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SC Court of Appeals

STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Ralph K. Anderson III, Administrative Law Judge

Opinion No. 5274 (S.C. Ct. App. filed October 8, 2014)

Appellate Case No. 2014-002736

Duke Energy Corporation. .... Petitioner,

v

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

REPLY TO RETURN TO PETITION FOR A WRIT OF CERTIORARI

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Petitioner Duke Energy Corporation ("Duke Energy") hereby files this Reply to the South Carolina Department of Revenue's ("Department") Return to Duke Energy's Petition for Certiorari For the reasons set forth in Duke Energy's Petition for Certiorari and set forth below, this Court should issue a writ for certiorari to review and reverse the opinion of the Court of Appeals. This case involves novel issues that have never been considered by this Court and that will have a significant impact on South Carolina's economy and all South Carolina taxpayers.

ARGUMENTS

I. This Court should issue a writ of certiorari because taxpayers cannot be taxed as service providers and manufacturers.

1. The Court of Appeals Opinion impermissibly disregarded long-standing administrative precedent.

The Court of Appeals reversed the Administrative Law Court ("ALC") and held that Duke Energy's primary business is the sale of electricity and that selling electricity is a service Notwithstanding these findings, the Court of Appeals concluded Duke Energy should be taxed as a manufacturer. *Duke Energy Corp v S C Dep't of Rev*, 410 S.C. 415, 425-26, 764 S E.2d 712, 718 (2014) The Court of Appeals' holding directly conflicts with long-standing precedent For decades, South Carolina courts and the Department have held that taxpayers whose principle business is the sale of services are required to apportion their income to South Carolina using a single-factor apportionment formula *See e g*, *Media Gen Commc'ns, Inc v S C Dep't of Rev*, 2009 S.C. Tax LEXIS 56, at *48, *58 (S.C. Admin. L. Ct. May 4, 2009), *upheld on appeal*, 388 S.C. 138, 694 S E 2d 525 (2010), S.C Rev Proc No 09-1, 2009 S.C. Tax LEXIS 84, at *2-3

(S C. Dep't of Rev. Jan 13, 2009). (*See also* Duke Energy's Cert Pet. at 9-10.) The Court of Appeals' holding directly conflicts with this long-standing precedent.

The Department urges this Court to disregard the Court of Appeals' dramatic change in the law and argues that two 80-plus year old cases[1] decided in different tax contexts and under different facts support the conclusion that Duke Energy is a manufacturer as a matter of law. (Department's Return at 8-9.)

However, unlike the taxes at issue in those cases, the term "manufacturing" used in the income tax statutes presupposes a taxpayer dealing in tangible personal property as demonstrated by the Department's published, long-standing policy. (Duke Energy's Cert. Pet. at 9-10) And more importantly, the courts in those cases did not determine the taxpayer's primary business – the courts simply relied on a single statement in the company's charter indicating that it was authorized to engage in manufacturing among numerous other activities. In this case, the Court of Appeals found that Duke Energy's primary business was the sale of electric service but nonetheless held that Duke Energy was a manufacturer for income tax purposes.

In an effort to avoid review of this case, the Department makes the astounding argument that if a term used in one tax context has a specific meaning, it has the same meaning for all other tax purposes. (Department's Return at 12) The Department argues that because *Duke Power Co v Bell*, 156 S.C. 299, 152 S E. 865, 868 (1930), held that Duke Energy is a manufacturer "for purposes of a tax statute," it follows that Duke Energy is a manufacturer for all tax purposes. (Department's Return at 12) The

[1] *Columbia Ry, Gas & Elec Co v S C Tax Comm'n*, 134 S C 319, 132 S E 611 (1926) (holding that a company engaged in the business of generating electricity is a manufacturer for purposes of the license tax imposed under the former Manufacturer's Tax Act, 1923 S C Acts 12, No 21 § 11), *Duke Power Co v Bell*, 156 S C 299, 152 S E 865 (1930) (holding that a power plant was a "manufactory" exempt from local county taxes)

Department's argument makes little sense and is inconsistent with the arguments made by the Department in this very case. In its arguments before the Court of Appeals regarding whether the term "gross receipts" should include all receipts, the Department argued that the meaning of the term gross receipts in other tax contexts was not controlling for South Carolina income tax purposes. (R. p. 8336.) In addition, South Carolina law is clear that the Legislature can modify the ordinary meaning of a term thereby giving it a different meaning for purposes of different taxes. *Trs of Wofford College v Spartanburg*, 201 S.C. 315, 23 S.E.2d 9, 11 (1942) ("The power of taxation is a legislative power, and knows no limitations, except those imposed expressly or by plain implication in the State or Federal Constitution.") For example, electricity is a service for income tax purposes, *Duke Energy,* 410 S C 415, 764 S E 2d at 718, and "tangible personal property" for sales and use tax purposes, S C. Code Ann. § 12-6-3360

At a minimum, the Court of Appeals' interpretation of "manufacturing" and "manufacturer," which is in conflict with the Department's long-standing policy of treating service providers differently than manufacturers for apportionment purposes, creates substantial ambiguity that the Court of Appeals should have, but failed to, resolve in favor of Duke Energy. *Alltel Commc'ns, Inc v S C Dep't of Rev* , 399 S.C. 313, 321, 731 S.E 2d 869, 873 (2012). (*See also* Duke Energy's Cert. Pet. at 11-12.)

Confronted by its numerous rulings, administrative guidance and policy documents that unequivocally state that service providers are not manufacturers, the Department asks this Court to afford deference to a different, "secret" policy contained in an unpublished manual, distributed only to a select few Department employees, that

states that electric utilities are manufacturers.[2] This type of unpublished, unsubstantiated, conclusory document is a poor substitute for the Department's long-standing, widely circulated and well-known policies providing that companies whose primary business is the sale of a service are required to apportion their income using the single factor apportionment formula

In sum, this Court should issue a writ of certiorari to review the Court of Appeals' Opinion because it overturns decades of long-standing precedent and presents the novel issue of whether a service provider can also be a manufacturer for South Carolina tax purposes

2. The Court of Appeals impermissibly adopted an alternative apportionment formula.

The Court of Appeals held that "[i]n this case, calculating the apportionment based on sales alone would not reasonably represent the taxpayer's business." *Duke Energy*, 410 S.C. at 425, 764 S E.2d at 718. However, the Department never argued that using the single-factor method of apportionment distorted Duke Energy's South Carolina income and offered no evidence to this effect. The Court of Appeals, in finding for the Department, created a huge loophole for the Department whereby the mere allegation of the statutory apportionment formula not reasonably reflecting the taxpayer's South Carolina income is enough to disregard the plain meaning of a statute and shift the burden of proof to taxpayers. The Court of Appeals' holding is thus an end run around this Court's recent holding in *CarMax Auto Superstores West Coast, Inc. v S C Dep't of Rev* , 2014 S.C. LEXIS 550 (S.C. Dec. 23, 2014).

[2] The manual relied upon by the Department is not dated, and the Department has not otherwise introduced testimony to indicate when the manual was prepared by the Department

The Department argues the Court of Appeals "simply interpreted the [apportionment] statute based on the pertinent language and this Court's precedent." (Department's Return at 13.) The Court of Appeals did more than that. It disregarded the Department's long-standing policy of treating manufacturers and service provides differently for apportionment purposes and failed to resolve any ambiguities with respect to the meaning of "manufacturing" or "manufacturer" in favor of Duke Energy as required under this Court's precedent. *See* discussion, *supra,* at Part I.1. It also made the factual determination that "calculating the apportionment based on sales alone would not reasonably represent the taxpayer's business because Duke Energy has significant capital investment and employment in South Carolina" without giving either party the opportunity to present evidence regarding whether applying the single-factor method actually results in a fair representation of Duke Energy's business activities in the State. *Duke Energy*, 410 S.C. at 425, 764 S E.2d at 718. (*See also* Department's Return at 13.)

Not only is the Court of Appeals' analysis in direct conflict with this Court's recent decision in *CarMax Auto Superstores*, but it also renders South Carolina's alternative apportionment statute meaningless. The alternative apportionment statute is a "relief mechanism," which authorizes a party to apply an alternative method to "effectuate an equitable apportionment of the taxpayer's income" when the standard apportionment formula does not fairly represent the taxpayer's business activities in the State. *Media Gen Commc'ns*, 388 S.C. at 151. This Court only recently held that a party claiming that the statutory formula does not fairly represent the taxpayer's business activity in South Carolina bears the burden of proof under the alternative apportionment statute *CarMax Auto Superstores*, 2014 S.C. LEXIS 550 (S.C Dec. 23, 2014). The

Department's position and the Court of Appeals' analysis presume that apportioning Duke Energy's income based on the single-factor formula does not fairly represent its business activities and the Court of Appeals remedy of that was its strained construction of the standard apportionment formula. The Court of Appeals therefore imputed an alternative apportionment mechanism into the standard apportionment provision.

Accordingly, this Court should grant a writ of certiorari to prevent the Court of Appeals' decision from rendering this Court's holding in *CarMax Auto Superstores* and the alternative apportionment statute superfluous and meaningless, and from affording the Department with unrestricted ability to alter taxpayers' apportionment results without any legal or factual justification

II. This Court should issue a writ of certiorari because the Court of Appeals erroneously found that "total gross receipts" and "total sales" do not include all of Duke Energy's receipts from sales of securities.

1. The Court of Appeals failed to apply the rule established by this Court that a tax statute must be given its plain and ordinary meaning.

The Gross Receipts issue is about whether "***total gross*** receipts" means "gross" and "***total*** sales" means "all" or whether those terms mean less than "gross" or "all" for purposes of South Carolina's apportionment statutes which require the inclusion of "***total gross*** receipts" or "***total*** sales " *See, e g*, S C Code Ann § 12-6-2290 (applicable for tax years beginning after 1995) and former S.C Code Ann. § 12-7-1190 (applicable for tax years prior to 1996) (emphasis added); S.C. Code Ann. § 12-6-2280 (for tax years after 1995) and former S.C. Code Ann. § 12-7-1170 (for tax years prior to 1996) (emphasis added). This is a novel issue and an issue of first impression for this Court.

It is black letter law that "[t]he language of a tax statute must be given its plain ordinary meaning in the absence of an ambiguity therein . . . . [I]f a legislative intent is

clearly apparent from the language of the statute there is no occasion to resort to the rule of statutory construction " *Beach v Livingston*, 248 S.C. 135, 139, 149 S.E.2d 328, 330 (1996); *see also Duke Power Co v S C Tax Comm'n*, 292 S.C. 64, 66, 354 S.E.2d 902, 903 (1987) ("The . . . language [of the statute] clearly states that the license fee on power companies, such as Duke, is based on entire gross receipts and not just receipts from customer charges.").[3] Applying this standard to the apportionment statutes at issue in this case, "total gross receipts" or "total sales" does not mean only "net receipts" or "profits."

The intent of the legislature is clear from the statutory language: "total gross receipts" means gross and "total sales" means all. This meaning is further supported by the South Carolina Legislature's recent actions. Effective for tax years after 2006, the Legislature changed the meaning of "gross receipts" and total "sales" to eliminate receipts from the sales of securities other than profits from the South Carolina income tax apportionment formula. S.C. Code Ann. § 12-6-2295(B)(1). If during the periods at issue in this case "total gross receipts" and "total sales" excluded sales of securities, the 2006 law change would not have been necessary

Indeed, this change in law was material and drastic. The 2006 law change added a new section to the statute which excluded ten new categories of receipts, including receipts from sales of securities other than profits, from the definition of "gross receipts." When the Legislature amends a statute to include a ***material*** change, there is a

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[3] The Court of Appeals held and the Department agrees that the plain language of a statute should control *Duke Energy*, 410 S C at 426-29, 764 S E 2d at 718-20, (Department's Return at 18) However, in an attempt to confuse this Court, the Department contends that Duke Energy "erroneously argues that it should prevail because the [apportionment] 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 " (Department's Return at 18) That is simply incorrect Duke Energy agrees that the plain meaning of the statutory language should control (Duke Energy's Cert Pet at 19-20), and submits that in the event the Court of Appeals had doubt as to the meaning of the terms "total gross receipts" and "total sales" and found them ambiguous, such doubt must be resolved in favor of Duke Energy (Duke Energy's Cert Pet at 22)

presumption that the Legislature intended to change the existing law rather than to clarify its original intent. *Key Corporate Capital, Inc v Cnty of Beaufort*, 373 S.C. 55, 60-61, 644 S.E.2d 675, 678 (2007) (emphasis added). Excluding ten new categories of receipts from the definition of "gross receipts" and "sales" is material by any measure.

In its Return, the Department attempts to sidestep this change in law by arguing that because the Legislature did not act until 2006, the Legislature must have supported the Department's purported long-standing policy regarding the interpretation of "total gross receipts" and "total sales." (Department's Return at 21) Yet the Department has offered no evidence explaining why, if the Legislature supported the Department's view of the law, it would have acted at all. And the changes to the law were so sweeping and drastic that it is simply impossible to believe that the change was merely an affirmation of the Department's position.

Therefore, applying the plain meaning rule, as one must under this Court's precedent, the Legislature's intent to require the inclusion of "all" receipts from business activities and sales in South Carolina in the apportionment formula is readily apparent from the language ("total gross receipts" and "total sales") of the apportionment statutes prior to the 2006 legislative change, and thus "there is no occasion to resort to the rule of statutory construction " *Beach*, 248 S.C. at 139, 149 S.E.2d at 330 (1996). Yet, ignoring the plain meaning rule, the ALC and the Court of Appeals ignored that principle. If the terms "total gross receipts" and "total sales" meant anything less than all for apportionment purposes, the terms would have been narrowly defined as they were narrowly defined by the Legislature in 2006.[4]

[4] In an apparent attempt to suggest some culpable responsibility, the Department claims that because Duke Energy did not include all of its receipts from sales of securities on its original returns, it must have agreed

2. The Court of Appeals erroneously held that a portion of the proceeds from sales of securities are not "receipts" for apportionment purposes.

The Department argues, for the very first time in these proceedings, that a portion of Duke Energy's receipts from sales of securities does not constitute a "sale" [5] or a "receipt." (Department's Return at 15-16.) The Department claims that concluding otherwise "is contrary to the purpose of the apportionment statutes." (*Id.* at 16.) Yet, the Department cites to no authority in support for its conclusory proposition other than to argue that the Court of Appeals' holding to that effect was correct.[6]

The Court of Appeals' conclusion that receipts from sales of investment securities other than the profit do not constitute "receipts" not only contradicts the plain language of the apportionment statutes, but also grossly misunderstands the nature of investment securities. (Duke Energy's Cert Petition at 20-23) The ALC and the Court of Appeals

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that the apportionment statutes did not require the inclusion of all receipts (Department's Return at 18-19) This unfounded and uncalled for allegation is not true and makes little sense Multi-state taxpayers, such as Duke Energy, file numerous state tax returns every year, often more than once a year It is not uncommon for such taxpayers to make errors in filing their tax returns Indeed, it is for that reason why state laws permit state revenue agencies to review a taxpayer's tax returns and make corrections by issuing assessments, or afford taxpayers with the opportunity to correct any errors by filing refund claims In fact, Duke Energy's witness testified under oath that Duke Energy filed its original tax returns by erroneously apportioning its income based on the multi-factor formula, an error which Duke Energy later corrected

[5] The Department mischaracterizes the Court of Appeals' holding While the Court of Appeals concluded that receipts from sales of investment securities other than the profit are not "receipts," the Court never found that such receipts are not "sales," contrary to the Department's assertion Indeed, the Court of Appeals concluded that Duke Energy "***sells*** the investment [securities] for a profit " *Duke Energy*, 410 S C at 429, 764 S E 2d at 719-20 (emphasis added)

[6] The Department cites decisions from other states that are distinguishable from this case (Department's Return at 16-17) The court in *Am Tel & Tel Co v Dir , Div of Taxation*, 476 A 2d 800 (N J Super Ct App Div 1984) held that the New Jersey statute, which only referred to "receipts" as opposed to "total gross receipts," could be interpreted to mean "net receipts" instead of "gross receipts " The Department also cites *Sherwin-Williams Co v Indiana Dep't of State Rev* , 673 N E 2d 849, 853 (Ind T C 1996), which was in essence an alternative apportionment case "In some cases, certain gross receipts should be disregarded in determining the sales factor to effectuate ***equitable apportionment*** " (Emphasis added) Here, the record contains no evidence regarding whether including all receipts from Duke Energy's sales of securities justifies the application South Carolina's alternative apportionment statute, S C Code Ann § 12-6-2320 Finally, in *Walgreen Ariz Drug Co v Ariz Dep't of Rev* , 97 P 3d 896 (Ariz Ct App 2004) and *Gen Motors Corp v Franchise Tax Bd* , 39 Cal 4th 773, 139 P 3d 1183 (2006), the courts' analogy to withdrawing money from a bank account misunderstands the nature of the negotiable, investment securities at issue in this case The majority of cases from other states have concluded that all receipts from sales of securities must be included in the apportionment factor (R p 8373-8374)

failed to understand that a gross receipt does not become a non-gross receipt due to the frequency of the transaction [7] Nor did the ALC or the Court of Appeals analyze or understand the difference between negotiable securities as assets and non-negotiable recovery of one's own money. Duke Energy's receipts from sales of investment securities do not differ economically from all of its other sources of business income and the Department has not argued to the contrary. (Duke Energy's Cert. Petition at 20-23.) Consequently, based on the plain meaning of the standard apportionment statute, the apportionment formula should include all receipts (including all receipts from sales of securities) from all sources of Duke Energy's business income unless otherwise provided by the Legislature.

3. The Court of Appeals impermissibly imputed an alternative apportionment in interpreting the standard apportionment formula statute.

The Court of Appeals' strained interpretation of the terms "total gross receipts" and "total sales" in essence constitutes an impermissible imputation of an *ipso facto* alternative apportionment formula into the standard apportionment statutes. The Department argues the Court of Appeals' analysis is justified because it claims "applying principles of statutory interpretation to the apportionment formula is not an application of alternative apportionment." (Department's Return at 18.) The Department fails to

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[7] The Department once again attempts to confuse the Court by characterizing Duke Energy's sales of securities as risk-free transactions First, nothing in the record supports such a proposition Second, the timing of this appeal demonstrates the irony – and inaccuracy – of the Department's characterization. Only recently we have seen more than a few local governments declare bankruptcy and default on their bonds *See, e g , Detroit is Broke, Could Bankruptcy Lie Ahead?* (May 13, 2013), *available at* http //news yahoo com/detroit-broke-could-bankruptcy-lie-ahead-185859786 html , *Another California City Scrambling to Avoid Bankruptcy* (September 27, 2012), *available at* http //www foxnews com/politics/2012/09/27/another-california-city-scrambling-to-avoid-bankruptcy/ (stating that Central Valley would be the fourth California city to file for municipal bankruptcy this year), *City Council in Harrisburg Files Petition of Bankruptcy* (October 12, 2011), *available at* http //www nytimes com/2011/10/13/us/harrisburg-pennsylvania-files-for-bankruptcy html?_r=0 In short, there is no such thing as a risk-free investment The Department's characterization of Duke Energy's investment in government securities is naive at best, and disingenuous at worst

recognize, however, that all the Court of Appeals had to do is look to the plain meaning of the terms "total gross receipts" and "total sales." *See, e g , Beach*, 248 S.C at 139, 149 S.E 2d at 330.

The Court of Appeals did not apply the plain meaning rule in construing "total gross receipts" or "total sales," and instead held that "total" and "gross" – both undefined for South Carolina income tax purposes[8] – mean less than all. The Court of Appeals also failed to apply the principle that in the event of doubt, tax statutes must be construed in favor of the taxpayer. *Alltel Commc'ns*, 399 S.C. at 321, 731 S E 2d at 873.

Instead, the Court of Appeals – and the ALC - subsumed alternative apportionment (or distortion) arguments into its analysis of the standard apportionment formula In the Court's view, including all proceeds from sales of securities "artificially inflat[es] the denominator of the formula" or "artificially reduce 'the base which reasonably represent the proportion of the trade or business carried on within this State.'" *Duke Energy*, 410 S C. at 428, 764 S.E.2d at 719. Furthermore, the Court of Appeals affirmed the ALC's ruling with regard to the Gross Receipts Issue that "distortion [would] inevitably result[] from the inclusion of principal in the standard apportionment formula " (R. p. 77-78) The Court of Appeals – and the ALC - reasoning presumes that the inclusion of all of Duke Energy's receipts from sales of securities inherently does not reasonably represent Duke Energy's business activity in the State and the Court of Appeals remedy of that was its strained interpretation of the statutory language of the standard apportionment formula. The Court of Appeals therefore imputed an alternative apportionment mechanism into the standard apportionment provision.

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[8] The South Carolina Code itself contain eighty-five uses of "gross" for tax purposes, including gross receipts,, gross income, gross wages, and gross proceeds (R p 8373) These statutes uniformly have been interpreted by the Department to mean "all" and not "less than all "

Allowing the Court of Appeals – and the ALC - to single-handedly modify the language of the apportionment statutes without any factual or legal justification and therefore usurping the Legislature of the legislative function under the disguise of statutory interpretation not only violates the Separation of Powers Clause, but also overturns this Court's recent holding in *CarMax Auto Superstores* and renders South Carolina's alternative apportionment statute set forth in S.C. Code Ann. section 12-6-2230 meaningless. *See* discussion, *supra,* at I 2.[9]

The Department also alleges that an inclusion of all receipts from sales of securities inherently produces an "absurd result." (Department's Return at 3, 18.) The Department has cited to no authority or presented no evidence in support of its allegation. Moreover, other state courts that have considered the "gross receipts" issue more recently have specifically rejected the "absurd results" line of cases for two reasons:

> First, they do violence to the language of the statutes they interpret. In each case, the same language governs both sales of off-the-shelf products and sales of securities *AT&T* and its progeny offer no explanation why in one instance that language should require inclusion of gross proceeds and in the other require inclusion of only net proceeds. Second, they overlook the fact no absurd result is required

Microsoft Corp v Franchise Tax Bd, 39 Cal. 4th 750,763, 139 P.3d 1169, 1177 (2006); accord *Sherwin-Williams Co v Johnson*, 989 S.W 2d 710, 715 (Tenn. Ct. App. 1998) These courts have found that where the statutory language is plain and clear, "[a]n absurd result is not necessary for, in spite of the plain language of [the sales factor statute], the

[9] Indeed, both the ALC and the Department themselves recognized that in construing the meaning of "total gross receipts" and "total sales," the proper analysis required under South Carolina law is first, "determining what the statute says," and "if it does result in something that's absurd, then you would find that apportionment – the standard apportionment formula is on that should not be used and it would invoke the statute to allow you to use the more appropriate formula " (R p 2936, lines 17-23, R p 2938, lines 15-18, R p 2938, line 23-p 2939, line 11) *See also* the Department's Determination denying Duke Energy's refund claims (R p 5554, n 8) ("In the alternative, the Department could argued that the return of principal should be excluded from the sales factor based on an alternative apportionment formula found in § 12-21-2320(A) as this would more fairly represent the taxpayer's business in South Carolina ")

commissioner may opt for a different scheme of assessment whenever the resulting apportionment does not fairly represent the taxpayer's business in this state." *Sherwin-Williams*, 989 S.W 2d at 715

Accordingly, this Court should grant a writ of certiorari to review and reverse the Court of Appeals' decision

4. The ALC erroneously concluded that the Department had an alleged long-standing policy of including less than all receipts from sales of securities in the apportionment formula.

The Department contends that it has a long-standing policy "to exclude recovered investment principal from the apportionment formula." (Department's Return at 19.) The Department points to two administrative rulings issued by the Department's predecessor (the South Carolina Tax Commission) in different contexts. But more importantly, the Department's purported long-standing policy is contrary to South Carolina law for two reasons.[10]

First, in its so-called "long-standing policy," the former Tax Commission concluded that, under the facts in the ruling, "[t]o include the gross sales price [from sales of tangible and intangible business connected property] tends to ***distort*** the sales factor " S.C. Tax Comm'n No. I-D-309, 1982 S C. Tax LEXIS 6, at *6 (S.C. Dep't of Rev. June 30, 1982) (emphasis added). In this case, the only issue before the Court is whether, based on the plain meaning of the apportionment statutes, the total receipts from Duke Energy's sales of securities must be included in the apportionment formula. Whether the inclusion of such total receipts results in "distortion" thereby necessitating the application of an apportionment method other than the statutory required method is an entirely

[10] The Department incorrectly asserts that Duke Energy did not dispute the Department's allegation of the existence of such policy (Duke Energy's Reply Br at 1)

separate and inherently factual question that, as the Department points out, is ***not*** before the Court (Department's Return at 17-18).

Second, even if the administrative rulings cited by the Department were to establish a long-standing policy, such a policy would be contrary to the plain language of the apportionment statutes. South Carolina courts have long held that "in construing a statute, words must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation." *State v Leopard*, 349 S.C. 467, 471, 563 S.E.2d 342, 344 (Ct App. 2002). In the instant case, the language of S.C. Code Ann. § 12-6-2290 and § 12-6-2280, and their predecessors, could not be more clear in that the ***"total gross,"*** and not net, receipts and ***"total,"*** and not net, sales must be included in the computation of the gross-receipts apportionment factor The Department has not presented a single shred of evidence that would indicate that, in enacting the gross receipts apportionment statute, the South Carolina Legislature intended otherwise. If the Legislature had wanted to limit the scope of "gross receipts" by only including the net receipts from certain transactions, it was free to do so (and subsequently did do so in 2006).

The Department's purported policy is in effect asking this Court to retroactively usurp the role of the Legislature and create a limitation that did not otherwise exist in violation of the Separation of Power Clause of the South Carolina Constitution. S.C Const. art I, § 8, *Am Petroleum Inst v S C Dep't of Rev*, 382 S.C. 572, 579, 677 S.E.2d 16, 20 (2009); *Henderson v Evans*, 268 S.C. 127, 130, 232 S.E.2d 331, 333 (1977). (*See also* Duke Energy's Cert Pet. at 17-18.) Therefore, the Department's purported policy is

invalid and this Court should issue a writ of certiorari to review and reverse the Court of Appeals' holding to the contrary.[11]

CONCLUSION

For the above-stated reasons, Duke Energy respectfully requests that this Court issue a writ of certiorari to review the Court of Appeals' Opinion in this matter.

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February 2, 2015

[11] Contrary to the Department's assertion, the Timeliness Issue is not dispositive of Duke Energy's refund claims for the years 1978-1993 because the Court of Appeals never considered that Issue as it erroneously found for the Department with regard to the Gross Receipts and Manufacturing Issues Therefore, if the Court of Appeals decision is reversed, the case should be remanded for consideration of the Timeliness Issue because the ALC erroneously found for the Department with respect to that issue

THE STATE OF SOUTH CAROLINA
in The Supreme Court

APPEAL FROM THE ADMINISTRATIVE LAW COURT

Ralph K. Anderson III, Administrative Law Judge

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

PROOF OF SERVICE

I certify that I have served Petitioner's Reply to the Return to the Petition for a Writ of Certiorari on counsel of record for the South Carolina Department of Revenue and to the Clerk of the Court of Appeals by depositing a copy of it in the United States Mail, postage prepaid, on February 2, 2015, addressed to:

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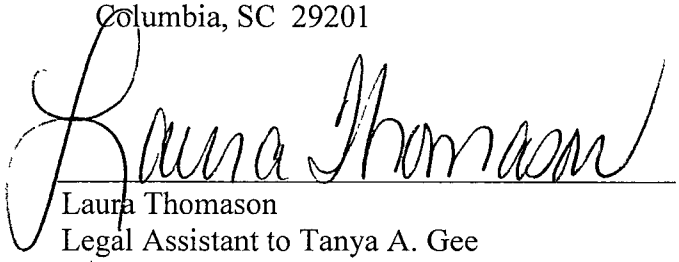
Hilton Head Island, SC 29928

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
1015 Sumter Street
Columbia, SC 29201



Laura Thomason
Legal Assistant to Tanya A. Gee

NEXSEN|PRUET

Tanya A. Gee
Special Counsel

February 2, 2015

HAND DELIVERED

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

Re: ***Duke Energy Corp. v. S.C. Dep't of Revenue***
Docket No.: 10-ALJ-17-0270-CC
Court of Appeals Opinion No. 5274

Dear Mr. Shearouse:

Enclosed for filing are the original and eight (8) copies of the Reply to the Return to the Petition for a Writ of Certiorari in the above matter along with a Proof of Service. Please return a clocked-in copy of each to us via our courier.

Thank you for your assistance in this matter.

Very truly yours,

Tanya A. Gee

Enclosures

cc. The Honorable Jenny Abbott Kitchings
Milton G Kimpson
John M S Hoefer
Tracey C Green
John W. Roberts
Harry A. Hancock

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The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
1015 Sumter Street
Columbia, SC 29201

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