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.

Brief of Respondent

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Counter Statement of the Issues

1. Duke Energy regularly invests excess cash from its operations in short-term investments and recovers the invested principal 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 include in its apportionment formula the amount of principal recovered from short-term investments of this excess cash?

2. On December 30, 2002, Duke Energy filed amended returns for the years 1978-2001 seeking an income tax refund in excess of $126 million, plus interest. The Administrative Law Court determined that the refund claims for 1978-1993 were untimely filed based on the applicable statutory periods and Duke Energy has not appealed that decision to this Court. Should this Court affirm the ALC's denial of Duke Energy's refund claims for 1978-1993?

Counter Statement of the Case

This case involves Duke Energy's amended South Carolina corporate income tax returns for the years 1978-2001 filed on December 30, 2002, and seeking a tax refund of approximately $126 million, plus interest. Duke Energy is now challenging the decision of the Court of Appeals to affirm the Administrative Law Court's order affirming the Department of Revenue's denial of the refunds sought. Duke Energy contends that the Court of Appeals erred in holding that it could not include recovered investment principal in its multi-state apportionment formula for 1978-2001.

In its original returns for 1978-2001, Duke Energy apportioned its income[1] using the property, payroll, and sales factors[2] for entities "whose

[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.

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. For 1978-1995, the sales factor was defined as "[t]he ratio of sales made by such taxpayer during the income year which is attributable to this State to the total sales made by such taxpayer everywhere during the income year..." S.C. Code Ann. § 12-7-1170 (years before 1996). For 1996 through 2001, the sales factor was similarly defined as "a fraction in which the numerator is the total sales of the taxpayer in this State during the taxable year and the denominator is the total sales of the taxpayer everywhere during the taxable year. S.C. Code Ann. § 12-6-2280(A) (years after 1995).

Duke Energy did not include in the sales factor of its apportionment formula of its original 1978-1999 returns the amount of principal recovered from its short-term investment transactions entered into as part of its treasury department's cash management program; rather, it included only the interest or gain from these transactions. [App'x. at 51 (Am. Order Granting Summ J. in Part & Denying Summ. J. in Part at 3 (Summ. J. Order)).] However, on its originally-filed returns for 2000 and 2001, and then

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[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.

on its amended returns for 1978-2001, Duke Energy added to the sales factor the amount of investment principal related to these transactions.[3]

On February 4, 2010, the Department issued a written Determination denying Duke Energy's refund claims in whole. With respect to Duke Energy's change in treatment of its investment principal for apportionment purposes, the Department determined that including recovered principal in the apportionment formula was contrary to the Department's long-standing administrative policy, would lead to an absurd result, and would unreasonably represent the amount of business Duke Energy does in South Carolina (recovery-of-principal issue).[4] [App'x. 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.

Following the completion of discovery, the Department moved for summary judgment on all three issues—timeliness, manufacturing, and recovery-of-principal. 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,

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[3] Duke Energy also changed to the single factor apportionment formula. *See* S.C. Code Ann. § 12-6-2290.

[4] The Department also denied Duke Energy's refund claims on the basis that the claims for many of the years at issue were untimely (timeliness issue) and that Duke Energy was a manufacturer required to use the multi-factor apportionment formula (manufacturing issue). [App.'x. at 5548-49, 5555-56 (Dep't Det'n at 2-3, 9-10).]

2012, the ALC granted in part the Department's motion for summary judgment, ruling in pertinent part that Duke Energy's amended returns filed for the 1978-1993 tax years were untimely and that Duke Energy could not include recovered principal from short-term investment transactions in its standard apportionment formula as a matter of law.[5] The ALC denied the Department's motion with respect to the manufacturing issue and conducted a contested case hearing regarding the manufacturing issue on September 5-6, 2012. 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 amended returns.[6]

Duke Energy timely filed a Notice of Appeal to the Court of Appeals on January 3, 2013. That court heard oral arguments on February 18, 2014, and, on October 8, 2014, affirmed the ALC's determinations on the manufacturing and recovery-of-principal issues.[7] *Duke Energy Corp. v. S.C. Dep't of Rev.*, 410 S.C. 415, 764 S.E.2d 712 (Ct. App. 2014). In affirming the ALC's ruling

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[5] On October 11, 2012, the ALC issued its Summ. J. Order and the Order Denying Motion for Reconsideration in Part and Granting Reconsideration in Part, 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. In the Summary Judgment Reconsideration Order, the ALC specifically found that the Department had a long-standing administrative policy of excluding recovered investment principal from the apportionment formula. [App'x. at 87 (Summ. J. Recons. Order at 3 & n.2).]

[6] Duke Energy moved for reconsideration but, on December 4, 2012, the ALC reaffirmed its decision.

[7] Because its decision regarding these two issues resolved the appeal, the Court of Appeals did not address the timeliness issue.

on the recovery-of-principal issue, the Court of Appeals held that, based on the plain meaning 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.[8] *Id.* at 426-29, 764 S.E.2d at 718-720. Duke Energy's timely Petition for Rehearing was denied on November 21, 2014.

On December 21, 2014, Duke Energy petitioned this Court for review of the manufacturing and recovery-of-principal issues. On April 9, 2015, the Court denied Duke Energy's petition as to the manufacturing issue and granted the petition as to the recovery-of-principal issue.

Summary of Argument

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. This repeatedly invested and recovered principal is nothing more than the company's own money—no different than an amount loaned and subsequently returned with interest or an amount deposited and later withdrawn from an interest-bearing bank account. The number of times Duke Energy or any other taxpayer invests and recovers this principal is not a reflection of its business activities within and outside of the State.

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[8] Contrary to Duke Energy's baseless assertion, the Court of Appeals did not reject Duke Energy's position "simply because it results in [Duke Energy] paying less tax." *See* Br. of Pet'r at 3.

The Court of Appeals correctly held that the recovered principal from Duke Energy's short-term investments should not be included in Duke Energy's apportionment formula based on the plain meaning of the standard apportionment statutes. The Court of Appeals' decision avoids the absurdity that would result from application of Duke Energy's proposed interpretation. The decision also is entirely consistent with the Department's long-standing policy, one which Duke Energy filed its tax returns consistently with for at least 21 years, and it reflects the almost universal rejection of the result Duke Energy seeks, notwithstanding what Duke Energy espouses is the "modern view."

On the other hand, Duke Energy's challenge does not withstand scrutiny. The General Assembly did not change the law by expressly defining the terms "sales" and "gross receipts" after the periods at issue through the enactment of § 12-6-2295. Nor did the Court of Appeals "impute" or do "an end-run around" the alternative apportionment statute by interpreting the standard apportionment statute. Duke Energy's new claim that there is "no return of principal" is directly contradicted by the undisputed record, Duke Energy's prior arguments before the ALC, and its current argument with respect to § 12-6-2295. Duke Energy's entire position also is undermined by its concession that the recovered principal from some of its short-term investment transactions for which its refund claims are based is properly excluded from the apportionment formula. Duke Energy's remaining

argument regarding a violation of the Separation of Powers Clause is not preserved and is meritless. Therefore, the decision of the Court of Appeals should be affirmed.

Additionally, the ALC properly determined that Duke Energy's refund claims for 1978-1993 were untimely and Duke Energy has not appealed that ruling to this Court. Accordingly, Duke Energy's appeal with respect to these years must be denied.

Statement of Facts

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.[9] *Duke Energy*, 410 S.C. at 427-28, 764 S.E.2d at 719; [App'x. at 3007:16-21 (Dep. of Sherwood L. Love); App'x. at 8214 (Aff. of Sherwood L. Love).] After a short period, the company 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. *Id.* Because liquidity was a required characteristic of these investments, the transactions were not risky and were typically outstanding between one and 30 days. [App'x. at 3007:22-3008:3, 3034:21-25, 3039:5-7 (Love Dep.); *see also* App'x. at 8368 (Reply Br. of Appellant at 7 ("The fact that one may repeatedly buy similar,

[9] Loan repurchase agreements or "repos" are generally overnight investment transactions secured by U.S. government and agency securities. [App'x. at 3007:22-3008:3 (Love Dep.).]

short-term investments is reflective of an investment strategy designed to provide liquidity and a rate of return at an acceptable level of market risk.")).] Indeed, Duke Energy never suffered a loss on these investments. [App'x. at 3039:2-7 (Love Dep.).] The gain or interest was minimal relative to the principal invested, but Duke Energy could repeatedly reinvest the principal recovered. *Duke Energy*, 410 S.C. at 427-28, 764 S.E.2d at 719; [*See* App'x. at 2998:4-17 (Love Dep.).]

Duke Energy's short-term investments were transacted outside of South Carolina. [App'x. at 3012:19-3016:14 (Love Dep.).] Decisions regarding Duke Energy's short-term investment transactions were made by a small subgroup of Duke Energy's treasury department, the "Short-Term Liquidity Group," located in Charlotte, North Carolina using company-approved investment guidelines that defined the "type, term, and ratings of permitted investment securities."[10] [App'x. at 8216 (Love Aff.).] The Short-Term Liquidity Group was responsible for ensuring that Duke Energy's "excess cash was appropriately invested, with a goal of minimizing cash in corporate bank accounts." [*Id.*]

In its amended returns, because its investment transactions occurred outside of South Carolina, Duke Energy reported the amount of recovered investment principal solely in the denominator of the sales factor.

[10] The "investment accounts" were maintained in New York and Georgia, however. [App'x. at 5579 (Duke Energy Req. for Contested Case Hr'g).]

Accordingly, Duke Energy's modified treatment of the principal from its short-term investment transactions had the effect of reducing the ratio of sales in South Carolina versus sales everywhere, thereby reducing the amount of taxable income attributable to South Carolina.[11] For example, on its originally-filed 1999 return, Duke Energy reported about $1.2 billion in sales within South Carolina and $4.8 billion in total sales from everywhere, yielding a sales factor of approximately 25%. [*See* App'x. at 5193 (Pet'r Hr'g Ex. 22).] On its 1999 amended return, Duke Energy added approximately $6 billion of recovered principal from short-term investment transactions to its sales from everywhere (*i.e.*, the denominator), thereby reducing the sales factor to approximately 11%. [*Id.*]

Argument

I. The Court of Appeals correctly affirmed the Administrative Law Court's determination that Duke Energy is not entitled to include in its apportionment formula the amount of principal recovered from short-term investments of excess cash from operations.

A. *The Court of Appeals correctly rejected Duke Energy's position that recovered principal must be included in the standard apportionment formulas.*

Recognizing that the recovery of investment principal from Duke Energy's very typical short-term investment transactions is simply the recovery of Duke Energy's own money and, thus, is not a sale or receipt, the Court of Appeals correctly held that the plain meaning of the apportionment

[11] However, this would not be the result for all taxpayers.

statutes does not include the recovered principal in the apportionment formula. *Duke Energy*, 410 S.C. at 428-29, 764 S.E.2d at 718-20;[12] *see Travelscape, LLC v. S.C. 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.").

Duke Energy's proposed treatment of its repeated recovery of investment principal as a "sale" is neither reasonable nor practical. *Id.*; *see also TNS Mills, Inc. v. S.C. Dep't of Rev.*, 331 S.C. 611, 624, 503 S.E.2d 471, 478 (1998) ("Subtle or forced construction of statutory words for the purpose of expanding a statute's operation is prohibited."). And there is no reasonable or practical interpretation that would expand the term "sales," or the standard apportionment statutes as whole, to include the repeated recoveries of principal from various cash-equivalent short-term investment transactions. Expanding the term "sales" and the apportionment statutes to accommodate Duke Energy would be tantamount to requiring an entity to include as a

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[12] Likewise, the ALC also correctly recognized that principal is not income, is not an expense, and is not a deduction, and thus, its recovery does not fit within the terms "sales" or "gross receipts" or the statutory apportionment scheme as a whole. [App'x. at 75-79 (Summ J. Order at 27-31); *see also* App'x. at 1831-32 (Mem. Opp'n. Duke Energy's Mot. for Recons of Summ. J. Order at 12-13).]

"sale" all amounts deposited and later withdrawn from an interesting-bearing bank account or requiring a car rental entity to include as a "sale" not just the rental price but the basis of a vehicle every time a customer returns a rented vehicle. *See, e.g., Am. Tel. & Tel. Co. v. Dir., Div. of Taxation*, 476 A.2d 800, 802 (N.J. App. Div. 1984) ("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. The bulk of funds flowing back to [the taxpayer] from investment paper was simply its own money.").[13]

Duke Energy can point to nothing in the plain language of the statutes requiring the unreasonable treatment of these investment recoupments as "sales." This is especially so considering that the purpose of the apportionment statutes is to determine the "base which reasonably represents the proportion of the trade or business carried on within this State." S.C. Code Ann. § 12-6-2210. It strains credulity to argue that the extent and frequency to which a taxpayer invests and promptly recovers its own money reasonably represents business activities. *Duke Energy*, 410 S.C. at 426-29, 764 S.E.2d at 719-20; *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, but the undefined word and its meaning in conjunction with the whole purpose of the statute and the policy of the law.").

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[13] *See also* discussion *infra* Part I.B.

Accordingly, neither the term "sales" nor the standard apportionment statutes as a whole require Duke Energy or any other taxpayer to report the return of principal from various short-term investment transactions in their standard apportionment formulas.

Nevertheless, Duke Energy contends that the Court of Appeals erred because the word "sales" is modified by "total" and "total means all." Br. of Pet'r at 14. However, the use of "total" in the statute does not answer the question of whether the return of principal from various similar short-term investment transactions is a "sale" and included in the standard apportionment formula. Indeed, Duke Energy's focus on the word "total" is wholly misplaced as shown by the General Assembly's use of "total" in § 12-7-1170 only with respect to "sales" from everywhere and not with respect to "sales" attributable to South Carolina. *See* Br. of Pet'r at 13 (quoting § 12-7-1170). That is, if Duke Energy's interpretation is accepted, for years prior to 1996, taxpayers would only include the return of principal from short-term investment transactions conducted in South Carolina in the denominator of the sales factor but not the numerator. This suggested interpretation is not supported by a plain reading of the statutory language or context.

Duke Energy further contends that its interpretation of "total sales" and the apportionment statutes is supported by the 2006 enactment of § 12-6-2295, which, in part, expressly defined the term "sales" to exclude "the

repayment, maturity, or redemption of the principal of a loan, bond, or mutual fund or certificate of deposit or similar marketable instrument." S.C. Code Ann. § 12-6-2295 ("Items included and excluded from terms 'sales' and 'gross receipts'"); *see* Br. of Pet'r at 14-15. Duke Energy contends this was a "material and drastic" change that confirms the plain meaning of the term "sales" includes the return of principal. Br. of Pet'r at 15. Duke Energy is incorrect.

Section 12-6-2295 did not change the existing apportionment law concerning the recovery of investment principal. As the ALC recognized, the General Assembly may amend the law to clarify its original intent. [App'x. 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 & 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."). In this argument, Duke Energy ignores that § 12-6-2295 also expressly includes a number of common items in the term "sales" that, under Duke Energy's theory, would not have been included before 2006, such as "receipts from the sale or rental of property maintained for sale or rental to customers in the ordinary course of the taxpayer's trade or business including inventory" and "net gain from the sale of property used in the trade or business." *See* S.C.

Code Ann. § 12-6-2295(A). Considering these provisions and the statute as a whole, the only reasonable reading of § 12-6-2295 is that the General Assembly sought to clarify the existing legislative intent regarding a taxpayer's recovery of its invested principal.[14] *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.").

Duke Energy further argues that it should prevail because the statutes are ambiguous and, thus, the Court of Appeals should have resolved any doubt in its favor. Br. of Pet'r at 16. The fact that the Department disagrees with Duke Energy's novel apportionment principle that it had never applied in at least 21 years of filing tax returns does not make the statute ambiguous.[15] *See S.C. 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

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[14] This is particularly true given the ALC's finding that the Department had a long-standing policy that the recovery of investment principal is not included as a sale in the apportionment formula. *See also* discussion *infra* Part I.C. Recognizing the Department's policy, the ALC correctly determined that "[i]f the Legislature was so troubled by an interpretation that would 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." [App'x. at 86 (Summ. J. Recons. Order at 2).]

[15] Also, contrary to Duke Energy's suggestion, *see* Br. of Pet'r at 16, South Carolina's definition of "sales" is not the same as the definition found in the Uniform Division of Income for Tax Purposes Act (UDITPA).

two ***reasonable*** interpretations); *see also 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.").

But even assuming that there is uncertainty regarding the statutory treatment of recovered principal for apportionment purposes, Duke Energy's argument regarding the benefit of any doubt for tax statutes does not apply. The issue here is not whether Duke Energy should be subject to a tax or whether a certain tax statute applies to or should be enforced against Duke Energy. *See Mitul Enterprises, L.P. v. Beaufort Cnty. Assessor*, 410 S.C. 430, 433, 764 S.E.2d 720, 722 (Ct. App. 2014) (holding that because "statute itself does not define who shall be taxed" it "does not require [ ] favorable taxpayer construction"), *cert. denied* (June 3, 2015). Rather, the issue is the construction of the standard apportionment statutes applicable to all taxpayers.[16] Accordingly, the Court is required to construe the apportionment statutes like any other statute: "'reasonably' and 'as a whole with the view of

[16] Indeed, if another multi-state taxpayer conducted its liquidity operations in South Carolina, including recovered investment principal in the apportionment formula could result in an increase in the amount of taxable income attributable to South Carolina. However, under Duke Energy's ambiguity theory, that taxpayer would have to be given the benefit of the doubt if it challenged the apportionment statutes. This position would result in the untenable position of the Department having to apply two conflicting constructions of the apportionment statutes.

carrying out [their] purpose and intent.'" *Id.* at 434, 764 S.E.2d at 722 (quoting *Fuller v. S.C. Tax Comm'n,* 128 S.C. 14, 21, 121 S.E. 478, 481 (1924)).

Thus, the only reasonable and logical interpretation of the apportionment statutes is the one which excludes recovered investment principal from the standard apportionment formula.[17] Moreover, even if there is any uncertainty regarding the treatment of recovered principal for apportionment purposes, the Department has had a long-standing policy—applied for at least 30 years—of excluding recovered investment principal from the apportionment formula. *See* discussion *infra* Part I.C. This Court has held that the rule of resolving doubt in favor of the taxpayer is subordinate to the Department's long-standing administrative interpretation if the General Assembly has given such interpretation at least its implied assent. *Ryder Truck Lines, Inc. v. S.C. Tax Comm'n*, 248 S.C. 148, 152-53, 149 S.E.2d 435, 437 (1966).[18] Although the apportionment statutes were

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[17] 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 require including recovered investment principal as a "sale."

[18] 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 Etiwan Fertilizer Co. v. S.C. 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

amended numerous times throughout the periods at issue, and were even completely reenacted under a new chapter of the Code of Laws, the General Assembly never altered or amended the statutes to reject the Department's interpretation and, in fact, ultimately adopted legislation ratifying the Department's position. 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. [App'x. at 87 (Summ. J. Recons. Order at 3 & n.2).]

Therefore, based on the foregoing, the Court of Appeals correctly determined that the return of principal from Duke Energy's various short-term investment transactions is not included in the standard apportionment formula.

B. *Because it achieves absurd results, Duke Energy's interpretation must be rejected.*

The Court of Appeals' decision also correctly avoids the absurd results produced from application of Duke Energy's proposed interpretation: (1) that the amount of a multi-state taxpayer's business activity attributable to South Carolina and other states is dependent on the extent and frequency that the taxpayer repeatedly invests its cash; and (2) that the alternative apportionment statute must be applied in all cases in which multi-state

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Assembly for a long period of time, such construction is entitled to weight, and should not be overruled without cogent reasons"); *see also Kiawah Dev. Partners, II v. S.C. Dep't of Health & Envtl. Control*, 411 S.C. 16, 34-35, 766 S.E.2d 707, 718 (2014).

taxpayers engage in very typical short-term investment transactions. *See, e.g., Kennedy v. S.C. Ret. Sys.*, 345 S.C. 339, 351, 549 S.E.2d 243, 249 (2001) ("Statutes should not be construed so as to lead to an absurd result.").

The representative transaction considered by the Court of Appeals fully reflects the absurdity of Duke Energy's position that the amount of principal recovered in short-term investment transactions is a "sale" representing business activity. This transaction involved Duke Energy investing slightly more than $14.983 million in a security and then redeeming it eight days later for $15 million—the original amount invested plus approximately $17,000 in interest. *Duke Energy*, 410 S.C. at 427-28, 764 S.E.2d at 719 (describing deposition testimony of Duke Energy treasury department representative, Sherwood L. Love). As the Court of Appeals recognized, Duke Energy then reinvested the $15 million and it could repeatedly reinvest that $15 million as often as and for whatever duration the Short-Term Liquidity Group chose. Accepting Duke Energy's position requires a conclusion that this cash management decision to make an eight-day investment of principal should be represented in the apportionment formula as a sale identical to Duke Energy's sale of $15 million in electricity because "the standard apportionment formula is simply a way to produce a 'rough approximation' of income." Br. of Pet'r at 22.[19] However, if the decision

[19] The Department does not generally dispute the "rough approximation" standard. However, this standard does not, as Duke Energy suggests,

is to instead invest the $15 million in two investments for four days each or in four investments for two days each, then Duke Energy's position is that these cash management decisions are the equivalent for apportionment purposes to the sale of $30 million in electricity or $60 million in electricity, respectively. *See Duke Energy*, 410 S.C. at 428, 764 S.E.2d at 719.

The impact these "slight variations" in cash management decisions have on determining a company's business activity to be reflected in the apportionment formula demonstrates the absurdity of Duke Energy's position. The inclusion of recovered investment principal will never, absent pure coincidence, reasonably represent or provide a rough approximation of the business activities of a taxpayer. In other words, contrary to Duke Energy's assertions, the absurdity is not determined by the extent to which the inclusion of principal unreasonably represents Duke Energy's or any other taxpayer's business activity.[20] Rather, the absurdity is the application of Duke Energy's interpretation in all cases.

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completely negate the need to interpret the standard apportionment statutes. Indeed, under Duke Energy's reasoning, a "rough approximation" is achieved regardless of what construction is given to the standard apportionment statutes, reasonable or not. Moreover, Duke Energy's reliance now on *Eastman Kodak Co. v. S.C. Tax Comm'n*, 308 S.C. 415, 418 S.E.2d 542 (1992), is particularly odd, considering Duke Energy informed the Court of Appeals that "this case is irrelevant" because it dealt with the issue of whether certain receipts were business or non-business income and the issue in this case "was simply not before the *Kodak* court." [App'x. at 8277 (Br. of Appellant at 32).]

[20] Contrary to Duke Energy's assertions, neither the Court of Appeals nor the ALC based their decisions on such an analysis.

Duke Energy's unreasonable view would require two taxpayers, equal in all respects except for their level of investment activity, to report drastically different apportionment formulas due solely to this difference in the level at which the taxpayers roll over their investments. Even more, it would provide an undue benefit to larger corporate taxpayers that engage in more of these investment transactions than other taxpayers with less excess cash because the denominator of their apportionment formulas would be packed with recovered principal, resulting in a decrease in the amount of income tax owed in South Carolina. Courts in other states have properly rejected this absurd result:

- "It 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.*, 476 A.2d at 802.

- "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. The bulk of funds flowing back to [the taxpayer] from investment paper was simply its own money." *Id.*

- "'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." *Sherwin-Williams Co. v. Indiana Dep't of State Rev.*, 673 N.E.2d 849, 853 (Ind. T.C. 1996) (emphasis added).

- Rejecting position similar to Duke Energy's because it "would create a tax loophole ... neither intended by the [] Legislature nor required by the plain meaning of the [statute] and the related statutory scheme." *Walgreen Ariz. Drug Co. v. Ariz. Dep't of Rev.*, 97 P.3d 896 (Ariz. Ct. App. 2004)

- Rejecting interpretation that, for purposes of statute used to measure company's business activity based on "gross receipts," recovered investment principal is included because this would lead to the absurd conclusion that a manufacturing company's "primary activity was acting as a cash management company in the business of purchasing and selling money market funds and commercial paper." *Genentech, Inc. v. Comm'n of Rev.*, 2014 WL 6609681, at *22 (Mass. App. Tax Bd. Nov. 17, 2014).

- "Thus, we hold that only the interest from [loan repurchase] transactions should be included as gross receipts." *Gen. Motors Corp. v. Franchise Tax Bd.*, 139 P.3d 1183, 1192 (Cal. 2006).

Duke Energy summarily dismisses these decisions on the purported basis that they are not representative of the "modern view," *see* Br. of Pet'r at 31 n.16, notwithstanding that *Genentech* was decided just last year—six years after the date of the most recent decision cited by Duke Energy—and the *Microsoft Corp. v. Franchise Tax Bd.*, 139 P.3d 1169 (Cal. 2006), decision chiefly relied on by Duke Energy was decided on the same day and by the same court as *General Motors*.[21]

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[21] The California Supreme Court in *Microsoft* and *General Motors* distinguished the return of principal from sales and redemptions of short-term investments from the return of principal from loan repurchase agreements. However, those cases appear to be driven by a concession by the California Franchise Tax Board that the recovered principal from sales of securities should be included as a "gross receipt." *See Microsoft*, 139 P.3d at 1175; *General Motors*, 139 P.3d at 1189. The Department certainly has not made such a concession. Moreover, although claiming otherwise, the California Supreme Court was promoting form over substance because, for apportionment purposes, there is no legitimate reason that what a taxpayer reports in its apportionment formula should be dependent on the type of short-term investment transaction it prefers. In any event, Duke Energy's short-term investment transactions consist of all three of these cash-equivalents—purchases and sales, redemptions at maturity, and loan

Further, the courts in the decisions relied on by Duke Energy expressly recognized the absurdity of including recovered investment principal in the standard apportionment formula, but chose to deal with this absurdity through the applicable alternative apportionment provisions rather than applying the first principles of statutory construction.[22] *See Microsoft*, 139 P.3d at 1177-78 (applying alternative apportionment so "an 'absurd result' may be avoided" and stating that it was "unable to accept, ***even for a moment***, the notion that" a significant portion of a taxpayer's business activities "should be attributed to any single state solely because it is the center of working capital investment activities that are clearly only an incidental part of" its business) (emphasis added); *see Sherwin Williams Co. v. Johnson*, 989

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repurchase agreements—and Duke Energy did not argue below that its transactions should be treated differently. *See* discussion *infra* Part I.D.

[22] Also, contrary to Duke Energy's assertions, *see* Br. of Pet'r. at 29, the courts in the decisions relied on by Duke Energy were not interpreting the term "sales" or "total sales." Moreover, the almost universal reaction by state legislatures to these decisions was to clarify that the apportionment statutes do not include a taxpayer's recovery of principal. *See* Br. of Pet'r at 29-31 (citing decisions from other states and subsequent actions by their respective legislatures to clarify the statutory language when the state courts allowed taxpayers to determine their business activity through the repeated reinvestment of excess cash). Duke Energy never explains why all of these legislatures found it necessary to change the law if the taxpayer's activity was consistent with what the legislature originally intended. [*See* App'x. at 86 (Summ. J. Recons. Order at 2) ("If the Legislature was so troubled by an interpretation that would 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.");] *Abell v. Bell*, 229 S.C. 1, 5, 91 S.E.2d 548, 550 (1956) ("Subsequent legislation may be of service as indicating the construction given to the former by the legislature itself.").

S.W.2d 710, 715 (Tenn. App. 1998) ("The very absurdity of the result sought...lays a sound basis for the implementation of [the alternative apportionment method statute]"); [*see also* App'x. at 74-75, 79-82 (Summ. J. Order at 26-27, 31-34 (rejecting *Microsoft* and *Sherwin Williams* holdings because absurdity determination must be part of statutory construction of the standard apportionment formula)).] This is essentially the position Duke Energy has advocated throughout this litigation—*i.e.*, that even if the interpretation of the standard apportionment statute leads to an absurd result, it nonetheless should be accepted because the alternative apportionment provisions of § 12-6-2320 exist to cure any such problem.

The Court of Appeals and the ALC correctly recognized that the analyses applied by these other courts begs the question of properly interpreting the apportionment statutes at the outset, which the Court of Appeals and the ALC correctly determined to preclude Duke Energy's proposed treatment. Aside from undermining the fundamental requirement that the statutory language must be properly defined before deciding whether to apply the alternative apportionment provisions, Duke Energy's position also creates yet another absurd result: the rote application of the alternative apportionment provisions. As Duke Energy recognizes, companies commonly engage in these types of transactions and application of § 12-6-2320 would become the rule rather than the exception if Duke Energy's position is accepted. [App'x. at 79-81, 83 (Summ. J. Order at 31-33, 35 (citing *St.*

Johnsbury Trucking Co. v. New Hampshire, 385 A.2d 215 (N.H. 1978), 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")).] This would result in a statutory process wholly inconsistent with this Court's holdings. *See Carmax Auto Superstores W. Coast, Inc. v. S.C. Dep't of Rev.*, 411 S.C. 79, 89-90, 767 S.E.2d 195, 200 (2014) (holding that "an alternative formula is the exception") (quoting *St. Johnsbury,* 385 A.2d at 217).

The Court of Appeals—and the ALC—correctly recognized this critical failure of Duke Energy's position and further understood 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. This is especially so considering § 12-6-2320 was not enacted until 1995 and, thus, has not always accompanied the standard apportionment formula. Simply put, it is necessary to decide if an item is included in the standard apportionment formula before alternative apportionment becomes an issue.[23]

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[23] If, however, the Court were to reverse the Court of Appeals on the recovery-of-principal issue, it would be necessary to remand for further proceedings pursuant to § 12-6-2320.

C. *The Department's long-standing administrative policy to exclude the return of principal from the calculation of the apportionment formulas is entitled to deference.*

The ALC specifically found that the Department had a long-standing policy—consistent with the plain meaning of the apportionment statutes—to exclude recovered investment principal from the standard apportionment formula. [*See* App'x. at 87 (Summ. J. Recons. Order at 3 & n.2); App'x. at 203 (Dep't Mot. Summ J at 36); App'x. at 857-66 (Dep't Mot. Summ J. Reply at 33-42).] Duke Energy has never challenged that this policy was in effect during the periods at issue and did not appeal from the ALC's finding in this regard. Accordingly, the ALC's finding is the law of the case. *E.g., 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).

This Court recently affirmed that "where 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." *Kiawah*, 411 S.C. at 34-35, 766 S.E.2d at 718; *see Colonial Life & Acc. Ins. Co. v. S.C. Tax Comm'n,* 248 S.C. 334, 339, 149 S.E.2d 777, 780 (1966) (holding that the Department's construction of a tax statute "will not be overthrown by the courts except upon a showing ... that it is arbitrary, discriminatory or unreasonable.") (internal quotations omitted). Here, as the ALC found, the Department has consistently construed the standard apportionment statutes as not requiring

taxpayers to include the repeated recoveries of investment principal in the calculation of the apportionment formula. The Department's construction does not in any way conflict with the plain language of the standard apportionment statutes and is entirely consistent with the statutory purpose of determining the "base which reasonably represents the proportion of the trade or business carried on within this State." S.C. Code Ann. § 12-6-2210.

As explained more fully above, Duke Energy has presented no compelling reason why, contrary to the Department's policy, the return of principal from its various short-term investment transactions should be included in the standard apportionment formulas or doing so reasonably represents its business activities. Duke Energy even concedes that the return of principal from its loan repurchase agreements is not a "sale" and, thus, that the Department's policy is appropriate with respect to those transactions. *See* discussion *infra* Part I.D. Further, Duke Energy cannot argue the Department's policy regarding recovered investment principal and the standard apportionment statutes is "arbitrary, discriminatory, or unreasonable" because the General Assembly has expressly ratified the Department's policy through the enactment of § 12-6-2295(B). *See, e.g.*, *Ryder*, 248 S.C. at 152-53, 149 S.E.2d at 437.

Therefore, even assuming the Court holds that the plain language of the standard apportionment statutes is silent as to the treatment of repeated recoveries of investment principal for purposes of apportionment, the

Department's long-standing policy is entitled to deference. *Kiawah*, 411 S.C. at 33, 766 S.E.2d at 717. And this serves as an additional basis to affirm the Court of Appeals' decision because the Court of Appeals' holding is consistent with the Department's policy. *See* Rule 220(c), SCACR ("The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal.").

D. ***Duke Energy has not preserved any argument that its short-term investment transactions do not involve the return of principal and, in any event, concedes that the return of principal from at least some of the short-term investment transactions on which its refund claims were based is excluded from the apportionment formulas.***

A linchpin of Duke Energy's argument to this Court and its attack on the Court of Appeals' decision is that Duke Energy's short-term investment transactions do not in any way involve a "return of principal." Br. of Pet'r at 19 ("Furthermore, unlike a transaction that involves a return of principal..."), 20 ("There is no 'return of principal'..."). However, Duke Energy never made such an argument to the ALC, nor did it challenge or appeal the ALC's use of "return of principal." [App'x. at 71-72 (Summ. J. Order at 23-24) ("The final issue is whether Duke Energy was allowed ... to include in the apportionment formula the return of principal from its sales of securities and other capital investments.");] *see Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review."). Rather, in stark contrast to what it now asserts to this Court, Duke Energy argued to the ALC: "The only

issue before the Court was whether, as a matter of law, the ***principal*** realized from sales of securities was included in the standard apportionment formula."[24] [App'x. at 1040 (Duke Energy's Mem. in Supp. of Mot. for Recons. at 5) (emphasis added);] *Butler v. Town of Edgefield*, 328 S.C. 238, 248, 493 S.E.2d 838, 843 (1997) ("[O]ne cannot present and try his case on one theory and thereafter advocate another theory on appeal.") (internal quotation marks and citations omitted). At a minimum, Duke Energy should be estopped from now making the remarkable argument that its various short-term investment transactions do not involve the return of principal. *Cothran v. Brown*, 357 S.C. 210, 215, 592 S.E.2d 629, 631 (2004) ("Judicial estoppel is an equitable concept that prevents a litigant from asserting a position inconsistent with, or in conflict with, one the litigant has previously asserted in the same or related proceeding.").

However, Duke Energy does not just make a linguistic attack on the Court of Appeals' use of "return of principal." It instead contends that there is

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[24] In addition to being a commonly used term to describe an amount of invested money, Duke Energy's treasury department representative also used the term "principal" in describing the investment transactions at issue. [*See, e.g.*, App'x. 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);] *cf.* Br. of Pet'r at 19 ("[N]othing in the record supports" the Court of Appeals' "false assumption that those receipts represent 'return of principal.'"). Moreover, Duke Energy's argument regarding § 12-6-2295 acknowledges that the issue in this case is the "repayment, maturity, or redemption of the ***principal***" of Duke Energy's short-term investment transactions. *See* Br. of Pet'r at 15 (quoting § 12-6-2295) (emphasis added).

a distinction between its short-term investment transactions and those that involve a "return of principal." Br. of Pet'r at 19-20. Astoundingly, it relies on the California Supreme Court's decision in *General Motors* to make this distinction even though that case held that the return of principal from one type of the short-term investment transactions for which Duke Energy's refund claims are based—loan repurchase agreements—should be excluded from the standard apportionment formula. *General Motors*, 139 P.3d at 1192 ("Thus, we hold that only the interest from [loan repurchase] transactions should be included as gross receipts."); *see* discussion *supra* Part I.B; [App'x. at 201 (Dep't Mem. in Supp. of Mot. for Summ. J. at 34 (citing *General Motors*)).] Duke Energy's novel theory does not comport with the economic realities of its transactions or Duke Energy's prior position in this case.

Duke Energy's telling change in its theory is reflected by comparing its argument to this Court with its rebuttal before the ALC of the *General Motors* decision:

> The Department's reliance on *General Motors Corp. v. Franchise Tax Bd*, 39 Cal. 4th 773, 139 P.3d 1183 (2006), is misplaced. In *General Motors*, the court's holding that only interest from sales of securities constitutes gross receipts was limited to repos. Repos represent a nominal percentage of the instruments purchased and sold by Duke Energy.

[App'x. at 422 (Duke Energy Mem. in Supp. of Mot. for Summ J. at 43 n.17).] In other words, far from distinguishing its short-term investment transactions from those at issue in *General Motors*, Duke Energy agreed that some of the short-term investment transactions for which its refund claims

are based—although allegedly a "nominal percentage"[25]—are the same as those at issue in *General Motors*. At the very least, Duke Energy's reliance now on *General Motors* is a concession that the return of principal from its loan repurchase agreements should be excluded from its apportionment formula and the corresponding portion of its refund claims denied.[26] But this new position also completely undermines Duke Energy's entire challenge to the Court of Appeals' decision because, based on the types of transactions at issue, there is no difference for apportionment purposes between the forms of any of Duke Energy's short-term investment transactions, nor has Duke Energy ever articulated any difference.

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[25] The Department does not agree that loan repurchase agreements represent only a "nominal percentage" of Duke Energy's short-term investment transactions. Nevertheless, determining the exact percentage and the amount of principal recovered from these transactions would only be necessary, and Duke Energy's burden, if the Court reverses the Court of Appeals' decision.

[26] It is not clear to the Department whether Duke Energy is now limiting its appeal to the portion of its refund claims related only to its short-term investment transactions consisting of purchases and sales of securities, rather than also those consisting of redemptions at maturity and loan repurchase agreements; however, Duke Energy's Brief certainly suggests it is doing just that. *See, e.g.*, Br. of Pet'r at 1 ("This case is about whether [Duke Energy] must include all of its receipts from sales of securities in the denominator of its sales apportionment factor when apportioning its South Carolina income."), 20 ("Therefore, Duke Energy's sales of securities are just that—sales."). If it is not, Duke Energy has added unnecessary confusion to this issue.

E. *Neither the Court of Appeals nor the Administrative Law Court* sua sponte *considered the application of the alternative apportionment formula.*

Duke Energy erroneously argues, as it did below with respect to the ALC, that the Court of Appeals did an "end-run around alternative apportionment" and "imputed" alternative apportionment into the standard apportionment provisions by construing the standard apportionment statute in light of its intended purpose. Br. of Pet'r at 23-27. Throughout this litigation, Duke Energy has repeatedly and unsuccessfully tried to make every judicial interpretation of the standard apportionment statutes into an improper application of the alternative apportionment statutes.[27] But that argument confuses the issue. As discussed above, 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* discussion *supra* Part I.B. At most, the Court of Appeals considered the ramifications of Duke Energy's position in the context of deciding whether its interpretation produced an absurd result. And the Court of Appeals' recognition that Duke Energy's position is inconsistent with the

[27] For example, contrary to Duke Energy's assertions, the ALC's decision was not based on a finding of fact that Duke Energy's inclusion of recovered investment principal resulted in "distortion." [*Compare* App'x. at 83-84 (Summ J. Order at 35-36)] *with* Br. of Pet'r at 7.

statutory purpose of imposing tax "upon a base which reasonably represents the proportion of the trade or business carried on within this State," *see* § 12-6-2210(B), is not an invocation of alternative apportionment but an interpretation of the statutory language in its context. Regardless, the Court of Appeals' holding was premised on its proper interpretation of the standard apportionment statute and not on the application of alternative apportionment. *Duke Energy*, 410 S.C. at 428, 764 S.E.2d at 719.

F. *The Court of Appeals did not violate the Separation of Powers Clause of the South Carolina Constitution.*

In a remarkable proposition, Duke Energy says that the judiciary violates the separation of powers when it interprets statutes. Br. of Pet'r at 27-28; *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 § 12-6-2295. This argument should be rejected because it was never raised to the Court of Appeals either in the briefs or the Petition for Rehearing. Rule 242(d)(2), SCACR. The argument also should be rejected because, as discussed *supra* Part I.A, § 12-6-2295 did not change the existing apportionment law concerning the recovery of investment principal. And the Court of Appeals' construction of the standard apportionment statutes and rejection of Duke Energy's argument regarding § 12-6-2295 is not a violation of the Separation of Powers Clause.

II. Regardless of its ruling on the question presented by Duke Energy, this Court must affirm the decision of the ALC for the years 1978-1993 because Duke Energy has failed to properly appeal to this Court from ALC's ruling that the refund claims for those years were untimely.

To properly appeal from a lower court decision, an appellant must meet certain minimal requirements for presenting the issues to the appellate court. If the decision of the lower court was based on multiple grounds, the appellant must appeal all of the grounds or the decision will be automatically affirmed. *Jones v. Lott*, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010) ("Under the two issue rule, where a decision is based on more than one ground, the appellate court will affirm unless the appellate appeals all grounds because the unappealed ground will become the law of the case."); *see also Atl. Coast Builders & Contractors LLC v. Lewis*, 398 S.C. 323, 730 S.E.2d 282 (2012) ("[A]n unappealed ruling, right or wrong, is the law of the case."). The appellant also must raise the ground in its issues on appeal. Rule 208(b)(1)(B), SCACR ("Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal."); *see Jones*, 387 S.C. at 346, 692 S.E.2d at 903 ("Every ground of appeal ought to be so distinctly stated that the reviewing court may at once see the point which it is called upon to decide without having to grope in the dark to ascertain the precise point at issue.") (internal quotation marks and citation omitted). And, when an appellant is before this Court by virtue of a writ of certiorari, the issue must also have been raised in the Petition for a Writ of Certiorari. *See* Rule 242(i), SCACR ("If the petition is granted, the Clerk shall notify each party or his

attorney, specifying the question or questions to be considered, ***and the parties shall prepare briefs addressing the questions***.") (emphasis added).

Duke Energy has not properly appealed from the ALC's determination that the 1978-1993 refund claims were untimely and has therefore abandoned any challenge to those years. Although separately identifying the issue in its Petition for Rehearing to the Court of Appeals, [App'x. at 8453 (Pet. for Reh'g at 6),][28] Duke Energy did not present any question to this Court regarding the timeliness of the 1978-1993 refund claims. *See* Pet. for Writ of Cert. at 1-2. The parties' treatment of the timeliness question as a separate issue throughout the briefing and argument before the ALC and the Court of Appeals, and Duke Energy's treatment of the question as a separate issue in the Petition for Rehearing demonstrates that the timeliness issue is not part of either of the two questions stated in the Petition for Writ of Certiorari but is a wholly distinct issue for the years 1978-1993 that Duke Energy was required to separately challenge on appeal. Any question regarding the timeliness of the refund claims for the years 1978-1993 is not fairly comprised within the question presented regarding Duke Energy's short-term investment transactions and the apportionment statutes. *See* Rule 242(d)(2) ("A question presented will be deemed to include every

[28] Specifically, and consistent with the parties' treatment of the issues below, Duke Energy identified the timeliness issue separately and stated that the "Court erred in failing to address the Timeliness Issue because of its rulings on the Manufacturing and Gross Receipts Issues ...." [App'x. at 8453 (Pet. for Reh'g at 6).]

subsidiary question fairly comprised therein."). Thus, any argument that Duke Energy preserved any challenge to the ALC's timeliness ruling through its questions presented is meritless, especially in light of the continuing separate treatment of that issue below by both the parties and the lower courts and the fact that it identified other subsidiary issues in the Petition for Writ of Certiorari.

Duke Energy also might argue that that it did raise the issue through references to it in a footnote and a request to "remand ... for a consideration of the Waiver Issue." Br. of Pet'r at 1 n.1, 31. However, Duke Energy was required to properly raise the issue before this Court because the ALC's ruling on the timeliness question—even if not addressed by the Court of Appeals due to its holdings on the other two issues—is an independent sustaining ground on which the lower court's decision may be affirmed. *I'On, LLC v. Town of Mt. Pleasant*, 338 S.C 406, 419, 526 S.E.2d 716, 723 (2000); *see also* Rule 220(c), SCACR ("The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal."). That is, Duke Energy was required to raise the issue to this Court in order to preserve any argument that it is entitled to a refund for its 1978-1993 tax returns. Duke Energy failed to do so because it did not identify the timeliness question as an issue for 1978-1993; did not provide any arguments or supporting authority regarding that issue; and made only conclusory suggestions regarding the issue. *See, e.g., State v. Jones*, 344 S.C.

48, 58, 543 S.E.2d 541, 546 (2000); *First Sav. Bank v. McLean*, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994); *Fields v. Melrose Ltd. P'ship*, 312 S.C. 102, 106 & n.3, 439 S.E.2d 283, 285 & n.3 (Ct. App. 1993). ("[A]n issue is deemed abandoned on appeal and, therefore, not presented for review, if it is argued in a short, conclusory statement without supporting authority.").

Thus, even if it determines that the Court of Appeals erred with respect to the treatment of Duke Energy's short-term investment transactions, the Court should affirm the denial of the 1978-1993 claims because Duke Energy has failed to appeal from the ALC's determination that these claims were untimely. Moreover, the ALC's determination regarding the untimeliness of the 1978-1993 refund claims is, as explained in the Department's brief to the Court of Appeals, fully supported by the record and the law. [App'x. at 52-70 (Summ. J. Order at 4-22); App'x. at 8312-25 (Br. of Resp't at 8-21);] *see I'On*, 338 S.C. at 419, 526 S.E.2d at 723 (holding that a respondent "may raise on appeal any additional reasons the appellate court should affirm the lower court's ruling, regardless of whether those reasons have been presented to or ruled on by the lower court."); *id.* at 420, 526 S.E. 2d at 723 ("The appellate court may review respondent's additional reasons and, if convinced it is proper and fair to do so, rely on them or any other reason appearing in the record to affirm the lower court's judgment."). Duke Energy's attempt to appeal from the denial of its 1978-1993 refund claims must therefore be denied.

Conclusion

For the reasons explained above, this Court should affirm the decision of the Court of Appeals.

Respectfully submitted,

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July 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 **Brief of Respondent South Carolina Department of Revenue** by placing the same in the care and custody of the U.S. Postal Service addressed as follows:

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