4 THE COURT: That's a cause of action.

5 MR. MAYBANK: Right.

6 THE COURT: See, the statute of limitations squarely
7 fits within causes of action.

8 MR. MAYBANK: Right. Ours --

9 THE COURT: The statute of limitations, the case law
10 says the statute doesn't begin to run until
11 you're aware of the cause -- rightfully aware
12 of the cause of action.

13 MR. MAYBANK: Right. But now --

14 THE COURT: But a specific explicit time frame to
15 file a tax refund doesn't fit within that
16 particular --

17 MR. MAYBANK: Well, Your Honor, there are two cases
18 involving the Department of Revenue. One of
19 them is -- as I've mentioned, one of them is
20 South Carolina Tax Commission versus
21 Metropolitan Life Insurance Company. That's a
22 1975 case. The Department asserted there that
23 the taxpayer had waived the statute of
24 limitations. The wiley, cagey taxpayer
25 basically lulled the DOR to sleep. When the

1 DOR then issued a proposed assessment against
2 the wiley taxpayer, the taxpayer said, "No, the
3 statute of limitations has run."

4 And the Court of Appeals in 1975,
5 221 S.E.2d 522, the Court said -- and this is
6 waiver of statute of limitations -- "To
7 constitute a waiver, there need not be a new
8 agreement for a valuable consideration, a
9 simple voluntary relinquishment of a right with
10 knowledge of all the facts. Here the fact show
11 conclusively by the speech, writings and
12 conduct, the taxpayer has waived the defense of
13 the statute of limitations. Such conduct on
14 the part of the taxpayer wholly inconsistent
15 with its rights to claim this defense against
16 the Commission and amounted a waiver of such
17 defense."

18 In the second case, *Anonymous Taxpayer versus*
19 the --

20 **THE COURT:** Can you tell me what that case is about?

21 **MR. MAYBANK:** It involved I believe unclaimed
22 property, a forfeiture of contract under
23 unclaimed property.

24 **THE COURT:** Okay. Thank you.

25 **MR. MAYBANK:** These cases are so concise. It's not

1 always clear.

2 **THE COURT:** I understand. I understand that.

3 **MR. MAYBANK:** The second case involved the
4 Department of Revenue, as well. That's a 2008
5 *Anonymous Taxpayer versus South Carolina*
6 *Department of Revenue.*

7 In that case, the taxpayer claimed the
8 Department waived the statute of limitations
9 defense where it didn't raise it as an
10 additional sustaining grounds in *Evans*. So
11 this is a follow-up to all the *Evans* retiree
12 lawsuit litigation.

13 **THE COURT:** Okay.

14 **MR. MAYBANK:** And the Court said simply, "A party
15 can waive a statute of limitations defense by
16 the -- but the waiver must be shown by words or
17 conduct including an expressed agreement," and
18 then that particular case, they held that the
19 Department of Revenue had not waived it, but
20 they said it quite simply.
21 "The general rule of waiver against the
22 government" -- now, this is waiver against the
23 government for statute of limitations, is found
24 in the *City of North Myrtle Beach versus Lewis-*
25 *Davis*. The Court -- the Supreme Court held in

1 that case -- Court of Appeals held in 2004, "A
2 party can waive a statute of limitations
3 defense". It cites a lawsuit against the
4 Highway Department. "Waiver is a question of
5 fact for the finder of fact. Waiver's a
6 voluntary and intentional abandonment or
7 relinquishment of a known right. It may be
8 expressed or implied by a party's conduct."

9 "A simple voluntary relinquishment of a right
10 with knowledge of all the facts of an
11 expression of intention not to demand a certain
12 thing is sufficient to constitute a waiver."

13 And they cite the *Tax Commission* case in that
14 one. "Waiver of the statute of limitations may
15 be shown by words or conduct. Thus, waiver may
16 result from an expressed agreement or by any
17 action or inaction manifestly inconsistent with
18 intent to insist upon the statute."

19 So, in our case we argue, Your Honor, they
20 contractually waived it under the form of the
21 agreement and under general litigation
22 principles -- under common law litigation
23 principles, they have waived the right to
24 assert the statute of limitations as a defense
25 in this particular case.

1 The courts do routinely have -- waiver is
2 obviously a question of fact. A couple of
3 other cases, sort of the preeminent waiver of
4 statute of limitations cases are *Mende versus*
5 *Conway Hospital*, 404 S.E. 2d 33, and *R.W.*
6 *Newcomb versus E.N.S.R.*, 644 S.E.2d 703. Those
7 are not cases against the government, however.
8 The third argument, Your Honor, is that the
9 Department should be estopped from asserting
10 the statute of limitations because of its
11 contact. We cheerfully admit estoppel
12 generally doesn't run against the government.
13 Estoppel generally doesn't run against tax
14 matters. And, clearly, the Department could
15 not be estopped from giving erroneous
16 interpretation of tax laws, particularly by low
17 level employees. We feel like that has nothing
18 whatsoever to do with this case.
19 The estoppel sought here is not an
20 interpretation of the tax laws. It's their
21 right to assert the statute of limitations as
22 a defense.
23 We're not saying that "owe us the money."
24 We're not saying they should be estopped from
25 claiming we're a manufacturer or a service

1 provider. We're simply saying they're estopped
2 from asserting the statute of limitations as a
3 defense in this matter.

4 Now, the most recent case, it's a 2010 case
5 involving estoppel against the government to
6 assert a statute of limitations -- it's
7 directly on point. Now, the litigant in that
8 case didn't prove factually his case, but the
9 Court said the law was as follows.

10 **THE COURT:** What case?

11 **MR. MAYBANK:** This is *Logan versus Cherokee*
12 *Landscaping and Grading*. And it doesn't appear
13 in the caption of West Law, but it was also
14 against Gaffney County. The issue involved
15 estoppel to assert the statute of limitations
16 against the County of Gaffney.

17 And what the court said is -- again, bears
18 repeating, a 2010 case -- "In South Carolina,
19 a defendant may be estopped from claiming the
20 statute of limitations as a defense if some
21 conduct or representation by the defendant has
22 induced the plaintiff to delay in filing suit.
23 An inducement for delay may consist of an
24 express representation or other conduct; an
25 intentional misrepresentation is not required."

1 And then it says, "Estoppel may apply against
2 a government agency, but the party asserting
3 estoppel against the government must prove lack
4 of knowledge and means of knowledge of the
5 truth as to the facts in question, justifiable
6 reliance upon the government's conduct, and a
7 prejudicial change in position."

8 Now, in our case, lack of knowledge is the lack
9 of knowledge that 20 years later, six years
10 after we filed the amended return, the
11 Department of Revenue's lawyers would assert
12 that the FS-43 was ineffective. Now, was there
13 any reason for us to know it?

14 Well, Marvin Davant said in his mind it worked
15 both ways. Robby Anderson said in his mind it
16 worked both ways. Joe Southard, the auditor,
17 said you can get a refund. Ron Urban the chief
18 legal counsel said post '95 you can get a
19 refund.

20 And then when the Department denied our claim -
21 - on the screen is a 2003 denial. They gave
22 two reasons why Duke's refund claim should be
23 turned down: A, we're a manufacturer and, B,
24 a change to gross receipts method is a change
25 of accounting method.

1 Even they didn't. The person who denied the
2 claim didn't say that there was -- that we were
3 untimely, that we had filed the claims
4 untimely. It wasn't until, let me see, how
5 many years after -- we filed the amended
6 returns in 2002. It wasn't until eight years
7 later that for the first time, the first time
8 ever, the Department of Revenue raised the
9 issue that the claims were untimely.
10 So the first issue is lack of knowledge. Not
11 only we not know it, the people who signed the
12 form didn't know it.
13 Justifiable reliance upon a government's
14 conduct. Again, I think if you sign 12 of them
15 or 21 of them, they -- the Department drafted
16 the form. They promulgated it. They executed
17 it and they gave it to you to sign. I would
18 say most of us would consider that to be
19 justifiable reliance.
20 And, lastly, prejudicial change in position,
21 that that would be -- we could have filed
22 amended returns much earlier. We would have
23 filed them timely had we known that they were
24 going to ten years later say the -- eight years
25 later say the form were ineffective.

1 Now, estoppel does run against the government.
2 There's a 2010 case, *HHHunt Corporation versus*
3 *Town of Lexington*, 699 S.E.2d 699. There are
4 a bunch of cases where the plaintiff did not
5 prevail. That's one case where a government
6 was actually estopped. And there's actually
7 four -- there's actually four cases in which
8 the government discusses the application of
9 equitable estoppel to assert the statute of
10 limitations. There are actually three of them.
11 In none of those three cases did the court give
12 the presumption that estoppel doesn't run
13 against the government. It discusses -- and
14 this is not explicit in there, but it's clear
15 to the Court of Appeals, estoppel to assert the
16 statute of limitations is different than
17 estoppel to assert a substantive position.
18 "Yeah, Burnie, you got your zoning request,"
19 or, "Yeah, Burnie, you are a manufacturer.
20 Here's a huge check."
21 Estoppel to assert the statute of limitations
22 is discussed differently. But those cases are
23 *Black v. Lexington School District*,
24 48 S.E.2d 327. And these are all in our brief,
25 but I have -- we have such a blizzard of cases,

1 I thought I'd culled them down, distilled them.
2 And the second one is Vines versus Self
3 Memorial Hospital, 443 S.E.2d 909. And,
4 lastly, the Logan case I just mentioned.
5 I'm out of time here, so I would like to
6 briefly talk about equitable tolling.

7 **THE COURT:** Well, let me -- all of the cases you've
8 referenced I think refer to causes of action
9 and they all -- if you look at them on their
10 face, they would be -- I mean, if you just
11 juxtapose them against *TNS Mills* and the other
12 cases of that ilk, they are at odds.
13 And it appears to me that the reason that
14 they're at odds is the concept of statute of
15 limitations in a cause of action arena
16 certainly exists against the government. But
17 when there's a specific statute setting forth
18 that this is the time frame for which you can
19 do an action of which the State granted the
20 authority to do that particular action, then
21 it's viewed differently.

22 **MR. MAYBANK:** *TNS Mills* is a good case to contrast.
23 In that case, the taxpayer never made -- made
24 its pollution control exemption filing very
25 untimely. There was no doubt about that. It