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THE 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.

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INTRODUCTION

The only question before this Court is whether, based on the plain words of the South Carolina income apportionment statute, all receipts from Duke Energy Corporation's ("Duke Energy") sales of securities should be included in the computation of its South Carolina apportionment formula as a ***matter of law***. The apportionment statute is clear that, during the tax years at issue in this case, the sales factor includes all receipts from sales made in the ordinary course of business. And the South Carolina Department of Revenue ("Department") agrees that Duke Energy's sales of securities were conducted as part of its ordinary business operations.

In an effort to obfuscate the important legal question presented in this appeal, the Department asks this Court to ignore the plain language of the apportionment statute and apply law changes limiting the definition of "sales" otherwise in effect after the tax years at issue. The Department argues that Duke Energy's sales of securities are not "sales" at all. Yet, at the same time, the Department agrees that the same transactions are "sales with respect to a portion of the total receipts generated from Duke Energy's sales of securities, and agrees that a portion of receipts is includable in the apportionment formula computation. The Department's claim simply makes no sense as the Department is asking this Court to rule that when Duke Energy sells a security, a part of the transaction is a sale and receipt, and a part of the same transaction is neither. This strained construction of the apportionment statute is not only illogical, but it also produces absurd results as a taxpayer selling securities (and perhaps other types of assets) would never be certain whether to include all or part of the proceeds from a sale transaction.

The Department's approach is simply an attempt at an end run around South Carolina's alternative apportionment statute in contradiction of this Court's recent decision in *CarMax Auto Superstores West Coast, Inc. v. S.C. Dep't of Revenue*, 411 S.C. 79, 767 S.E.2d 195 (2014), *aff'g*, 397 S.C. 604, 725 S.E.2d 711 (2012), which made clear that the party deviating from the plain words of the apportionment statute must show that both, as a ***matter of fact***, the statutory apportionment formula is unreasonable and, as a ***matter of fact***, its proposed alternative is reasonable. Because neither one of these factual inquiries is before this Court, and for the reasons set forth in the Brief of Petitioner and below, Duke Energy respectfully requests that this Court reverse the Court of Appeals decision and grant the relief requested in the Brief of Petitioner.

ARGUMENT

I. The plain language of the apportionment statute requires the inclusion of all of Duke Energy's receipts from sales of securities in its South Carolina income tax apportionment computation.

During the tax years at issue, the South Carolina sales factor of the apportionment formula was computed based on the ***total sales*** of a taxpayer during the tax year. S.C. Code Ann. § 12-6-2280 (for tax years after 1995); former S.C. Code Ann. § 12-7-1170 (for tax years prior to 1996); (Pet'r Br. at 12.) 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." *Beach v. Livingston*, 248 S.C. 135, 139, 149 S.E.2d 328, 330 (1996)); *Alltel Commc'ns, Inc. v. S.C. Dep't of Revenue*, 399 S.C. 313, 320, 731 S.E.2d 869, 873 (2012).[1] Applying this standard of statutory construction, "total sales" means all sales. *See Total, Merriam-Webster*, http://www.merriam-webster.com/dictionary/total

[1] The Department agrees that the plain language of a statute should control. (Resp't Br. at 22.)

("comprising or constituting a whole: ENTIRE <the *total* amount>" (emphasis original)); *see also Total, Black's Law Dictionary* (10th ed. 2014) ("total ... 1. Whole; not divided; full; complete. 2. Utter; absolute."); (Pet'r Br. at 14). The Department argues that "total" does not mean all receipts but rather "net receipts," i.e., a portion of all receipts. Not only is the Department's view inconsistent with the plain language of the apportionment statute – which requires the inclusion of all receipts from sales made in the ordinary course of a taxpayer's business – but the Department has not cited to any part of the South Carolina Code that supports its view. (*See* Pet'r Br. at 13-17.)

The plain meaning of the apportionment statutes is further demonstrated by actions of the South Carolina Legislature. As discussed in Petitioner's Brief, the Legislature enacted an entirely new statutory provision that, effective for tax years *after* 2006, limits the scope of the terms "sales" (for purposes of the three-factor formula) and "gross receipts" (for purposes of the single-factor formula) by carving out ***ten new categories of receipts to be excluded from the terms' definitions***. 2007 S.C. Laws Act 110 § 51.A (enacted as S.C. Code Ann. § 12-6-2295(B)). Under the new provision, the definitions of "sales" and "gross receipts" are identical and for the first time exclude receipts from sales of securities other than net receipts from the South Carolina sales apportionment factor. *See* S.C. Code Ann. § 12-6-2295(B)(1).

The Department attempts to sidestep the material nature of the 2006 change in law by arguing that the Legislature's enactment of the 2006 amendment "ratified" the Department's purported long-standing policy to exclude receipts other than net receipts from sales of securities from the apportionment formula. (Resp't Br. at 12-13, 26.) While, as a general matter, the construction of a statute by an administrative agency will

be accorded deference, "where the terms of the statute are clear, the court must apply those terms according to their literal meaning ... [and] ***the court will reject the agency's interpretation where it is specifically contrary to the statute or regulation.***" *Comm'rs of Pub. Works v. S.C. Dep't of Health & Envtl. Control*, 372 S.C. 351, 359, 641 S.E.2d 763, 767 (Ct. App. 2007) (emphasis added).

If the Legislature supported the Department's purported view of the law, it would not have acted at all. The Department has presented no evidence that the Legislature was making a ratification or clarification. And the 2006 changes to the law were so sweeping and drastic that it is simply impossible to believe that the change was merely a ratification of the Department's position. That is particularly so when the Department's own officials acknowledged that other categories in the 2006 change to the definition of "sales" and "gross receipts" were indeed changes. (App. pp. 4148, 4151, 8371.)

This Court has stated that when the Legislature amends a statute to include a material change, there is a 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). The Department's argument to the contrary and the Court of Appeals' decision to ignore this Court's directive are reversible errors. (App. p. 8269.)

Indeed, the Department previously argued – and this Court agreed – that a 1985 legislative amendment to the South Carolina license tax base from "the entire gross receipts" to "the gross receipts derived from services rendered from regulated business," limited the tax base and was therefore a change in the law. (Pet'r Br. at 15-16); *Duke Power Co. v. S.C. Tax Comm'n*, 292 S.C. 64, 354 S.E.2d 902 (1987). Why such a

massive change to the definitions of "sales" and "gross receipts" in this case could be viewed as anything other than a change in the law is inconceivable given the Department's prior position.[2]

Furthermore, the Department's alleged long-standing administrative policy that purportedly supports its exclusion of some receipts from Duke Energy's sales of securities from the apportionment factor calculation cannot withstand scrutiny given the plain words of the apportionment statute.

In addition, the Department is incorrect in asserting that Duke Energy has not challenged the existence of the Department's alleged long-standing policy and did not appeal from the ALC's finding to that effect. First, there is no such finding made by the ALC in its Order. And secondly, Duke Energy did challenge the Department's purported policy in its briefings to the ALC and at the summary judgment hearing. (App. pp. 423-426, 2919-2924.) Therefore, the Department's attempt to distract this Court by making false accusations is unavailing.

II. The inclusion of all receipts from Duke Energy's sales of securities does not produce an absurd result.

The Department claims that including all receipts from sales of securities in the apportionment formula "will never, absent pure coincidence, reasonably represent or provide a rough approximation of the business activities of a taxpayer." (Resp't Br. at 19.) Once again, the Department has lost sight of the true legal issue in this case. The only question before this Court is whether, based on the plain language of the

[2] In an effort to distract this Court, the Department claims that Duke Energy argues that the apportionment statute is ambiguous. (Resp't Br. at 14.) That is incorrect. As discussed in Duke Energy's brief to this Court – and throughout this litigation – Duke Energy submits that the plain language of the apportionment statute is clear and requires the inclusion of all receipts from sales of securities in the computation of Duke energy's South Carolina apportionment formula. Duke Energy noted that if the Court of Appeals had any doubt as to the plain meaning of the apportionment statute, South Carolina requires the resolution of such doubt in favor of Duke Energy. (Pet'r Br. at 16.)

apportionment statute, all receipts from sales of securities are includable in the standard apportionment computation, ***as a matter of law.*** Whether the inclusion of all of such receipts reasonably represents a taxpayer's business activities in the state is an entirely separate and inherently factual question, to be addressed only ***after*** the standard apportionment formula results have been determined. In other words, first, if a transaction is a sale for purposes of the standard statutory apportionment formula, then it must be included in the apportionment computation. And second, if such an inclusion is then found to not reasonably represent the taxpayer's business activity, South Carolina law provides a specific mechanism for parties to deviate from the standard apportionment provision. *See CarMax*, 411 S.C. at 89-90, 767 S.E.2d at 200; (Pet'r Br. at 24-25).

Indeed, the Department itself recognized this two-part analysis during the proceedings before the ALC.[3] The Department now attempts to run away from its own admission by suggesting that Duke Energy has the burden of showing that the standard apportionment formula reasonably represents its business activities. (Resp't Br. at 26.) Not only is the Department's claim in direct conflict with this Court's directive in *CarMax* – that the party deviating from the statutory formula has the dual burden of showing that the standard formula is unreasonable and a proposed alternative method is reasonable – but it also renders South Carolina's alternative apportionment statute set forth in S.C. Code Ann. § 12-6-2230 a nullity.

[3] The ALC: Well, when you say it does not provide a reasonable basis, is that analysis more one that should be made in the ***second stage*** of – by this case or is that one that is more – I know you're going to say "yes," so it's more proper in determining what the statute says.
The Court: Because if it does result in something that's absurd, then you would find that the apportionment – the standard apportionment formula is one that should not be used and it would invoke the statute to allow you to use the more appropriate formula, is that not ...
Mr. Greene: If – yeah. If you – for instance, if you reach that conclusion, that gross receipts covers these types of transaction, the return of somebody's principal within 30 days is a gross receipt, it has to be added to the apportionment basis, then yes, we would go to the ***next step***. (App. pp. 2936, 2938-2939, 8272.)

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, Inc. v. S.C. Dep't of Revenue*, 388 S.C. 138, 151, 694 S.E.2d 525, 531 (2010). The Department's argument presumes that the inclusion of all receipts from the sales of securities could never be a reasonable representation of a taxpayer's business activity in the state and the proper remedy for that should be the limited construction of the standard apportionment formula. The Department thus proposes to impute an alternative apportionment mechanism into the standard apportionment provision in violation of this Court's directive in *CarMax*. If the Department believes that that the standard apportionment provision does not fairly reflect Duke Energy's business activity in the state, it must satisfy its dual burden of proof. It has not done so in this case.

1. Whether the plain language of the apportionment statute reasonably represents Duke Energy's business activities in South Carolina is a factual question not before this Court.

In an attempt to camouflage its true actions – i.e., the application of the alternative apportionment statute – and escape the dual burden of proof, the Department argues that including all receipts from sales of securities would lead to an absurd result because such an inclusion can never reasonably represent a taxpayer's activity in the state. (Resp't Br. at 19.) Yet the Department offers no evidence whatsoever in support of its position. Furthermore, it offers little explanation as to why including all receipts from sales of securities in the apportionment formula does not, or could not, reasonably represent a taxpayer's business activity in South Carolina. Indeed, in many cases, depending on the

size of the taxpayer, the location of its business operations, the type of industry it is in, and a variety of other factors, including all of the taxpayer's receipts fairly reflects its business activities.

The Department conflates the absurd result principle with the alternative apportionment analysis. As discussed above and in Petitioner's Brief, determining whether the inclusion of certain transactions in the apportionment formula computation is not a reasonable representation of a taxpayer's business activities is an inherently factual issue to be addressed only ***after*** the standard apportionment formula results are determined. *CarMax*; (Pet'r Br. at 23-25). The South Carolina's standard apportionment provisions – including a calculation of total sales based on the plain words of the statute – must first be applied. Whether that application reflects a reasonable representation of business activities in the state – an issue ***not*** before this Court – is determined only after the apportionment results are calculated.

The Department's theory presupposes that the inclusion of all receipts from sales of securities in the apportionment formula is absurd. Such a conclusion requires a factual inquiry of the nature of the taxpayer's activities in South Carolina, a comparison of that activity to the apportionment results (with and without all receipts), and a factual finding that such a comparison produces an absurd result in most if not all cases. None of these steps are followed in the Department's theory or by the Court of Appeals.

The Department agreed that Duke Energy's sales of securities were conducted as part of its ordinary business operations. Including all of its receipts from its business operations in the sales factor of the standard apportionment formula, as required under the plain language of the apportionment statute, reasonably represents the proportion of

Duke Energy's business carried on in South Carolina and the Department has not offered any evidence showing to the contrary. The Department has not offered a single shred of evidence showing that including all of the receipts from sales of securities in the apportionment formula produces an absurd result in most if not all cases.

Contrary to the Department's claim, it is quite logical that if a taxpayer sells securities outside South Carolina – for example, in New York – as part of its ordinary business, the taxpayer's New York sales factor numerator would include all receipts from such sales and New York would be entitled to a greater proportion of the taxpayer's income than South Carolina. And vice versa, if the sales are made in South Carolina, then all receipts from those sales should be included in the taxpayer's South Carolina sales factor numerator and South Carolina would be entitled to tax tax a greater portion of the taxpayer's income than New York.

A court is permitted to deviate from a statute's plain language only when "the result would be so patently absurd that it is clear that the Legislature could not have intended such a result." *Harris v. Anderson Cnty. Sheriff's Office*, 381 S.C. 357, 363, n.1, 673 S.E.2d 423, 426, n.1 (2009). However, this Court has cautioned that "[a] merely conjectural absurdity is not enough; the result must be 'so patently absurd that it is clear that the General Assembly could not have intended such a result.'" *S.C. Dep't of Revenue v. Blue Moon of Newberry, Inc.*, 397 S.C. 256, 261, 725 S.E.2d 480, 484 (2012) (quoting *Cabiness v. Town of James Island,* 393 S.C. 176, 192, 712 S.E.2d 416, 425 (2011); *see also S.C. Coastal Conservation League v. S.C. Dep't of Health & Envtl. Control*, 2003 SC ENV LEXIS 12 (S.C. Admin. L. Ct. 2003) ("'To justify a departure from the letter of the law ... the absurdity must be so gross as to shock the general moral

or common sense. And there must be something to make plain the intent ... that the letter of the statute is not to prevail.' Indeed, an adjudicating body should be less than quick to depart from the meaning of literal language when the controversy between the parties arises from differing views on policy. A provision 'is not absurd merely because it does not comport with one's notion of what constitutes good policy.'"

In *Blue Moon of Newberry*, the South Carolina Supreme Court refused to adopt the Department's restricted interpretation of the plain language of a regulation promulgated by the Department, which permitted the sale of alcoholic beverages by nonprofit organizations only to "bona fide guests of members of such organizations." 397 S.C. at 258, 725 S.E.2d at 482. The regulation provided that "bona fide guests" are those "who accompany a member onto the premises or for whom the member has made prior arrangements with the management of the organization." *Id.* The Department took the position that the term "bona fide implies that the guest have some degree of familiarity or camaraderie with the member." *Id.* at 263, at 484. The court rejected the Department's view on the grounds that "the plain language of the regulation contains no support for this, and the ordinary definition of bona fide does not require it." *Id.* at 264, at 485. The court opined that to adopt the Department's position would constitute an "improper narrowing of the regulatory definition based on some notion of what a bona fide guest *should* be, not what the regulation actually provides. For us to do so therefore would require the abdication of our role as the interpreter of a regulation and the assumption of the position of a drafter." *Id.* (internal citations omitted). Similarly, in the instant case, the Court should not restrict the meaning of "total sales" when the language of the statute does not contain or require any limitations.

The Department further argued that a broad interpretation of the term "bona fide guest" would "'eviscerate' the purpose of the regulation, which is to limit those who may consume alcohol on the premises of private clubs," and produce "an absurd result as it [will] effectively allow[] a private club to be open to the public." *Id.* at 265, at 485. The court acknowledged that the plain language of the regulation "may permit some organizations to push the envelope on what it means to be 'private,'" but it nevertheless concluded that "we are not convinced the result is so absurd that we can ignore the regulation's plain language." *Id.* The court agreed with the lower court's dissent:

> If the Department of Revenue has an issue with how the regulation itself defines "bona fide guest," then it may promulgate a new regulation as appropriate upon proper notice to the public. Until then, other businesses which follow the unambiguous language of the regulation should not be punished as a result.

Id. at 265, at 485.

Corporate treasury departments that sell securities on a regular basis are not a new phenomenon. And the Department has not argued that Duke Energy's sales of securities are in any way special or unique. Instead, throughout this litigation, the Department has taken issue with the fact that the inclusion of all receipts from Duke Energy's sales of securities in its apportionment formula "does nothing more than artificially inflate the denominator of either the sales factor or gross receipt factor and thereby decrease the amount of income subject to tax in South Carolina." (App. p. 201.) Not only is there no requirement that taxpayers pay the *most* taxes,[4] but this Court has rejected this reasoning.

[4] There is simply no rule of statutory construction that requires that taxpayers pay the *most* taxes. In fact, the Fourth Circuit has cautioned that:

> It cannot be said that giving effect to the plain meaning of the language would bring a result that is irrational or absurd, however much we may disagree with its necessity or wisdom. We have no right to fetter a broad provision with

The standard apportionment formula is designed to reasonably represent and provide a "rough approximation" of a taxpayer's income attributable to business activity in the state. S.C. Code Ann. § 12-6-2210; *Eastman Kodak Co. v. S.C. Tax Comm'n*, 308 S.C. 415, 419, 418 S.E.2d 542, 544 (1992). In *Eastman Kodak*, the South Carolina held that in apportioning its general business income from photography equipment and film processing to South Carolina, Kodak properly included receipts from safe harbor leasing transactions[5] in the denominator of its apportionment formula. Similar to Duke Energy's treasury function transactions, the safe harbor leasing "'was a means of gaining working capital and increasing cash flow for all of plaintiff's business operations.'" *Id.* at 418-19, at 544 (quoting *Nat'l Serv. Indus., Inc. v. Powers,* 98 N.C. App. 504, 508, 391 S.E.2d 509, 512 (Ct. App. 1990). The South Carolina Tax Commission (now the Department) pointed out that "[t]he result is that Kodak, despite having virtually no safe harbor presence in South Carolina seeks to reduce its South Carolina taxable income by over 33% in 1984 and by over 90% in 1985." (Tax Comm'n Br. at 21.) This Court disagreed with the Tax Commission (and the lower court) and held that:

> This Court has held that the apportionment formula is a reasonable basis for establishing the income tax of corporations which, like Kodak, do business on a multistate level. *Covington Fabrics v. S. C. Tax Comm'n,* 264 S.C. 59, 212 S.E.2d 574 (1975). Since the safe harbor lease transactions were a part of Kodak's general business, they

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> conditions not expressed and not essential to the execution of the law, for courts are not free to rewrite legislative enactments to give effect to the judges' ideas of policy and fitness or the desirability of symmetry in statutes.

United States v. Shirah, 253 F.2d 798, 800 (4th Cir. 1958).

[5] "These transactions ... allowed one corporation to transfer tax benefits to another corporation in the following scenario: One corporation (the lessee) needs special assets, generally equipment, but cannot utilize the related investment tax credits and depreciation deductions. The lessee corporation seeks a relationship with another corporation (the lessor, here Kodak), who makes an initial payment on the asset, then leases it back to the lessee. The lessee makes all other payments on the asset and retains legal title; however, the lessor utilizes the tax benefits associated with the asset." *Eastman Kodak*, 308 S.C. at 417, 418 S.E.2d at 542-43.

> were properly included in the denominator of the apportionment formula in computing Kodak's national net income from payroll, property, and sales. The fact that a very small percentage of the leased assets are located in South Carolina is accounted for in the numerator of the apportionment formula in which Kodak's payroll, property, and sales in this state are computed. Therefore, the apportionment formula reflects a "reasonable representation" of Kodak's business in this state.

Eastman Kodak, 308 S.C. at 419, 418 S.E.2d at 544.

Similarly, Duke Energy's sales of securities are connected with its trade or business and the Department has not argued otherwise. Thus, the inclusion of all receipts from sales of securities in Duke Energy's apportionment formula does not produce a result that is so absurd to require the Court to ignore the plain meaning of the apportionment statutes. *See Capco of Summerville, Inc. v. J.H. Gayle Constr. Co.*, 368 S.C. 137, 144, 628 S.E.2d 38, 42 (2006) ("However, although we are troubled by this result, we are not at liberty to rewrite the statutes, and any amendment must come from the Legislature.") Presumably, the South Carolina Legislature was troubled by the inclusion of all receipts from sales of securities in the apportionment formula, which led to its changing the statute in 2006 to exclude some receipts generated from such transactions.

2. The inclusion of all receipts from sales of securities in the apportionment formula would not lead to an increased application of alternative apportionment.

The Department claims that the inclusion of all receipts from sales of securities in the standard apportionment formula would produce an absurd result because "the alternative apportionment statute must be applied in all cases in which multi-state taxpayers engage in very typical short-term investment transactions." (Resp't Br. at 17.)

The Department's argument makes little sense. Whether the inclusion of all receipts from sales of securities in the **standard apportionment formula** produces an absurd result does not require an evaluation of the **alternative apportionment statute.** The alternative apportionment provision would come into play only in unusual circumstances when, after conducting a factual analysis, the inclusion of the principal in the standard apportionment formula does not fairly represent (or is not a rough approximation of) the in-state business activities of a specific taxpayer, for a specific period. *See CarMax*, 411 S.C. at 89-90, 767 S.E.2d at 200.

III. Contrary to the Department's contention, Duke Energy's sales of securities are "sales" made in its ordinary course of business that generate business receipts, which are required to be included in the apportionment formula computation.

With respect to a portion of the receipts ("net receipts") generated from Duke Energy's sales of securities, the Department agrees that such sales of securities are "sales" that generate "receipts." Yet, with respect to the remaining portion of the total receipts, the Department argues that those same sales of securities are not "sales" that generate "receipts" but are instead deposits and withdrawals from a bank account and then argues that such transactions are not "sales" or "receipts."[6] First, nothing in the record supports such an analogy. Further, unlike a bank account which guarantees the return of one's own money, sales of marketable securities are highly dependent on the market environment and Duke Energy was not protected from fluctuations in the value of the securities it had acquired. (Pet'r Br. at 19-20); *General Motors Corp. v. Franchise Tax Bd.*, 39 Cal. 4th 773, 786-87, 139 P.3d 1183, 1190-91 (2006) ("in the case of debt instruments like bonds and Treasury bills, consider the case of a security (a $10,000

[6] Contrary to the Department's assertion, the Court of Appeals did not conclude that Duke Energy's sales of securities were not "sales." (Resp't Br. at 9.)

Treasury bill, say) bought on the market from a securities dealer, then redeemed with the issuer, the United States government. The price the purchaser/taxpayer receives on redemption, $10,000, ***is dependent on the value of the commodity it holds and independent of the price it paid to the broker. The taxpayer is not being repaid for money it lent; it had, in fact, paid nothing and lent nothing to the United States government. The entire amount received is properly treated as gross receipts***" (emphasis added).). Therefore, the Department's characterization of Duke Energy's sales of securities is naïve at best and disingenuous at worst.

The record demonstrates that Duke Energy's sales of securities, which generated receipts upon disposition, were just that – sales, not deposits or withdrawals of its own money. (App. pp. 3007, 8214, 8368) Marketable securities are bought and sold. The fact that one repeatedly buys similar, short-term securities is reflective of an investment strategy designed to provide liquidity and a rate of return at an acceptable level of market risk. The Department seems to suggest that an alternative investment strategy – perhaps one that involves the purchase and sale of common stock – would be considered a sale rather than a "return of principal." However, the Department cannot provide a legal (or policy) basis for favoring an investment strategy that is long term, yields more volatile returns, and/or attracts greater market risks.

Third, the Department's fragmentation of the very same transaction into a sale and non-sale and "receipts" and non-receipts is inconsistent with the evidence in this case and longstanding South Carolina precedent. The Department agrees that Duke Energy's sales of securities are made as part of its integrated business operations. Therefore, all

receipts from such sales are required to be included in the computation of Duke Energy's apportionment formula.

The Department's analogy of sales of securities to car leases also makes little sense. First, nothing in the record supports such an analogy. Second, unlike a car lease, sales of marketable securities are highly dependent on the market environment. (*See* Pet'r Br. at 19-20.) When one returns a car at the conclusion of a lease, one can simply walk away or buy the car for predetermined residual value. When one sells a bond, the amount of money earned is entirely dependent on the market.

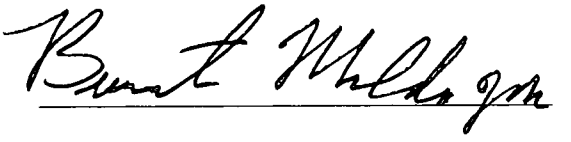
IV. Contrary to the Department's contention, Duke Energy has not abandoned the Waiver Issue.

Duke Energy's appeal of the Waiver Issue to this Court is proper. *See State v. Oxner*, 391 S.C. 132, 705 S.E.2d 51 (2011) ("'[A]ll this Court has ever required is that the questions presented for its decision must first have been fairly and properly raised to the lower court and passed upon by that court,'" *quoting Hubbard v. Rowe*, 192 S.C. 12, 5 S.E.2d 187 (1939)). The ALC ruling on the Waiver Issue is part of the record in this case. Contrary to the Department's claim, Duke Energy properly appealed from the ALC's determination of the Waiver Issue. Duke Energy extensively and specifically briefed the issue in its Motion for reconsideration to the ALC (App. pp. 1039-40) and its filings to the Court of Appeals (App. 8256-8266). Because the Court of Appeals ruled in favor of the Department on the Gross Receipts and Electricity Issue, it did not consider the Waiver Issue. As a result, in its Brief of Petitioner, Duke Energy specifically asked this Court to reverse the Court of Appeals' decision regarding the Gross Receipts Issue and remand the case for a consideration of the Waiver Issue. Duke Energy also described the Waiver issue in its Petition for a Writ of Certiorari to this Court. Therefore, contrary

to the Department's allegations, Duke Energy has not abandoned the Waiver Issue and that issue is properly preserved for consideration if this case is remanded by this Court.

CONCLUSION

For the above-stated reasons, Duke Energy respectfully requests that this Court reverse the Court of Appeals' decision, hold that the total receipts from Duke Energy's sales of securities must be included in its sales apportionment factor, and remand this case for a consideration of the Waiver Issue.



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THE 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)

Duke Energy Corporation.....Petitioner,

v.

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

PROOF OF SERVICE

I certify that I have served Reply Brief of Petitioner 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 July 31, 2015, addressed to:

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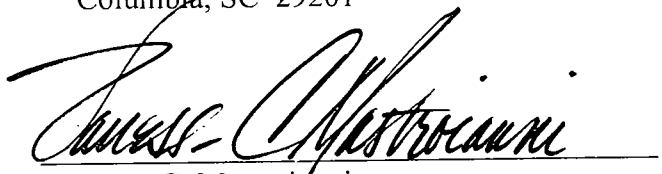

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