THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Ralph K. Anderson III, Chief Administrative Law Judge

Opinion No. 5274 (S.C. Ct. App. Filed Oct. 8, 2014)

Appellate Case No. 2014-002736

Duke Energy Corporation .....Petitioner,

v.

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

Return to Petition for a Writ of Certiorari

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This Court should not issue a Writ of Certiorari to review *Duke Energy Corp. v. South Carolina Dep't of Revenue*, 410 S.C. 415, 764 S.E.2d 712 (Ct. App. October 8, 2014), which affirmed the Administrative Law Court's (ALC) denial of Duke Energy's amended tax returns seeking refunds of more than $126 million plus interest for 1978-2001. The Court of Appeals correctly applied this Court's long-standing precedent to hold that Duke Energy is a manufacturer for purposes of applying the appropriate multi-state apportionment formula for 1978-2001. The Court of Appeals also correctly held that Duke Energy cannot increase the denominator of its apportionment formula by including as a sale or receipt the principal recovered from routine short-term investments. Because the Court of Appeals' decision is a straightforward application of this Court's precedent and the principles of statutory interpretation, the Petition should be denied.

Counter Questions Presented for Review

1. This Court has held that an entity engaged in generating electricity is a manufacturer. Duke Energy is engaged in the generation, transmission, distribution, and sale of electricity. The ALC found that Duke Energy did not establish that its principal business in South Carolina is not manufacturing. Did the Court of Appeals correctly affirm the ALC's determination that Duke Energy is a manufacturer required to apportion its income using the same formula applied on its original returns?

2. Duke Energy regularly invests excess cash from its operations in relatively risk-free short-term investments and recovers the invested asset plus an investment return within a short period of days or a few weeks. Did the Court of Appeals correctly hold that Duke Energy is not entitled to amend its corporate income tax returns to include invested principal in the denominator of the multi-state apportionment?

Counter Statement of the Case

This case began when Duke Energy filed amended corporate income tax returns on December 30, 2002. In its original returns for each of the years 1978-2001, Duke Energy had apportioned its income[1] using the property, payroll, and sales factors[2] for entities "whose principal business in this State is (a) manufacturing or any form of collecting, buying, assembling, or processing goods and materials within this State or (b) selling, distributing, or dealing in tangible personal property within this State." S.C. Code Ann. § 12-6-2250. Duke Energy also did not include in the apportionment formula of its original 1978-1999 returns the amount of principal recovered from its short-term investment transactions; rather, it included only the interest or gain from these transactions. [R. at 51 (Am. Order Granting Summ J. in Part & Denying Summ. J. in Part at 3 (Summ. J. Order)).] The company did, however, include the amount of principal recovered in each of its originally-filed returns for 2000-2001. [R. at 51 (Summ. J. Order at 3 n.6).][3]

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[1] Because Duke Energy operated in more than one state, it was required to calculate its South Carolina taxable income using an appropriate apportionment formula. S.C. Code Ann. §§ 12-6-2210(B), -2240.

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

[3] Duke Energy incorrectly asserts that it "excluded the receipts from its sales of securities" from its original returns for all taxable years at issue. *See* Petition at 6.

In the amended returns, Duke Energy made the following substantial changes to its originally-applied apportionment formulas for 1978-2001:

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

On February 4, 2010, the Department issued a written Determination denying Duke Energy's refund claims in whole on the following grounds:

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

Duke Energy timely filed a request for contested case hearing with the ALC on March 3, 2010. After discovery concluded, the Department moved for summary judgment on all three grounds in the Determination. Duke Energy filed its opposition to the motion for summary judgment and also filed a cross-motion for summary judgment on the ground that it was entitled to

include the return of investment principal in its apportionment formula as a matter of law.

By Order dated August 9, 2012, the ALC granted in part the Department's motion for summary judgment, ruling that Duke Energy's amended returns filed for the 1978-1993 tax years were untimely and that Duke Energy could not include recovered principal in its apportionment formula. The ALC denied the Department's motion with respect to the manufacturing issue, concluding that a hearing would be necessary to determine factual issues related to the claim. On October 11, 2012, the ALC issued the Summ. J. Order and the Order Denying Motion for Reconsideration in Part and Granting Reconsideration in Part (Summ. J. Recons. Order),[4] in which the ALC amended its original order in some respects but reaffirmed the grant of summary judgment to the Department on the same grounds.

The ALC conducted a contested case hearing regarding the manufacturing issue on September 5-6, 2012, during which the parties presented witnesses and introduced exhibits, both separately and jointly. On November 2, 2012, the ALC issued an Order determining that Duke Energy is not eligible to use the single-factor apportionment method reported on its

[4] In the Summ. J. Recons. Order, the ALC specifically found that the Department had a long-standing administrative policy of excluding recovered investment principal from the apportionment formula that Duke Energy did not dispute. [R. at 87 (Summ. J. Recons. Order at 3 & n.2).]

amended returns because it did not meet its burden to prove that it is not a manufacturer and does not otherwise fall within § 12-6-2250. Duke Energy moved to reconsider the order but, on December 4, 2012, the ALC reaffirmed its decision through the Amended Final Order and Decision (Mfg. Order) and the Reconsideration Order (Mfg. Recons. Order).[5] Duke Energy timely filed a Notice of Appeal on January 3, 2013, of all the orders issued by the ALC.

Oral arguments were heard on February 18, 2014, and, on October 8, 2014, the Court of Appeals affirmed the ALC's determinations on the manufacturing and recovery-of-principal issues.[6] *Duke Energy*, 410 S.C. at 429, 764 S.E.2d at 720. In affirming the ALC's ruling on the manufacturing issue, the Court of Appeals held that (1) this Court's prior holdings that producing electricity is manufacturing and that Duke Energy is a manufacturer were indistinguishable and controlling, and (2) applying the applicable standard of review, the ALC's finding that "Duke Energy has

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[5] The ALC also made findings that the Department had a long-standing administrative policy that electric utilities should be characterized as manufacturers for purposes of corporate income tax apportionment. [R. at 127 (Mfg. Order at 8); R. at 154 (Mfg. Recons. Order at 8).]

[6] Because its conclusions as to these two issues resolved the appeal, the Court of Appeals did not address the timeliness issue. However, contrary to Duke Energy's assertions that the Court of Appeals only "substantially affirm[ed] the results of the ALC Order" and even "reversed the ALJ," the Court of Appeals affirmed the ALC's determinations. *See Duke Energy*, 410 S.C. at 429, 764 S.E.2d at 720 ("We **AFFIRM**.") (emphasis in original). The Department further contends the timeliness issue is an alternative sustaining ground for the years 1978-1993 even if the decision is reversed on either of these issues. *See, e.g., I'On, LLC v. Town of Mt. Pleasant*, 338 S.C 406, 419, 526 S.E.2d 716, 723 (2000).

failed to establish...that its principal business in South Carolina is not manufacturing" was supported by substantial evidence. *Id.* at 421-26, 764 S.E.2d at 715-18. The Court of Appeals also concluded, as did the ALC, that Duke Energy's "undisputed activity" of generating and providing electricity fell within the plain and ordinary meaning of "manufacturing" and that the purpose of the apportionment statutes supported this conclusion. *Id.* In affirming the ALC's ruling on the recovery-of-principal issue, the Court of Appeals held that, based on the plain meaning and purpose of the apportionment statutes and the nature of Duke Energy's short-term investment transactions, the return of principal from these transactions is not part of Duke Energy's apportionment formula.[7] *Id.* at 426-29, 764 S.E.2d at 718-720. Duke Energy's timely Petition for Rehearing was denied on November 21, 2014.

Summary of Grounds for Denying Certiorari

The Petition should be denied because the Court of Appeals' decision is a routine application of this Court's precedent and the principles of statutory interpretation. This Court already has held that entities engaged in generating electricity are manufacturers. *Columbia Ry., Gas & Elec. Co. v.*

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[7] Contrary to Duke Energy's assertion that the Court of Appeals "held that Duke Energy's receipts from sales of securities were not part of Duke Energy's 'total sales' or 'total gross receipts' ***at all*** for corporate income tax purposes," *see* Petition at 6 (emphasis added), the Court of Appeals held that only the interest or gain from Duke Energy's short-term investment transactions was included and that the recovered principal was excluded. *Duke Energy*, 410 S.C. at 429, 764 S.E.2d at 720.

Query, 134 S.C. 319, 132 S.E. 611 (1926). More to the point, this Court has held that Duke Energy itself is engaged in manufacturing. *Duke Power Co. v. Bell*, 156 S.C. 299, 152 S.E. 865 (1930). Because an entity's appropriate apportionment formula is determined based on its principal business in South Carolina, Duke Energy could prevail only if it proved by a preponderance of the evidence that its principal business in South Carolina is something other than manufacturing. The ALC found that Duke Energy failed to meet this burden of proof, and the Court of Appeals affirmed that finding based on the substantial evidence of record. The Court of Appeals also correctly determined that the principal recovered from Duke Energy's short-term investments may not be included in the denominator of Duke Energy's apportionment formula based on the plain meaning and purpose of the apportionment statutes. On both issues, the Court of Appeals' decision was perfectly consistent with the Department's long-standing administrative policy.

Certiorari therefore is not warranted because this case does not involve novel questions of law or substantial constitutional issues. The Court of Appeals applied this Court's decisions and interpreted the applicable statutory language, and the Court of Appeals certainly did not violate the separation of powers clause by interpreting statutes. The decision also does not conflict with prior decisions of this Court. Accordingly, the Petition should be denied.

Argument

I. The Court of Appeals correctly affirmed the ALC's finding that Duke Energy is engaged in manufacturing based on this Court's prior decisions and the substantial evidence supporting the ALC's findings.

Because electricity has been generated using the same process for over 100 years, this Court already has held on two occasions that Duke Energy is engaged in manufacturing. In 1926, this Court held that electric utilities in general are manufacturers in the context of a tax statute. *Columbia Railway*, 134 S.C. at 324, 132 S.E. at 611 ("We do not think that there is any doubt that the [company] is engaged in the business of manufacturing gas and electricity, and it is clearly within the provisions of [the Manufacturer's Tax Act]."). And even more significantly, this Court held in 1930 that Duke Power Co., a predecessor of Duke Energy, was entitled to a tax exemption for manufactories—defined as a physical plant, or a place or building, where manufacturing is carried on—because it was a manufacturer. *See Duke Power*, 156 S.C. at 306, 152 S.E. at 868 ("If a company engaged in the generation of electricity is a 'manufacturer' *for the purposes of a Statute imposing a tax* ....) (emphasis added).[8]

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[8] The fact that *Columbia Railway* and *Duke Power* reached the same conclusion with respect to separate tax statutes specifically refutes Duke Energy's claim—rejected by both the ALC and the Court of Appeals—that these cases do not apply here because they were decided under different tax statutes. Further refuting Duke Energy's claim is the fact that the *Columbia Railway* decision is based on a statute using virtually identical language as the apportionment statute at issue. *Compare* S.C. Code Ann. § 12-6-2250 (applying to "a taxpayer whose principal business in this State is ...

There is no question that Duke Energy is an electric utility because the parties stipulated that during 1978-2001 Duke Energy was engaged in the generation, transmission, distribution, and sale of electricity in portions of North Carolina and South Carolina. *Duke Energy*, 410 S.C. at 417, 421-22, 764 S.E.2d at 713, 715-16; [s*ee* R. at 122 (Mfg. Order at 3).] The ALC also found that the process by which electricity is produced has not substantially changed since the time of the *Columbia Railway* and *Duke Power* decisions. [*See* R. at 2539:7-16, 2550:11-24, 2669:6-19, 2718:25-2719:12, 2730:3-20.] Accordingly, Duke Energy is a manufacturer today for the same reason that it was when *Duke Power* was decided in 1930, and the Court of Appeals correctly applied these decisions to hold that Duke Energy is a manufacturer as a matter of law for purposes of the apportionment statutes.[9]

Based on this precedent and in view of the Department's determination, Duke Energy could prevail only if it proved that its principal business in South Carolina is other than manufacturing. *See* S.C. Code Ann. § 12-6-2250. The ALC found that Duke Energy did not prove that manufacturing was not its principal business in South Carolina, and the Court of Appeals correctly

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manufacturing") *with* 1923 S.C. Acts 12, No. 21, §11-A (applying to a taxpayer "engaged in the business of manufacturing").

[9] In addition to the fact that the electric generation process has remained substantially unchanged, the pertinent language in Duke Energy's charter identifying the company as a manufacturer during 1978-2001 was identical to that described in the *Duke Power* decision. *Compare* [R. at 7941 (Resp't Hrg. Ex. 2, art. III, § (b))] *with Duke Power*, 156 S.C. at 303, 152 S.E. at 867.

determined that substantial evidence supports that finding. *Duke Energy*, 410 S.C. at 426, 764 S.E.2d at 718; *see Nucor Corp. v. S. Carolina Dep't of Employment & Workforce*, 765 S.E.2d 558, 563 (S.C. 2014) ("Under the deferential substantial evidence standard of review, [appellate courts must] affirm the ALC's factual findings when supported by some evidence in the record."). Except to argue that it actually provides a service, Duke Energy never explains how the Court of Appeals erred in view of the reliable, probative, and substantial evidence of record supporting the company's classification as a manufacturer.

Rather than address the *Columbia Railway* and *Duke Power* decisions, Duke Energy seeks review because the Court of Appeals' decision allegedly "overturns decades of longstanding precedent" and "conflicts with prior decisions of this Court." Petition at 8-9. But Duke Energy does not identify a single decision of this Court holding that electric utilities are anything other than manufacturers for purposes of tax statutes. And although the *Columbia Railway* and *Duke Power* decisions are directly applicable and figure prominently in the Court of Appeals' decision, Duke Energy barely acknowledges this existing precedent, neglecting to even provide a full citation of the cases. Duke Energy also does not identify any decision of this Court that conflicts with the Court of Appeals' decision. Instead, it identifies

a 2009 ALC decision[10] and various Department rulings in other contexts that discuss apportionment principles in general rather than electric utilities in particular. None of these authorities credibly demonstrate how the Court of Appeals erred or suggest the need to review the decision below.

Duke Energy also remarkably argues that the Court of Appeals erred in ignoring agency precedent issued in other contexts generally characterizing an entity as a service provider if over 50 percent of its receipts are from providing services. *See* Petition at 12-13. However, the ALC found that "Duke Energy failed to meet its burden of proving more than 50 percent of its gross receipts were [not] derived from" manufacturing or any other activities covered in § 12-6-2250[11] and that the company "introduced *no* evidence supporting any breakdown of its gross receipts from manufacturing, services,

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[10] *See* Petition at 10 (citing *Media Gen. Commc'ns, Inc. v. S.C Dep't of Rev.*, No. 07-ALJ-17-0090-CC (S.C. Admin. Law Ct. May 4, 2009), *aff'd*, 388 S.C. 138, 694 S.E.2d 525 (2010)). The ALC's summary of general apportionment principles in its *Media General* decision was not at issue in that case and is not discussed in this Court's holding affirming the ALC's decision.

[11] As previously stated, the ALC found that, in addition to being engaged in manufacturing, Duke Energy's undisputed activity fits within each of the other prongs of § 12-6-2250 that require Duke Energy to use the multi-factor apportionment formula. Because the Court of Appeals affirmed the ALC's finding regarding the "manufacturing" prong of § 12-6-2250, it did not reach the ALC's other findings. However, because Duke Energy did not challenge the Court of Appeals' failure to consider these issues in the Petition for Rehearing, those findings are the law of the case and provide an alternative ground for sustaining the Court of Appeals' decision. *See I'On*, 338 S.C at 419, 526 S.E.2d at 723; *ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche*, 327 S.C. 238, 241, 489 S.E.2d 470, 472 (1997) (holding that an unappealed ruling by a lower court is the law of the case).

and/or any other activity." [R. at 146 (Mfg. Order at 27); R. at 164 (Mfg. Recons. Order at 18) (emphasis added).] Duke Energy does not address or challenge these findings. Regardless, then, of the Department's general policy for characterizing service entities, Duke Energy did not meet its burden to prove that it is a service provider under this general policy rather than a manufacturer as dictated by this Court's precedent and Department policy. As the Court of Appeals correctly held, this failure of proof, especially in light of *Columbia Railway* and *Duke Power* and the substantial evidence of record, is fatal to Duke Energy's quest to use single-factor apportionment on its 1978-2001 returns.

There also is no statutory ambiguity at issue because Duke Energy's "undisputed activity" of generating or producing electricity constitutes manufacturing as such term is usually and customarily understood. *Duke Energy*, 410 S.C at 422, 764 S.E.2d at 716.[12] The lack of ambiguity is fully shown by the fact that this Court already had determined that Duke Energy's activities constitute manufacturing for purposes of a tax statute. Duke Energy's argument also disregards the Department's long-standing

[12] Although it does not address the plain meaning definitions applied by the Court of Appeals and the ALC, Duke Energy claims, "[i]nexplicably, the Court of Appeals did not consider" other uses of the term manufacturing for tax purposes other than apportionment. Petition at 12 n.7. Notwithstanding this hyperbole, these other uses are perfectly consistent with the decisions by the Court of Appeals and the ALC and Duke Energy's argument in this regard in fact was specifically rejected by the ALC. [*See* R. at 160 (Mfg. Recons. Order at 14).] Duke Energy also never presented this so-called "instructive guidance" to the Court of Appeals.

administrative policy that the term "manufacturing" in the apportionment statutes included entities generating electricity—a finding of fact specifically included within the ALC's order. [R. at 127 (Mfg. Order at 8); R. at 154 (Mfg. Recons. Order at 8);] *see Kiawah Dev. Partners, II v. S. Carolina Dep't of Health & Envtl. Control*, Op. No. 27065, 2014 WL 6992119 (Dec. 10, 2014) ("[W]here an agency charged with administering a statute or regulation has interpreted the statute or regulation, courts, including the ALC, will defer to the agency's interpretation absent compelling reasons."). Accordingly, the Court of Appeals correctly held that "what Duke Energy does to generate electricity is 'manufacturing' as that term is used" in the statute. *Duke Energy*, 410 S.C at 423, 765 S.E.2d at 716.

Finally, Duke Energy contends that the Court of Appeals applied the alternative apportionment statute when interpreting § 12-6-2250. *See* S.C. Code Ann. § 12-6-2320. The Court of Appeals did no such thing. It simply interpreted the statute based on the pertinent language and this Court's precedent. *See Hertz Corp. v. S. Carolina Tax Comm'n*, 246 S.C. 92, 96, 142 S.E.2d 445, 446-47 (1965) ("In short, the nature of the taxpayer's business is entirely appropriate to the use of the three factor formula. It is clearly within the spirit of the legislative classification, which should be liberally construed in favor of the inclusion of businesses to which the formula is appropriate."); *see also Duke Power*, 156 S.C. at 306, 152 S.E. at 868; *Columbia Railway*, 134 S.C. at 324, 132 S.E. at 611. Duke Energy devotes much discussion to this

"alternative apportionment" contention, *see* Petition at 13-16, but there is nothing extraordinary about the Court of Appeals' analysis that warrants this Court's review, especially considering this Court's existing precedent. Not every statutory analysis of a tax statute incorporates the alternative apportionment formula. *See also* discussion *infra* at Part II.A. This argument should be rejected because it lacks merit and because it was never fairly presented to the Court of Appeals in the Petition for Rehearing. *See* Rule 242(d)(2), SCACR.

II. The Court of Appeals correctly determined that Duke Energy may not include in its apportionment formula the amount of principal recovered from short-term investments of excess cash from operations.

A. *Duke Energy's recovery of principal from short-term investments is not included in its multi-state apportionment formulas.*

Like many companies, Duke Energy repeatedly invests excess working capital in short-term investments and then, after a few days or weeks, recovers its invested principal plus a proportionately small amount of interest or gain.[13] Recognizing that the recovery of investment principal from these various transactions is not a sale or receipt, the Court of Appeals correctly held that the plain meaning of the apportionment statutes does not

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[13] During the Periods at Issue, Duke Energy invested excess cash from operations in municipal bonds, U.S. Treasury securities, commercial paper, agency securities, and loan repurchase agreements, then recovered its investment principal along with some interest or gain by redeeming the security at maturity, selling the security, or completing the loan repurchase transaction. *Duke Energy*, 410 S.C. at 427-28, 764 S.E.2d at 719; [R. at 3007:16-21 (Dep. of Sherwood L. Love).]

include the recovered principal in the apportionment formula.[14] *Duke Energy*, 410 S.C. at 426-29, 764 S.E.2d at 718-20; *see Travelscape, LLC v. S. Carolina Dep't of Rev.*, 391 S.C. 89, 99, 705 S.E.2d 28, 33 (2011) ("A statute as a whole must receive practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of lawmakers."); *Gay v. Ariail*, 381 S.C. 341, 344, 673 S.E.2d 418, 420 (2009) ("In interpreting statutes, the Court looks to the plain meaning of the statute and the intent of the Legislature."). Accordingly, the Court of Appeals correctly recognized that recovered principal is not part of the "base which reasonably represents the proportion of the trade or business carried on within this State." *Duke Energy*, 410 S.C. at 428-29, 764 S.E.2d at 719-20; *see* S.C. Code Ann. § 12-6-2210; S.C. Code Ann. § 12-7-250 (repealed in 1995); *Hertz*, 246 S.C. at 96-97, 142 S.E.2d at 446-47; *see also Travelscape*, 391 S.C. at 99, 705 S.E.2d at 33 ("Courts should consider not merely the language of the particular clause being construed,

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[14] Duke Energy takes issue with the Court of Appeals' use of the term "principal," stating, "the Court of Appeals appears to suggest, without providing any explanation or legal authority, that Duke Energy's receipts other than the profit from its sales of securities are the 'principal of the investment'...." Petition at 21. Apart from this being a commonly used term to describe an amount of invested money, the Court of Appeals could have ascertained this term from Duke Energy's Assistant Treasurer and General Manager of Long Term Investments, who used this exact term in exactly the same manner. [*See, e.g.*, R. at 3028:6-9 (Love Dep.) ("It certainly appears as though the ***principal*** associated with the short-term investment maturity and the amount of the short-term investment were booked to the same account.") (emphasis added).] Duke Energy also recognized the distinction between recovered principal and interest or gain by only including the interest or gain, not the recovered principal, in the apportionment formulas reported on its originally-filed returns for years 1978-1999.

but the undefined word and its meaning in conjunction with the whole purpose of the statute and the policy of the law").

A proper consideration of the nature of these investment transactions demonstrates that including recovered principal in the apportionment formula as a sale or receipt is contrary to the purpose of the apportionment statutes. As one court recognized, "[i]t is no true reflection of the scope of [the taxpayer's] business done within and without [the state] to allocate to the numerator or the denominator of the [standard apportionment formula] fraction the full amount of money returned to [the taxpayer] upon the sale or redemption of investment paper." *Am. Tel. & Tel. Co. v. Dir., Div. of Taxation*, 476 A.2d 800, 802 (N.J. App. Div. 1984); *see Sherwin-Williams Co. v. Indiana Dept. of State Rev.*, 673 N.E.2d 849, 853 (Ind. T.C. 1996) (determining that "'gross receipts' for the purpose of the [standard apportionment formula] includes only the interest income, and not the ***rolled over capital*** or return of principal, realized from the sale of investment securities.") (emphasis added). "To include such [recovered principal] in the fraction would be comparable to measuring business activity by the amount of money that a taxpayer repeatedly deposited and withdrew from its own bank account." *Am. Tel. & Tel. Co.*, 476 A.2d at 802; *see Walgreen Ariz. Drug Co. v. Ariz. Dept. of Rev.*, 97 P.3d 896 (Ariz. Ct. App. 2004) (rejecting the taxpayer's interpretation like that proposed by Duke Energy because such interpretation "would create a tax loophole ... neither intended by the []

Legislature nor required by the plain meaning of the [statute] and the related statutory scheme."); *see also Gen. Motors Corp. v. Franchise Tax Bd.*, 39 Cal. 4th 773, 789, 139 P.3d 1183, 1192 (Cal. 2006) ("Thus, we hold that only the interest from [loan repurchase] transactions should be included as gross receipts.").

As it did below with respect to the ALC, Duke Energy erroneously argues that the Court of Appeals incorporated alternative apportionment[15] into the standard apportionment provisions. Petition at 23-25. Throughout this litigation, Duke Energy has repeatedly and unsuccessfully tried to make every judicial interpretation of the apportionment statutes into an improper application of the alternative apportionment statutes. But that argument confuses the issue. The Court of Appeals—and the ALC—correctly recognized that, in resolving a question regarding the content of the apportionment formula, it is necessary to determine in the first instance whether an item is included in the apportionment formula as a matter of law before the alternative apportionment methods even become an issue. *See Carmax Auto Superstores W. Coast, Inc. v. S.C. Dep't of Rev.*, No. 2012-212203, 2014 WL 7273958, at *5 (Dec. 23, 2014) (holding that "an alternative formula is the exception") (quoting *St. Johnsbury Trucking Co. v. State,* 385 A.2d 215, 217

[15] The provisions to which Duke Energy refers are set forth in S.C. Code Ann. § 12-6-2320, which, for years after 1995, provided that a taxpayer could request, or the Department could require, an alternative apportionment formula if the standard apportionment formula did "not fairly represent the extent of the taxpayer's business activity in this State."

(N.H. 1978)); [R. at 79-81, 83 (Summ. J. Order at 31-33, 35) (also citing *St. Johnsbury* and stating that Duke Energy's position would create the absurd result of making application of the alternative apportionment provisions the "standard follow-up to the application of the standard apportionment statute").] Simply put, it is necessary to decide if an item is included in the apportionment formula before alternative apportionment becomes an issue, and applying principles of statutory interpretation to the apportionment formula is not an application of alternative apportionment.

Duke Energy also erroneously argues that it should prevail because the statutes are ambiguous, essentially because it has argued a position different than that espoused by the Department and the conclusion reached by the Court of Appeals. But the fact that there is a disagreement among the parties does not create an ambiguity. *See Bank of Am. Nat. Trust & Sav. Ass'n v. 203 N. LaSalle St. P'ship*, 526 U.S. 434, 461 (1999) (Thomas, J., concurring) ("A mere disagreement among litigants over the meaning of a statute does not prove ambiguity; it usually means that one of the litigants is simply wrong."). Moreover, Duke Energy's position that the denominator of its apportionment formula should be increased by recovered investment principal is not reasonable. *See S. Carolina Dep't of Soc. Servs v. Lisa C.*, 380 S.C. 406, 416, 669 S.E.2d 647, 652 (Ct. App. 2008) (stating statute is ambiguous if susceptible to two ***reasonable*** interpretations). This is especially so given that Duke Energy did not include recovered principal in its apportionment

formulas for its original 1978-1999 returns, demonstrating that it, too, considered that the pertinent apportionment statutes do not include recovered investment principal as a sale or receipt.

In addition to its reasonable interpretation of the statute in light of its intended purpose, *Kiriakides v. United Artists Commc'ns, Inc.*, 312 S.C. 271, 275, 440 S.E.2d 364, 366 (1994), the Court of Appeals' decision is entirely consistent with the Department's long-standing policy—applied for at least 30 years—to exclude recovered investment principal from the apportionment formula. [*See* R. at 87 (Summ. J. Recons. Order at 3 & n.2); R. at 203 (Dep't Mot. Summ J at 36); R. at 857-66 (Dep't Mot. Summ J. Reply at 33-42);] *see Kiawah*, Op. No. 27065, 2014 WL 6992119, at *8. And this Court previously held that the general rule of resolving doubt in favor of the taxpayer is subordinate to the Department's long-standing administrative interpretation if the Legislature has given such interpretation at least its implied assent. *Ryder Truck Lines, Inc. v. S. Carolina Tax Comm'n*, 248 S.C. 148, 152-53, 149 S.E.2d 435, 437 (1966);[16] *see* Petition at 11 (favorably citing *Ryder*). Although the apportionment statutes were amended numerous times throughout the

[16] In resolving a similar issue, this Court in *Ryder* held that "a strong presumption arises that [a 35-year] administrative construction has the approval of the legislature..." and that the Court "would not be justified in overturning the commission's long continued application of the statute to which the legislature has given at least implied assent." *Id.*; *see also Etiwan Fertilizer Co. v. S. Carolina Tax Comm'n*, 217 S.C. 354, 359, 60 S.E.2d 682, 684 (1950) ("[W]here the construction of the statute has been uniform for many years in administrative practice, and has been acquiesced in by the General Assembly for a long period of time, such construction is entitled to weight, and should not be overruled without cogent reasons").

periods at issue, and were even completely reenacted under a new chapter of the Code of Laws, the Legislature never altered or amended the statutes to reject the Department's interpretation and, in fact, ultimately adopted legislation affirming the Department's position. *See* discussion *infra* Part II.B. Duke Energy has never challenged that this policy was in effect during 1978-2001 and also filed its corporate income tax returns consistent with this policy for at least 21 years. [R. at 87 (Summ. J. Recons. Order at 3 & n.2).]

B. *The Court of Appeals' interpretation of the apportionment statutes decision does not violate the Separation of Powers Clause.*

In a remarkable proposition, Duke Energy says that the judiciary violates the separation of powers when it interprets statutes. Petition at 17-18; *see Lindsay v. Nat'l Old Line Ins. Co.*, 262 S.C. 621, 628, 207 S.E.2d 75, 78 (1974) ("The construction of a statute is a judicial function and responsibility."). There is no citation to authority for this proposition. Rather, Duke Energy bases this novel argument on the Court of Appeals' rejection of its argument regarding S.C. Code Ann. § 12-6-2295, which in pertinent part expressly defined the terms "gross receipts" and "sales" to exclude for years after 2006 "the repayment, maturity, or redemption of the principal of a loan, bond, or mutual fund or certificate of deposit or similar marketable instrument" and "the principal amount received under a repurchase agreement or other transaction properly characterized as a loan." S.C. Code Ann. § 12-6-2295 ("Items included and excluded from terms 'sales' and 'gross receipts'"). This argument should be rejected if for no other reason that it was

never raised to the Court of Appeals[17] either in the briefs or the Petition for Rehearing. Rule 242(d)(2), SCACR.

Regardless, the argument also should be rejected because § 12-6-2295 did not change the existing apportionment law concerning the recovery of investment principal. As the ALC ruled, the Legislature may amend the law to clarify its original intent. [R. at 88 (Summ. J. Recons. Order at 4 ("An amendment to the language of a law does not necessarily mean a change in the meaning of that law, for an amendment may also be interpreted as a clarification by the legislature of its original intent") (citing cases));] *see also Stuckey v. State Budget and Control Bd.*, 339 S.C. 397, 401, 529 S.E.2d 706, 708 (2000) ("A subsequent statutory amendment may be interpreted as clarifying original legislative intent"). This is especially so given the Department's long-standing policy that the recovery of investment principal is not included as a sale in the apportionment formula.[18] *See also* discussion *supra* n.16. In view of the Department's policy, the ALC correctly determined that "[i]f the Legislature was so troubled by an interpretation that would

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[17] Moreover, Duke Energy never noted a constitutional violation when the ALC rejected Duke Energy's argument regarding S.C. Code Ann. § 12-6-2295. [*See* R. at 86-92 (Summ. J. Recons. Order at 2-8).]

[18] Again, Duke Energy has not challenged the ALC's finding that it was the Department's long-standing administrative policy to exclude recovered principal from the apportionment formulas. *Kiawah*, Op. No. 27065, 2014 WL 6992119, at *8. This finding now is the law of the case, thereby further diminishing Duke Energy's "fundamental and substantial[]" change argument. *ML-Lee Acquisition Fund,* 327 S.C. at 241, 489 S.E.2d at 472 (1997).

allow the inclusion of principal in the sales factor, it is just as likely, if not more so, that this troublesomeness would motivate the Legislature to clarify the existing law so as to avoid an application that it never intended."[19] [R. at 86 (Summ. J. Recons. Order at 2);] *see Cotty v. Yartzeff*, 309 S.C. 259, 262 n.1, 422 S.E.2d 100, 102 n.1 (1992) ("[L]ight may be shed upon the intent of the General Assembly by reference to subsequent amendments which, although normally presumed to change existing law, may be interpreted as clarifying it."). Accordingly, there was no change in the law, let alone any violation of the Separation of Powers Clause.

Conclusion

For the reasons explained above, this Court should deny Duke Energy's Petition for a Writ of Certiorari.

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[19] As discussed above, the Department's long-standing policy regarding recovered principal from short-term investment transactions was entirely consistent with § 12-6-2295, as were the Department's prior policies with respect to the majority of items identified in § 12-6-2295. Consequently, there is no merit to Duke Energy's suggestion, Petition at 18, that the Department acknowledged § 12-6-2295 changed the law for 1978-2001. In fact, based on Duke Energy's own reasoning and its agreement with the applicability of the "deference doctrine," the Legislature's actions clarified and confirmed the Department's interpretation. *See also Kiawah*, Op. No. 27065, 2014 WL 6992119, at *8.

Respectfully submitted,

SOUTH CAROLINA DEPARTMENT OF REVENUE

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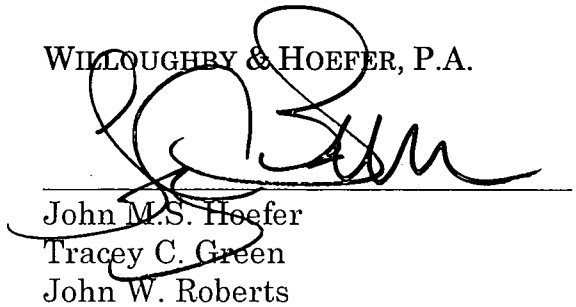

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Attorneys for the South Carolina Department of Revenue

Columbia, South Carolina
January 21, 2015

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Ralph K. Anderson III, Chief Administrative Law Judge

Opinion No. 5274 (S.C. Ct. App. Filed Oct. 8, 2014)

Appellate Case No. 2014-002736

Duke Energy Corporation,.....Petitioner,

v.

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

This is to certify that I, an Administrative Assistant with the law firm Willoughby & Hoefer, P.A., have caused to be served this day one (1) copy of the **Respondent South Carolina Department of Revenue's Return to Petition for a Writ of Certiorari** by placing the same in the care and custody of the U.S. Postal Service addressed as follows:

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This 21st day of January 2015.

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January 21, 2015

HAND DELIVERY

The Honorable Daniel E. Shearouse
Clerk of Court
South Carolina Supreme Court
1231 Gervais Street
Columbia, South Carolina 29201

Re: *Duke Energy Corp. v. S.C. Dep't of Revenue*
Appellate Case No. 2014-002736

Dear Mr. Shearouse:

Enclosed please find the original and seven copies of the Respondent South Carolina Department of Revenue's Return to Petition for a Writ of Certiorari along with Proof of Service. Please file-stamp the extra copy and return it by the courier delivering these materials.

Thank you. If you have any questions, please call.

Very truly yours,

WILLOUGHBY & HOEFER, P.A.

Tracey C. Green

TCG/lg
Enclosure

cc: Burnet R. Maybank, III, Esquire
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